

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF VALIDUS POWER CORP., IROQUOIS
FALLS POWER CORP., BAY POWER CORP., KAP POWER
CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP
INC., EACH BY THEIR COURT APPOINTED RECEIVER AND
MANAGER, KSV RESTRUCTURING INC.

FACTUM OF THE APPLICANTS

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000
Toronto, ON M5K 1E7
Fax: 416.216.3930

Jennifer Stam LSO#: 46735J
Tel: 416. 202.6707
jennifer.stam@nortonrosefulbright.com
Evan Cobb LSO#: 55787N
Tel: 416.216.1929
evan.cobb@nortonrosefulbright.com

Lawyers for the Applicants, each by the
Receiver

TO: **THE SERVICE LIST**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF VALIDUS POWER CORP., IROQUOIS
FALLS POWER CORP., BAY POWER CORP., KAP POWER
CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP
INC., EACH BY THEIR COURT APPOINTED RECEIVER AND
MANAGER, KSV RESTRUCTURING INC.

TABLE OF CONTENTS

PART I - INTRODUCTION 1

PART II - SUMMARY OF FACTS..... 2

PART III - ISSUES, LAW & ANALYSIS..... 4

PART IV - ORDER REQUESTED 11

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

FACTUM OF THE APPLICANTS

PART I - INTRODUCTION

1. Validus Power Corp. ("**VPC**"), Iroquois Falls Power Corp. ("**IFPC**"), Bay Power Corp., Kap Power Corp., Validus Hosting Inc., and Kingston Cogen GP Inc. (each, a "**Company**" and together, the "**Companies**"), each by their court appointed receiver and manager, KSV Restructuring Inc. ("**KSV**" and in such capacity, the "**Receiver**") brings this application seeking, among other things, the proposed Initial Order to commence proceedings under the *Companies' Creditors Arrangement Act* (Canada), RSC 1985, c C-36 (the "**CCAA**") in respect of the Companies and to extend the benefits and protections of the CCAA to Kingston Cogen Limited Partnership ("**Kingston LP**" and together with the Companies, the "**Validus Entities**").
2. The primary purpose of the CCAA application is to provide a forum for the conduct of a sale and investment solicitation process ("**SISP**") in respect of the Validus Entities' assets and business operations. Given, among other things, the highly regulated nature of the Validus Entities' business, a SISP conducted through a CCAA will provide the greatest degree of deal structure flexibility including the possibility of a reverse vesting order ("**RVO**") transaction, certain tax-related benefits and a corporate arrangement.

3. The relief that the Receiver seeks in this application is conditional upon this Court authorizing the Receiver, in the receivership proceedings, to apply for the Initial Order. Accordingly, the Receiver has also brought a motion in the receivership proceedings for such relief that will be heard contemporaneously with the CCAA application.

PART II - SUMMARY OF FACTS

4. The Validus Entities are a group of entities that own and operate four power plants located in North Bay, Kapuskasing, Iroquois Falls and Kingston, Ontario, the latter two of which provide electricity generation capacity to Ontario's electricity grid, controlled by Ontario's Independent Electricity System Operator ("**IESO**").¹

5. On August 2, 2023, Macquarie Equipment Finance Limited ("**Macquarie**") brought an application (the "**Receivership Application**") before the Ontario Superior Court of Justice (Commercial List) (the "**Court**") for the appointment of a receiver and manager over all of the assets, property and undertakings of the Validus Entities (the "**Property**"). Macquarie holds security in respect of obligations under a secured lease (the "**Secured Lease**") between Macquarie and IFPC, which obligations were guaranteed by the other Validus Entities, and which are in default.²

6. Macquarie sought the appointment of the Receiver to preserve the value of its collateral given monetary defaults under the Secured Lease as well as several alleged operational defaults including, among other things, failing to remit HST and other taxes, failing to maintain insurance,

¹ Pre-Filing Report of the Proposed Monitor, KSV Restructuring Inc., dated August 23, 2023 ("**Pre-Filing Report**"), section 2.0, paras 1 and 2, Application Record returnable August 29, 2023 ("**Application Record**") Tab 2, p 15.

² Pre-Filing Report, section 1.0, para 1, Application Record, Tab 2, p 15. August 18 Endorsement, para 20, Appendix C to the First Report, Motion Record, Tab 2C, p 53.

failing to maintain books and records and failing to provide employee benefits and make RRSP contributions to their employees, including unionized employees.³

7. At the August 2 hearing, the Validus Entities requested an adjournment of a number of weeks to provide them with the opportunity to file responding material and seek alternative sources of debt or equity (a “**Refinancing**”), which request was opposed by Macquarie. The Court adjourned the full receivership application for approximately one week to allow the Validus Entities time to file responding materials, but granted an order appointing KSV as interim receiver, noting the seriousness of the allegations made by Macquarie and the potential risk to the Property if an interim receiver was not appointed.⁴

8. Upon the return of the Receivership Application on August 10, 2023, the Court granted an order (the “**Receivership Order**”) appointing KSV as the receiver and manager (the “**Receiver**”) of all of the Property of the Validus Entities pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act* (Ontario).⁵

9. The appointment of the Receiver was intended to provide stability to the business, which included the replacement of management and to implement a SISF in respect of the Validus Entities in order to preserve and maximize value for all stakeholders. The Receiver is now negotiating the terms of an offer (the “**Offer**”) that is intended to serve as a stalking horse bid in a SISF, subject to this Court’s approval. That Offer is submitted by Macquarie and Hut 8 Power Inc., as Macquarie’s designee (collectively, the “**Potential Purchaser**”). The Offer is contemplated to be completed through an RVO transaction within a CCAA proceeding.⁶

³ August 2 Endorsement, para 4, Appendix A to the Pre-Filing Report, Application Record, Tab 2A, p 23.

⁴ August 2 Endorsement, paras 9 and 12, Appendix A to the Pre-Filing Report, Application Record, Tab 2A, pp 23 and 24.

⁵ Order of Justice Osborne dated August 18, 2023 (“**Receivership Order**”), Appendix B to the Pre-Filing Report, Application Record, Tab 2B, p 26.

⁶ Pre-Filing Report, section 1.0, paras 3 and 4, Application Record, Tab 2, p 12.

PART III - ISSUES, LAW & ANALYSIS

A. The CCAA Applies

10. Relief under the CCAA is available to a “debtor company” or affiliated “debtor companies” where the total claims against such company or affiliated companies exceed \$5 million.

11. The CCAA defines a “company” to include any incorporated company having assets in Canada. A “debtor company” includes any company that is “bankrupt or insolvent”.⁷ A financially troubled company is insolvent for the purposes of the CCAA if it is “reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”⁸

12. This Court has the jurisdiction to hear the application.⁹ The Companies, along with Kingston LP, are insolvent and already subject to the Receivership Order. In this case, the Companies are debtor companies to which the CCAA applies. Among other things:

- (a) the Companies are affiliated corporations having assets in Canada and are, collectively, subject to claims well in excess of \$5,000,000. Macquarie alone has claimed amounts owing by the Companies of over \$55 million;¹⁰
- (b) the Property consists primarily of four power plants that are located in Ontario; and
- (c) the registered offices of each of the Validus Entities are located in Ontario.¹¹

⁷ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”), ss 2 and 3.

⁸ *Stelco Inc. (Re)*, [2004 CanLII 24933 \(ON SC\)](#) at para. 26.

⁹ Section 9(1) CCAA.

¹⁰ Endorsement of Justice Osborne dated August 18, 2023, para 22, Appendix C to the Pre-Filing Report, Application Record, Tab 2C, p 53.

¹¹ Pre-Filing Report, section 2.0, paras 1 and 2, Application Record, Tab 2, p 15.

13. The Receiver, on behalf of the Applicants, has complied with the requirements set out in Section 10(2) of the CCAA. Specifically:

- (a) a projected cash flow of the Companies has been filed setting out such amounts on a weekly basis, together with the required accompanying report to the cash flow;¹² and
- (b) Section 10(2)(c) of the CCAA requires that the application record contain “[c]opies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.” Unaudited financial statements for VPC, IFPC, Kingston LP, Kap and Bay have been filed.¹³ Financial statements for Hosting and Kingston GP have not been located.¹⁴ However, Section 10(2)(c) does not require financial statements to be prepared in the absence of the existence of financial statements but rather requires any such statements in existence to be filed. The Applicants have satisfied this requirement.

The Court Should Exercise its Discretion to Grant the Initial Order

14. An Initial Order under the CCAA should be granted if it accords with the remedial purposes of the CCAA, which include rehabilitation, the avoidance of social and economic loss resulting from liquidation, and the building of consensus among interested stakeholders.¹⁵

¹² Cash Flow Forecast, Appendix G to the Pre-Filing Report, Application Record, Tab 2G, p 75.

¹³ Pre-Filing Report, section 2.0, para 4, Application Record, Tab 2, p 15; Financial Statements, Appendix F to the Pre-Filing Report, Application Record, Tab 2F, p. 63, Affidavit of Evan Cobb sworn August 25, 2023.

¹⁴ Pre-Filing Report, section 2.0, para 4, Application Record, Tab 2, p 15.

¹⁵ *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#) (CanLII), paras 15, 59, 70.

15. An Initial Order may include any relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course during the restructuring period.¹⁶

16. The Court should exercise its discretion to grant the Initial Order for the following reasons¹⁷:

- (a) no refinancing appears forthcoming—the Validus Entities have not provided any further information or engaged in discussions with, or indeed even responded to, the Receiver with respect to any proposed Refinancing;
- (b) the Offer is conditional on the Court issuing an RVO in the context of a CCAA proceeding;
- (c) the Validus Entities hold numerous permits and licences that allow it to operate in a highly regulated industry. As such, the Potential Purchaser requires that an RVO be issued due to, *inter alia*, uncertainty related to the transferability of these licenses and permits in a commercially reasonable timeframe;
- (d) it is likely that any other purchaser would also require the preservation of permits and licenses pursuant to an RVO;
- (e) the implementation steps also contemplate a corporate arrangement pursuant to one or both of the *Business Corporations Act* (Ontario) and the *Canada Business Corporations Act*, which is more commonly completed in CCAA proceedings than in receivership proceedings;

¹⁶ Section 11.02(1) CCAA.

¹⁷ Pre-Filing Report, section 3.0, paras 3(a)-(k) and section 4.0, para 1 and 2, Application Record, Tab 2, pp 16-18.

- (f) the Potential Purchaser has indicated that it is not prepared to pay any amounts owing to CRA in respect of the HST obligation that IFPC failed to remit when it entered into the sale leaseback transaction with Macquarie. Completion of the contemplated transaction under the CCAA will reverse the priority of the HST obligation;
- (g) any purchaser will likely also require that the HST obligation be reversed. The super-priority status of this obligation outside of the CCAA is likely to be an impediment to any going-concern transaction. Reversing priorities in insolvency proceedings is a common consideration in choice of insolvency proceeding;¹⁸
- (h) there is significantly more precedent for the issuance of RVOs in a CCAA proceeding than in a receivership or other insolvency processes;
- (i) as a result of issues concerning the transferability of the licenses and the unpaid HST obligation, there is a greater likelihood that the SISP will result in a going-concern transaction if conducted under the CCAA than in a receivership;
- (j) commencement of the CCAA proceedings now will permit the 10-day statutory comeback period to run while the parties continue to negotiate the Offer and finalize the terms of the SISP; and
- (k) the SISP should commence as quickly as possible given, among other things, ongoing concerns regarding employee retention and the desire to complete a

¹⁸ The Receiver notes that the Validus Entities took the position at the receivership application that there are sufficient input tax credits ("ITCs") to offset the entirety of the potential HST obligation for which CRA registered a \$6 million lien against IFPC's real property. Given the state of the Validus Entities' books and records, the Receiver has not been able to verify the HST obligation and/or the extent of any offsetting ITCs. The Receiver has been in contact with CRA representatives and has requested that CRA perform a trust exam to determine the Validus Entities' source deduction and HST obligations. Pre-Filing Report, footnote 1, Application Record, Tab 2, p 17.

transaction pursuant to the SISP prior to the upcoming bid deadline of November 29, 2023 for participating in the IESO's capacity auction market.

B. The Stay of Proceedings Should be Granted

17. The stay of proceedings granted pursuant to an Initial Order ensures that creditor enforcement does not interfere with the company's ability to maintain operations while restructuring its affairs.¹⁹ The stay of proceedings maintains the *status quo* while the company develops a plan for the benefit of its creditors. To obtain a stay of proceedings under the CCAA, the company must satisfy the Court that circumstances exist to make the order appropriate.²⁰

18. Since November 1, 2019, when certain amendments to the CCAA became effective, any stay of proceedings in an Initial Order under the CCAA is restricted to ten days,²¹ albeit subject to extension at the first comeback application and subsequently thereafter. The shortened initial stay period is meant to minimize prejudice to creditors who may have received short or no notice of the initial application.

19. In this case, creditors will not be prejudiced by virtue of the granting of the stay of proceedings under the Initial Order. Creditors are already aware of the Receivership Order including the stay of proceedings granted thereunder. Service of the application was provided on August 23, 2023, six (6) days in advance of the return of the application. The stay being requested pursuant to the proposed Initial Order expires upon the 10 day limitation as set out in the CCAA and is appropriate in the circumstances. The stay being requested pursuant to the proposed Initial Order expires upon the 10 day limitation as set out in the CCAA and is appropriate in the

¹⁹ CCAA, s 11.02.

²⁰ CCAA, s 11.02(3)(a).

²¹ CCAA, s 11.02(1).

circumstances. The Applicants anticipate returning at the come-back hearing to seek, among other things, an extension of the stay of proceedings.

20. The Initial Order does not seek to stay the Receivership Order.

The Stay Should be Extended to Kingston LP

21. The CCAA expressly applies by its terms to debtor companies but not partnerships.²²

22. It is well-established that the Court has the jurisdiction to extend CCAA protection to limited partnerships to ensure that the purposes of the CCAA can be achieved where the operations of such partnerships are tied to the operations of the business. Such relief has been granted on multiple occasions.²³

23. Kingston LP owns one of the four (4) plants operated by the Validus Entities and is subject to the security held by Macquarie.²⁴ To adequately market the Property, and therefore to ensure that the best price can be obtained for same, the protections enjoyed by the Companies under the CCAA must also be afforded to Kingston LP.²⁵

²² CCAA, s. 11.001.

²³ See, for example *Target Canada Co. (Re)*, [2015 ONSC 303](#) at paras 42 and 43; *4519922 Canada Inc. (Re)*, [2015 ONSC 124](#) at para. 37; *Just Energy Corp. (Re)*, [2021 ONSC 1793](#) at para. 116; *Bed Bath & Beyond Canada Limited (Re)*, [2023 ONSC 1014](#), at para. 28.

²⁴ Pre-Filing Report, section 2.0, paras 1 and 2, Application Record, Tab 2, p 15.

²⁵ Pre-Filing Report, section 5.0, para 2(a), Application Record, Tab 2, p 19.

KSV Should be Appointed as Monitor

24. KSV is a licenced trustee within the meaning of section 2(1) of the BIA and has consented to act as Court-appointed Monitor of the Validus Entities.²⁶ KSV is qualified to act in such capacity under section 11.7 of the CCAA.²⁷

25. Neither KSV nor any of its representatives or affiliates has at any time in the past two years been: (a) a director, officer or employee of any member of the Companies; (b) related to any member of the Companies, or to any director or officer of any member of the Companies; or (c) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of any member of the Companies.

26. KSV has already been appointed as Receiver. Nothing in the Receivership Order prevents KSV from also acting as monitor in the CCAA proceedings.²⁸

27. The powers proposed to be granted to the Monitor in the Initial Order are consistent with those set out in the Model Order. As KSV is already the Receiver, there will be no duplication in efforts or overlap in cost.²⁹

The Additional Relief in the Proposed Initial Order Should be Granted

28. The remaining provisions of the proposed Initial Order should be granted and have been limited to that which is absolutely necessary for the initial 10-day stay period. Notably, the Applicants are not currently seeking any relief in respect of: (a) an Administration Charge; (b) a

²⁶ BIA, s 2(1).

²⁷ CCAA, s 11.7.

²⁸ Receivership Order, para 32, Appendix B to the Pre-Filing Report, Application Record, Tab 2B, p 41.

²⁹ *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, [2022 NLSC 48](#), Appendix "A".

Directors' Charge; or (c) a DIP Charge. The Applicants further do not require affirmation with respect to the Validus Entities' ongoing cash management.

29. It is anticipated that for at least the first 10 days, operations will continue largely through the receivership. This will avoid any confusion or duplication of cost or work. To the extent that further relief is required in respect of the above, it will be sought in a future motion before this Court.

PART IV - ORDER REQUESTED

30. For these and the other reasons noted above, the Applicants therefore request an Order substantially in the form of the draft Initial Order included in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of August, 2023.

Jennifer Stam

Jennifer Stam / Evan Cobb

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000
Toronto, ON M5K 1E7
Fax: 416.216.3930

Jennifer Stam LSO#: 46735J
Tel: 416. 202.6707
jennifer.stam@nortonrosefulbright.com
Evan Cobb LSO#: 55787N
Tel: 416.216.1929
evan.cobb@nortonrosefulbright.com

Lawyers for the Applicants, each by the
Receiver

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Stelco Inc. (Re)*, [2004 CanLII 24933 \(ON SC\)](#)
2. *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#) (CanLII)
3. *Target Canada Co. (Re)*, [2015 ONSC 303](#)
4. *4519922 Canada Inc. (Re)*, [2015 ONSC 124](#)
5. *Just Energy Corp. (Re)*, [2021 ONSC 1793](#)
6. *Bed Bath & Beyond Canada Limited (Re)*, [2023 ONSC 1014](#)
7. *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, [2022 NLSC 48](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, RSC 1985, c C-36

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of [section 2](#) of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

debtor company means any company that

- (a) is bankrupt or **insolvent**,
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed **insolvent** within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
- (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is **insolvent**; (*compagnie débitrice*)

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with [section 20](#), is more than \$5,000,000 or any other amount that is prescribed.

Jurisdiction of Courts

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Relief reasonably necessary

11.001 An order made under [section 11](#) at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of [subsection 2\(1\)](#) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

- (a) if the trustee is or, at any time during the two preceding years, was
 - (i) a director, an officer or an employee of the company,
 - (ii) related to the company or to any director or officer of the company, or
 - (iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or
- (b) if the trustee is
 - (i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or
 - (ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of [subsection 2\(1\)](#) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

Bankruptcy and Insolvency Act, RSC 1985, c B-3

trustee or licensed trustee means a person who is licensed or appointed under this Act. (*syndic ou syndic autorisé*)

APPENDIX "A"

PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc., 2022 NLSC 48

See attached.



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION
In Bankruptcy and Insolvency**

Citation: *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2022
NLSC 48

Date: March 24, 2022

Docket: 202201G0709

IN THE MATTER OF an application
of Canada Fluorspar (NL) Inc. and
Canada Fluorspar Inc., by their Court-
Appointed Interim Receiver, Grant
Thornton Limited

AND IN THE MATTER OF the
*Companies' Creditors Arrangement
Act*, R.S.C. 1985, c. 36, as amended

BETWEEN:

**PRICEWATERHOUSECOOPERS INC.,
IN ITS CAPACITY AS COURT-
APPOINTED RECEIVER AND
MANAGER OF BRIDGING FINANCE
INC. AND BRIDGING INCOME FUND
LP**

APPLICANT

AND:

**CANADA FLUORSPAR (NL) INC. AND
CANADA FLUORSPAR INC.**

RESPONDENTS

**Before: Justice Alexander MacDonald
Edited Transcript of Oral Reasons for Judgment**

Filed Mar 24/22 GA

GA

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: March 11, 2022

Date of Oral Judgment: March 11, 2022

Appearances:

Geoffrey L. Spencer,
Meghan M. King
and Phil Clarke Appearing on behalf of the Applicant,
Grant Thornton Limited, Court-Appointed
Interim Receiver of Canada Fluorspar
(NL) Inc. and Canada Fluorspar Inc.

Darren D. O'Keefe and
Allison J. Philpott Appearing on behalf of Canada Fluorspar
(NL) Inc. and Canada Fluorspar Inc.

Joseph J. Thorne,
Meaghan E. McCaw and
Graham Page Appearing on behalf of
PricewaterhouseCoopers Inc., on behalf of
Bridging Finance Inc.

Robert J. Kennedy and
Geoffrey W.P. Davis-
Abraham Appearing on behalf of HSBC Bank
Canada

James Foran Appearing on behalf of Deloitte
Restructuring Inc., financial advisor for
HSBC Bank Canada

David G. Rogers and
Julia Tomson Appearing on behalf of Her Majesty in
Right of Newfoundland and Labrador



Maeve A. Baird

Appearing on behalf of the Canada
Revenue Agency

Andrew Harmes

Appearing on behalf of Golden Gate
Capital

Sean M. Pittman

Appearing on behalf of M. Rock Inc.,
Atlantic Explosives Limited and Lorne
Tide Controls Limited

Authorities Cited:

CASES CONSIDERED: *Lydian International Limited (Re)*, 2019 ONSC
7473

STATUTES CONSIDERED: *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36

REASONS FOR JUDGMENT

MACDONALD J.

INTRODUCTION

[1] Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., by their court-appointed interim receiver (“Receiver”), Grant Thornton Limited (“GTL”), and on behalf of Newspar, a general partnership (collectively, the “Companies”), apply for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”). They seek an initial order substantially in the form attached to the application record. No party on the motion opposed the request.

[2] For the reasons that follow, I grant the Initial Order described in Schedule “A” attached to this decision.



FACTS

[3] The Companies operate or support operations of a fluorspar mine and related facilities, including a mill facility and marine terminal, all near St. Lawrence, NL. In early February 2022, they employed about 280 people, most of whom are in Newfoundland and Labrador. Golden Gate Capital now wholly owns Canada Fluorspar Inc., which wholly owns Canada Fluorspar (NL) Inc., which owns 99.999% of Newspar.

[4] The economics of the facility require the Companies' operations to operate at near full capacity to produce enough fluorspar to recover the costs associated with production.

[5] The Companies' December 31, 2020 consolidated financial statements show the Companies have net book value assets of about \$411 million and net book value liabilities of about \$286 million. The Companies then had about \$301,000 in available cash, a working capital deficit of about \$82 million, and cumulative retained earnings deficit of about \$39 million.

[6] The Companies lost about \$29 million in 2020 and \$44 million (preliminary) in 2021. The Companies experienced liquidity challenges caused in part by logistical and COVID-19 related issues that adversely affected production at their facilities.

[7] Mr. Phil Clarke, of GTL, the court-appointed interim receiver of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc., says that a combination of shareholders' equity, secured creditors, capital lessors, and unsecured creditors financed the Companies' operations.



[8] Golden Gate Capital has invested approximately USD 238 million in equity financing since it acquired the Companies in 2014, including covering operating losses, but it refused to continue to provide additional financial support in February 2022. This refusal triggered the liquidity crisis, which in turn resulted in the Interim Receivership Order described later.

[9] As of March 4, 2022, the Companies have about \$95 million in secured debt, about \$10 million in capital leases, and about \$23 million in unsecured debt. The secured creditors include Bridging Finance Inc. (“Bridging”), the Government of Newfoundland and Labrador (“GNL”), and HSBC Bank Canada (“HSBC”).

[10] When Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. asked for the court-appointed receiver, they had approximately \$1.8 million in cash and owed \$800,000 to employees. On February 21, 2022, as a result of these financial difficulties, the Court:

- (a) appointed GTL as interim receiver of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc.;
- (b) ordered a stay of proceedings against Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. or their property without the written consent of the interim receiver or leave of the Court;
- (c) ordered that the interim receiver’s and its counsel’s reasonable fees not exceed \$250,000 and be a priority charge on their property;
- (d) ordered that Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. are authorized borrow up to \$2 million to finance operations, also secured by a priority charge on the Companies’ property (Interim Receiver Borrowing); and



- (e) ordered that the interim receiver could commence *CCAA* proceedings for Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc.

(Interim Receivership Order)

[11] The Interim Receivership Order did not affect HSBC's security interest in specified receivables.

[12] The Companies' cash flow statements filed show that during the week of February 21, 2022, Bridging lent the Companies about \$1,809,000 as part of the Interim Receiver Borrowing.

[13] The Companies took this motion and now say they require immediate protection under the *CCAA* for breathing room to pursue restructuring options. They intend to continue discussions with their lenders and other stakeholders. They intend to continue to evaluate financing or sale options with a view to achieving a viable path forward.

[14] The draft Initial Order also does not affect HSBC's security interest in specified certain receivables. The parties dispute whether HSBC has a security interest over approximately \$2.5 million in inventory at the Companies' facilities. This issue will not be resolved today.

ISSUES

[15] The Companies say time is of the essence given its minimal cash flow position and negative cash flows. The issues are:

- (a) Do the Companies meet the criteria for protection of the *CCAA*?

d

- (b) Should GTL be appointed the Monitor?

- (c) Should the Court exercise its discretion to:
 - i. order the “Enhancement of the Monitor’s Powers” referred to in the draft Initial Order?

 - ii. grant the Administration Charge? and

 - iii. authorize borrowings under the DIP Financing Agreement secured by a priority charge?

ANALYSIS

Do the Companies Meet the Criteria for Protection under the CCAA?

[16] I have considered the affidavit of the proposed Monitor, Phil Clarke, on the financial condition of the Companies. I find it is appropriate to grant an order under section 11.02 and in particular I find that:

- (a) the Companies meet the *CCAA* definition of a company and are eligible for *CCAA* protection;

- (b) the Companies are debtor companies under the *CCAA*. Mr. Clarke told me that all three companies are insolvent and each have liabilities in excess of \$5 million. He referred me to the Companies’ consolidated financial statements to support his statement; and



- (c) the Companies are eligible for *CCAA* protection.

Should GTL be appointed the Monitor?

[17] I will appoint GTL as Monitor and do so for the following reasons:

- (a) GTL is qualified to act as Monitor under Section 11.7(1) of the *CCAA*;
- (b) GTL is already Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc.'s interim receiver pursuant to the Interim Receivership Order. That order remains in effect until at least 30 days after February 21, 2022;
- (c) Paragraph 6(o) of the Interim Receivership Order specially allowed GTL to commence proceedings under the *CCAA*. Paragraph 36 provides that the Interim Receivership Order does not prevent GTL from acting as Monitor;
- (d) Many of the activities provided for in the Initial Order are also contained in the Interim Receivership Order. Indeed the interim receiver's costs are already secured under that order; and
- (e) It serves all of the stakeholders to avoid duplication of effort. GTL is already responsible for many of the activities provided for in the Initial Order.

On

Should the Court exercise its discretion to provide for the “Enhancement of the Monitor’s Power” referred to in the draft Initial Order?

[18] Pursuant to section 11.02(1) of the *CCAA*, a court may make an order staying all proceedings in respect of the Companies for a period not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

[19] Section 11.001 of the *CCAA* provides:

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is *reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.*

[Emphasis added.]

[20] The Parliament of Canada enacted these provisions in 2019. Justice Morawetz in *Lydian International Limited (Re)*, 2019 ONSC 7473, referred to a News Release issued by Innovation Science and Economic Development Canada, which specifically states that these amendments “limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players” (paragraph 25).

[21] I agree with Justice Morawetz’s observations, at paragraph 26, that the intent of section 11.001 is clear. Absent exceptional circumstances, the relief I grant in an initial hearing shall be limited to relief that is reasonably necessary for the continued operations of the debtor Companies in the ordinary course of business during that period. The period being no more than 10 days, and wherever possible, the *status quo* should be maintained during this period.



[22] Some of the enhanced powers relate to the Monitor's ability to facilitate restructuring, including the power to proceed with an orderly restructuring or liquidation of the business. This goes beyond the *status quo*; it is more appropriate that I deal with these parts of the enhanced Monitor's powers at the comeback hearing and in the Amended and Restated Initial Order.

[23] I will order some of the enhanced powers that are not directly related to restructuring or liquidation of the business. The Monitor persuaded me that he needs these to complete his duties.

[24] This is not to say the Monitor will be idle without all of the enhanced powers. Justice Morawetz observed in paragraph 27 of his decision that many things can happen after the Initial Order, including:

- (a) notifying all stakeholders of the *CCAA* application;
- (b) stabilizing the operation of the Companies;
- (c) negotiating with key stakeholders who were consulted prior to the *CCAA* filing; and
- (d) starting negotiations with stakeholders who were not consulted prior to the *CCAA* filing.

Should the Court exercise its Discretion to Grant the Administration Charge?

[25] The Companies seek, pursuant to section 11.52(1), a charge on the Companies' property to a maximum amount of \$250,000 to secure the Monitor's costs, and his and the Companies' costs for legal, financial and other experts. For



the reasons I will discuss, I will allow an administration charge of \$250,000, but this amount will include the amount provided for in paragraph 24 of the Interim Receivership Order so that the total charge will be \$250,000.

[26] I must limit this administration charge to that which is reasonably necessary for the continued operation of the Companies during the initial 10-day stay.

[27] The Companies' cash flow statements show that administration costs will be more than \$300,000 up to the issuance of the Initial Order, and something less than \$150,000 in the two weeks after. The costs on a weekly basis are \$75,000. The Monitor must take on additional duties because senior management and the directors of the Companies have resigned. The proposed Monitor says that he needs these funds. I find that the \$250,000 is a fair and reasonable allowance for these costs.

[28] I have also considered:

- (a) This is a mine with a number of ancillary operations. The *CCAA* process will last for months and perhaps longer;
- (b) Even though I have not allowed for all of the Monitor's enhanced powers in the Initial Order, the Monitor will have more responsibility because the entire management team and board of directors have resigned; and
- (c) There is no avoidable duplication of roles.



Should the Court exercise its Discretion to Authorize Borrowings under the DIP Financing Agreement secured by a Priority Charge?

[29] The Companies ask that I allow the Monitor to execute the DIP Financing Agreement on its behalf. GNL and Bridging have or will provide an interim loan facility of up to \$3.6 million (“DIP”) and secure it by a priority charge of the Companies’ property. For the reasons I will describe, I will make provision for DIP of up to \$1.8 million in the Initial Order.

[30] The Interim Receivership Order allowed the Interim Receiver to borrow up to \$2 million in interim financing. The Court secured this borrowing by a priority charge on the Companies’ property. The cash flow statement shows that the Companies borrowed \$1.809 million from Bridging during the week of February 22, 2022. The parties confirmed that it advanced this loan under the same terms in the proposed DIP Facility Loan Agreement.

[31] Under section 11.2(1) of the *CCAA*, I may make an order to allow the DIP Facility Loan Agreement and secure it by a priority charge, but the charge may not secure an obligation that exists before I make the order. Therefore, I may not order in this *CCAA* proceeding that Bridging has such a priority charge for its advance. I am prepared to include bridging language to the effect that the Court authorized the bridging loan in the Interim Receivership Order. The parties may make further representations on this issue at the comeback hearing.

[32] The Companies project that the GNL will advance about \$1.809 million shortly after I grant this Initial Order. I am satisfied that this financing is necessary to allow the Monitor to perform his duties. I have also considered:

- (a) that the *CCAA* process is a complex proceeding and the cash flow statements show the Monitor’s expenses will extend for months;

- (b) that the Monitor will likely have enhanced powers in the ultimate order (issued after the comeback hearing) because the entire management team and board of directors have resigned, therefore placing a larger burden on the Monitor;
- (c) that the Monitor told me that without the DIP advance of \$1.8 million, the Companies could be bankrupt. The Companies' cash flow statements support this possibility. The loan provides the means to allow for the development of a possible compromise proposal; and
- (d) that this is a complex mining operation. The costs associated with maintaining and protecting the facility are significant. Furthermore, it is likely that the Monitor will attempt to sell the facility as an operating mine; and
- (e) that all secured creditors consent to this charge.

DISPOSITION

[33] I grant the Initial Order described in Schedule "A". I hereby set the comeback hearing for March 18, 2022 at 10:00 a.m.



ALEXANDER MACDONALD
Justice

Schedule "A"

2022 01G 0709

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF an application of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., by their Court Appointed Interim Receiver, Grant Thornton Limited.

AND IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended

INITIAL ORDER

BEFORE THE HONOURABLE JUSTICE MACDONALD

THIS APPLICATION, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "Interim Receiver" or the "Applicant") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCA") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

ON READING the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "Clarke Affidavit") and the Exhibits thereto, the consent of Grant Thornton Limited ("GTL") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "Monitor"), and the Pre-Filing Report of GTL as Interim Receiver;

ON HEARING the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.
3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.
5. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
 - (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
 - (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and



- (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.
6. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:
- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and
 - (b) payment for goods or services actually supplied to the Company following the date of this Order.
7. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:
- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
 - (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and
 - (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of



municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

8. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.
9. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

10. **THIS COURT ORDERS** for ten (10) days from the date of this order or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

Or

NO EXERCISE OF RIGHTS OR REMEDIES

11. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.
12. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

NO INTERFERENCE WITH RIGHTS

13. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

CONTINUATION OF SERVICES

14. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the



continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

15. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

APPOINTMENT OF MONITOR

16. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.
17. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:
- (a) monitor the Company's receipts and disbursements;

- (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;
- (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;
- (e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;
- (f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement;
- (g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;
- (h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (i) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;
- (j) enter into any agreements in the ordinary course of business;



- (k) exercise any rights of the Company;
 - (l) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;
 - (m) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;
 - (n) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof, in the ordinary course of business; and
 - (o) perform such other duties as are required by this Order or by this Court from time to time.
18. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.
19. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.



20. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:
- (a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:
 - (i) before the Monitor's appointment; or
 - (ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.
 - (b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.
 - (c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,
 - (i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:
 - (A) complies with the order, or
 - (B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;



- (ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,
 - (A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or
 - (B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or
- (iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

21. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

22. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

23. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor,

counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

24. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.
25. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of \$250,000.00, as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 37 and 39 herein.

ENHANCEMENT OF MONITOR'S POWERS

26. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:
 - (a) (take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:
 - (i) temporarily ceasing, downsizing or shutting down any of the Company's operations;
 - (ii) terminating the employment of or temporarily laying off employees of the Company;
 - (iii) taking any and all corporate governance actions for the Company; and



- (iv) providing instruction and direction to the advisors of the Company;
- (b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:
 - (i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);
 - (ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;
 - (iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;
- (c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;
- (d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;
- (e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;
- (f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;



and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

27. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:
- (a) advising the Monitor of the existence of any Property of which such party has knowledge of;
 - (b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;
 - (c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information ("**Records**") of which such party has knowledge of; and
 - (d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.



LIMITATION ON THE MONITOR'S LIABILITY

28. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.
29. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.
30. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

DIP FINANCING

31. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the ___ day of March, 2022 between, the Company, as borrower, and Bridging Finance Inc., Bridging Income Fund LP, Bridging Private Debt Institutional LP, Bridging Mid-Market Debt Fund LP, Bridging Private Debt Lending Master Fund I, LP (Cayman), Bridging SMA 1 LP, Bridging SMA 2 LP, and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology as lender (collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, interim financing of up to One Million Eight Hundred Thousand (\$1,800,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements and other general corporate purposes of the Company during the ten (10) day Stay Period.
32. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and



other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

33. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 37 and 39 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank *pari passu* with the DIP Lender's Charge.
34. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:
- (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;
 - (b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the



Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

- (c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

35. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

36. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

37. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except



the Excluded Property and Excluded Inventory), (collectively, the "Charges"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of \$250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

38. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
39. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.
40. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "Chargees"), or further Order of this Court.
41. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any



bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

- (a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;
- (b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and
- (c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

42. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

SERVICE AND NOTICE

43. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than \$1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed



manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

GENERAL

44. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
45. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.
46. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
47. **THIS COURT ORDERS** that a hearing for the balance of the relief sought by the Monitor, on behalf of Company in the Notice of Motion is hereby scheduled before this Court for the 18th day of March 2022 at 10:00 am or such other date as determined by this Court.



Schedule "A"

Defined Terms

"Excluded Inventory" means inventory representing a value in the amount of USD2,500,000

"Excluded Property" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"HSBC" means HSBC Bank Canada; and

"RFA" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.





IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT
ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF VALIDUS POWER CORP., IROQUOIS FALLS
POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS
HOSTING INC. AND KINGSTON COGEN GP INC. EACH BY THEIR
COURT APPOINTED RECEIVER AND MANAGER, KSV
RESTRUCTURING INC.

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANTS

NORTON ROSE FULBRIGHT CANADA LLP

222 Bay Street, Suite 3000
Toronto, ON M5K 1E7
Fax: 416.216.3930

Jennifer Stam LSO#: 46735J

Tel: 416.202.6707
jennifer.stam@nortonrosefulbright.com

Evan Cobb LSO#: 55787N

Tel: 416.216.1929
evan.cobb@nortonrosefulbright.com

Lawyers for the Applicants, each by the Receiver

CAN_DMS: \1000298453