

**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 MONITOR
(Reverse Vesting Order)**

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TO: **THE SERVICE LIST**

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(RVO Transaction Approval)**

PART I - INTRODUCTION

1. On August 10, 2023, the Court granted an Order (the "**Receivership Order**") appointing KSV Restructuring Inc. ("**KSV**") as the receiver and manager (in such capacity, the "**Receiver**") of the properties, assets and undertakings (the "**Property**") of Validus Power Corp. ("**VPC**"), Iroquois Falls Power Corp. ("**IFPC**"), Bay Power Corp. ("**Bay**"), Kap Power Corp. ("**Kap**"), Validus Hosting Inc. ("**Hosting**"), Kingston Cogen GP Inc. ("**Kingston GP**" and collectively with each of the foregoing entities, the "**Companies**") and Kingston Cogen Limited Partnership ("**Kingston LP**" and together with the Companies, the "**Validus Entities**").¹

2. On August 29, 2023, upon application by the Receiver, the Court granted an Initial Order in these proceedings (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* ("**CCAA**") in respect of the Companies that, among other things, appointed KSV as monitor (in such capacity, the "**Monitor**") and extended relief and protections thereunder to Kingston LP. The Stay Period (as defined in the Initial Order) has since been extended to January 31, 2024.²

¹ Fourth Report of the Monitor, KSV Restructuring Inc. (the "**Monitor**"), dated December 22, 2023 (the "**Fourth Report**"), section 1.0, para 2, Motion Record of the Monitor ("**MR**"), Tab 2, p 20.

² Fourth Report, section 1.0, paras 5 and 10, MR, Tab 2, pp 21-22.

3. This factum is being filed in support of the Monitor's request for an order, among other things:

(a) approving a transaction for the sale of certain assets owing by the Validus Entities (the "**Transaction**") to Macquarie Equipment Finance Limited ("**Macquarie**") and Far North Power Corp.³ ("**Far North**" and together with Macquarie, the "**Purchasers**"); (b) granting certain relief related to the Transaction, on those terms set out in the proposed reverse vesting order ("**RVO**"), including, among other things, adding 1000745924 Ontario Inc. ("**ResidualCo**") as a debtor company in these CCAA proceedings and the receivership proceedings; (c) redeeming and cancelling the IFPC Legacy Shares and other Subject Interests; (d) confirming that all Continuing Contracts and Permits and Licenses to which any of the Validus Entities (other than VPC) are a party at the Effective Time, will be and shall remain in full force and effect upon and following the Effective Time; (e) authorizing Ryan Chua to act as the first director of ResidualCo and granting certain related protections to Mr. Chua; and (f) granting the proposed releases.

4. Capitalized terms used herein and not otherwise defined have the meaning given to them in the Fourth Report of the Monitor dated December 22, 2023 (the "**Fourth Report**").

5. Approval of the proposed Transaction and related relief will facilitate the best path forward for the Validus Entities, which provides numerous benefits to stakeholders, including: (a) maximizing recoveries for the Validus Entities' stakeholders; (b) ongoing employment for employees; (c) an ongoing counterparty for Continuing Contract counterparties, including the assumption of all pre and post-filing amounts owing under all such contracts; and (d) dedicated funding to fund the priority payables and complete the orderly and efficient administration of the receivership and CCAA proceedings.

³ Formerly known as Hut 8 Power Inc., a company controlled by Hut 8 Mining Corp. (now known as Hut 8 Corp., "**Hut 8**").

SUMMARY OF FACTS

6. The Validus Entities are a group of privately-held companies that own and operate power generation plants that sell capacity and power to the Independent Electricity System Operator (“**IESO**”) as a participant in its “capacity auction” market. The Property is principally comprised of four power plants in Ontario located in North Bay, Kapuskasing, Iroquois Falls and Kingston. Currently, the plants in Kingston and Iroquois Falls are operational; these plants are on standby and can supply power to the IESO if called upon as a participant in its capacity auction market. The Kapuskasing and North Bay plants are being maintained and secured but are not otherwise operational at this time.⁴

7. From the outset of the proceedings, the primary purpose of the CCAA proceedings was to stabilize the business and conduct a sale and investment solicitation process (“**SISP**”) for the Property.

The SISP

8. On November 1, 2023, the Monitor brought a motion seeking an order for approval of a SISP (the “**SISP Approval Order**”) and acceptance of, for the purpose of the SISP, the Stalking Horse Offer submitted by the Purchasers. The Stalking Horse Offer is structured to be completed through a reverse vesting order transaction for the acquisition of the Purchased Entities and certain related assets of VPC. As consideration for those assets, the Purchasers will pay, in part, a full release of the secured debt claim of MEFL pursuant to the Participation Agreement Documents, which claim amounts to approximately \$61 million (plus ongoing interest and costs) in the aggregate (the “**Macquarie Claim Amount**”).⁵

9. Counsel to the Validus Entities objected to the approval of the Stalking Horse Offer and the SISP claiming, among other things, that the Macquarie Claim Amount was significantly overstated

⁴ Fourth Report, section 2.0, para 1, MR, Tab 2, p 24.

⁵ Fourth Report, section 1.0, para 9 and section 3.1, para 1(a), MR, Tab 2, pp 22 and 25.

and should otherwise not be approved given the credit bid component of the Stalking Horse Offer. On November 2, 2023, the Court issued its reasons and approved the SISP Approval Order dismissing the objections raised and noting the calculation of the Macquarie Claim Amount was appropriate for the purposes of the motion (including setting a floor for bidding in the SISP and acceptance of the Stalking Horse Offer as a “stalking horse offer” in the SISP).⁶

10. The Monitor commenced the SISP on November 3, 2023 with a bid deadline of December 7, 2023 at 11:59 pm, which the Monitor, in accordance with the SISP, extended to that same time on December 8, 2023 (the “**Bid Deadline**”). As set out in the Fourth Report, although the Monitor again extended the Bid Deadline to 4:00 pm on December 11, 2023 (the “**Extended Bid Deadline**”) to accommodate a prospective bidder, no Qualified Bids were received prior to the Extended Bid Deadline (other than the Stalking Horse Offer).⁷

11. Accordingly, on December 11, 2023, the Monitor advised the Purchasers that their bid was the Successful Bid under the SISP.⁸

The Transaction

12. The Transaction is set out in (a) a form of Amended and Restated Transaction Agreement, (b) Amended and Restated Terms and Conditions, and (c) a Disclosure Schedule (collectively, the “**Transaction Documents**”), along with Implementation Steps that have been settled between the parties.⁹ The Transaction Documents are substantially similar to the original Transaction Documents. The Transaction is structured as a “sign and close” transaction whereby, although the Purchasers have agreed to be bound by the terms of the Transaction Documents and complete the Transaction upon satisfaction of the conditions, the Transaction Documents will only be signed, and therefore become effective, at the Effective Time.¹⁰

⁶ Fourth Report, section 3.1, para 1(a), MR, Tab 2, p 25; Endorsement dated November 2, 2023, Appendix G, MR, Tab 2G p 136.

⁷ Fourth Report, section 4.0, paras 1-2 and section 4.1, paras 1(c)-(d), MR, Tab 2, pp 27-28.

⁸ Fourth Report, section 4.1, para 2, MR, Tab 2, p 29.

⁹ Transaction Documents, Appendix I to the Fourth Report, MR, Tab 2I, p 184.

¹⁰ Fourth Report, section 5.0, para 3, MR, Tab 2, p 29.

13. Certain of the key terms of the Transaction Documents are as follows:
- (a) **Purchased Assets**: All of the shares and interests held by Validus Parent in Bay, Kap, Kingston GP and Kingston LP, newly issued shares in IFPC, three closing promissory notes which will be issued in consideration of the conveyance of the Leased Property by Macquarie to IFPC (the “**Promissory Notes**”) and the transfer of the Purchased Validus Parent Assets (defined below).¹¹
 - (b) **Purchase Price**: The consideration being provided for the Purchased Assets is comprised of: (i) payment of the Priority Payments Closing Amount of \$1.5 million plus a secured indemnity in respect of any other Priority Payments for which Validus Parent determined to be is liable and which are not satisfied by the payment of the Priority Payments Closing Amount (the “**Priority Payments Indemnity**”); (ii) funding of the Administrative Expense Closing Amount; (iii) the release by Macquarie of all obligations owing by the Validus Entities under the Participation Agreement Documents (currently estimated to be approximately \$61 million in the aggregate); and (iv) the transfer of the Leased Property by Macquarie to IFPC pursuant to the RVO.¹²
 - (c) **Continuing Contracts**: All contracts identified as “Continuing Contracts” will be continued by the applicable Purchased Entity – and any pre-filing and post-filing claims will be assumed under the Transaction Agreement.¹³
 - (d) **Permits and Licenses**: All of the permits and licenses of the Purchased Entities are preserved, including permits and licenses issued by Ontario Energy Board, Technical Standards and Safety Authority, Ministry of the Environment and Climate Change, Ministry of the Environment, Conservation and Parks, Environment and Climate Change Canada and

¹¹ Fourth Report, section 5.0, para 3, MR, Tab 2, p 30

¹² Fourth Report, section 5.0, para 3, MR, Tab 2, pp 30-31.

¹³ Fourth Report, section 5.0, para 3, MR, Tab 2, p 32.

Innovation, Science and Economic Development Canada (“**Permits and Licenses**”). There are at least 56 known Permits and Licenses.¹⁴

- (e) **Employees**: Far North presently intends to engage an Alternative Operator, NAES Corporation (“**NAES**”) ¹⁵, and it is contemplated that NAES will offer employment to employees it determines, in its/Far North’s sole discretion, on terms and conditions of employment that are substantially similar in the aggregate to, and no less favorable in the aggregate than, those in effect for each Employee set out in the Disclosure Schedule. NAES has also commenced discussions with the unions that represent certain employees. If NAES (or another Alternative Operator) is not engaged by Far North or, in the case of the unions, able to reach an agreement, Far North or a Purchased Entity will offer employment to employees it determines, in its sole discretion, on terms and conditions of employment that are substantially similar in the aggregate to, and no less favourable in the aggregate than, those in effect for each Employee set out in the Disclosure Schedule.¹⁶

- (f) **Assumed Liabilities**: Include, among other things, all pre- and post-filing outstanding amounts relating to “Continuing Contracts”, ongoing employment obligations for retained employees, post-filing claims, obligations of IFPC under the Promissory Notes, priority municipal taxes and Priority Payments of the Purchased Entities.¹⁷

- (g) **Excluded Liabilities**: All of the Validus Entities’ debts, obligations and liabilities, other than the Assumed Liabilities, and specifically including: (i) all Intercompany Claims that do not constitute Assumed Liabilities, including any Intercompany Claim asserted by Validus Parent

¹⁴ Fourth Report, section 5.0, para 3, MR, Tab 2, p 31; Appendix K to the Fourth Report, MR, Tab 2K, p 502.

¹⁵ NAES Corporation is a third-party operator that the Monitor is advised has extensive experience in the operation of power plant assets throughout North America, and which has been working with the Purchasers in respect of the post-closing operations of the Validus Entities.

¹⁶ Fourth Report, section 5.0, para 3, MR, Tab 2, p 33.

¹⁷ Fourth Report, section 5.0, para 3, MR, Tab 2, p 32.

against any Purchased Entity; (ii) amounts owing under the Receiver's Certificates; and (iii) other identified excluded liabilities.¹⁸

(h) **Priority Payments Indemnity Charge**. To secure the Priority Payments Indemnity, the Monitor, with the consent and support of the Purchasers, is requesting this Court to grant a super-priority charge (the "**Priority Payments Indemnity Charge**") on the Purchased Interests (excluding the Kingston GP Interests and the Kingston LP Interests) pursuant to the RVO.¹⁹

(i) **Conditions**:²⁰

(i) **Mutual Conditions**: (A) the Receivership Order, the Initial Order, the SISP Approval Order and the RVO shall have been issued and entered, and shall be Final Orders; and (B) the Parties shall have agreed on and implemented the Implementation Steps within the required timeframe. As noted above, the Implementation Steps have been agreed at this time.

(ii) **Purchaser Conditions**: (A) from the date of the Offer Letter, there shall not have occurred any change, effect, event or development that resulted in, or would reasonably be expected to result in, a Material Adverse Effect; and (B) the Monitor shall have accepted and executed the Transaction Agreement.

(iii) **Vendor Conditions**: as of immediately prior to the Closing, Far North shall have sufficient funds to pay the Administrative Expense Closing Amount and the Priority Payments Closing Amount.

(j) **Outside Date**: February 15, 2024.²¹

¹⁸ Fourth Report, section 5.0, para 3, MR, Tab 2, p 33.

¹⁹ Fourth Report, section 5.0, para 3, MR, Tab 2, p 32.

²⁰ Fourth Report, section 5.0, para 3, MR, Tab 2, pp 34-35.

²¹ Fourth Report, section 5.0, para 3, MR, Tab 2, p 34.

- (k) **Termination**: Among other things, if the RVO is not granted by January 8, 2024 or if the Effective Time has not occurred by February 15, 2024 or such later date as agreed to by the Monitor, Macquarie and Far North.²²
- (l) **Implementation Steps**: Certain implementation steps have been agreed on to address certain pre-filing matters including as it relates to the filing of HST returns, rectification of minute books and set off of intercompany claims.²³

Purchased Validus Parent Assets

14. As set out above, the security granted by Validus Parent to Macquarie in connection with its guarantee obligations of the Macquarie Claim Amount is limited to a pledge of shares of IFPC, Kap, Kingston LP, Kingston GP and Bay. The Transaction contemplates the purchase of certain assets of Validus Parent that are not subject to the Macquarie security (the “**Purchased Validus Parent Assets**”), including the following: (a) the Hut 8 Litigation; (b) the shares of Hosting; (c) employment contracts held by Validus Parent; and (d) certain other commercial contracts related to the business.²⁴

HST Considerations

15. When IFPC sold the Leased Property to Macquarie, Macquarie paid approximately \$6 million to IFPC in respect of HST payable on the Leased Property (the “**Purchase Price HST**”). IFPC did not remit the Purchase Price HST to CRA.²⁵

16. One of the consequences of the commencement of the CCAA Proceedings is that the obligation of IFPC to pay the Purchase Price HST will be treated as an unsecured claim and pursuant to the RVO, vest in ResidualCo.²⁶

²² Fourth Report, section 5.0, para 3, MR, Tab 2, p 35.

²³ Fourth Report, section 5.0, para 3, MR, Tab 2, p 35.

²⁴ Fourth Report, section 5.0, para 3, MR, Tab 2, p 30.

²⁵ Fourth Report, section 5.1, para 1, MR, Tab 2, p 36.

²⁶ Fourth Report, section 5.1, para 2, MR, Tab 2, p 36.

17. IFPC paid various rent payments under the Lease Agreement, however, from April 2023 to July 2023, IFPC made no rent payments under the Lease Agreement. In respect of the Pre-Filing ITCs (defined below), based on preliminary work done, it appears that IFPC filed HST returns through March 2023, with the balance of April through July 2023 remaining outstanding. For the periods already filed by IFPC, it appears to have claimed approximately \$3.4 million in respect of Pre-Filing ITCs.²⁷

18. Pursuant to the Transaction Agreement, upon closing of the Transaction, IFPC will purchase back the Leased Property from Macquarie and discharge rental arrears, in part, through its issuance of the Promissory Notes consisting of: IFPC Note 1 (\$29 million), IFPC Note 2 (\$10 million) and IFPC Note 3 (\$6,435,000).²⁸

19. IFPC Note 3 represents the amount of the HST payable by IFPC in respect of the purchase of the Leased Property by IFPC and payment of arrears rent by IFPC, as contemplated by the Transaction Agreement, and consists of approx. \$5.85 million in respect of the Leased Property plus approx. \$585,000 in respect of lease arrears (collectively, the “**HST Amount**”). Following Closing, Macquarie will (to the extent it has not already done so) be responsible for remitting the HST Amount to CRA (subject to ITCs to which Macquarie itself is entitled from the conduct of Macquarie’s business), and IFPC will be entitled to claim an ITC in respect of the HST Amount paid by IFPC to Macquarie by way of issuance of IFPC Note 3 (the “**Post-Filing ITC Entitlements**”). These Post-Filing ITC Entitlements are generated in respect of HST paid as a result of the transactions that take place pursuant to the Transaction Agreement on Closing, and in respect of the payment of HST owing to Macquarie which Macquarie has already reported as HST in its net tax for HST purposes. Accordingly, IFPC will retain the entitlement to the Post-Filing ITC Entitlements. Such amounts will not be available to set off against the Pre-Filing HST Claim, which remains with ResidualCo.²⁹

²⁷ Fourth Report, section 5.1, paras 6 and 5(b), MR, Tab 2, p 36.

²⁸ Fourth Report, section 5.1, para 7, MR, Tab 2, p 36.

²⁹ Fourth Report, section 5.1, para 8, MR, Tab 2, p 37.

PART II - ISSUES, LAW & ANALYSIS

20. The issues to be determined in connection with this motion are as follows:

- (a) should the Court approve the Transaction and Transaction Documents including: (i) granting of the RVO; (ii) approving the redemption, termination and cancellation of the IFPC Legacy Shares and other Subject Interests for no consideration; and (iii) granting certain relief related to the Continuing Contracts and Permits and Licenses;
- (b) adding ResidualCo as a Debtor in the CCAA Proceedings and in the Receivership Proceeding and authorizing Mr. Chua to act as the First Director; and
- (c) granting the Releases.

The Transactions and Transaction Documents Should be Approved

21. Pursuant to Section 36 of the CCAA, the Court has the jurisdiction to approve a sale transaction within the context of CCAA proceedings. Section 36(3) of the CCAA sets out the relevant factors for consideration as follows:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties;
- and

- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.³⁰

22. The above factors, however, are not intended to be exhaustive nor to be considered a checklist that must be followed in every transaction.³¹ The Courts have also continued to consider the *Soundair* criteria as relevant to whether or not a sale should be approved, which factors are similar to those set out in Section 36(3) of the CCAA and are as follows:

- (a) whether the Court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
- (b) the interest of all parties;
- (c) the efficacy and integrity of the process by which the offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.³²

23. The Transaction and Transaction Documents satisfy the above test. Among other things:

- (a) the SISP was commercially reasonable and conducted in accordance with the SISP Approval Order, including its timelines, which allowed the opportunity for the market to be broadly canvassed and provided an opportunity for parties to perform due diligence,³³
- (b) the Transaction provides for the greatest recovery available in the circumstances as there were no Qualified Bids other than the Stalking Horse Offer submitted in the SISP;³⁴

³⁰ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), [s 36\(3\)](#).

³¹ *Target Canada Co. (Re)*, [2015 ONSC 1487 \(CanLII\)](#) [**"Target"**] at para 16.

³² *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#) [**"Soundair"**] at para 16. See also, [Target](#), *supra* at paras 14-17.

³³ Fourth Report, section 6.0, para 1(a), MR, Tab 2, p 39.

³⁴ Fourth Report, section 6.0, para 1(c), MR, Tab 2, p 39.

- (c) Macquarie, being the Validus Entities' principal secured creditor, was consulted in the development and negotiation of the Transaction and the SISF and has consented to all of the relief sought;³⁵
- (d) the Transaction provides a going-concern solution for the Purchased Entities. It contemplates the continuation of operations and preserves employment. This is particularly beneficial in these circumstances as certain plants operate in rural communities where the Validus Entities are a significant employer;³⁶
- (e) the Monitor has indicated that it does not believe that further time spent marketing the Validus Entities' businesses and assets will result in a superior transaction nor is there sufficient funding to continue a marketing process;³⁷
- (f) absent the Transaction, Macquarie is not prepared to continue to fund the Validus Entities. Funding available at this time is projected to be exhausted on or around the proposed Outside Date of February 15, 2024;³⁸
- (g) certainty is required for the Validus Entities and their employees, as has been communicated by the Monitor throughout these CCAA Proceedings. It is critical and urgent that the Transaction be completed expeditiously;³⁹
- (h) the Monitor has expressed its view that the terms and conditions of the Transaction Agreement are commercially reasonable;⁴⁰

³⁵ Fourth Report, section 6.0, para 1(d), MR, Tab 2, p 39.

³⁶ Fourth Report, section 6.0, para 1(e), MR, Tab 2, p 39.

³⁷ Fourth Report, section 6.0, para 1(f), MR, Tab 2, p 39.

³⁸ Fourth Report, section 6.0, para 1(h), MR, Tab 2, p 40.

³⁹ Fourth Report, section 6.0, para 1(i), MR, Tab 2, p 40.

⁴⁰ Fourth Report, section 6.0, para 1(j), MR, Tab 2, p 40.

- (i) the Monitor filed a report stating that a liquidation of the power plant assets would result in a significantly worse outcome for many stakeholders, including in particular, employees and Continuing Contract counterparties;⁴¹ and
- (j) the Monitor and its counsel worked with the Purchasers and their counsel to settle the Implementation Steps. The Monitor has expressed its view that it does not believe any party is prejudiced by the Implementation Steps, which are required to complete the Transaction in accordance with the Transaction Documents.⁴²

The Reverse Vesting Order Should be Granted

24. Unlike a traditional asset sale, pursuant to “reverse vesting order” or “RVO” transaction, excluded assets and liabilities are vested “out” of the debtor company into a residualco leaving desired assets and liabilities in the debtor company which is acquired by the purchase. The residualco is then generally put into bankruptcy at the end of the CCAA proceeding.⁴³

25. It is now well established that the Court has the jurisdiction to approve RVO transactions pursuant to Sections 11 and 36 of the CCAA in the appropriate circumstances.⁴⁴ The relevant question then is not whether the jurisdiction is available but whether the relief is appropriate in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.⁴⁵

26. The jurisprudence as to when an RVO should be granted has continued to evolve in the past few years and the Courts have advised that RVOs should not be considered the “norm” and must be carefully scrutinized in each case as to whether or not they are appropriate in the circumstances.⁴⁶ However, notwithstanding the foregoing, Courts have recognized that RVOs are more commonly

⁴¹ Fourth Report, section 6.1, para 1(b), MR, Tab 2, p 41.

⁴² Fourth Report, section 6.0, para 1(k), MR, Tab 2, p 40.

⁴³ *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, [2022 ONSC 6354](#) [*“Just Energy”*] at para 27.

⁴⁴ CCAA, *supra* [ss 11 and 36](#); *Quest University Canada (Re)*, [2020 BCSC 1883](#) [*“Quest University”*] at paras 40, 157; *Just Energy*, *supra* at para 29; *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828 \(CanLII\)](#) [*“Blackrock”*] at para 85.

⁴⁵ *Quest University*, *supra* at para 157; *Harte Gold Corp. (Re)*, [2022 ONSC 653 \(CanLII\)](#) [*“Harte Gold”*] at para 29.

⁴⁶ *Just Energy*, *supra* at para 33.

used in connection with the sale of businesses in highly regulated industries including energy, cannabis and mining.⁴⁷

27. In *Just Energy*, Justice McEwan noted that RVOs had been granted where: (a) the debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser; (b) the debtor is party to certain key agreements that would be similarly difficult or assign to a purchaser; and (c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.⁴⁸

28. In addition to the *Soundair* principles, this Court's *Harte Gold* decision provides a list of salient factors that should be specifically considered in deciding whether an RVO is appropriate in the circumstances (the "**Harte Gold Factors**"). The Harte Gold Factors are:⁴⁹

(a) **Why is the RVO necessary in this case?** Preserving the Permits and Licenses required to operate in the highly regulated Ontario power industry is the principal factor driving the requirement that the Transaction be completed through an RVO. An RVO provides for the seamless preservation of the Permits and Licenses required to operate the Validus Entities' businesses - the time and cost of transferring them absent an RVO, if even possible, could impair the businesses of the Validus Entities and unduly complicate, delay and/or frustrate completion of a transaction. The Purchasers are not prepared to acquire the businesses under an alternative structure.

Completing the Transaction through a CCAA plan of arrangement ("**Plan**") is not a viable alternative as no party has been identified to sponsor a Plan given there is no value for

⁴⁷ For example, see *Arrangement relatif à Nemaska Lithium inc.*, [2020 QCCA 1488 \(CanLII\)](#), *Just Energy*, *supra*, *Harte Gold*, *supra*, *Blackrock*, *supra*, and *Fire & Flower Holdings Corp. et al.*, [2023 ONSC 4934 \(CanLII\)](#).

⁴⁸ *Just Energy*, *supra* at para 34.

⁴⁹ *Harte Gold*, *supra* at para 38. See also: *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of CannaPiece Group Inc.*, [2023 ONSC 841 \(CanLII\)](#) at para 58; *Just Energy*, *supra* at para 33; *PaySlate Inc. (Re)*, [2023 BCSC 608 \(CanLII\)](#) [*"PaySlate"*] at para 107; *Acerus Pharmaceuticals Corporation (Re)*, [2023 ONSC 3314 \(CanLII\)](#) at para 12.

unsecured creditors. The delay and uncertainty to the businesses resulting from a Plan process would impair value as employees would likely seek alternative employment. Employee flight risk has been highlighted to the Court since the commencement of these proceedings. The RVO effectively provides all the benefits of a Plan, while providing more certainty, with less cost, risk and instability.⁵⁰

- (b) **Does the RVO structure produce an economic result at least as favourable as any other viable alternative?** The RVO allows for the expedient conveyance of the Purchased Entities to the Purchasers. Without an RVO, there would be substantial delay transferring the Permits and Licenses, and the ability to transfer some or all of them at all may be at risk. Macquarie has advised the Monitor that it is not prepared to continue to provide funding absent the certainty of the Transaction, meaning the operations of the Validus Entities would need to be discontinued, resulting in a loss of employment in rural communities, as well as a cascading number of issues and problems which may arise as a result of the power plants not being maintained. The issuance of the proposed RVO is a material condition of the Transaction and is integral to completing the Transaction. Accordingly, there does not appear to be any viable alternative to the proposed RVO.

The absence of a viable alternative is illustrated by the Purchasers' insistence on the RVO as the proposed structure and the lack of other Qualified Bids submitted in the SISP. The only alternative would be a liquidation of the plant assets, which would result in a significantly worse outcome for many stakeholders including Continuing Contract counterparties, whose pre-filing liabilities are being assumed, and employees who would be terminated in such circumstances.⁵¹

⁵⁰ Fourth Report, section 6.1, para 1(a), MR, Tab 2, pp 40-41.

⁵¹ Fourth Report, section 6.1, para 1(b), MR, Tab 2, p 41.

- (c) **Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative?** For the reasons set out above, the Monitor's view, no stakeholders are prejudiced by the issuance of an RVO relative to any other structure of transaction, particularly given the Monitor's views as to the lack of any other viable option noted above. The Monitor is of the view that, in fact, many stakeholders will have an improved outcome as a result of the RVO given the treatment of pre-filing liabilities related to Continuing Contracts and the ongoing employment opportunities for employees. Priority amounts are also accounted for.⁵²
- (d) **Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?** The value of the Validus Entities' Permits and Licenses preserved under the RVO structure is the critical consideration in structuring the Transaction. These assets were extensively marketed for sale in the SISP and, in the case of IFPC, in a pre-filing sale process conducted by EY. The consideration being paid by the Purchasers is directly attributable to their importance and value, which provides significant benefit for other stakeholders, including contract counterparties and the Validus Entities' employees.⁵³

The Sale of the Purchased Validus Parent Assets is Appropriate

29. The Purchased Validus Parent Assets consist of the shares of Hosting, the litigation claim of Hut 8 and certain contracts in VPC's name but used in the business of the Purchased Entities.⁵⁴ Macquarie does not have security in respect of these assets.⁵⁵ Notwithstanding that Macquarie's security does not extend to the Purchased Validus Parent Assets, their inclusion in the Transaction is appropriate given, among other things:

⁵² Fourth Report, section 6.1, para 1(c), MR, Tab 3, p 41.

⁵³ Fourth Report, section 6.1, para 1(d), MR, Tab 2, p 42.

⁵⁴ Fourth Report, section 5.0, para 3, MR, Tab 2, p 30.

⁵⁵ Fourth Report, section 5.2, para 1, MR, Tab 2, p 38.

- (a) all assets subject to these proceedings, including the Purchased Validus Parent Assets, were made available for sale under the SISF and no Qualified Bids were received;⁵⁶
- (b) there is significant consideration and benefit provided under the proposed Transaction Documents over and above the release of the Macquarie debt and security, including, without limitation, the ongoing employment of VPC employees and assumption of associated liabilities, the payment of the Priority Payments Closing Amount, the granting of the Priority Payments Indemnity (and Priority Payments Indemnity Charge) and the funding of the Administrative Expense Closing Amount;⁵⁷
- (c) based on the Monitor's review of the litigation between VPC and Hut 8 by NRF, it appears that there is a lack of evidence to support VPC's claim against Hut 8 and that there is considerable strength in Hut 8's claim against VPC;⁵⁸
- (d) the Monitor is unaware of any material value in Hosting, which, to the Monitor's knowledge, is inactive and has no assets;⁵⁹
- (e) the TransCanada Contract, although held in the name of VPC, is used in the course of Bay's business (and available to Kap and IFPC) and is unlikely to be monetized on a standalone basis. Based on the obligations thereunder, the contract is a cost to VPC's estate (and thus these proceedings), and Far North is required to replace a cash deposit held by TransCanada with respect to the TransCanada Contract that has the potential to result in a return of the existing deposit to VPC;⁶⁰ and
- (f) the Transaction Agreement requires an allocation of the consideration payable among the Purchased Assets and provides that the consideration payable for the Purchased Validus

⁵⁶ Fourth Report, section 5.2, para 4(a), MR, Tab 2, p 38.

⁵⁷ Fourth Report, section 5.2, para 4(b), MR, Tab 2, p 38.

⁵⁸ Fourth Report, section 5.2, para 4(c), MR, Tab 2, p 38.

⁵⁹ Fourth Report, section 5.2, para 4(d), MR, Tab 2, p 38.

⁶⁰ Fourth Report, section 5.2, para 1(e), MR, Tab 2, p 38.

Parent Assets shall be paid and satisfied by the assumption by the Purchasers of certain of the Priority Payments of Validus Parent.⁶¹

The Redemption and Cancellation of the IFPC Legacy Shares and other Subject Interests for No Consideration is Appropriate

30. Pursuant to the Transaction, the existing shares of Bay, Kap, Kingston and Hosting will be purchased and the existing shares of IFPC (the “**IFPC Legacy Shares**”) will be cancelled and new shares of IFPC will be issued (the “**IFPC Interests**”) and conveyed to Far North. Other than the foregoing, all other equity interests in the Purchased Entities (the “**Subject Interests**”) will be cancelled for no consideration to ensure that upon the completion of the Transaction, Far North is the 100% shareholder of each of the Purchased Entities.⁶² This relief has been commonly granted in connection with other RVOs, and is particularly necessary in this case given the deficient state of the Validus Entities’ books and records, as previously disclosed.⁶³

31. The Court has the jurisdiction to grant this relief pursuant to Sections 11 and 36 of the CCAA and, in particular, Section 36 of the CCAA provides that transactions may be approved notwithstanding “any requirement for shareholder approval.”⁶⁴

Continuing Contracts and Permits and Licenses

32. Pursuant to the Transaction Documents and the RVO, Continuing Contracts and Permits and Licenses will continue with the Purchased Entities after the Effective Date. In connection therewith, all counterparties will have the benefit of having (a) an ongoing counterparty; and (b) any pre- or post-filing arrears assumed and continued post closing.⁶⁵ The RVO provides restrictions on termination of Continuing Contracts and Permits and Licenses.⁶⁶

⁶¹ Fourth Report, section 5.2, para 1(f), MR, Tab 2, p 38.

⁶² Draft Reverse Vesting Order, para 5(h), MR, Tab 4, pp 622-623.

⁶³ Fourth Report, footnote no. 4, MR, Tab 2, p 24.

⁶⁴ CCAA, *supra* ss [11](#) and [36](#).

⁶⁵ Fourth Report, section 6.1, para 1(c), MR, Tab 2, p 41.

⁶⁶ Draft Reverse Vesting Order, para 14, MR, Tab 4, p 625.

33. Recent jurisprudence is to be considered as to the extent to which notice has been provided to all parties whose contracts are to be affected by the proposed RVO. In *PaySlate*, the Court expressed concern that contract counterparties whose contracts were being retained, had not been given notice of the hearing despite the fact that certain of their contractual rights (such as the right to terminate upon a change of control) may be affected.⁶⁷

34. On November 2, 2023, the Court approved the Unknown Contract Bar Process, which was conducted by the Monitor pursuant to its terms. The Monitor was not contacted by any such parties prior to the bar date of November 28, 2023.⁶⁸

35. In connection with this motion, the Monitor has served all counterparties with Continuing Contracts and Permits and Licenses (other than those with a pure right in land evidenced by an easement), as well as the primary service list and all additional PPSA registrants.⁶⁹

ResidualCo and appointment of the First Director

36. Pursuant to the terms of the RVO, the liabilities of the Purchased Entities excluded from the Transaction will vest in ResidualCo and ResidualCo would become a debtor company subject to the receivership and CCAA proceedings upon the issuance of the order sought.⁷⁰ The Monitor seeks to have ResidualCo added as an Applicant in these CCAA Proceedings.⁷¹

37. ResidualCo may be an Applicant if it satisfies the definition of “debtor company” in Section 2(1) of the CCAA. The CCAA applies to affiliated debtor companies if the aggregate value of the claims against the affiliated debtor companies exceeds \$5 million.⁷² A “debtor company” under the CCAA is, among other things, any company that is bankrupt or insolvent.⁷³ CCAA courts have applied the definition of the terms “insolvent person” in the *Bankruptcy and Insolvency Act*, which

⁶⁷ *PaySlate*, *supra* at paras 73-77.

⁶⁸ Fourth Report, section 8.0, paras 1-2, MR, Tab 2, p 43.

⁶⁹ Affidavit of Service of Katie Parent, sworn December 22, 2023.

⁷⁰ Fourth Report, section 9.0, para 1, MR, Tab 2, p 44.

⁷¹ Fourth Report, section 1.1, para 1(i), MR, Tab 2, p 23.

⁷² CCAA, s 3(1)

⁷³ CCAA s 2, “debtor company”

includes a person, “the aggregate of whose property is not, at a fair, valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all [its] obligations, due and accruing due”.⁷⁴

38. Ryan Chua, the Validus Entities former general counsel, has agreed to act as the first director (the “**First Director**”) of ResidualCo, which is a requirement for its incorporation. Mr. Chua was engaged earlier in the proceedings on a contract basis to also assist with the SISP.⁷⁵ Mr. Chua has agreed to this role subject to receiving certain protections in the RVO (and release, discussed below).⁷⁶ Pursuant to Section 119 of the *Business Corporations Act* (Ontario), a director named in the articles may not resign until the first meeting of shareholders.⁷⁷ It is also anticipated that Mr. Chua will resign prior to the anticipated bankruptcy of ResidualCo.

39. The Court has the jurisdiction pursuant to its inherent jurisdiction and the jurisdiction conferred to it under Section 11 of the CCAA to grant the requested relief.⁷⁸ Courts have specifically recognized that the CCAA provides the Court with the jurisdiction to override corporate statutes where it is necessary to facilitate a transaction.⁷⁹ Such relief is also consistent with Section 11.5 of the CCAA, which expressly permits directors to be removed by Court Order.⁸⁰

Tax Considerations

40. Under the Transaction Documents, the treatment of HST and ITCs follows the following principles:

(a) the Pre-Filing HST Claim is vested into ResidualCo;

⁷⁴ *Re Stelco Inc.*, [2004 CanLII 24933 \(ONSC\)](#) at paras 21-22 and 26; *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 2(1) “insolvent person”.

⁷⁵ Fourth Report, sections 2.0, para 4 and section 9.0, para 3, MR, Tab 2, pp 25 and 44.

⁷⁶ Draft Reverse Vesting Order, para 38, MR, Tab 4, p 634.

⁷⁷ *Business Corporations Act* (Ontario), [s 119](#).

⁷⁸ *CCAA*, *supra* s 11.

⁷⁹ *Just Energy Group Inc. et al.*, [2021 ONSC 7630 \(CanLII\)](#) at paras 58 and 59.

⁸⁰ *CCAA*, *supra* s 11.5.

- (b) any entitlement to ITCs generated in respect of HST paid pre-filing continues in ResidualCo (the “**Pre-Filing ITCs**”). As set out above, it appears that IFPC has already claimed approximately \$3.4 million of Pre-Filing ITCs. The Monitor understands that there may be further Pre-Filing ITCs available to claim by IFPC; and
- (c) ITCs which are generated in respect of HST being paid to Macquarie pursuant to the transaction on closing will be for the benefit of the “restructured” IFPC.⁸¹

41. It is well established law, that while set off is preserved under the CCAA, the right to set off is generally limited to “pre-pre” and “post-post”.⁸² The proposed tax treatment under the Transaction Documents preserve such rights in that (a) pre-filing HST liabilities may be set off against Pre-Filing ITCs, and (b) post filing HST liabilities arising from the Transaction are not to be set off against Pre-Filing ITCs but, pursuant to the Transaction Documents, are for the benefit of IFPC or other Purchased Entity (post closing).⁸³

42. The issue as to what is characterized as a pre- or post-filing HST liability is relevant to this analysis. The Court of Appeal of Quebec recently considered a similar issue in the *Bloom Lake* case.⁸⁴ In *Bloom Lake*, certain contracts had been disclaimed as part of the CCAA proceedings giving rise to damages claims by those suppliers. The suppliers subsequently received distributions under the Plan in respect of their damages claims – which distributions resulted in corresponding ITCs. The Court of Appeal found that the ARQ was not entitled to set off the ITCs against its pre-filing tax claim given the clear provisions of the *Excise Tax Act*.⁸⁵

43. This issue was also considered by the Court in *Re 12463873 Canada Inc.* (“**Green Relief**”).⁸⁶ In the *Green Relief* case, there was a dispute as to what the parties had negotiated as to entitlement

⁸¹ Fourth Report, section 5.1, para 5 (a)-(c), MR, Tab 2, p 36.

⁸² *Montréal (City) v Deloitte Restructuring Inc.*, [2021 SCC 53 \(CanLII\)](#) at paras 62 and 63.

⁸³ Fourth Report, section 5.1, paras 5-9, MR, Tab 2, pp 36- 37.

⁸⁴ *Arrangement relatif à Bloom Lake*, [2022 QCCA 1740 \(CanLII\)](#) [“*Bloom Lake*”].

⁸⁵ *Bloom Lake*, *supra* at paras 48 and 49

⁸⁶ [Re 12463873 Canada Inc. \(September 3, 2021\)](#), Toronto, Court File No. CV-20-00639217-00CL (Endorsement of Justice Koehnen) (ONSC).

to ITCs where there was a dispute as to whether the buyer's claims under the purchase agreement as well as a subsequent claim for it was entitled to ITCs claimed in the same reporting period but not satisfy the HST reported for the same period.

44. The treatment of HST under the Transaction Documents is consistent with applicable law and, among other things:

- (a) the Pre-Filing ITCs will be vested into ResidualCo along with the Pre-Filing HST Claim;⁸⁷
- (b) HST paid by IFPC in respect of the purchase of Leased Property would only become payable on the closing of the Transaction and so is a post-filing payment of HST. Correspondingly, any ITCs generated as a result of such payment of HST cannot be set off against the pre-filing Purchase Price HST obligation;⁸⁸ and
- (c) rental arrears and associated HST are being satisfied by IFPC on closing. HST in respect of rental arrears is being paid by IFPC on closing through the issuance of promissory notes and is to be funded by Macquarie on the closing of the Transaction. While the entitlement to claim an ITC, as well as the obligation to pay the corresponding HST, arises at the time the consideration for the taxable supply (in this case, the rent) becomes payable, there is no requirement to claim ITCs only in the period in which they arise (provided claims are made within the limitations provided in the HST legislation). As the HST in respect of the rental arrears is being funded by Macquarie, it is appropriate that the related ITC is claimed post-filing and is therefore a post-filing ITC;⁸⁹

45. Additional factors that are relevant for consideration include that (a) HST is being actually funded and paid for by Macquarie - the equities weigh in favour of the funding party continuing to have the benefit of the offsetting ITCs; (b) the parties are free to structure their transaction in a tax

⁸⁷ Fourth Report, section 5.1, para 9(a)(i), MR, Tab 2, p 37.

⁸⁸ Fourth Report, section 5.1, para 9(a)(ii), MR, Tab 2, p 37.

⁸⁹ Fourth Report, section 5.1, para 9(a)(iii), MR, Tab 2, p 37.

efficient manner; and (c) any ITCs generated from the payment of HST on obligations of VPC during the Receivership or CCAA period will continue to be assets of VPC or ResidualCo, but also cannot be set off against the pre-filing Purchase Price HST.⁹⁰

46. The above rationale in 45(a) is of particular relevance to any objection that could be made by the Validus Entities themselves or former management or the directors of the Validus Entities, given that (a) no HST was ever remitted in respect of the original purchase of the Leased Property; (b) IFPC did not pay HST from April to July 2023, and HST was instead remitted by Macquarie from its own funds; and (c) pursuant to the Transaction, although IFPC Note 3 is in respect of the HST payable, Macquarie (and not IFPC) will fund the HST.⁹¹

The Releases in the RVO Should be Granted

47. The RVO provides for: (i) KSV, in its personal capacity and its capacities as Receiver and Monitor, and its legal counsel, and (ii) Macquarie, Far North and their respective current and former directors, officers, employees, legal counsel and representatives; and (iii) Ryan Chua, in his capacity as the First Director (collectively, the “**Released Parties**”) to be released from the Released Claims (as defined in the proposed RVO).⁹²

48. The claims to be released include any claims arising out of the Validus Entities’ business, assets, operations and affairs or the Transaction Documents but excludes, among other things, any claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA (the “**Released Claims**”).⁹³

49. Releases for directors and officers, the Monitor and other advisors to debtor companies are a common feature of CCAA plans. CCAA courts have, on multiple occasions, approved releases in the absence of a CCAA plan, both on consent and in contested matters, including in the case of

⁹⁰ Fourth Report, section 5.1, paras 9(b)-(d), MR, Tab 2, p 37.

⁹¹ Fourth Report, section 5.1, paras 1, 6-8, MR, Tab 2, pp 36-37.

⁹² Fourth Report, section 7.0, para 1, MR, Tab 2, p 42.

⁹³ Fourth Report, section 7.0, paras 2-3, MR, Tab 2, p 42.

RVOs. In *Harte Gold*, the Court granted releases and in doing so, considered the factors set out in the *Lydian* decision as follows:

- (a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- (b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- (c) whether the plan could succeed without the releases;
- (d) whether the parties being released were contributing to the plan; and
- (e) whether the release benefitted the debtors as well as the creditors generally.⁹⁴

50. In these proceedings, the Released Parties have been integral to the proceedings including the conduct of the SISP, negotiation and implementation of the Transaction.⁹⁵ The Third Report sets out benefits provided by the Purchasers (as stalking horse purchasers) to facilitate the SISP including funding due diligence efforts and being willing to provide a stalking horse offer that provided stability for, crucially, the employees.⁹⁶ The Purchasers require the releases as a condition of the Transaction, which provides significant benefit to multiple stakeholders including employees and contract counterparties. As set out above, Mr. Chua has also required a release in connection with his limited role as the First Director.

51. Additionally, the Monitor is of the view that the scope of the Released Claims is reasonable in the circumstances as, among other things: (i) there has been significant opposition by the Validus Entities and Mr. Shortt at times in these proceedings; and (ii) the records and information that the parties have had to rely upon in structuring the Transaction and in the course of the business

⁹⁴ *Harte Gold*, *supra* at paras 80-86; *Lydian International Limited (Re)*, [2020 ONSC 4006 \(CanLII\)](#) at para 54.

⁹⁵ Fourth Report, section 7.0, para 4(a), MR, Tab 2, p 42.

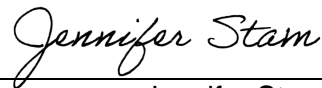
⁹⁶ Second Report of the Monitor dated October 19, 2023, section 4.9, paras 4 and 8, Appendix H to the Fourth Report, MR, Tab 2H, pp 178-179.

operations has been unreliable or non-existent. The release of such claims in favour of the proposed Released Parties will assist in completing the administration of the estate for which reserves or charges might otherwise be required.⁹⁷

PART III - ORDER REQUESTED

52. For these and the other reasons noted above, the Monitor therefore requests an Order substantially in the form of the draft Order included in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of December, 2023.



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⁹⁷ Fourth Report, section 7.0, para 5, MR, Tab 2, p 43.

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Target Canada Co. (Re)*, [2015 ONSC 1487 \(CanLII\)](#)
2. *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#)
3. *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, [2022 ONSC 6354](#)
4. *Quest University Canada (Re)*, [2020 BCSC 1883](#)
5. *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828 \(CanLII\)](#)
6. *Harte Gold Corp. (Re)*, [2022 ONSC 653 \(CanLII\)](#)
7. *Arrangement relatif à Nemaska Lithium inc.*, [2020 QCCA 1488 \(CanLII\)](#)
8. *In the Matter of the Companies’ Creditors Arrangement Act and In the Matter of CannaPiece Group Inc.*, [2023 ONSC 841 \(CanLII\)](#)
9. *PaySlate Inc. (Re)*, [2023 BCSC 608 \(CanLII\)](#)
10. *Acerus Pharmaceuticals Corporation (Re)*, [2023 ONSC 3314 \(CanLII\)](#)
11. *Re Stelco Inc.*, [2004 CanLII 24933 \(ONSC\)](#)
12. *Just Energy Group Inc. et al.*, [2021 ONSC 7630 \(CanLII\)](#)
13. *Montréal (City) v Deloitte Restructuring Inc.*, [2021 SCC 53 \(CanLII\)](#)
14. *Arrangement relatif à Bloom Lake*, [2022 QCCA 1740 \(CanLII\)](#)
15. [Re 12463873 Canada Inc.. \(September 3, 2021\)](#), Toronto, Court File No. CV-20-00639217-00CL (*Endorsement of Justice Koehnen*) (ONSC).
16. *Lydian International Limited (Re)*, [2020 ONSC 4006 \(CanLII\)](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY- LAWS

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

2(1) 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*)

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been

made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b)** whether the monitor approved the process leading to the proposed sale or disposition;
- (c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d)** the extent to which the creditors were consulted;
- (e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Business Corporations Act, R.S.O. 1990, c. B.16

First directors

119 (1) Each director named in the articles shall hold office from the date of endorsement of the certificate of incorporation until the first meeting of shareholders. R.S.O. 1990, c. B.16, s. 119 (1).

Resignation

(2) Until the first meeting of shareholders, the resignation of a director named in the articles shall not be effective unless at the time the resignation is to become effective a successor has been elected or appointed. 1994, c. 27, s. 71 (13).

Powers and duties

(3) The first directors of a corporation named in the articles have all the powers and duties and are subject to all the liabilities of directors. R.S.O. 1990, c. B.16, s. 119 (3).

Election of directors

(4) Subject to clause 120 (a), shareholders of a corporation shall, by ordinary resolution, elect, at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election. R.S.O. 1990, c. B.16, s. 119 (4); 2020, c. 34, Sched. 1, s. 6.

Term for directors

(5) It is not necessary that all directors elected at a meeting of shareholders hold office for the same term. R.S.O. 1990, c. B.16, s. 119 (5).

Idem

(6) A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following his or her election. R.S.O. 1990, c. B.16, s. 119 (6).

Idem

(7) Despite this section, if directors are not elected at a meeting of shareholders the incumbent directors continue in office until their successors are elected. R.S.O. 1990, c. B.16, s. 119 (7).

Failure to elect required number of directors

(8) If a meeting of shareholders fails to elect the number of directors required by the articles or by section 125 by reason of the disqualification, incapacity or death of one or more candidates, the directors elected at that meeting, if they constitute a quorum, may exercise all the powers of the directors of the corporation pending the holding of a meeting of shareholders in accordance with subsection 124 (3). R.S.O. 1990, c. B.16, s. 119 (8).

Consent required

(9) Subject to subsection (10), the election or appointment of a director under this Act is not effective unless the person elected or appointed consents in writing before or within 10 days after the date of the election or appointment. 1999, c. 12, Sched. F, s. 8.

Later consent

(10) If the person elected or appointed consents in writing after the time period mentioned in subsection (9), the election or appointment is valid. 1999, c. 12, Sched. F, s. 8.

Exception

(11) Subsection (9) does not apply to a director who is re-elected or re-appointed where there is no break in the director's term of office. 1999, c. 12, Sched. F, s. 8.

Director may require copy of consent

(12) The Director may, at any time by notice, require that a copy of a consent mentioned in subsection (9) or (10) be provided to the Director within the time period set out in the notice. 2017, c. 20, Sched. 6, s. 11.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

2 insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- **(a)** who is for any reason unable to meet his obligations as they generally become due,
- **(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- **(c)** the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

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

Court File No.: CV-23-00705215-00CL

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.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE MONITOR
(Reverse Vesting Order)**

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