



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE
NO.:

CV-23-00703754-00CL

DATE: 29 August 2023

NO. ON LIST: 4

TITLE OF PROCEEDING: **MACQUARIE EQUIPMENT FINANCE LIMITED v.
VALIDUS POWER CORP. et al**

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Other:

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ENDORSEMENT OF JUSTICE OSBORNE:

1. The Receiver seeks an order authorizing it to apply for an initial order in respect of the *CCAA* (including additional relief in respect of Kingston LP), and if that authorization is granted, it seeks an Initial Order pursuant to the *CCAA* in what would immediately be a new proceeding commenced under that statute.
2. The Service List has been served with the materials. The relief sought today is unopposed, and in particular is not opposed by the Respondents or by the CRA. The Respondents are represented in Court today and the CRA has received the materials and counsel have advised the Applicant of the fact that the CRA is not opposing the relief sought.
3. The Receiver relies on the First Report of the Receiver, which is also the Prefiling Report of the Proposed Monitor (KSV in each case) dated August 23, 2023, together with Appendices thereto.
4. The Report sets out the basis for the relief sought. Defined terms in this Endorsement have the meaning given to them in the Report and/or my earlier Endorsement made in this proceeding.
5. I granted an order on August 10, 2023, appointing the Receiver. At that time, I was of the view that the relief sought in respect of authorizing the Receiver to commence a proceeding pursuant to the *CCAA* was premature and while I decline to grant that relief then, I was clear that my decision was without prejudice to the ability of the Receiver to seek that relief in the future. My view on August 10 was that affected stakeholders needed more time to absorbency what would be a somewhat fundamental step.
6. As contemplated, that relief is now sought.
7. I am satisfied that the Receiver should be authorized to bring a *CCAA* application. This Court has jurisdiction to grant such relief pursuant to s. 243 (1)(c) of the *BIA*. In this case, only the Receiver, who has replaced management of the Respondents, could seek such relief in any event. The granting of the order sought provides the maximum chance that the business of the Respondents can be preserved as a going concern, in turn maximizing the chances of continuing the employment for some of the existing employees and maximizing the outcome for all stakeholders.
8. I have not set out in this Endorsement my reasons for concluding that it was not only just or convenient, but just *and* convenient, to appoint a Receiver, which are fully canvassed in my Endorsement dated August 18, 2023. Since that time, the Receiver has not received any response or indication from the Respondents that the previously contemplated Refinancing would be forthcoming imminently. I pause to observe, however, that counsel for the Respondents advised the Court that they intend to participate in the proposed SISF by submitting a bid.

9. The Receiver has, however, received a proposed Offer from a Potential Purchaser which includes both a reverse vesting structure, and a proposed stalking horse bid, both to be effected within a CCAA proceeding.
10. It is the strong view of the Receiver, with no contrary view expressed by any party, that any other potential bids are expected to be structured in the same way, and similarly be proposed to be effected within a CCAA proceeding.
11. This make sense in the circumstances and given the business of the Respondent since they hold numerous permits and licenses that allow them to operate in a highly regulated energy industry. A reverse vesting structure would reduce, among other things, the uncertainty related to the transfer and transferability of those licenses and permits in any commercially reasonable time frame.
12. Moreover, the implementation steps contemplated a corporate arrangement pursuant to either or both of the OBCA and/or the CBCA. While I am not certain that such could not be effected within a receivership, they are certainly more common in CCAA proceedings, and I need not decide that issue here since as stated I am satisfied for other reasons that a CCAA proceeding is appropriate here.
13. The Potential Purchaser has indicated that it is not prepared to pay arrears owing to the CRA in respect of HST remittances owing. I observe as noted by counsel that completion of the contemplated transaction under the CCAA will reverse the priority of the HST obligation.
14. The Receiver submits that any other purchaser will likely also require that the HST obligation be reversed with the result that the super priority status of this obligation, absent a CCAA proceeding, is very likely to be an impediment to any going concern transaction in this case.
15. Here, the HST obligations exceed approximately \$6 million. I note, as submitted by counsel for the Respondents, that there are input tax credits. It is not clear as to the extent to which those input tax credits will reduce the arrears owing, and the CRA has not conducted and HST audit. Court approval of any transaction resulting from a sales process is for another day, but it will be a factor, presumably, in such approval, how the HST obligations are treated so as to not separate those from potential benefits achieved by the application of input tax credits.
16. Authorizing the Receiver to commence proceedings pursuant to the CCAA now will permit the 10 day statutory comeback period to run, while the parties continue to negotiate terms with the potential purchaser and also finalize the terms of the proposed SISP.
17. I am also satisfied that there is some urgency to this matter given that the business of the Debtors is power, and if there is to be participation in the IESO's capacity auction market, the bid deadline for participation is November 29, 2023. There is much to be done between now and then, with the result that the process should begin as quickly as possible.
18. For all of these reasons, the relief is granted. The Commercial List Office will provide a Court File number for the new proceeding pursuant to the CCAA.
19. Authorization order to go in the form signed by me, which is effective immediately and without the necessity of issuing and entering.
20. This Endorsement may be read together with my Endorsement made in the CCAA proceeding.

Osawa, J.