

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

BETWEEN

MACQUARIE EQUIPMENT FINANCE LIMITED

Applicant

- and -

**VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY
POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC.,
KINGSTON COGEN LIMITED PARTNERSHIP AND
KINGSTON COGEN GP INC.**

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED;
AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43,
AS AMENDED

**REPLY FACTUM OF THE APPLICANT
(Receivership Order)**

August 9, 2023

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Limited, the Applicant

TO: SERVICE LIST

PART I — OVERVIEW

1. The Debtors owe the Applicant, their senior secured creditor, approximately \$55 million. The Debtors had: (i) extended debt forbearance; (ii) two months of notice of the Applicant's intention to enforce its security and (iii) an adjournment of this receivership application. The Debtors do not contest that their debt to the Applicant is in default and is now due and owing.

2. The Debtors have no plan to repay the Applicant. They have no plan to fund the business in the near term, to meet payroll, or to pay insurance. There is a threat of a mass resignation of their employees and plant shutdown. There is no basis for the Debtors to resist the appointment of a receiver.

PART II — LAW AND ARGUMENT

3. The Applicant will address the following issues raised by the Debtors' responding materials: (A) the Debtors do not present any viable alternative path forward; (B) there is imminent risk to the business; (C) the Debtors have not addressed the Applicant's loss of confidence in management; and (D) the Applicant remains entitled to the appointment of a receiver.

A. The Debtors have no Viable Plan

4. On August 2, the Debtors successfully sought a short adjournment of the receivership motion. They did so in order to "try to find an alternative source of debt and/or equity so that the Applicant can be repaid in full", which was "something they have been working on since the beginning of 2023."¹ In short, they asked for a chance to pull a rabbit out of the hat. Their evidence represents that they have performed this feat. They have not.

5. The Debtors have no plan to resolve their current financial situation. Mr. Shortt, on behalf of

¹ Endorsement of Justice Kimmel dated August 2, 2023, [para 9](#), Exhibit B to the Second Supplemental Affidavit of Joshua Hamilton Stevens, sworn August 8, 2023 ("**Second Supp. Stevens Affidavit**").

the Debtors, says that he has “successfully arranged” “alternative financing to take out in Macquarie’s position” (*sic*) “which just needs to be formally documented.”²

6. There is no such financing. Mr. Shortt does not provide any substantiation for his bald claim: he does not identify the purported financier, he provides no commitment from the financier, he gives no timeframe for the alleged financing, and he does not attach a term sheet. There is no way to assess the creditworthiness of the financier, the conditionality of the deal, the quantum of the financing, the timing or likelihood to close or the ability to repay the Applicant’s—and the CRA’s—secured debts of more than \$60 million.

7. Moreover, the Applicant is skeptical that such a financing could be arranged. First, Mr. Shortt has claimed that “financing was just around the corner” for at least 8 months.³ It has never materialized. Even a small financing facility of \$5 million was unable to close.⁴ Second, because of the state of the Debtors’ affairs, including deficient books and records and extensive liabilities, the Applicant believes it would be “virtually impossible” for financing to materialize.⁵ At the very least, the books and records would need to be fixed and prepared. Any such work would require costly third party professionals, which the Debtors have not—and cannot afford to—retain.⁶

8. Third, the purported late-breaking appearance of financing is belied by the recent failure of a four-month marketing process for the IFPC assets, led by an M&A advisor and funded by the Applicant.⁷ While the Debtors point to “why it has become advantageous to own and operate a natural gas power plant”, none of these reasons are new: they all existed during that failed sales

² Affidavit of Todd Shortt sworn August 7, 2023, [para 28](#) (“**Shortt Affidavit**”).

³ Second Supp. Stevens Affidavit, [para 15](#).

⁴ Second Supp. Stevens Affidavit, [para 15](#).

⁵ Second Supp. Stevens Affidavit, [para 16](#).

⁶ Second Supp. Stevens Affidavit, [para 17](#).

⁷ Affidavit of Joshua Hamilton Stevens sworn July 31, 2023, [paras 81-84](#) (“**First Stevens Affidavit**”); Second Supp. Stevens Affidavit, [para 21](#).

process.⁸ Indeed, a prospective bidder in the IFPC sales process cited “reputational damages with suppliers/employees and the liens” as reasons to not pursue a bid.⁹ Nothing differs today.

9. Much more than a bald assertion of financing is needed to properly respond to a receivership application. *BCIMC Construction Fund Corporation* is an analogous case: in response to a receivership application, the debtors received a short adjournment to “pull[] a rabbit out of the hat” and pay out the secured creditors.¹⁰ In that case, the proposal was far more fully formed than at present: the debtors had obtained contingent commitments from a reputable condominium developer as purchaser and a comfort letter from a reputable bank providing contingent financing.¹¹ This was not enough: “[f]ar from pulling a rabbit out of the hat”, the proposal would inappropriately keep the secured creditors in the project.¹²

10. *BCIMC* held that secured creditors “should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing.” Denying the secured creditors control of the liquidation or fundraising process “is even more unfair when the contracts to which the Debtors agreed give the [secured creditors] a right to control the process through a receivership.”¹³ This is the situation here.

B. Imminent risk to the business

11. The Debtors also have no plans to meet their immediate obligations. The Debtors have critical payments due in the next 10 days, including payroll, net of source deductions, due August 10, 14 and

⁸ Second Supp. Stevens Affidavit, [para 24](#).

⁹ Second Supp. Stevens Affidavit, [para 19](#); June 12, 2023 [Email from EY dated June 12, 2023](#), Exhibit F to Second Supp. Stevens Affidavit.

¹⁰ *BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc.*, [2020 ONSC 1953](#), [para 62](#) [*BCIMC*].

¹¹ *BCIMC*, [2020 ONSC 1953](#), [paras 53-55](#) and [66](#).

¹² *BCIMC*, [2020 ONSC 1953](#), [para 69](#).

¹³ *BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc.*, [2020 ONSC 1953](#), [para 71](#); see also *Romspen Investment Corporation v 6711162 Canada Inc.*, [2014 ONSC 2781](#), [paras 13](#) and [74](#).

18 of \$108,183.02 in the aggregate and an insurance installment of \$306,005 due on August 15.¹⁴ The Debtors lack the funds to meet these payments. They will not receive funds in time from the IESO to satisfy these obligations.¹⁵ And the Applicant is unwilling to fund in the absence of a receivership.

12. As this court held in *Rompsen*, “the status quo is untenable even in the short term.” The appointment of a receiver will not stop the Debtors from obtaining alternate financing, but it will create “the most efficient process in a difficult situation” and results in the “orderly liquidation of assets bearing in mind the best interest of all parties and when required subject to court approval.”¹⁶

C. There is still no confidence in management

13. In its evidence, the Applicant detailed at length the many reasons it lost faith in Debtors’ management. The Debtors do not reply—or respond—to any of them. Since the initial attendance, the Applicant has received further information that corroborates its previous concerns: the Debtors are a total of \$1,955,470.84 behind on their payroll obligations, including \$1,180,666.84 on account of unremitted source deductions, as of August 3.¹⁷

14. The Applicant’s prior evidence also raised concerns that critical employees will leave their roles, forcing plant shutdowns. The Interim Receiver has now reported that the Debtors’ employees have expressed a lack of confidence in management, frustration with non-payment and concern if management remains in control. The Interim Receiver believes that mass resignation is a risk.¹⁸

D. The Applicant is entitled to the appointment of a Receiver

¹⁴ Second Supp. Stevens Affidavit, [paras 7 and 8](#).

¹⁵ Second Supp. Stevens Affidavit, [para 7](#).

¹⁶ *Rompsen Investment Corp. v. 1514904 Ontario Ltd. et al.*, [2010 ONSC 832](#), para [19](#); See also *Rompsen Investment Corp. v. 1514904 Ontario Ltd. et al.*, [2010 ONSC 1339](#), para [32](#).

¹⁷ Second Supp. Stevens Affidavit, [para 11](#); [Payroll Arrears Summary dated August 3, 2023](#), Exhibit C to the Second Supp. Stevens Affidavit; First Report of the Interim Receiver dated August 9, 2023, para 3.2 (“**IR Report**”).

¹⁸ IR Report, paras 4.1 and 4.2.

15. Nothing in the Debtors' evidence addresses the fundamental issue: they have defaulted on significant debt and agreed to the appointment of a receiver in the case of such a default.¹⁹

16. It would be no answer to allege that the Applicant is oversecured: it is entitled to realize on that illiquid security and the equity provided to other creditors, like the CRA. However, the Debtors' assertion of oversecurity is lacking. They cite a Kroll appraisal, but do not produce it. None of the critical information, including the valuation date or assumptions underlying the conclusions of such alleged appraisal are available to the Applicant or this Court.²⁰ The best evidence is that the Applicant sought to help the Debtors sell IFPC by paying for a sales process. That process failed to find a buyer.

17. Nor is it an answer to continue the interim receivership. The interim receivership order was intended to bridge the gap between the adjournment and August 10 hearing. It did not provide the Interim Receiver with possession or control over the Debtors' business unless and until certain triggering events, such as the resignation of senior management, and does not authorize the Interim Receiver to take the necessary steps to realize on the Applicant's security through a SISP.²¹ It is also not a response to challenge the precise quantum of debt owing to the Applicant.²²

18. Most importantly, the Interim Receivership does not provide a path forward for the Debtors or the recovery of the Applicant's debt. The Applicant is not prepared to provide additional funding to the Debtors unless a full receiver is appointed.²³

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Applicant

¹⁹ First Stevens Affidavit, [para 41](#).

²⁰ Shortt Affidavit, [para 20](#).

²¹ Interim Receiver Order dated Aug 2, 2023, [para 4\(a\)](#), Ex A to the Second Supp. Stevens Affidavit

²² *Pandion Mine Finance Fund LP v Otso Gold Corp.*, [2022 BCSC 136](#), paras [28-30](#) and [63](#).

²³ Second Supp. Stevens Affidavit, [para 47](#).

SCHEDULE A – LIST OF AUTHORITIES

1. *BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc.*, [2020 ONSC 1953](#)
2. *Romspen Investment Corporation v 6711162 Canada Inc.*, [2014 ONSC 2781](#)
3. *Romspen Investment Corp. v. 1514904 Ontario Ltd. et al.*, [2010 ONSC 832](#)
4. *Romspen Investment Corp. v. 1514904 Ontario Ltd. et al.*, [2010 ONSC 1339](#)
5. *Pandion Mine Finance Fund LP v Otso Gold Corp.*, [2022 BCSC 136](#)

SCHEDULE B – TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

INTERPRETATION

Definitions

2 In this Act,

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*)

[...]

locality of a debtor means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

[...]

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

- (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the Civil Code of Québec or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
- (b) any of
 - (i) the vendor of any property sold to the debtor under a conditional or instalment sale,
 - (ii) the purchaser of any property from the debtor subject to a right of redemption, or
 - (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the Civil Code of Québec entitled Prior Claims and Hypothecs that deal with the exercise of hypothecary rights; (*créancier garanti*)

PART II – BANKRUPTCY ORDERS AND ASSIGNMENTS

Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) take possession of all or part of the debtor's property mentioned in the appointment;
- (b) exercise such control over that property, and over the debtor's business, as the court considers advisable;
- (c) take conservatory measures; and
- (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor's estate; or
- (b) the interests of the creditor who sent the notice under subsection 244(1).

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

PART XI – SECURED CREDITORS AND RECEIVERS

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6);
or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

Courts of Justice Act, RSO 1990, c. C.43

INTERLOCUTORY ORDERS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

APPENDIX "A"
Updated Chronological Summary of Key Events

The following table provides an updated chronological summary of the key events that led to the Applicant's decision to seek the appointment of a receiver in respect of the Debtors by commencing the within receivership proceedings. Events described in rows highlighted orange constitute events of default (or allegations that would constitute event of defaults if proven true) under the applicable Lending Transaction Documents. Capitalized terms used in this summary have the meanings given to them in the affidavit of Joshua Hamilton Stevens sworn July 31, 2023.

Date	Event
April 2022	The Applicant enters into the original sale and leaseback transaction with the Debtors. Security is given by each of the Debtors, except for Kingston LP and Kingston GP and Validus Parent's shares and units in those entities (which was given as security in February 2023).
January 2023	Hut 8 files a statement of claim against the Validus Defendants in the Hut 8 Litigation. The Applicant discovers that the Validus Defendants allegedly breached the Hut 8 PPA.
January 16, 2023	IFPC fails to make a prepayment of Base Rent and HST under the Prepayment Arrangement.
February 2023	The Applicant and the Debtors enter into the Forbearance Arrangements which provide for, among other things: <ul style="list-style-type: none"> • a four-month rent holiday; • as further security, substantially all of Kingston GP's and Kingston LP's real and personal property and Validus Parent's shares and units in those entities; and • the commencement of the IFPC Marketing Process.

Date	Event
March 8, 2023	CRA registers liens for unpaid taxes against certain of the real property associated with the Iroquois Falls power plant.
April 5, 2023	The M&A Advisor commences the IFPC Marketing Process.
April – May, 2023	Upon review of the Debtors’ books and records in the IFPC Marketing Process, the Applicant discovers that the Debtors failed to adequately maintain their books and records.
March – May, 2023	<p>Upon review of the Debtors’ books and records in the IFPC Marketing Process, the Applicant discovers that certain Debtors, among other things:</p> <ul style="list-style-type: none"> • failed to remit HST to CRA (including \$5,850,000 of HST the Applicant paid to the Debtors as part of the sale and leaseback transaction); • failed to pay municipal taxes; and • possibly failed to remit source deductions to CRA.
April 11, 2023	The Validus Defendants file an amended statement of defence and counterclaim against Hut 8.
April 16, 2023	The Applicant delivers a further notice of default to the Debtors.
May 12, 2023	CIBC delivers a letter to certain Debtors alleging that Kingston GP misappropriated, and failed to return, funds that they were not entitled to access.
May 25, 2023	The Union representing IFPC’s employees delivers a grievance to IFPC and Validus Parent alleging that those Debtors failed to provide group benefit coverage and to match and/or remit RRSP contributions for those employees.

Date	Event
May – July, 2023	The Debtors fail to make three payments of Base Rent and HST to the Applicant that came due after the four-month rent holiday expired.
June 9, 2023	The Applicant delivers letters demanding payment of the Base Rent and HST in arrears and section 244 notices to each of the Debtors.
June – July 2023	The Debtors fail to pay insurance premiums that are required to maintain their property and commercial general liability insurance policies. The Applicant pays, on the Debtors’ behalf, an aggregate amount of \$675,379.60 on account of those premiums to prevent the Debtors’ insurance from lapsing.
July 2023	The IFPC Marketing Process unsuccessfully concludes without any viable bids in respect of IFPC.
July 21, 2023	The Applicant causes IFPC to transfer a total of \$2,012,950 of cash received from the IESO from IFPC’s and Kingston LP’s bank accounts and applies those amounts to the Debtors’ outstanding indebtedness by way of a set-off in accordance with the Lease Transaction Documents.
July 24, 2023	<p>The Applicant delivers further letters demanding payment of:</p> <ul style="list-style-type: none"> • the Base Rent and HST in arrears; and • the Accelerated Payments.
July 31, 2023	The Applicant commences the within receivership proceedings.
August 2, 2023 (morning)	The Applicant’s receivership application is adjourned for eight days to August 10 th . Justice Kimmel grants an Interim Receivership Order, and the Interim Receiver is appointed over the Debtors.

Date	Event
Updates Since Adjournment:	
[August 2, 2023 (afternoon)]	CIBC freezes \$550,000 of cash from the Debtors' bank accounts and claims a right to that amount in respect of the funds the Debtors allegedly misappropriated.
August 3, 2023	The Debtors pay their payroll, leaving only \$122,862.66 of unfrozen funds in accounts.
August 4, 2023	The Applicant learns that the Debtors are behind by \$1,955,470.85 in their payroll liabilities, including \$1,180,666.84 of unremitted source deductions.
Events Following the August 10 Hearing:	
August 10, 2023	The Debtors' payroll of \$72,277.56, net of source deductions, comes due and payable.
August 14, 2023	The Debtors' payroll of \$11,107.70, net of source deductions, comes due and payable.
August 15, 2023	The Debtors' final insurance payment of \$306,005 comes due and payable.
August 18, 2023	The Debtors' payroll of \$24,797.76, net of source deductions, comes due and payable.

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**ONTARIO
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COMMERCIAL LIST**

Proceeding commenced at TORONTO

**REPLY FACTUM OF THE APPLICANT
(Receivership Order)**

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