

**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
INVOLVING VALIDUS POWER CORP. and 1000745924 ONTARIO INC.

**FACTUM OF THE MONITOR
(CCAA Termination Order)**

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TO: THE SERVICE LIST

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**FACTUM OF THE MONITOR
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PART I - INTRODUCTION

1. KSV Restructuring Inc. ("**KSV**"), in its capacity as monitor (in such capacity, the "**Monitor**") of Validus Power Corp. ("**VPC**") and 1000745924 Ontario Inc. (the "**ResidualCo**" and together with VPC, the "**Remaining Companies**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended¹ (the "**CCAA**"), brings this motion requesting the following relief, among other things: terminating these CCAA proceedings (the "**CCAA Proceedings**"), discharging KSV as the Monitor of the Remaining Companies upon the filing of a certificate (the "**CCAA Termination Certificate**"), and granting related releases and certain additional ancillary relief set out in the proposed Order.

2. The facts with respect to this motion are more fully set out in the Sixth Report of the Monitor dated September 11, 2024² (the "**Sixth Report**"). Capitalized terms used herein but otherwise undefined have the respective meanings given to them in the Sixth Report. Dollar amounts referred to herein are in Canadian dollars.

¹ *Companies' Creditors Arrangement Act*, [RSC 1985, c. C-36](#) [**CCAA**].

² Sixth Report of KSV Restructuring Inc., in its capacity as the Court-appointed monitor (the "**Monitor**"), dated September 11, 2024 (the "**Sixth Report**"), Motion Record of the Monitor dated September 11, 2024 ("**MR**"), Tab 2.

PART II - SUMMARY OF FACTS

Background

3. Pursuant to an application filed by Macquarie Equipment Finance Limited (“**Macquarie**”) on August 10, 2023, the Court granted an Order appointing KSV as the receiver and manager (in such capacity, the “**Receiver**”) of the properties, assets and undertakings of 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, the “**Companies**”), along with Kingston Cogen Limited Partnership (“**Kingston LP**” and together with the Companies, the “**Validus Entities**”), pursuant to the *Bankruptcy and Insolvency Act* (Canada), RSC, 1985, c B-3, as amended³ (the “**BIA**”).⁴

4. The Validus Entities were a group of privately-held companies that owned and operated power generation plants and sold capacity and power to the Independent Electricity System Operator as a participant in its “capacity auction” market. The property of the Validus Entities comprised of four power plants in Ontario located in North Bay, Kapuskasing, Iroquois Falls and Kingston (the “**Property**”).⁵

5. On August 29, 2023, upon a motion brought by the Receiver, the Court granted an initial Order under the CCAA (the “**Initial Order**”) that, among other things, appointed KSV as the Monitor of the Validus Entities.⁶

The Transaction

6. On October 16, 2023, Macquarie and Far North Power Corp. (“**Far North**”) submitted a stalking horse offer (the “**Stalking Horse Bid**”), which bid contemplated the acquisition of the

³ *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#).

⁴ Sixth Report, section 1.0, para 1, MR, Tab 2, p 13.

⁵ Sixth Report, section 2.0, para 1, MR, Tab 2, p 16.

⁶ Sixth Report, section 1.0, paras 5-6, MR, Tab 2, p 14.

business and assets of the Validus Entities (the “**Transaction**”).⁷

7. On November 1, 2023, the Court granted an Order approving the SISP (the “**SISP Order**”) and accepting the Stalking Horse Bid solely as the stalking horse bid in the SISP. The Monitor carried out the SISP in accordance with the SISP Order. No other Qualified Bids were received before the Bid Deadline (as both terms are defined in the SISP) and the Stalking Horse Bid was declared the Successful Bid (as defined in the SISP).⁸

8. On January 4, 2024, the Court approved the Transaction and granted a reverse vesting order (“**RVO**”). Consequently, ResidualCo was added as a debtor company to the CCAA Proceedings and these proceedings (together, the “**Proceedings**”).⁹

9. The Transaction closed on February 15, 2024.¹⁰

10. As a result of the closing of the Transaction, *inter alia*, the shares (and in the case of Kingston LP, the limited partnership units) of IFPC, Kingston LP, Kingston GP, Bay, KAP and Hosting (the “**Purchased Entities**”) vested in Far North. Accordingly, pursuant to the RVO, KSV was discharged as the Receiver and the Monitor of the Purchased Entities.¹¹

The Remaining Activities and the Proposed Termination of the CCAA Proceedings

11. The Proceedings are now largely complete subject to the completion of a small number of outstanding matters (the “**Remaining Activities**”) as outlined in the Sixth Report.¹²

PART III - ISSUES, LAW & ANALYSIS

12. The issues to be determined in connection with this motion are whether this Court should:

⁷ Sixth Report, section 1.0, para 7, MR, Tab 2, p 14.

⁸ Sixth Report, section 1.0, paras 8-9, MR, Tab 2, p 14.

⁹ Sixth Report, section 1.0, para 10, MR, Tab 2, p 14.

¹⁰ Sixth Report, section 1.0, para 11, MR, Tab 2, p 14.

¹¹ Sixth Report, section 3.0, para 4, MR, Tab 2, p 17.

¹² Sixth Report, section 6.0, para 4, MR, Tab 2, p 19.

- (a) authorize the termination of the CCAA Proceedings and discharge the Monitor upon the filing of the CCAA Termination Certificate;
- (b) grant the releases in favour of the Released Parties; and
- (c) grant the other requested relief.

13. For the reasons that follow, the Monitor submits that each of these issues should be answered in the affirmative.

The CCAA Proceedings Should be Terminated and the Monitor Should be Discharged

14. Section 11 of the CCAA grants this Court broad discretion to make “any order that it considers appropriate in the circumstances.”¹³ The Supreme Court of Canada in *X9354-9186 Québec inc. v Callidus Capital Corp.* has clarified that the discretionary authority under Section 11 must be exercised to further the remedial objectives of the CCAA and should be guided by the following considerations:¹⁴

- (a) the order sought is appropriate in the circumstances;
- (b) the debtor company is acting in good faith; and
- (c) the debtor company is acting with due diligence.

15. The remedial objectives underlying the CCAA include “maximizing creditor recovery”¹⁵ and providing a “timely, efficient and impartial resolution of a debtor’s insolvency.”¹⁶ In furtherance of the CCAA’s remedial objectives, courts often grant orders to discharge a court-appointed monitor and terminate CCAA Proceedings.¹⁷

¹³ CCAA, s. 11. *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#) at para 48 [*Callidus*].

¹⁴ *Ibid* at para 49.

¹⁵ *Callidus* at para 42.

¹⁶ *Callidus* at para 40.

¹⁷ See *In the Matter of a Plan of Compromise or Arrangement of Golf Town Canada Holdings Inc., et al.* (March 29, 2018), Toronto, [CV-16-11527-00CL \(CCAA Termination Order\) \(ONSC\) \[Golf Town Termination Order\]](#); see also *In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp., et al.* (February 15, 2022), Toronto, [CV-21-00673304-00CL \(CCAA Distribution and Termination](#)

16. In the current circumstances, the requested relief is appropriate for the following reasons:
- (a) as a result of the Transaction, there are no ongoing business operations of the Validus Entities and the Proceedings are largely complete, save and except the Remaining Activities outlined in the Sixth Report;
 - (b) upon the filing of the CCAA Termination Certificate, certifying that the Remaining Activities have been completed, the Monitor will have fulfilled its mandate, as contemplated by the Initial Order and the CCAA;
 - (c) since the Initial Order, the Monitor has acted, and continues to act, in good faith and with due diligence; and
 - (d) the Monitor supports the termination of the CCAA Proceedings on the terms set out in the proposed Order.¹⁸

17. The proposed Order provides that the Monitor shall retain such capacities for the performance of such incidental duties as may be required to complete the administration of the CCAA Proceedings and the Monitor shall continue to have the benefit of the provisions of all Court Orders made in the CCAA Proceedings, including all approvals, protections and stays of proceedings in favour of the Monitor in its capacity as the Monitor.¹⁹ The Monitor believes this provision is appropriate in the circumstances as it will allow it to address any issue that may arise following its discharge. In addition, this is a customary provision in discharge orders granted in CCAA proceedings.²⁰

[Order](#) (ONSC) [Harte Gold Corp. Order]; see also *In the Matter of a Plan of Compromise or Arrangement of Trichome Financial Corp., et al.* (September 14, 2023), Toronto, [CV-22-00689857-00CL \(CCAA Termination Order\) \(ONSC\)](#) [Trichome Financial Corp. Order].

¹⁸ Sixth Report, section 1.1, para 1(e), MR, Tab 2, p 15.

¹⁹ Sixth Report, section 6.0, para 5, MR, Tab 2, p 19.

²⁰ See *In the Matter of a Plan of Compromise or Arrangement of PGM ResidualCo Holdings Inc.* (July 19, 2018), Vancouver, [No. S-228723 \(Fee Approval and Discharge\)](#) at para 7.

The Releases Should be Granted

18. The proposed Order contemplates releases for the Released Parties from the Released Claims. This Court has the jurisdiction to render orders approving releases under the broad discretion inherent in Section 11 of the CCAA to make any order considered “appropriate in the circumstances.”²¹ Such discretion has previously been exercised by this Court to grant releases when terminating a debtor company's CCAA proceedings in favour of, among other parties, directors, officers, monitors, counsel, employees, shareholders and advisors.²²

19. In determining whether to approve releases in favour of third parties, Courts have considered the following factors:²³

- (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.

20. It is not necessary for each of the above factors to apply in order for a release to be granted.²⁴ In this case, the proposed releases are appropriately limited in scope, and do not apply in respect of any claim or liability arising out of gross negligence or willful misconduct on the part of the Released Parties.²⁵ The proposed Order specifies that the releases would be effective upon the filing of the

²¹ CCAA, s. 11.

²² See *Golf Town Termination Order* at para 14; see also *Trichome Financial Corp. Order* at para 16.

²³ *Lydian International Limited (Re)*, [2020 ONSC 4006](#) at para 54.

²⁴ *Re Green Relief Inc.*, [2020 ONSC 6837](#) at para 28.

²⁵ Sixth Report, section 6.0, para 2, MR, Tab 2, p 19.

CCAA Termination Certificate. Once the CCAA Proceedings are concluded, granting the Releases will provide certainty and finality to the Released Parties.

The Additional Ancillary Relief Should be Granted

21. In *Re Target Canada Co.*, the Court noted that there are good policy and practical reasons to grant the approval of a court-appointed officer's report and the activities described therein.²⁶

22. In this case, the activities detailed in the Sixth Report and the Fifth Report Monitor dated February 26, 2024 were carried out in good faith by the Monitor and the Receiver, undertaken with efficiency and reasonableness, and served the best interests of the Validus Entities and their stakeholders. In addition, the Monitor's and the Receiver's activities were undertaken in accordance with their mandates set forth in the previous Orders issued in the Proceedings and the CCAA and BIA more generally.

23. The question for this Court in deciding to approve the KSV's fees and disbursements in its capacities as the Monitor and the Receiver, and its counsel, Norton Rose Fulbright Canada LLP ("**NRFC**"), is whether the fees were "fair and reasonable in all the circumstances," with an emphasis on "what was accomplished, and not on how much it took."²⁷ This Court has provided a non-exhaustive list of factors to consider when determining whether the fees and disbursements are fair and reasonable, including, *inter alia*, the time spent and the cost of comparable services when performed in a prudent and economical manner.²⁸

24. The Monitor and the Receiver are of the view that the hourly rates charged by NRFC are consistent with the rates charged by large corporate law firms practicing in the area of corporate insolvency and restructuring in the Toronto market, that NRFC's billings reflect work performed

²⁶ *Re Target Canada Co.*, [2015 ONSC 7574](#) at para 22 [**Target**]; see also *Laurentian University of Sudbury*, [2022 ONSC 2927](#) at para 13.

²⁷ *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#) at para 45.

²⁸ *Re Nortel Networks Corporation, et al.*, [2017 ONSC 673](#) at para 14.


consistent with the Monitor's and the Receiver's instructions, and that the overall fees charged by NRFC, the Monitor and the Receiver are reasonable and appropriate in the circumstances.²⁹

25. In addition, the Fee Accrual is reasonable in the circumstances and should also be approved. The Monitor and the Receiver believe the Fee Accrual is sufficient and necessary to cover their fees and the fees of NRFC from September 1, 2024 to the completion of the Proceedings, which have primarily been, or will be, incurred in connection with preparing for the hearing of this motion returnable September 17, 2024, and the cost of administering the bankruptcies of the Remaining Companies by the Receiver. Pursuant to a third party guarantee agreement to be entered into between the Receiver and the Trustee (if appointed), any unused portion of the Fee Accrual would be paid to the Receiver who will, in turn, pay it to Far North.³⁰

PART IV - ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of September, 2024.



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²⁹ Sixth Report, section 8.0, para 6, MR, Tab 2, p 21.

³⁰ Sixth Report, section 8.0, para 7, MR, Tab 2, p 21.

SCHEDULE "A"

LIST OF AUTHORITIES

1. 9354-9186 Québec inc. v Callidus Capital Corp., [2020 SCC 10](#)
2. Bank of Nova Scotia v Diemer, [2014 ONCA 851](#)
3. *In the Matter of a Plan of Compromise or Arrangement of Trichome Financial Corp., et al.* (September 14, 2023), Toronto, [CV-22-00689857-00CL \(CCAA Termination Order\) \(ONSC\)](#)
4. *In the Matter of a Plan of Compromise or Arrangement of Golf Town Canada Holdings Inc., et al.* (March 29, 2018), Toronto, [CV-16-11527-00CL \(CCAA Termination Order\) \(ONSC\)](#)
5. *In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp., et al.* (February 15, 2022), Toronto, [CV-21-00673304-00CL \(CCAA Distribution and Termination Order\) \(ONSC\)](#)
6. *In the Matter of a Plan of Compromise or Arrangement of PGM ResidualCo Holdings Inc.* (July 19, 2018), Vancouver, [No. S-228723 \(Fee Approval and Discharge\)](#)
7. *Laurentian University of Sudbury*, [2022 ONSC 2927](#)
8. *Lydian International Limited (Re)*, [2020 ONSC 4006](#)
9. *Re Green Relief Inc.*, [2020 ONSC 6837](#)
10. *Re Nortel Networks Corporation, et al.*, [2017 ONSC 673](#)
11. *Re Target Canada Co.*, [2015 ONSC 7574](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

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.

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 INVOLVING
VALIDUS POWER CORP. and 1000745924 ONTARIO INC.

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

Proceeding commenced at Toronto

**FACTUM
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