

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

B E T W E E N:

MACQUARIE EQUIPMENT FINANCE LIMITED

Applicant

- and -

VALIDUS POWER CORP. AND 1000745924 ONTARIO 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

**FACTUM OF THE RECEIVER
(Receiver's Discharge)**

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TO: THE SERVICE LIST

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**FACTUM OF THE RECEIVER
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PART I - INTRODUCTION

1. KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacities, the "**Receiver**") of the property, assets and undertakings of Validus Power Corp. ("**VPC**") and 1000745924 Ontario Inc. (the "**ResidualCo**" and together with VPC, the "**Remaining Companies**"), brings this motion requesting the following relief, among other things:

- (a) authorizing the Receiver to file an assignment in bankruptcy (the "**Assignments**") pursuant to the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.

B-3, as amended¹ (the “**BIA**”), for and on behalf the Remaining Companies;

- (b) discharging KSV as the Receiver upon the filing of a certificate (the “**Discharge Certificate**”); and
- (c) releasing the Receiver from any and all liability, save and except for gross negligence or wilful misconduct on the Receiver’s part.

2. The facts with respect to this motion are more fully set out in the Second Report of the Receiver dated September 11, 2024² (the “**Second Report**”). Capitalized terms used herein but otherwise undefined have the respective meanings given to them in the Second Report.

PART II - SUMMARY OF FACTS

Background

3. Pursuant to an application filed by Macquarie Equipment Finance Limited (“**Macquarie**”) to appoint KSV as receiver and manager of all of the property, assets, and undertaking 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**”), the Ontario Superior Court of Justice (Commercial List) issued an order on August 2, 2023 adjourning Macquarie’s application until August 10, 2023 and appointing KSV as interim receiver of the property acquired for, or used in relation to, the business carried on by the Validus Entities (the “**Property**”) until the earlier of: (i) the taking possession of

¹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [**BIA**].

² Second Report of KSV Restructuring Inc., in its capacity as the Court-appointed receiver and manager (the “**Receiver**”), dated September 11, 2024 (the “**Second Report**”), Motion Record of the Receiver dated September 11, 2024 (“**MR**”), Tab 2.

the Property by a receiver, within the meaning of Section 243 of the BIA,³ and (ii) August 10, 2023.⁴

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. On August 10, 2023, the Court granted an Order (the “**Receivership Order**”) appointing KSV as the Receiver of the Property (the “**Receivership Proceedings**”).⁵

5. The principal purpose of the Receivership Proceedings was to create a stabilized environment to enable the Receiver to take possession and control of the Property, thereby allowing the business of the Validus Entities to continue to operate in the normal course while the Receiver and Macquarie prepared for a sale and investment solicitation process (the “**SISP**”).⁶

6. On August 29, 2023, upon a motion brought by the Receiver, the Court granted an Order pursuant to the *Companies’ Creditors Arrangement Act* (the “**CCAA Proceedings**”), that, among other things, appointed KSV as the Court-appointed monitor of the Validus Entities (in such capacity, the “**Monitor**”) and extended the stay of proceedings in the CCAA Proceedings to Kingston LP.⁷

The Transaction

7. 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 BIA, s. 243.

⁴ Second Report, section 1.0, para 1, MR, Tab 2, p 11.

⁵ Second Report, section 2.0, para 1, MR, Tab 2, p 14; Second Report, section 1.0, para 2, MR, Tab 2, p 11.

⁶ Second Report, section 1.0, para 3, MR, Tab 2, p 11.

⁷ Second Report, section 1.0, paras 5-6, MR, Tab 2, p 12.

business and assets of the Validus Entities (the “**Transaction**”).⁸

8. 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 SISP was carried out in accordance with the SISP Order. No other Qualified Bids were received prior to 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).⁹

9. 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 the Receivership Proceedings (together, the “**Proceedings**”).¹⁰

10. The Transaction closed on February 15, 2024.¹¹

11. 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.¹²

Assignment of the Remaining Companies into Bankruptcy

12. The Receivership Order does not authorize the Receiver to place into bankruptcy any of the entities subject to the Receivership Order. All of the directors and officers of the Remaining Companies have either been terminated or resigned. As such, the Receiver intends to file the Assignments, subject to the granting of the proposed Order. KSV is proposed to act as the

⁸ Second Report, section 1.0, para 7, MR, Tab 2, p 12.

⁹ Second Report, section 1.0, paras 8-9, MR, Tab 2, p 12.

¹⁰ Second Report, section 1.0, para 10, MR, Tab 2, p 12.

¹¹ Second Report, section 1.0, para 11, MR, Tab 2, p 12.

¹² Second Report, section 3.0, para 4, MR, Tab 2, p 15.

Licensed Insolvency Trustee (the “**Trustee**”) given its knowledge of the Validus Entities, the Transaction, and the Proceedings.¹³

13. It is not anticipated that there will be any funds available for distribution by the Trustee to the creditors of VPC and/or the ResidualCo.¹⁴

The Remaining Activities and Proposed Termination of the Receivership Proceedings

14. The Proceedings are now largely complete subject to the completion of a small number of outstanding matters (the “**Remaining Activities**”) as outlined in the Second Report.¹⁵

PART II - ISSUES, LAW & ANALYSIS

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

- (a) authorize the Receiver to make the Assignments on behalf of the Remaining Companies;
- (b) authorize the discharge of the Receiver upon the filing of the Discharge Certificate;
- (c) release the Receiver from any and all liability, save and except for gross negligence or wilful misconduct on the Receiver’s part; and
- (d) grant the other requested relief.

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

¹³ Second Report, section 5.0, paras 1-2, MR, Tab 2, p 16.

¹⁴ Second Report, section 5.0, para 3, MR, Tab 2, p 16.

¹⁵ Second Report, section 6.0, para 4, MR, Tab 2, p 17.

The Receiver Should be Authorized to Make the Assignments

17. Courts have routinely authorized a court-appointed receiver to file an assignment in bankruptcy.¹⁶ In *Bank of Montreal v Owen Sound Golf and Country Club*, Justice Brown observed that “[i]t is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order.”¹⁷

18. In the current case, all of the directors and officers of the Remaining Companies have either been terminated or resigned. Accordingly, the Receiver intends to file the Assignments, subject to the granting of the proposed Order. The bankruptcies will facilitate the completion of an orderly wind-down of the Receivership Proceedings and the termination of the businesses of the Remaining Companies.¹⁸

19. In addition, the practice of appointing a receiver to act as the trustee in bankruptcy is commonly approved in cases involving both receiverships and bankruptcies.¹⁹ The Receiver is of the view that it is appropriate for it to act as the Trustee due to its familiarity with the Remaining Companies’ affairs, the Transaction, and the Receivership Proceedings. Therefore, authorizing the Receiver to act as the Trustee will significantly reduce the costs associated with the bankruptcies, since appointing another Trustee would result in duplicated efforts and increased expenses, thereby depleting the funds available for creditor recovery.

The Receivership Proceedings Should be Terminated and the Receiver Should be Discharged

20. This Court has recognized that a receiver may “[...] be discharged once it has completed the substance of its mandate,” unless there is gross negligence or wilful misconduct.²⁰ Once the

¹⁶ See *RBC v Gustin*, [2019 ONSC 5370](#) at para 15.

¹⁷ *Bank of Montreal v Own Sound Golf and Country Club*, [2012 ONSC 557](#) at para 7.

¹⁸ Second Report, section 5.0, para 2, MR, Tab 2, p 16.

¹⁹ See *Ethier, Re*, [1991 CarswellOnt 213](#) at para 25; *Pinnacle* at paras 5-6; *HSBC Bank Canada v Kupritz*, [2011 BCSC 788](#) at para 4.

²⁰ See *Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc. (2009)*, [OJ No. 4265](#) at paras 8-9; see also *Yukon* at paras 27-28.

Receiver has completed the Remaining Activities, it will have completed its mandate as contemplated by the Receivership Order, the other Orders in this matter, and the BIA.

21. The proposed Order provides that the Receiver shall retain such capacities for the performance of such incidental duties as may be required to complete the administration of the Receivership Proceedings and the Receiver shall continue to have the benefit of the provisions of all Court Orders made in the Receivership Proceedings, including all approvals, protections and stays of proceedings in favour of the Receiver in its capacity as the Receiver. The Receiver 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 the model discharge order that has been adopted by the Commercial List User's committee (the "**Model Discharge Order**").²¹

The Receiver Should be Released

22. The release contained in the proposed Order is appropriate in the circumstances. In *Pinnacle v Kraus*, this Court granted an order releasing a court-appointed receiver, emphasizing that, in the absence of improper or negligent conduct by the Receiver, such a release should be granted.²²

23. In this case, there is no evidence of improper or negligent conduct on the part of the Receiver. In addition, the text of the release in the proposed Order is consistent with the release provided for in the Model Discharge Order and includes a carve out for gross negligence or wilful misconduct. Accordingly, it is fair and reasonable for this Court to exercise its jurisdiction to release the Receiver.

²¹ Second Report, section 6.0, para 5, MR, Tab 2, p 17.

²² *Pinnacle v Kraus*, [2012 ONSC 6376](#) at para 47 [*Pinnacle*].

PART III - ORDER REQUESTED

24. For these and the other reasons noted above, the Receiver 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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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Montreal v Own Sound Golf and Country Club*, [2012 ONSC 557](#)
2. *Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc. (2009)*, [OJ No. 4265](#)
3. *Ethier, Re*, [1991 CarswellOnt 213](#)
4. *HSBC Bank Canada v Kupritz*, [2011 BCSC 788](#)
5. *Pinnacle v Kraus*, [2012 ONSC 6376](#)
6. *RBC v Gustin*, [2019 ONSC 5370](#)
7. *Yukon (Government of) v Yukon Zinc Corporation*, [2022 YKSC 58](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

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.

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Proceeding commenced at TORONTO

**FACTUM
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