



BETWEEN:

INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC.

PLAINTIFF

AND:

WEDGEMOUNT POWER LIMITED PARTNERSHIP, WEDGEMOUNT POWER (GP) INC., WEDGEMOUNT POWER INC., THE EHRHARDT 2011 FAMILY TRUST, POINTS WEST HYDRO POWER LIMITED PARTNERSHIP by its general partner POINTS WEST HYDRO (GP) INC., CALAVIA HOLDINGS LTD., SWAHEALY HOLDING LIMITED, BRENT ALLAN HARDY, DAVID JOHN EHRHARDT, 28165 YUKON INC., PARADISE INVESTMENT TRUST and SUNNY PARADISE INC.

DEFENDANTS

### APPLICATION RESPONSE

**Application response of:** British Columbia Hydro and Power Authority (“BCH” or the “Application Respondent”)

THIS IS A RESPONSE TO the notice of application of Industrial Alliance Insurance and Financial Services Inc. (“IA”) filed March 23, 2018 (the “IA Application”).

#### **Part 1: ORDERS CONSENTED TO**

The Application Respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: none.

#### **Part 2: ORDERS OPPOSED**

The Application Respondent opposes the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: all.

#### **Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Application Respondent takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: none.

## Part 4: FACTUAL BASIS

### Commencement of Proceedings and Appointment of Receiver

1. IA commenced these proceedings in May of 2017 to enforce debts owed to it by Wedgemount Power Limited Partnership (“**Wedgemount LP**”) pursuant to a credit agreement and to enforce security granted to it by Wedgemount LP and Wedgemount Power (GP) Inc. (“**Wedgemount GP**”). In the Notice of Civil Claim filed in these proceedings, IA states that Wedgemount LP owes IA approximately \$21 million, with interest accruing at a rate of 25% per annum.
2. In addition to seeking judgment on the credit agreement and guarantees, IA sought the appointment of Deloitte Restructuring Inc. (the “**Receiver**”) as receiver and manager of Wedgemount LP, Wedgemount GP and Wedgemount Power Inc. (collectively, the “**Wedgemount Entities**”).

### Stay of Proceedings under Receivership Order

3. On May 12, 2017, this Honourable Court made an order (the “**Receivership Order**”) appointing the Receiver as receiver and manager of the Wedgemount Entities. Pursuant to Paragraphs 8 and 9 of the Receivership Order, among other things:
  - all rights and remedies against the Wedgemount Entities or affecting their property are stayed and suspended, except with the Receiver’s consent or leave of the Court; and
  - no person shall terminate any right, contract or agreement held by the Wedgemount Entities without the Receiver’s consent or leave of the Court.
4. BCH is not named as a defendant in this proceeding, and it was not served with the application in respect of the Receivership Order.

### Electricity Purchase Agreement and Arbitration Agreement

5. BCH is a party to an electricity purchase agreement dated March 6, 2015 with Wedgemount LP, by its general partner Wedgemount GP (the “EPA”). The EPA includes an arbitration clause (the “Arbitration Agreement”):

7.5(a) **Arbitration:** Any dispute under or in relation to this EPA will be referred to and finally resolved by arbitration conducted by a single arbitrator in Vancouver, British Columbia....

### Lender Consent Agreement

6. BCH, Wedgemount LP and Travelers Capital Corporation (as agent for IA)<sup>1</sup> are party to a lender consent agreement made as of June 12, 2015 (the “Lender Consent Agreement”), which sets out the respective rights and obligations of the parties with respect to the termination, enforcement and assignment of the EPA. Among other things, the Lender Consent Agreement provides as follows:

- **Section 4.1** – BCH acknowledges that Wedgemount LP has made a security assignment of the EPA in favour of IA.
- **Section 4.2** – IA acknowledges that the security granted to it by Wedgemount LP is “subject in all respects to the terms and conditions of the EPA and to this Agreement”.
- **Section 5** – BCH agrees to give IA a copy of any default or termination notice given to Wedgemount LP under the EPA. BCH further agrees that it will not terminate the EPA without giving IA at least 45 days’ notice thereof, and will not terminate the EPA solely as a result of Wedgemount becoming bankrupt or insolvent until 30 days after the expiry of any court order restricting termination of the EPA.

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<sup>1</sup> For purposes hereof, Travelers can be ignored as agent for IA, and IA treated as the party to the Lender Consent Agreement

- **Section 5** – BCH is not restricted in exercising any other right or remedy under the EPA. IA is entitled to cure or cause to be cured any default under the EPA that would be curable by Wedgemount LP.
- **Section 6** – IA may give an “**Assumption Notice**” to BCH, upon which IA becomes a party to the EPA and subject to all of its terms as if it were an original party thereto.
- **Section 9** – the parties attorn irrevocably and unconditionally to the courts of the Province of British Columbia in connection with any action, suit or proceeding commenced under or in relation to the Lender Consent Agreement; provided that upon an Assumption Notice being given by IA, it becomes subject to and bound by the Arbitration Agreement.

7. The Lender Consent Agreement gives IA only those specific rights set out in the agreement; that is, the rights to:

- 45 days’ notice of termination;
- 30 day termination “grace period” after the stay of proceedings under the Receivership Order is lifted;
- cure any defaults that Wedgemount would be able to cure; and
- step into the shoes of Wedgemount LP by delivering an Assumption Notice to BCH and becoming a full party to the EPA and subject to all of its terms.

8. By operation of Paragraphs 8 and 9 of the Receivership Order, BCH is stayed from terminating the EPA without leave of the Court or consent of the Receiver. Accordingly, BCH has not issued any notice of termination to Wedgemount LP or IA. IA has not delivered an Assumption Notice to BCH, and therefore is not a party to the EPA.

#### **BCH Application to lift the stay of proceedings**

9. BCH has brought its application for leave under Paragraphs 8 and 9 of the Receivership Order, in order to allow it to proceed with exercising its termination rights under the EPA (the “**BCH Application**”).

10. The BCH Application does not seek any relief under the EPA itself; it does not ask the Court to make any findings as to the parties’ rights and obligations thereunder, including whether BCH has a contractual right to terminate the EPA.

11. IA opposes the BCH Application on the basis that BCH does not have a contractual right to terminate the EPA, or is estopped from exercising that right.

**IA Application for declaration that BCH has no right to terminate the EPA**

12. The IA Application seeks:

- a declaration that BCH may not terminate the EPA pursuant to section 8.1(a) or 8.1(f) of the EPA; and
- costs.

13. At issue is IA's standing to apply for the declaration that it seeks in this proceeding with respect to the EPA, which is a contract:

- to which IA is not a party; and
- that in any event requires any disputes be resolved at arbitration.

14. BCH submits that it would be inappropriate for this Honourable Court to exercise its jurisdiction to make the declaration sought by IA.

**Part 5: LEGAL BASIS**

15. BCH submits that this Honourable Court does not have jurisdiction to hear IA's application with respect to relief regarding the EPA because:

- IA is a stranger to the EPA and does not have standing to seek relief in respect thereof; and
- if IA did establish standing to seek such relief, the EPA is subject to a binding Arbitration Agreement.

**Resolution of EPA disputes if the Stay of Proceedings is Lifted**

16. BCH has proposed to IA and the Receiver that the stay of proceedings under the Receivership Order be lifted by consent of the Receiver, upon which it is anticipated that the following would occur:

- BCH would issue a termination notice to the Wedgemount LP (by its Receiver) pursuant to the EPA.
- BCH would also issue a copy of the termination notice to IA pursuant to the Lender Consent Agreement.
- The Receiver would presumably object to the termination under the EPA, and IA would object to the termination under the Lender Consent Agreement.
- Any contractual or legal issues, or other “disputes under or in relation to” the EPA, would then be resolved by arbitration among the applicable parties, pursuant to the Arbitration Agreement.
- IA would make a decision whether to become party to the EPA by delivering an Assumption Notice to BCH under the Lender Consent Agreement (which may require IA to make an application in the receivership for leave to proceed).
- Alternatively, or in addition, if IA wished to pursue separate and additional claims against BCH “in an action, suit or proceeding commenced under or in relation to the Lender Consent Agreement”, it would be entitled to do so in this Court (but not in these proceedings).

Affidavit #1 of Melinda McKie made April 2, 2018, Exhibit B.

17. IA has not consented (or obtained the Receiver’s consent) to a voluntary lifting of the stay of proceedings.

**IA seeks to do indirectly what the Receiver cannot do directly**

18. Instead, IA seeks to do indirectly what the Wedgemount Entities and the Receiver cannot do directly; that is, litigate a contractual dispute over termination of the EPA in this Court, and in contravention of the Arbitration Agreement. In effect, IA as a secured creditor of Wedgemount LP seeks to stand in a better position than its debtor with respect to its debtor’s contract (the EPA).

19. The only way that IA could stand in a better position than Wedgemount LP in relation to the EPA would be if BCH had agreed to that; it hasn’t agreed. The Lender Consent

Agreement gives IA no contractual right to the Declaration it seeks under the IA Application. IA has provided no contractual, legal or factual basis for the relief it seeks, and BCH submits that this Honourable Court should stay or dismiss its application.

### **The Arbitration Act**

20. The *Arbitration Act* provides that the Act applies to any “arbitration agreement”, which is defined as:

A written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not the arbitrator is named, but does not include an agreement to which the *International Arbitration Act* applies...

*Arbitration Act* R.S.B.C. c.55 (the “Act”) at ss. 1 and 2.

21. The Arbitration Agreement in the EPA provides that if there is a dispute with respect to the EPA the parties will refer the matter to arbitration. The EPA includes an “arbitration agreement” for purposes of the Act.

22. Section 15 of the Act provides that:

15(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivering any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.

15(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

*Act* ss.15(1) and 15(2).

23. Section 15 of the Act requires a mandatory stay of proceedings in circumstances where a party to an arbitration agreement commences arbitration proceedings in respect of an issue that the parties have agreed to arbitrate.

*ABOP LLC v. Qtrade Canada Inc.*, 2007 BCCA 290 at para 27.

24. IA seeks relief under the EPA in an attempt to avoid the Arbitration Agreement and the effect of the Act on the basis that it is not a party to the EPA. Because IA is not a party to the Arbitration Agreement, Section 15 of the Act does not yet apply, but IA cannot have it both ways. Until it becomes a party to the EPA it is a stranger to the contract and has no standing to seek any relief thereunder. If it does become a party to the EPA (as it is entitled to do under the Lender Consent Agreement), it will immediately become subject to the Arbitration Agreement. IA must choose one of these two paths.

25. In any scenario, if either the Receiver or IA disputes BCH's right to terminate the EPA, that cannot be done in this proceeding, due to the Arbitration Agreement and Section 15 of the Act.

26. The BC Court of Appeal has noted that appellate courts and the Supreme Court of Canada take a deferential approach when determining whether a dispute is arbitrable and a stay of proceedings should be granted:

It is useful in approaching this question to consider the principles appellate courts and the Supreme Court of Canada have developed in considering whether legal proceedings should be stayed in favour of arbitration. Generally, the courts have taken a deferential approach to a challenge to an arbitrator's jurisdiction, giving precedence to the agreement between the parties to arbitrate and allowing the arbitrator to determine, at first instance, whether a particular dispute is arbitrable.

*St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para 24.

27. In the alternative, to the extent that this Honourable Court finds that IA has a proper basis to seek a Declarations with respect to the EPA (which BCH denies), BCH submits that



this would necessarily make IA sufficiently connected to the EPA to be subject to the Arbitration Agreement. In particular, the BC Court of Appeal has held that:

Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement, then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

*Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.).

28. Fundamentally, IA cannot seek a Declaration in respect of the EPA to its benefit, while disregarding provisions in the EPA that it does not like.

29. Further, this Honourable Court retains jurisdiction to stay third party claims (such as IA's request for a Declaration regarding the EPA) pending resolution of a related arbitration.

*Yaworsky v. Gowling Lafleur Henderson LLP*, 2012 ABQB 414 (aff'd 2013 ABCA 21) at para 46.

### **No Attornment by BCH**

30. IA submits that "the parties" irrevocably and unconditionally attorned to the jurisdiction of this Honourable Court upon IA's commencement of these proceedings. This is incorrect. IA commenced these proceedings to enforce debts owed to it by Wedgemount LP and to enforce its security. That is wholly unrelated to contractual rights and remedies as between BCH and Wedgemount LP pursuant to the EPA or the Arbitration Agreement. As noted above, IA has not availed itself of its right under the Lender Consent Agreement to make itself a party to the EPA, and it remains simply a secured creditor of Wedgemount LP with a security assignment of the EPA. As a secured creditor it takes the EPA as it finds it, "warts and all", as confirmed by the terms of the Lender Consent Agreement. Except as explicitly provided therein, the Lender Consent Agreement does not amend, or give IA any right to override or ignore, any terms of the EPA including the Arbitration Agreement. There is no basis in fact or in law to conclude that IA commencing this proceeding to enforce

its debt and security claims against Wedgemount LP could constitute attornment by BCH to the jurisdiction of any court for disputes pursuant to the EPA.

31. BCH has not, by making the BCH Application, attorned to the jurisdiction of this Honourable Court with respect to issues that are properly subject to the Arbitration Agreement. BCH is subject to the stay of proceedings imposed by Paragraphs 8 and 9 of the Receivership Order, which was made without notice to BCH. BCH does not dispute that it is subject to the Receivership Order, and accordingly as a procedural necessity the BCH Application seeks leave for BCH to proceed with its termination rights. If and when its notice of termination is disputed, BCH asserts and relies on its contractual and statutory right to have that issue decided at arbitration.

32. In particular, the Act and the Arbitration Agreement each provide that parties to an arbitration agreement can seek interim measures from the court without losing their right to arbitrate. The BCH application is unavoidable and necessary in order to lift the stay of proceedings so that any disputes in relation to the EPA can be resolved at arbitration. It does not constitute attornment to the jurisdiction of this Honourable Court, nor does it constitute a “step in the proceeding” to oust the application of the Arbitration Agreement.

*Act at s.15(4).*

Affidavit #1 of Bruce Chow made January 19, 2018, Exhibit A s.7.5 (pg 13).

33. Based on all of the foregoing, BCH respectfully submits that this Court should dismiss the IA Application on the basis that IA has no standing to apply in this proceeding for the declaration that it seeks, or in the alternative that the IA Application should be stayed.

**Part 6: MATERIAL TO BE RELIED ON**

34. The Notice of Civil Claim filed in these proceedings;

35. The Receivership Order made in these proceedings;

36. The Affidavit #1 of Bruce Chow made January 19, 2018;

37. The Affidavit #1 of May Chong made April 3, 2018;

38. Such further and other material as counsel for the Application Respondent may advise and this Honourable Court may permit.

The Application Respondent estimates that the application will take ½ day.

The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

Date: April 3, 2018



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Signature of Magnus Verbrugge/Lisa Hiebert

application respondent

lawyer for Application Respondent

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No. S-174308  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL  
SERVICES INC.

PLAINTIFF

AND:

WEDGEMOUNT POWER LIMITED PARTNERSHIP,  
WEDGEMOUNT POWER (GP) INC., WEDGEMOUNT POWER  
INC., AND OTHERS

DEFENDANTS

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APPLICATION RESPONSE

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