



No. S-174308
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

NOTICE OF APPLICATION



Name of applicant: British Columbia Hydro and Power Authority ("BCH")

To: Deloitte Restructuring Inc.

TAKE NOTICE that an application will be made by BCH to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, BC on April 6, 2018 at 10:00 for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order abridging the time for service such that this application is returnable on April 6, 2018.
2. An order staying, or in the alternative, dismissing, the Notice of Application of Deloitte Restructuring Inc. seeking declarations in respect of the EPA (as defined below).

Part 2: FACTUAL BASIS

Commencement of Proceedings and Appointment of Receiver

3. 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**”).

4. In addition to seeking judgment on the credit agreement and guarantees, IA sought the appointment of 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

5. 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:

- (a) 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
- (b) no person shall terminate any right, contract or agreement held by the Wedgemount Entities without the Receiver’s consent or leave of the Court.

6. 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

7. 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....

8. Neither the Receivership Order nor the appointment of the Receiver modified the EPA or the Arbitration Agreement, except to the extent that BCH was stayed from exercising its rights under the EPA.

9. Because the Receivership Order, at paragraphs 8 and 9, stays BCH from terminating the EPA without leave of the Court or consent of the Receiver, BCH has not issued any notice of termination to Wedgemount LP or the Receiver.

BCH Application to lift the stay of proceedings

10. BCH has brought an 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**”). The BCH Application is scheduled to be heard on April 6, 2018.

11. 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.

12. The Receiver opposes the BCH Application on the basis that the EPA is fundamental to the value of the Project (as defined in the Receiver’s Application) and on the basis that BCH does not have a contractual right to terminate the EPA.

Receiver’s Application for declaration that BCH has no right to terminate the EPA

13. The Receiver’s Application seeks:

- (a) an order abridging the time for service such that the Receiver’s Application is returnable on April 6, 2018; and
- (b) a declaration that BCH may not terminate the EPA on the basis of “any existing ground or fact”.

14. In effect, the Receiver's Application seeks a permanent injunction against BCH in respect of its contractual rights under the EPA.

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

Urgency

16. Due to the provisions of the *Arbitration Act*, as set out below, BCH cannot yet file an Application Response to the Receiver's Application. Given the nature of this Application, it must be heard at the same time as the Receiver's Application. Accordingly, BCH seeks an order abridging the time for service such that this Application is heard at the same time as the Receiver's Application (which the Receiver proposes to have heard on April 6, 2018).

Part 3: LEGAL BASIS

17. BCH submits that this Honourable Court does not have jurisdiction to hear the Receiver's Application because the EPA is subject to a binding Arbitration Agreement and any disputes related to the EPA (including BCH's right to terminate) must be decided at arbitration.

Resolution of EPA disputes if the Stay of Proceedings is Lifted

18. 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 BCH would issue a termination notice pursuant to the EPA, followed by the Receiver and IA disputing that termination. The dispute regarding BCH's termination right would then be resolved by arbitration among the applicable parties, pursuant to the Arbitration Agreement.

19. IA and the Receiver did not consent to a voluntary lifting of the stay of proceedings.

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 clearly provides that if there is a dispute with respect to the EPA the parties will refer the matter to arbitration. The EPA creates 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. This section 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. In the Receiver’s Application, the Receiver asks this Court to make orders in respect of the EPA. That cannot be done in this proceeding. The Arbitration Agreement and Section 15 of the Act require that this issue be referred to arbitration.

25. The Receiver has not provided any legal or factual basis for this Court to find that the Arbitration Agreement is void, inoperative or incapable of being performed.

The Receiver cannot modify the terms of contracts

26. The Receivership Order gives the Receiver extensive powers to safeguard the Wedgemount Entities' property; it does not give the Receiver the authority to modify or disregard the terms of the Wedgemount Entities' contracts.

27. While the stay of proceedings created by the Receivership Order prevents BCH from terminating the EPA without consent of the Receiver or leave of the Court, it does not render the contractual provisions of the EPA void.

Firenze Energy Ltd. v. Scollard Energy Ltd., 2018 ABQB 126 at para 28:

28. A receiver "steps into the shoes" of the debtor with respect to its property, including its contracts. Where a receiver elects to continue a contract, it is bound by the obligations of that agreement. In this case, that includes the Arbitration Agreement. It would be inequitable to permit a receiver to obtain the benefits of the EPA while disregarding its obligations.

Springer Development Corp. Ltd. v. Alberta Mortgage and Housing Corp., (1987), 79 A.R. 368 (Q.B.) at para 20.

29. BCH is subject to a stay of proceedings imposed by the Receivership Order, which was made without notice to BCH. BCH does not dispute that it is subject to Receivership Order, and accordingly as a procedural necessity it has filed the BCH Application to seek leave to proceed with its termination rights. It is now clear that its right to terminate will be disputed, and BCH asserts and relies on its contractual and statutory right to have that issue decided at arbitration.

30. The Receiver has no greater rights under the EPA than the Wedgemount Entities had. Accordingly, BCH respectfully submits that this Honourable Court ought to stay the Receiver's Application pursuant to Section 15 of the Act. If BCH's application for leave to proceed under the EPA is granted, then any disputes under the EPA can and will be resolved at arbitration.

Part 4: MATERIAL TO BE RELIED ON

31. The Notice of Civil Claim filed in these proceedings;
32. The Receivership Order made in these proceedings;
33. The Affidavit #1 of Bruce Chow made January 19, 2018;
34. The Affidavit #1 of May Chong made April 3, 2018;
35. Such further and other materials as counsel for BCH may advise and this Honourable Court may permit.

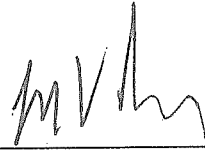
The applicant estimates that the application will take 60 minutes.

This matter is not within the jurisdiction of a master. Related applications have been set through Trial Scheduling, and this application ought to be heard at the same time.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: April 3, 2018



Signature of Magnus Verbrugge/Lisa Hiebert

applicant lawyer for applicant, BCH

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of
Part 1 of this notice of application

with the following variations and additional terms:

Date: _____

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matters concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- other

