IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership,* 2018 BCSC 723

Date: 20180406
Docket: S174308
Registry: Vancouver

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
Sunny Paradise Inc.

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:	C.D. Brousson J.D. Bradshaw
Counsel for BC Hydro and Power Authority:	M.C. Verbrugge L. Hiebert
Counsel for Receiver, Deloitte Restructuring Inc.:	V. L. Tickle

Place and Date of Hearing:	Vancouver, B.C. April 6, 2018
Place and Date of Judgment:	Vancouver, B.C. April 6, 2018

[1] **THE COURT:** These are receivership proceedings. Three interrelated applications are before me: firstly, BC Hydro and Power Authority's ("BC Hydro") application to lift the stay of proceedings; secondly, Deloitte Restructuring Inc.'s (the "Receiver") application for a declaration as to whether BC Hydro has certain termination rights under a certain contract; and thirdly, BC Hydro's application to stay the Receiver's application pursuant to s. 15 of the *Arbitration Act*, R.S.B.C. 1996, c. 55.

The Facts

[2] The facts are both controversial and non-controversial. I will briefly summarize them.

[3] On March 6, 2015, BC Hydro and the defendants Wedgemount Power Limited Partnership and its general partner Wedgemount Power (GP) Inc. (collectively, "Wedgemount") entered into an electricity purchase agreement (the "EPA").

[4] The EPA is a complex document. In broad terms, it provided that, after completion of Wedgemount's run-of-river project, the power supplied through the operations would be linked to the hydro or electrical grid in this province, and that BC Hydro would pay a certain amount for the electricity supplied.

[5] Not surprisingly, Wedgemount required financing to complete this project. On June 30, 2015, BC Hydro, Wedgemount and Travelers Capital Corporation, as agent, entered into a lender consent agreement (the "LCA"). The lender who financed the project is the plaintiff, Industrial Alliance Insurance and Financial Services Inc. ("Industrial Alliance"). As part of those arrangements, Industrial Alliance took security against Wedgemount's assets. I am advised that, as of the spring of 2015, Industrial Alliance had advanced funds in excess of $20 million.

[6] The EPA includes various so-called "deadlines". It provides for a "Target COD" (COD meaning "commercial operation date") of September 30, 2015. The EPA provides that, if completion of the project had not occurred by that date, the COD could be extended for a two-year period, meaning to September 30, 2017.

[7] By the spring of 2017, Wedgemount had failed to reach the Target COD. Unfortunately, at that time, Wedgemount defaulted in its loans to Industrial Alliance and that

default in turn led to the filing of this receivership proceeding. On May 12, 2017, Justice Steeves granted a receivership order appointing Deloitte Restructuring Inc. as receiver manager of Wedgemount's assets and undertakings.

[8] In the usual fashion, the receivership order empowered the Receiver to take steps to sell the assets of Wedgemount. In addition, the receivership order granted a stay of proceedings in respect of Wedgemount and its assets, including the right to terminate contracts to which Wedgemount was a party.

[9] Following the granting of the receivership order, the Receiver undertook extensive steps to deal with the assets. All of these steps are outlined in the First Report of the Receiver dated April 2, 2018 and reference the Receiver's extensive sales process, including such steps as setting up a data room and inviting expressions of interest or offers.

[10] In addition, the Receiver made extensive efforts to move the project towards completion. I do not propose to set out those efforts in detail, save to note that all of the Receiver's efforts have been towards putting the Receiver in a position where it can complete a sale of the project for the purpose of realizing on Wedgemount's assets for the benefit of the stakeholders.

[11] Importantly, the Receiver has been operating on the understanding that Wedgemount's assets, which were to be disposed of, included its rights under the EPA. I accept without hesitation that those rights are valuable and comprise a significant proportion of the value of the operations and assets. BC Hydro's counsel suggests that the project and assets can be sold without the EPA. I do not doubt that that is true, however, I consider it inarguable that, if Wedgemount's rights under the EPA are not married up with the other project assets, there will be a significant reduction in the realizations from those assets.

[12] The importance of the looming two-year deadline from the Target COD has not been something that has simply come to the fore recently. Industrial Alliance and the Receiver have been very much alive to that date. Both engaged in discussions with BC Hydro from the outset of the sales process to ensure that all of Wedgemount's rights under the EPA were intact for the purpose of completing the sales process, which understandably did include Wedgemount's rights under the EPA. Numerous discussions, meetings and email and/or letter correspondence took place between Industrial Alliance's representatives, the Receiver and BC Hydro.

[13] The crux of the matter arose on September 29, 2017. On that date, the Receiver and Industrial Alliance received what they describe as a dramatic communication from BC Hydro. That communication indicated or suggested that BC Hydro was not on side with the

disposition of Wedgemount's rights under the EPA and that in fact, BC Hydro had an "impending termination right" with respect to the EPA. That communication, received on September 29, 2017, was just one day prior to the two-year deadline from the Target COD.

[14] Since September 29, 2017, much has transpired between the parties. Even in the face of BC Hydro's communication on that date, the Receiver has soldiered on towards a completion of the project. In that respect, I have reviewed the Receiver's Confidential Supplement to the First Report dated April 2, 2018. That document was sealed by my order. The Supplement indicates that there are two binding offers in hand that, presumptively, can proceed toward completion. However, both binding offers, not surprisingly, state that completion of any sale is contingent on BC Hydro agreeing to an assignment of Wedgemount's rights under the EPA.

[15] The Receiver and Industrial Alliance assert that, in reliance of what it says were representations of BC Hydro from the time of the receivership, Industrial Alliance advanced approximately $1.5 million to the Receiver in respect of this work to bring the project toward completion.

[16] The conundrum that has arisen is how to resolve the impasse that has developed between Industrial Alliance and the Receiver, on the one hand, and BC Hydro, on the other. I will turn to the application to lift the stay.

Lifting of Stay

[17] Counsel for Industrial Alliance refer to two authorities as to the applicable test in lifting a stay: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 199 at para. 14 and *Scanwood Canada Ltd.*, 2011 NSSC 189 at para. 19. Both decisions state that, when considering whether a stay should be lifted, the court should consider the totality of the circumstances and the relative prejudice to both sides.

[18] It is common ground here that BC Hydro, as the applicant seeking to lift the stay, bears the burden of convincing the Court that that relief is appropriate.

[19] Turning to the overall circumstances of the case, BC Hydro asserts that it has a right to terminate the EPA on two bases, which I will summarize for the purpose of today's reasons.

[20] Firstly, BC Hydro asserts a contractual right to terminate the EPA since May 12, 2017, arising from the appointment of the Receiver. There is a provision in the EPA

referring to such circumstances, although whether that provision applies is far from clear, particularly given the LCA, which ameliorates those rights to some extent.

[21] Secondly, BC Hydro argues that since September 30, 2017, the ultimate COD deadline, it has a contractual right to terminate the EPA.

[22] In those circumstances, BC Hydro asserts that the Court should lift the stay so as to allow it to immediately deliver a notice of termination to Wedgemount (and presumably Industrial Alliance and the Receiver) under section 8.1 of the EPA.

[23] To the contrary, the Receiver and Industrial Alliance argue that BC Hydro does not presently have a contractual right to terminate the EPA. In addition, the Receiver and Industrial Alliance argue that BC Hydro is estopped from asserting a right of termination right at this time because of the interactions between Industrial Alliance, the Receiver and BC Hydro that I have very generally referred to above.

[24] All parties agree that the determination of whether BC Hydro has the right to terminate is not to be determined at this hearing. It remains relevant to consider whether any of these arguments have merit. Again, the parties agree that all arguments have some merit and therefore, should be resolved in some forum.

[25] There is also the arbitration issue. Section 7.5 of the EPA, titled Dispute Resolution, provides that any dispute under the EPA is to be referred to arbitration. The decision of the arbitrator is to be final and binding on the parties. Referring to this provision in the EPA, BC Hydro's counsel submits that the issue as to whether it has the right to terminate the EPA must be referred to arbitration.

[26] On the face of it, the *Arbitration Act* supports BC Hydro's position. Section 15 of the *Arbitration Act* provides:

> **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 filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
>
> (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.
>
> …

[27] The Receiver advances a number of arguments in support of its position that s. 15(2) is not the operative statutory provision in these circumstances. Those arguments include: that the Receiver is not bound by that provision in the EPA; a paramountcy argument; and,

that within the context of this receivership, the provision for arbitration in the EPA can be considered “inoperative.”

[28] I now turn to the issue of prejudice.

[29] BC Hydro does not assert that it would suffer any prejudice if the stay is maintained in respect of any right to deliver a notice of termination. To the contrary, Industrial Alliance and the Receiver advance that there will be significant prejudice if BC Hydro is allowed to deliver a notice of termination.

[30] I would note at this stage that, even if BC Hydro does deliver a notice of termination, that step does not resolve the issue between the parties as to whether the dispute between the parties is to be decided in this Court or by arbitration.

[31] I agree that there is no question that significant prejudice, or financial loss, will be visited upon numerous stakeholders in the event that the EPA is terminated. These stakeholders, of course, includes Industrial Alliance. In addition, the Receiver refers to potential prejudice arising from the impact benefits agreements negotiated or to be negotiated with the First Nations that are involved.

[32] There are significant other consequences arising from any termination of the EPA. If the project fails and Industrial Alliance walks away, it has been suggested that millions of dollars of remediation costs will be incurred to clean up the site. Without Industrial Alliance there to pick up the tab, there is no doubt that the British Columbia taxpayers will be next up to pay the bill. Not surprising, in light of this risk, the Province of British Columbia has filed a response supporting the continuation of the stay.

[33] BC Hydro’s counsel makes the point that there is a distinction between prejudice from the notice of termination and prejudice from the cancellation or termination of the EPA. In the circumstances of this case, I consider that this is a distinction without a difference. If nothing else, if the notice of termination is delivered, it will lead, as Industrial Alliance’s counsel argues, to uncertainty in the marketplace and will put the entire sales process in potential jeopardy. Therefore, even though the prejudice may not directly arise from the notice of termination, in my view there is certainly interim prejudice, which may in fact lead to the ultimate prejudice that I have already referred to above.

[34] The other issue is urgency. Urgency here may be relevant as to where the termination issue is to be resolved. Counsel refer to the fact that the snowmelt is almost upon us, if not upon us. The Receiver indicates that various work has to be undertaken to address and avoid any environmental concerns arising from spring runoff. Again, with

uncertainty as to whether the termination issue is going to be resolved quickly, the ability or willingness of Industrial Alliance to advance funds for this purpose is in jeopardy. In short, there is considerable risk that the uncertainty here could result in the whole house of cards falling down.

[35] In summary, I accept that there is no prejudice to BC Hydro and that there is substantial prejudice to the other stakeholders, both present and potential, if the stay is lifted in order to allow BC Hydro to deliver any notice of termination.

[36] I conclude that the stay should not be lifted. Of course, it is obvious to everyone that the issues need to be resolved, whether by arbitration or in this Court. Those looming options pose their own uncertainty and risk. There is the risk to the Industrial Alliance side, if I can call it that, that this Court will ultimately decide that the matter must be arbitrated, which will result in further cost and delay. Further, even if the matter is ultimately addressed in this Court, there is also potential for delay and costs, depending on whether the issue can be decided on a summary basis.

[37] In any event, the parties are well-attuned to the state of play going forward. No doubt they will continue discussions toward having the matter heard or determined as soon as possible in whatever forum is necessary or appropriate.

[38] Accordingly, BC Hydro's application to stay the Receiver's application filed January 19, 2018 is adjourned. I agree with BC Hydro's counsel that that application should be adjourned to the next set of hearings, which will also include the Receiver's application for the declaration as to BC Hydro's termination rights. So all three matters can be before the court at the same time.

[39] It is my intention that the two applications, the Receiver's application and BC Hydro's application to stay that application will be heard at the same time. At the conclusion of those matters, you can address the lifting of the stay, if necessary.

[40] MR. VERBRUGGE: My Lady, the practical problem that raises for me is that until my stay application is decided, I can't file responsive materials to the Receiver's application.

[41] THE COURT: Well, I am dismissing BC Hydro's application to lift the stay.

[42] MR. VERBRUGGE: Sorry, not lifting of the stay. Sorry, we're confusing the matter. My application under the *Arbitration Act* to stay the Receiver's application, I can't file – if the Receiver's application is to be heard at the same time on the merits before my stay

application is decided, I'm stuck, because I can't file responsive materials to my friend's application as a result of the *Arbitration Act*.

[43] THE COURT: Do you want to have the Receiver's application heard first?

[44] MR. VERBRUGGE: Well, that would render my application moot, because the – I'm just not sure how I can deal with it.

[45] THE COURT: I think they both have to be heard at the same time, Mr. Verbrugge. It seems to be that everybody is onside. I do understand the position of the other side to be that they are going to stick the procedural issue or substantive issue to you if you provide your materials.

[46] MR. BROUSSON: I think that's a done deal. He can file –

[47] THE COURT: That is what I am saying. I do not think they are going to stick the procedural issue to you if you provide your materials. You can provide it even unfiled, I suppose, although it has to be before the Court at some point. It could be on an unfiled basis if that makes you more comfortable. You could also get some written assurance from them that they will not take that position. It seems to me this is doable. I appreciate your concerns. No one dismisses those concerns. However, we will have to arrive at a work-around for it.

[48] MR. BROUSSON: We can formally on the record agree that if my friend wants to file the affidavits, we're not going to take the procedural issue and say, oh, we've got you. Now you've filed these affidavits and therefore you've attorned to the jurisdiction. We're not going to make that argument.

[49] MR. VERBRUGGE: Well, I think the right way to proceed, then, is to just adjourn both of those applications, both the Receiver's application and the *Arbitration Act* application, because I will need to get instructions. One of the issues of course is the problem with arguing the merits of the Receiver's application at the same time is that if we then file all of our materials, that sort of guts the privacy benefit of an arbitration; right?

[50] THE COURT: Privacy?

[51] MR. VERBRUGGE: The ability to do a private arbitration, because now all of your materials are out in the public. That is one of the reasons why BC Hydro wants to rely on this arbitration provision. What I'm saying is, I think if both applications are adjourned, then my friends and I can try to work out some way to deal with that issue, and if we can't, then we may have to make a further application to deal with it. Antecedent to those things being

heard, make an application to deal with, look, it's filed, and on what terms. Do you see what I mean?

[52] THE COURT: I cannot speak to privacy issues. It seems to me that at least half of the dispute is already public, so whether that issue still arises is debatable. However, I appreciate your comment, Mr. Verbrugge, that you need to get instructions. In summary, I am dismissing BC Hydro's application to lift the stay with liberty to bring it back before the court. I am adjourning the other two applications generally.

[53] THE COURT: Some final comments. I am not seized of this matter. In addition, I am suggesting to counsel, towards assisting the judge who hears these later applications, that a chronology would be very helpful in this situation in terms of setting out the dates of the documents and the various communications between the parties as are relevant to the issues.

"Fitzpatrick J."