VANCOUVER
JUN 18 2018
COURT OF APPEAL
REGISTRY

Court of Appeal File No. CA45325

COURT OF APPEAL

BETWEEN:

INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC.

RESPONDENT
(PLAINTIFF)

AND:

WEDGEMOUNT POWER LIMITED PARTNERSHIP,
WEDGEMOUNT POWER (GP) INC.
and WEDGEMOUNT POWER INC

RESPONDENTS
(DEFENDANT)

AND:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

APPELLANT
(APPLICANT)

# WRITTEN ARGUMENT OF THE RESPONDENT, INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC.

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1. The two decisions of Mr. Justice Butler under appeal were both made in the context of an ongoing receivership pursuant to Section 243(1) of the *Bankruptcy and Insolvency* Act, RSC, 1985, c. B-3, ("***BIA***").

2. On April 3, 2018, the Receiver brought an application ( the "**Receiver's Application**") for a declaration that BC Hydro was not permitted, on any existing ground or fact, to terminate an Electricity Purchase Agreement ("**EPA**") between BC Hydro and the companies in receivership (collectively, "**Wedgemount**"). The EPA is the key asset of Wedgemount. BC Hydro brought a cross application on April 3, 2018, to have the Receiver's Application stayed pursuant to s. 15 of the *Arbitration Act*, R.S.B.C. 1996, c. 55 (the "**Arbitration Act Application**").

3. On May 4, 2018, Butler J. relied upon and exercised his jurisdiction under the *BIA* and the receivership order to dismiss the Arbitration Act Application (the "**May 4th Decision**") and proceeded to hear the Receiver's Application. Butler J. reserved judgment and gave oral reasons to the Receiver's Application on May 18, 2018 (the "**May 18th Decision**", and together with the May 4th Decision, the "**Decisions**").

4. In the May 18th Decision, Butler J. found that BC Hydro was estopped from terminating the EPA for a failure to reach commercial operation by a certain date, but declined to make the declaration for broader relief that the Receiver was seeking.

5. The Decisions were made in the context of an ongoing and active *BIA* receivership. Appeals from such orders are governed by the *BIA*: *Re Orthoschaf Inc.*, 57 C.B.R. (N.S.) 281, *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48 at para. 11.

6. Section 31 (1) of the *BIA Rules* states that "[a]n appeal to a court of appeal ... must be made by filing a notice of appeal ... within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates." As such, both Notices of Appeal have been filed out of time on June 1, 2018.

7. This Honourable Court does not have jurisdiction to hear these appeals. The non-compliance with the *BIA Rules* deprives the appellate court of jurisdiction: *May v. Hartin*, [1946] 2 WWR 655:

> [3] The appellant has not filed and served his notice of appeal within ten days after the pronouncement of the order appealed from as required by the above statutory Rule. Nor has he obtained an extension of time within the meaning of that Rule. ...
>
> [4] We see no escape from the conclusion that the appellant's non-compliance with Bankruptcy Rule 68(1) [Equivalent to the current Rule 31 of the *BIA Rules*] deprives this Court of jurisdiction, ...
>
> [5] The appeal must therefore be quashed. ...

8. In the alternative, the overarching principle in requests for extensions of time is whether or not the justice of the case requires an extension be granted. This includes consideration of the relevant factors including: whether or not the applicant had a *bona fide* intention to appeal before the expiration of the appeal period; the length of and explanation for the delay in filing; any prejudice to the responding parties caused by the delay; and the merits of the proposed appeal: *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 at para. 26.

9. There is no evidence that BCH formed an intention to appeal the Decisions prior to the expiration of the appeal periods; given the urgency of this matter the delay was significant and remains unexplained. This delay has caused significant prejudice to the parties in the receivership proceeding. Receivers are entitled to act on the advice they receive from the court: *Ontario*

*Wealth*, supra at para. 33. Since the Decisions were made the Receiver has resumed the sales process, engaged in discussions and negotiations with the owner of lands on which portions of the Project are located, and moved penstock piping sections, all at substantial cost and expense borne by the Respondent Industrial Alliance. Interested purchasers have also conducted significant due diligence efforts following the granting of the Decisions. BCH has identified no grounds on which to challenge the decisions of Butler J. and its appeal is without merit. The justice of this case requires that the extension not be granted.

10. In the May 4th Decision, Butler J. exercised discretion granted to the British Columbia Supreme Court ("**BCSC**") under the *BIA* and that Court's inherent jurisdiction to refuse a stay: *Hayes Forestry Services Ltd., Re.,* 2009 BCSC 1169, at paras. 20-30, *Pope & Talbot Ltd., Re.*, 2009 BCSC 1014 at paras. 147-150 and *Pope & Talbot Ltd., Re.*, 2009 BCSC 1552.

11. In making the Decisions, Butler J., as the supervising *BIA* receivership judge, was tasked with weighing the competing stakeholder interests in the context of a real-time and ongoing complex receivership. It is not the role of appellate courts to re-weigh findings of facts in complicated and discretionary orders made under the *BIA*: *Alberta Treasury Branches v. Conserve Oil 1st Corp.*, 2016 ABCA 87 at paras. 12, 17; *Farm Credit Canada v. Gidda*, 2015 BCCA 236 at paras. 16-18.

12. In the case of the May 18 Decision, Butler J. was dealing with contractual interpretation and the application of the well-established principles of contractual estoppel to the evidence before him.

13. Appellate courts should not permit attempts to re-litigate the chambers hearing if the grounds of appeal are factual and case specific: *Farm Credit Canada v. Gidda*, supra, at para. 18, *Ontario Wealth Management*, supra, at para. 30.

14. The reason all parties agreed to have the matter determined on a summary basis was that they recognized the urgency in having the matter resolved. Madam Justice Fitzpatrick of the BCSC commented on the urgency of this matter in her reasons for judgment indexed as 2018 BCSC 723 at paragraphs 31 to 36. See also: *Edgewater Casino Inc., Re.*, 2009 BCCA 40 at para. 21.

15. Save for some narrow exceptions, appeals of bankruptcy orders require leave: *BIA* s. 193. In bankruptcy proceedings, an appeal as of right is only available in the specific circumstances enumerated in paragraphs (a) to (d) of s.193 of the *BIA*. The rights of appeal are limited and should be construed narrowly: *Ravelston Corp., Re,* 2005 CarswellOnt 4907 (ONCA) at paras. 14 - 15, *Enroute Imports Inc.*, 2016 ONCA 247; *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611; *Farm Credit Canada v. West-Kana Farms Ltd.*, 2014 BCCA 501. In any other case, leave of a judge of the Court of Appeal is needed under 193(e): See: *Re Kaiser,* 2012 ONCA 838, at paras. 13 to 14. None of the exceptions to the leave requirement for a bankruptcy appeal apply to these orders.

16. Appellate judges hearing leave applications play an important gatekeeper function: *Teck Cominco Metals Ltd. v. British Columbia (Minister of Revenue)*, 2009 BCCA 3 at para. 27. The criteria for leave to appeal under s. 193(e) of the *BIA* are whether or not the appeal:

(a) Is significant to the practice;
(b) Is significant to the action itself;
(c) Is *prima facie* meritorious; and
(d) Whether the appeal will unduly hinder the progress of the insolvency proceedings.

*Edgewater,* supra at para. 17, citing *Power Consolidation (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396.

17. In respect of the May 4th Decision:

(a) The question is not of significance to the practice. The Court has done so before and this is not a novel point.

(b) The question is not of significance to the case. The May 4th Decision was procedural and involved a determination of the forum in which a contractual issue was to be tried.

(c) There is no merit to the appeal. Butler J. made it clear that the decision is fact specific and discretionary. There is no prejudice to having had the issue determined by the BCSC as opposed to an arbitrator and this appeal is moot in any event given that the matter has already been heard by the BCSC: See: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, *Binnersley v. BCSPCA*, 2016 BCCA 259.

(d) The appeal will delay the process. Delay will, as detailed in the affidavit material, the Receiver's Report and the reasons of Justice Fitzpatrick, have a disastrous effect on the value of the assets.

18. In respect of the May 18th Decision:

(a) The question, in this case whether an estoppel arose in respect of a contract, is of no significance to the insolvency practice. It was a singular issue, restricted to its unique facts.

(b) It was of significance to the case in the sense that the continuing existence of the EPA adds substantial value to the estate.

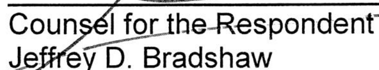
(c) There is no merit to the appeal. The chambers judge simply applied non-controversial legal principles to the facts. The onus is on the Appellant to show some palpable and overriding error of fact or an error of law. There is none.

(d) An appeal will unduly delay the insolvency process. The continuing uncertainty over the status of the EPA has negatively impacted the sales process. There are ongoing site costs, and environmental and permitting risks that the receiver needs to attend to and need to be funded. Potential buyers may become fatigued with the process and go elsewhere. These risks have been highlighted in the Receiver's First Report. The issue of prejudice to the process is identified by Tysoe JA in *Edgewater* at para. 18 as being of most significance in an insolvency proceeding.

19. The Appellant and the Respondents are sophisticated commercial parties, conducting real time litigation in the context of insolvency proceedings. Here however, the Notices of Appeal were brought out of time, without permission of this Court, and were advanced without leave of this Court. The Appellant cannot meet the test for an extension of time, nor for leave to appeal. This Honourable Court should strike the Notices of Appeal and dismiss the appeals.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated: June 18, 2018



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