



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, in its capacity as the Receiver and Manager (the “Receiver”) of all of the assets and property of Wedgemount Power Limited Partnership, Wedgemount Power (GP) Inc. and Wedgemount Power Inc.

**And To:** Industrial Alliance Insurance and Financial Services Inc.

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on February 2, 2018 at 9:45am for the orders set out in Part 1 below.

**Part 1: ORDER(S) SOUGHT**

1. An order pursuant to paragraphs 8 and 9 of the Receivership Order made May 12, 2017 with respect to the EPA (as defined below) granting BCH leave to exercise its termination rights under the EPA.
2. Such further and other relief as counsel for BCH may advise and this Honourable Court may permit.

## **Part 2: FACTUAL BASIS**

3. BCH is a Crown corporation owned by the government of British Columbia. BCH is responsible for generating and purchasing electricity that is provided to its customers. In carrying out that mandate, BCH acquires power from independent power producers (“**IPPs**”)

4. One of BCH’s acquisition processes is the Standing Offer Program (the “**SOP**”). Under the SOP, IPPs that wish to participate are required to meet the key eligibility requirements, and submit an application. If that application meets all of the SOP requirements it may be awarded an electricity purchase agreement with BCH.

5. In order to be awarded an electricity purchase agreement pursuant to the SOP, the developer must include a date indicating when the project will reach commercial operation. Commercial operation for an IPP project effectively begins on the date upon which the developer has complied with all conditions necessary to begin selling electricity to BCH (the “**Commercial Operation Date**” or the “**COD**”).

6. Under the SOP, each IPP is responsible for developing its project and ensuring that it can achieve COD on the terms set out in its electricity purchase agreement with BCH.

### **The EPA**

7. BCH entered into an SOP electricity purchase agreement dated March 6, 2015 (the “**EPA**”) with Wedgemount Power Limited Partnership, a limited partnership IPP represented by its general partner Wedgemount Power (GP) Inc. (“**Wedgemount**”) with respect to the Wedgemount Creek IPP project (the “**Project**”).

8. The EPA provides for a “**Target COD**” date of September 30, 2015. The Target COD was the date by which the Project was anticipated to reach COD. Under the SOP rules, IPP’s were required to select, in their discretion, a Target COD of any date within three years of the effective date of the electricity purchase agreement. For its Project, Wedgemount elected Target COD of September 30, 2015.

9. Section 8.1(a) of the EPA provides that BCH may terminate the EPA “if COD does not occur by the second anniversary of Target COD [the “**COD Deadline**”] for any reason whatsoever (including Force Majeure), provided that [BCH] may terminate the EPA under this provision only if [BCH] delivers a termination notice prior to COD”.

10. Section 8.1(f) of the EPA provides that BCH may terminate the EPA if Wedgemount is “Bankrupt or Insolvent”, which is a defined term in Appendix I to the EPA, and includes the appointment of a receiver of Wedgemount.

11. The Project did not reach COD by the Target COD of September 30, 2015, did not reach COD by the COD Deadline of September 30, 2017, and has not reached COD as of January 19, 2018.

12. On May 12, 2017 Deloitte Restructuring Inc. was appointed as receiver and manager (the “**Receiver**”) of the assets and property of Wedgemount and Wedgemount Power Inc., including the Project.

13. Accordingly, BCH has had a contractual right to terminate the EPA:

- (a) since May 12, 2017, as a result of the appointment of the Receiver; and
- (b) since September 30, 2017, the COD Deadline.

14. Under Section 8.1 of the EPA, termination of the agreement by BCH has immediate effect on delivery of a notice of termination by BCH to Wedgemount.

15. There is no provision in the EPA that permits Wedgemount to cure a termination right triggered by either of Sections 8.1(a) and 8.1(f) of the EPA. On the contrary, the cure rights that Wedgemount has under the EPA (for example the 30 day cure period in Section 8.1(g) in respect of certain material defaults by Wedgemount of its covenants, representations or warranties) specifically exclude any of BCH’s termination rights resulting from either the COD Deadline being missed or Wedgemount being Bankrupt or Insolvent.

16. In any event, missing the COD Deadline is an event that could not be “cured” by Wedgemount because the operative date of September 30, 2017 has passed and BCH is not willing to extend the COD Deadline.

17. BCH also entered into a lender consent agreement dated June 12, 2015 among BCH, Wedgemount and Travelers Capital Corporation (the “**Agent**”) (as agent for Wedgemount’s lenders) with respect to the Project (the “**LCA**”).

18. Pursuant to the LCA, BCH agreed that it would not terminate the EPA solely as a result of Wedgemount’s insolvency (if the lenders were promptly and diligently enforcing

their security) and that, where the EPA required that BCH deliver a notice of termination that would entitle it to terminate, those termination rights would be effective 45 days after BCH issued its notice of termination (or immediately for other termination events).

19. The LCA does not create any cure rights, i.e. the Agent can only cure defaults that are curable under the EPA. As noted above, Wedgemount missing the COD Deadline is not a default that Wedgemount has either the contractual right or the ability to cure.

20. Throughout these receivership proceedings, while considering its position and continuing discussions with the Receiver in connection with the Project and the steps taken by the Receiver to sell the Project including the EPA, BCH has reserved its termination rights under the EPA and has notified the Receiver that it has not waived them.

21. It is now more than 39 months past the Target COD under the EPA, and nearly four months since BCH's right to termination for failure to reach COD crystallized. BCH's understanding is that the Project will not be able to achieve commercial operation in the near future.

22. BCH has determined that it is not in the best interests of BCH or its ratepayers to proceed with the EPA. Accordingly, BCH has decided to terminate the EPA in accordance with its terms, and seeks an Order of this Court granting BCH leave to do so pursuant to the Order made May 12, 2017 in these proceedings (the "**Receivership Order**").

### **Part 3: LEGAL BASIS**

23. Paragraphs 8 and 9 of the Receivership Order operate to stay and suspend BCH from (a) exercising any rights or remedies against Wedgemount, the Receiver or the Project, or (b) terminating the EPA, without consent of the Receiver or leave of the Court.

24. The EPA constitutes the primary saleable asset of Wedgemount, and its termination will be an adverse event for Wedgemount and its secured creditors.

25. Receivership orders commonly contain provisions similar to paragraphs 8 and 9 of the Receivership Order that limit parties from exercising their contractual rights without the consent of the receiver or leave of the court. However, Canadian courts have confirmed that leave will be granted to allow termination by a third party that has a right to terminate its contract with the party in receivership,

*Canadian Western Bank v. 702348 Alberta Ltd. and Guild Developments (“Guild”)*, 2009  
ABQB 271

*Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd. (“Ford”)*, 2010 ABQB 798

26. In the *Guild* and *Ford* decisions, the question considered by the Alberta Court of Queen’s Bench was whether third parties could terminate their contracts with companies in receivership on the basis of fundamental breach. In each case, the Alberta Court assessed whether fundamental breach had occurred (albeit coming to different conclusions on that question). In other words, while there may be an issue as to whether a third party has a contractual right to terminate, if it does, it will be entitled to exercise it. Here, BCH relies on a contractual right to terminate, not fundamental breach.

27. BCH has a right of termination under the EPA that cannot be cured, either as a matter of contract or as a practical matter. BCH is not prepared to amend the EPA to extend the COD Deadline and it cannot be required to do so. Consequently, the EPA almost certainly cannot be sold by the Receiver because no third party would purchase an EPA encumbered with a live termination right that would be exercised immediately upon transfer of the contract.

28. There is no practical or commercial reason for the Receivership Order to continue to stay BCH from exercising its contractual termination right under Section 8.1(a) of the EPA.

29. The objective of receivership proceedings is to “safeguard the property for the benefit of those ultimately entitled to it”.

*Toronto Dominion Bank v. First Canadian Land Corporation Ltd.* (1989), 77 C.B.R. (N.S.)  
189 at para 8

30. In this case, there is nothing to safeguard in respect of the EPA. Given BCH’s decision to terminate in accordance with the terms of the agreement, the EPA has no value.

31. In order to achieve the objective of these proceedings, it is no longer necessary for the Receivership Order to stay and suspend BCH’s contractual rights. Accordingly, BCH ought to be granted leave pursuant to paragraphs 8 and 9 of the Receivership Order to exercise its rights and remedies against Wedgemount including its termination rights under the EPA.

**Part 4: MATERIAL TO BE RELIED ON**

32. The Receivership Order;
33. The Affidavit #1 of Bruce Chow made January 19, 2018; and
34. Such further and other material as counsel for the Applicant may advise and this Honourable Court may permit.

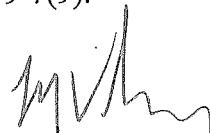
The Applicant Estimates that the application will take 1 hour.

X This Application is not within the jurisdiction of a master.

**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: January 19, 2018



\_\_\_\_\_  
Signature of Magnus Verbrugge/Lisa Hiebert

applicant  lawyer for Applicant

***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



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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

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