IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership,* 2018 BCSC 971

Date: 20180518
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 Mr. Justice Butler

Oral Reasons for Judgment

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

Place and Date of Hearing:	Vancouver, B.C. May 4, 2018
Place and Date of Judgment:	Vancouver, B.C. May 18, 2018

THE COURT:

Introduction

[1] This is the second of two urgent applications I have heard in this receivership proceeding. In the first, I dismissed the application of British Columbia Hydro and Power Authority ("BC Hydro") for a stay of this application, which has been brought by Deloitte Restructuring Inc. (the "Receiver"). In this application, the Receiver seeks a declaration that BC Hydro "may not terminate the Electricity Purchase Agreement dated March 6, 2015 (the "EPA") between BC Hydro and Wedgemount Power Limited Partnership … on the basis of any existing ground or fact."

[2] Industrial Alliance Insurance and Financial Services Inc. ("IA") is the primary lender to and secured creditor of Wedgemount Power Limited Partnership, Wedgemount Power (GP) Inc. and Wedgemount Power Inc. (collectively, "Wedgemount"). It commenced this action and obtained the order of May 12, 2017 appointing the Receiver (the "Order"). IA supports the Receiver's application, while BC Hydro opposes it.

Background

[3] The history and circumstances are well known to the parties and were succinctly summarized in the reasons of Madam Justice Fitzpatrick in *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCSC 723. I can do no better than repeat that summary at paras. 3-12:

> [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.

[4] In the application before Madam Justice Fitzpatrick, BC Hydro sought to lift the stay of proceedings granted under the Order, so that it could deliver a notice of termination to Wedgemount and IA based on Wedgemount's failure to meet the September 30, 2017 commercial operation date. That application was dismissed, and Madam Justice Fitzpatrick directed that the two applications I have heard be heard at the same time. In arriving at these conclusions, she found that BC Hydro would suffer no prejudice if the stay continued, while the other stakeholders, including the Receiver and IA, would suffer substantial prejudice if the stay was lifted. She commented as follows at para. 36:

> [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.

[5] At the time of the Order, Wedgemount's hydro generation facilities were substantially complete. However, the design for the interconnection facilities that would connect the project to the BC Hydro grid was not finalized and the construction of the interconnection facilities was far from complete. The delay in completing the interconnection facilities appears to have been caused by both parties, although a considerable amount of the fault rests with BC Hydro. The parties spent some time in pointing out the difficulties and delays caused by the issues that arose in planning the interconnection facilities. I conclude that it is not possible in this summary application to determine, with any confidence, the extent of each party's responsibility for the delay. However, the draft interconnection facilities study and project plan dated August 16, 2016 (the "Draft Report"), issued by BC Hydro's consultant, was delivered seven months later than promised, and it was evident to

all parties that the route and design in the Draft Report was not acceptable to BC Hydro or Wedgemount and would have to be revised.

[6] When the Receiver became involved, the first step was to assess the situation, including the looming issue of the commercial operation date (the "COD") deadline. The Receiver's first contact with BC Hydro was during a conference call on May 18, 2017. The Receiver wanted to understand the steps required to complete the project and in particular, what was required to connect the project to BC Hydro's grid. This was critical because the Receiver wanted to know if the project could be put in service without BC Hydro terminating the electricity purchase agreement (the "EPA") in accordance with the contract provisions. During the conference, Joanne McKenna, a project manager for BC Hydro, told the Receiver that BC Hydro was still "awaiting an interconnection solution" and that the COD deadline would expire on September 30, 2017 under the EPA.

[7] The EPA is a standard form agreement drafted by BC Hydro. It contains the following provisions for termination by BC Hydro (which is described as the "Buyer"):

> 8.1 Termination by Buyer - in addition to any other right to terminate this EPA expressly set out in any other provision of this EPA and in addition to all other rights and remedies the Buyer may have under this EPA or at law or in equity in respect of any of the following events, the Buyer may terminate this EPA on notice to the Seller if:
>
> (a) COD does not occur by the second anniversary of Target COD for any reason whatsoever (including Force Majeure), provided that the Buyer may terminate the EPA under this provision only if the Buyer delivers a termination notice prior to COD; or
>
> …
>
> (f) any one of the Seller or the General Partner is Bankrupt or Insolvent; or
>
> …
>
> (i) any one of the Seller or the General Partner is in material default of any of its covenants, representations and warranties or other obligations under this EPA (other than as set out above), unless within 30 days after the date of notice by the Buyer to the Seller of the default the Seller has cured the default…
>
> Any termination pursuant to this section shall be effective immediately upon delivery of the notice of termination to the Seller.

[8] The EPA contains other terms that are central to the positions taken by the parties on this application. I will set out the relevant provisions to which I was referred.

[9] The EPA provides that the "Effective Date" is March 6, 2015. Section 2.1 provides that "the term ('Term') of this EPA commences on the Effective Date and continues until the anniversary of COD, unless it is terminated earlier as authorized under this EPA." The "COD" is the date on which Wedgemount must have satisfied certain conditions necessary to begin selling electricity to BC Hydro. The "Target COD" was defined to mean "September 30, 2015, as revised pursuant to either or both of ss. 3.9 and 3.11, if applicable." The parties agree that s. 3.11 is not relevant on this application.

[10] Section 3.9 provides:

> Change in Target COD - if the Estimated Interconnection Facilities Completion Date is later than 90 days prior to the Target COD, and unless otherwise agreed by the Parties in writing, the Target COD shall be postponed to the Estimated Interconnection Facilities Completion Date plus 90 days.

[11] Relevant definitions in the EPA include:

> "Estimated Interconnection Facilities Completion Date" means the most recent estimated date for completing the Interconnection Network Upgrades, as set forth in the Final Interconnection Study Report.
>
> "Final Interconnection Study Report" means the final report issued to the Seller by the Distribution Authority or the Transmission Authority, as applicable, in respect of the interconnection of the Seller's Plant, consisting of a system impact study report and the facilities study report. (the "FIS Report")

[12] The FIS Report must be issued by BC Hydro. As of the date of the Order, no FIS Report had been issued. Accordingly, there was no Estimated Interconnection Facilities Completion Date. In addition, there had been no agreement between the parties to set a Target COD at any other date.

[13] It should be evident from this review of the relevant EPA provisions that there was some doubt in May 2017 as to BC Hydro's right of termination. Section 8.1(a)

gives BC Hydro the right to terminate "if the COD does not occur by the second anniversary of Target COD", meaning September 30, 2017. However, pursuant to s. 3.9, the Target COD "shall be postponed" to the Estimated Interconnection Facilities Completion Date plus 90 days, if the latter date is later than 90 days prior to the Target COD. The Estimated Interconnection Facilities Completion Date could only be set by the FIS Report, which must be issued by BC Hydro, and that report had not been issued because BC Hydro had not signed off on an interconnection design for the network upgrades.

[14] Later in May, after the first discussion with the Receiver, BC Hydro gave the Draft Report to the Receiver. As previously noted, the parties were aware that the Draft Report would not be used to establish the connections to the grid. However, it was understood by all parties that a modified design was being prepared by the Receiver's consultant.

[15] With this background, two representatives of the Receiver (Melinda McKie and Paul Chambers) met with BC Hydro representatives on June 6, 2017, along with the Receiver's consultant, Michael Potyok. BC Hydro was represented by Ryan Hefflick and Vic Rempel. The Receiver maintains that BC Hydro made critical representations at that meeting which led the Receiver to spend substantial sums and pursue completion of the project on the understanding that BC Hydro would not terminate the EPA at the end of September 2017.

[16] The Receiver says, based on the affidavit evidence of Ms. McKie, Mr. Chambers and Mr. Potyok, that it told BC Hydro it was considering the design of a new route for interconnection along Wedge Creek Forest Service Road and that it hoped to accomplish that by late summer or fall of 2017. The BC Hydro representatives said that that timing might be challenging for BC Hydro because of technical issues. However, according to the Receiver, the following significant representations were made by BC Hydro at that meeting:

- the Draft Report of August 2016 was still in draft form, and that the route of interconnection had changed since it was issued;

- the FIS Report would not be issued until the route of interconnection was finalized and the engineering design work for the interconnection was further developed; and

- because the Draft Report was still in draft form, there was no Target COD set and consequently there was no COD deadline of September 30, 2017 (collectively the "June 6 Representations").

[17] BC Hydro denies making the last of these alleged representations. It says that the discussions at the meeting of June 6, 2017 were limited to technical aspects of the project. BC Hydro said it needed to receive a complete design from the Receiver in order to move forward with the FIS Report. Mr. Hefflick and Mr. Rempel advised the Receiver of the amount required ($105,000) to pay the cost of the reports associated with connecting the project to BC Hydro's grid. Neither Mr. Hefflick nor Mr. Rempel recall making any comments about a "COD deadline" and both say that "the interconnections group does not discuss contractual issues" and had no authority to do so. Mr. Rempel says it was his experience with similar projects that where contractual issues arise in the course of discussions, the interconnections group would refer independent power producers to BC Hydro's contracts management group. Both of the men at the meeting were part of BC Hydro's interconnections group.

[18] Mr. Hefflick and Mr. Rempel say they would have discussed the Draft Report and acknowledged that it was in draft form and that an FIS Report would not be issued until the route of interconnection was finalized. However, they say they would not have discussed the implications of those reports in relation to the EPA. They stressed that they do not address contractual issues and so they do not have discussions related to the terms of the contracts or the interpretation of the contracts.

[19] The next meeting of significance took place on June 14, 2017 between BC Hydro representatives and three representatives of IA: Stefanie Leduc, Maxime

Durivage and Luc Fournier. On a May 9, 2017 telephone call, prior to the receivership, the IA representatives had been advised by BC Hydro representatives (including Mr. Rempel and Mr. Hefflick) that extending the Target COD should not be a problem because the facilities study report that forms part of the FIS Report was not completed. The IA representatives say that Olha Lui, a BC Hydro representative, stated at the June 14 meeting that IA should not worry about the EPA remaining valid even if the COD was not achieved by September 30, 2017, because the facility study was not final and the time did not start to run until it was finalized.

[20] Ms. Lui says that IA "misunderstood" what she said at the meeting, although she acknowledges that she did say "when the facility study was finalized, this would reset the Target COD date pursuant to the terms of the EPA." Further, her note of that meeting states:

> From BCH CM perspective, no particular concern about Target COD deadlines in the EPA, since it is understood that Final Interconnection Study will be issued shortly and that study would effectively reset the Target COD in the EPA.

[21] The Receiver says the June 6 Representations were consistent with its understanding of the terms of the EPA. IA agrees with the Receiver's understanding of the EPA and says that the statements made at the June 14 meeting confirmed this understanding.

[22] The Receiver had a second meeting with BC Hydro on June 15, 2017, following which the Receiver dispersed to BC Hydro the $105,000 requested at the June 6 meeting. Over the following months, in consultation with IA, the Receiver:

a) determined to move ahead with the project and pursued a sales process;

b) worked with BC Hydro to advance the engineering design for the distribution line and point of interconnection on the new route;

c) applied for and obtained the necessary permits and approvals for the project from various government agencies;

d) negotiated a revised impacts and benefits agreement with the Lil'wat and Squamish First Nations;

e) engaged engineering, forestry and environmental consultants and professionals to advance the engineering design, permitting and environmental monitoring of the project;

f) advanced construction of the project; and

g) in doing all of the above, expended funds in excess of $1.5 million.

[23] As part of this process, the Receiver set up a data room so that parties who had expressed an interest in acquiring the assets of Wedgemount could review information about the project following execution of a confidentiality agreement. Based on its understanding of the June 6 Representations, the Receiver posted the following update in the data room:

> [BC Hydro] has verbally confirmed to the Receiver that the EPA will not be terminated as a result of the COD deadline of September 2017. The EPA includes various provisions for changing the Target COD (paragraphs 3.9 and 3.11). Based on discussions with [BC Hydro], the receiver understands that since the Interconnection Study Report remains in draft form and has not been finalized, the Estimated Interconnection Facilities Completion Date remains subject to change, and accordingly the Target COD may be changed subject to the provisions of paragraph 3.9 of the EPA.

[24] The Receiver's consultant, Mr. Potyok, indicates that the design for the interconnection was 95% complete as of September 2017. It is not clear to the Court exactly what is required to complete the design, what construction is required to complete the interconnection or how long that would take. However, it is evident that as of September 2017, the interconnection process stalled. The FIS Report was not issued and so the Estimated Interconnection Facilities Completion Date has not been set.

[25] The sales process that was established by the Receiver after the June meetings has produced offers from potential purchasers of the assets and undertakings. I understand that at the present time there are at least six offers, all of which seek some form of confirmation about the status of BC Hydro's termination rights. As a result of the offers it was receiving, the Receiver sought written confirmation from BC Hydro that the termination provision in para. 8.1(a) of the EPA was not applicable. Ms. McKie sought that confirmation from Ms. McKenna by email on September 11, 2017.

[26] That request started a new round of discussions. On September 19, 2017, Ms. McKenna indicated that she was not able to provide the confirmation sought, as BC Hydro was awaiting information. The parties met on September 25, 2017, at which time Ms. McKenna indicated that BC Hydro was reviewing its rights under the EPA. At that meeting, the Receiver provided updates on the interconnection design and permitting. On September 27, 2017, Ms. McKie wrote to BC Hydro referencing the June 6 Representations and the extensive work done based on those representations. On September 29, 2017, Ms. McKenna responded by stating that BC Hydro was only "aware of the receivership generally", denied making any representations or assurances, and asserted that it had an impending termination right.

[27] On October 6, 2017, Ms. McKie and Mr. Chambers attended a further meeting with Ms. McKenna and other BC Hydro representatives. At that meeting Ms. McKenna stated, for the first time, that BC Hydro did not need the power that would be produced by the project. However, Ms. McKenna said BC Hydro was prepared to reconsider its position on the EPA.

[28] Further discussions took place between the parties, including discussions about BC Hydro's comments on the nearly-complete design drawings for the interconnection distribution line and interconnection on the new route.

[29] On November 20, 2017, BC Hydro indicated that it was still in the process of considering the EPA and that it would require further discussion to be kept

confidential and subject to a proposed non-disclosure agreement ("NDA"). BC Hydro indicated that subject to the NDA, it expected to provide a proposal for an amended EPA within two weeks. No such proposal was forwarded, and the Receiver sought updates at various times over the next two months. On January 19, 2018, BC Hydro gave its response: it delivered the notice of application seeking an order lifting the stay so that it could issue a notice of termination based on the failure to meet the September 30, 2017 COD deadline.

[30] To complete this background, I should note that until recently, BC Hydro ran what is described in the EPA as a "Standing Offer Program", under which it agreed to purchase power from independent power producers from run-of-river hydro power generation facilities. However, its policy has changed, perhaps in part because of the Site C dam development. In any event, on October 6, 2017, BC Hydro advised the Receiver, for the first time, that it did not need the power that would be produced by the project.

Position of the Receiver and IA

[31] The Receiver says that when the provisions of the EPA are properly construed and considered in light of the circumstances of this case, BC Hydro does not have a right of termination on the basis that the COD did not take place on or before September 30, 2017. This is because s. 3.9 provides that the Target COD "shall be postponed" to the Estimated Interconnection Facilities Completion Date plus 90 days. Of course, that date depends on the "most recent estimated date for completing the Interconnection Network Upgrades" which must be set by the FIS Report which has not been issued by BC Hydro. The failure of BC Hydro to issue the FIS Report and establish the Estimated Interconnection Facilities Completion Date cannot be relied upon by BC Hydro as a basis for termination of the project.

[32] With regard to the alleged representations at the meetings in June 2017, the Receiver says the evidence of its affiants and those from IA is direct, clear and credible, while the evidence of the BC Hydro affiants is much less so. Further, the Receiver emphasizes its role as an officer of the court. The Receiver received the

representations made by BC Hydro while acting in that role and relied upon those representations in carrying out its duties. As noted in the Receiver's first report to the Court:

> The Receiver has expended significant time and resources in advancing the Project since the Date of Receivership in reliance on the representations made by BC Hydro at the June 6 Meeting that the EPA would not be terminated as a result of the Project COD not being achieved by September 30, 2017.
>
> IA has continued to support the Project, and the funding of the Receivership, on the basis of representations made to IA by BC Hydro.

[33] The Receiver stresses that the EPA is a standard form contract drafted by BC Hydro as part of its Standing Offer Program to purchase power from independent power producers. The ability to achieve a COD within two years of a Target COD was in the hands of BC Hydro as it must complete the steps required to issue the FIS Report. The contract cannot be interpreted in a way that would allow BC Hydro to unilaterally avoid its contractual obligations because it did not complete steps it was required to perform. The Receiver says that to the extent there is any ambiguity in the EPA, that ambiguity should be resolved against BC Hydro as the author of the agreement.

[34] The Receiver also says that BC Hydro should not be permitted to rely on Wedgemount's insolvency to issue a notice of termination. It says that BC Hydro only recently took this position and it had previously given assurances to Wedgemount that, so long as it was working towards finishing the project, it would not rely on s. 8.1(f) to terminate the EPA. In any event, the stay is still in place which prevents BC Hydro from taking any action on the basis of s. 8.1(f) of the EPA.

[35] IA supports the position of the Receiver. It notes that the system impact study issued by BC Hydro to Wedgemount as the first step in the EPA process dramatically underestimated the cost estimate for interconnection and the time required to produce the Draft Report. IA says that the delays in producing the FIS Report were caused almost entirely by the actions of BC Hydro, including the provision of unrealistic cost estimates and a failure to live up to proposed timelines.

[36] IA also argues that the termination right under s. 8.1(a) of the EPA has not been triggered because the Target COD has been postponed pursuant to s. 3.9 of the EPA. This is because BC Hydro has yet to complete the FIS Report. IA says that the subsequent conduct of the parties is relevant because of ambiguity in the EPA. Here, the subsequent conduct supports the conclusion that the Target COD was postponed. It also argues that the subsequent change in the standard form EPA supports its contention that there is ambiguity in the agreement. BC Hydro subsequently revised s. 3.9 to require an independent power producer to request a change to the Target COD in writing.

[37] IA also says the Court can and should grant a permanent stay that would prevent BC Hydro from relying on Wedgemount's insolvency to form the basis for terminating the EPA under s. 8.1(f). It says the powers of the court in a receivership under the *BIA* are similar to those of the court under a *CCAA* proceeding. It says the court can take into account the interests of the third parties, including First Nation bands and the province, in deciding to make such an order.

Position of BC Hydro

[38] BC Hydro opposes the application on a number of bases. It says that the Receiver has failed to prove that BC Hydro made the alleged June Representations to the Receiver's representatives or to IA. It says the evidence of the BC Hydro representatives establishes that no such representations were made. Rather, the Receiver's representatives misunderstood what was said by BC Hydro's representatives or their statements were taken out of context. It says statements were taken out of context because all of the discussions in May and June 2017 took place in the context of the Receiver's expressed intention to have the project operational by the fall of 2017. Had the technical information to achieve that completion date been provided, the FIS Report could have been issued and the Estimated Interconnection Facilities Completion Date could have been set.

[39] BC Hydro says it did nothing other than cooperate with the Receiver as it was required to do. It says it always maintained its rights under the EPA, including the right to terminate for failure to achieve the COD by September 30, 2017.

[40] BC Hydro rejects IA's complaints about the shortcomings of the Draft Report and says it does not and cannot guarantee the cost or the requirements for upgrades to facilitate interconnection. Wedgemount, as the independent power producer, has the obligation to fund all of the work and perform the required work. Here, it says the challenges and the risks were properly identified in the Draft Report. The project has never reached the stage where the FIS Report could be issued by BC Hydro or agreed to by Wedgemount. Both parties have to sign off on it before they can enter into the interconnection agreement that would allow interconnection construction to take place.

[41] BC Hydro also relies on s. 8.1(i) and says that this provision governs the ability of Wedgemount to cure a default and specifically excludes the curing of a default under s. 8.1(a) or (f). BC Hydro says that as a result of this provision it has had termination rights under the EPA for some time: since May 12, 2017, as a result of the breach of s. 8.1(f); and since September 30, 2017, as a result of the breach of s. 8.1(a). Pursuant to s. 8.1(i), those breaches cannot be cured.

[42] BC Hydro argues that the plain meaning of the EPA is that Wedgemount was obliged to reach the COD by September 30, 2017, failing which it could exercise its right of termination. While that right has been stayed by the receivership, it has not been extinguished. Any interpretation that would postpone the Target COD date until the FIS Report is finalized is contrary to the plain language. BC Hydro says it would also create an absurdity because the COD date could be postponed indefinitely.

[43] With regard to the discussions about the appropriate design of the interconnection route, BC Hydro says that it has always remained open to the design suggestions made by Wedgemount, before the appointment of the Receiver, and those made by the Receiver after May 12. BC Hydro maintains that it never agreed

to extend the COD date or provide compensation because of the design complications.

[44] In addition, BC Hydro also says that the Receiver cannot rely on statements made by Messrs. Hefflick and Rempel because they were part of the technical interconnections group and not responsible for the Wedgemount EPA. Ms. McKenna was the individual they should have spoken to about EPA issues.

[45] BC Hydro also maintains that estoppel is not available as a remedy in these circumstances. This is because BC Hydro has not acted in any way that is inconsistent with its earlier representations.

[46] Finally, it says the fact that the loss of the EPA would be detrimental to creditors and to other third parties such as the First Nations and the Province is irrelevant to the issue to be decided on this application.

Issues

[47] My initial concern in considering the arguments of the parties was whether it is possible to resolve these issues on a summary application based on affidavit evidence. It is evident from my outline of the circumstances and the parties' positions that there is contradictory evidence about what was said at the June 6 meeting. There are also contract interpretation issues that would normally be difficult to resolve on a summary application.

[48] In spite of these concerns, I have decided that it is possible to determine the issues before the Court based on the extensive affidavit evidence. I have arrived at this conclusion in part because of the detailed evidence but also because no party took the position that I could not find the necessary facts or that it would be unjust to resolve the issues on this application. With regard to the latter point, there is urgency to this decision that affects all of the parties. Work needs to be done to protect the project from possible damage by the spring runoff. Further, the parties and affected third parties would like a prompt resolution to these issues. I note as well that Madam Justice Fitzpatrick specifically raised the question as to whether this could

be determined on a summary basis at para. 36 of her reasons. She noted the "potential for delay and costs, depending on whether the issue can be decided on a summary basis" (emphasis added). Based on the submissions of the parties, I assume they have accepted that the issues can be decided summarily.

[49] Accordingly, the issue before the Court is whether it can make the declaration sought by the Receiver. Having heard the arguments of the parties, I will approach this question by considering the two termination rights claimed by BC Hydro separately. In other words, I will consider the following issues:

1. Should the Court declare that BC Hydro may not terminate the EPA because of a breach of s. 8.1(f) on the basis of any existing ground or fact?

2. Should the Court declare that BC Hydro may not terminate the EPA because of a breach of s. 8.1(a) on the basis of any existing ground or fact?

[50] For the reasons that follow, I would answer the first question in the negative. In other words, I will not make a declaration that BC Hydro may not issue a notice of termination pursuant to s. 8.1(f). However, I do make the declaration that BC Hydro may not issue a notice of termination because of a breach of s. 8.1(a).

Issue 1. Should the Court declare that BC Hydro may not terminate the EPA because of a breach of s. 8.1(f) on the basis of any existing ground or fact?

[51] The arguments of the Receiver and IA on this issue are founded on two factual matters and on one legal proposition. I will describe each of these.

[52] First, they say that prior to the Order, BC Hydro indicated to Wedgemount that it would not rely on the termination provisions so long as Wedgemount continued to work towards completion of the project. In the spring of 2017, BC Hydro was well aware of Wedgemount's financial difficulties. Wedgemount wanted to know if BC Hydro might terminate the EPA because of the financial difficulties and the

impending September deadline. BC Hydro's employee, Frank Lin stated in an email on March 31, 2017:

> I have received feedback re EPA termination and I want to assure you and the lender that as long as we are working towards a solution, we will not terminate the EPA.

[53] Second, the Receiver and IA say that until very recently BC Hydro has not raised the issue of a potential termination as a result of Wedgemount's insolvency.

[54] Third, IA argues that this Court has a broad discretion to indefinitely or permanently stay provisions in contracts that affect contractual rights: *Pope & Talbot Ltd. (Re)*, 2009 BCSC 1552. It says that this Court should permanently stay BC Hydro's right to rely on s. 8.1(f).

[55] I do not accept that the factual matters relied upon are sufficient to create an estoppel. While the assurance granted by Mr. Lin was undoubtedly of assistance to the lender as it was deciding in the spring whether to continue funding Wedgemount, it cannot be said that BC Hydro waived reliance on its contractual rights or that IA relied upon Mr. Lin's comments to its detriment. Indeed, shortly after that assurance, IA commenced this action and appointed the Receiver. This changed the circumstances dramatically. There can be no suggestion that Mr. Lin's comment contemplated or was directed at what might happen in the event of a receivership. Further, the fact that BC Hydro has not purported to rely on the insolvency termination provision is not surprising. Once the Order was issued, the stay was imposed and it could not rely on that provision.

[56] Of equal importance is the fact that BC Hydro, Wedgemount and Travellers Capital Corporation, as agent for Wedgemount's lenders (including IA), entered into a lender consent agreement (the "LCA") that specifically deals with the rights of BC Hydro and the lenders in the event of a termination event.

[57] Section 5 of the LCA provides that BC Hydro:

> (b) shall not exercise any right it may have to terminate the EPA until the later of: (i) the date that is 45 days after the date on which the Buyer

> delivered to the Agent Default or Termination Notice entitling the Buyer to terminate the EPA; and (ii) the date on which the buyer is entitled to terminate the EPA;
>
> (c) shall not, provided that there is no other Buyer termination event under the EPA, terminate the EPA based on [Wedgemount]… becoming Bankrupt or Insolvent if the Agent is promptly and diligently prosecuting to completion enforcement proceedings under the Agent Security until 30 days after the expiry of any court order period restricting the termination of the EPA.

[58] In other words, the LCA contemplated the event of a termination for insolvency and BC Hydro agreed to defer its rights under the EPA.

[59] When I consider all of these circumstances, I conclude there is no basis on any existing ground or fact to issue the declaration sought by the Receiver.

[60] I am also not prepared at this time to consider the argument that the Court should issue a permanent stay of BC Hydro's right of termination under s. 8.1(f). The cases relied upon by IA in advancing that argument are generally based on the broad discretion that the court exercises in a restructuring situation. At this time there is no proposal or restructuring before the Court.

[61] Further, I note that the stay imposed by the Order is still in place. BC Hydro's application to lift the stay was dismissed. Accordingly, at the present time, BC Hydro is not able to rely on that termination provision. There is no basis or need for this Court to make the order sought by the Receiver with regard to s. 8.1(f).

Issue 2. Should the Court declare that BC Hydro may not terminate the EPA because of a breach of s. 8.1(a) on the basis of any existing ground or fact?

[62] The first issue I must consider is whether BC Hydro made the representations alleged by the Receiver. I conclude that those representations were made at the June 6 meeting by Mr. Hefflick and Mr. Rempel. I arrive at this conclusion for the following reasons:

- The evidence of the Receiver's representatives is, as the Receiver argues, clearer, more direct and, ultimately, more credible. Ms. McKie and Mr.

Chambers' assertions are specific and directly on point about the issues they would have been primarily focused on at that meeting.

- By contrast, the contrary evidence of Mr. Hefflick and Mr. Rempel is couched in statements about their usual practice or approach. They both say they do not recall making the statements about the COD deadline and assert that "the interconnections group does not speak to the interpretation of the EPA or its specific terms."

- I resolve this conflict by considering the circumstances and interests of the participants involved in that meeting. The Receiver had been advised in the telephone conference of May 18 of the two-year deadline set out in the EPA. From its perspective, the purpose of the meeting of June 6 was to resolve an unresolved issue arising in part from the apparent ambiguity in the EPA: whether the deadline was impending or would be extended. Without some assurance that the deadline would not be relied upon by BC Hydro, it is very unlikely the Receiver would have embarked on the effort to conclude the project, particularly when they were advised at the meeting that there were technical difficulties that made completion by the end of September problematic.

- I accept that the BC Hydro representatives were focused on the technical issues. However, this does not mean that they did not make the representations; indeed, it provides an explanation for their failure to recall or appreciate the significance of their statements about the COD deadline.

- BC Hydro's assertion that the discussions only involved technical issues is disingenuous. Ms. McKie and Mr. Chambers were not participating as technical representatives. They were new to the project, new to BC Hydro and were representatives of the newly appointed Receiver. BC Hydro's suggestion that it was "generally aware" of the receivership is also disingenuous. The Order dramatically changed the situation and BC Hydro

would have been acutely aware of that. The BC Hydro representatives knew or must have known that the Receiver was attempting to decide what to do with the nearly-complete project.

- I also reject BC Hydro's reliance on s. 10.7 of the EPA as a basis for its position that the statements made by Mr. Hefflick and Mr. Rempel cannot amount to representations made by BC Hydro. They knew they were dealing with the Receiver to resolve issues arising from the EPA as well as the interconnection. The representations were not made solely with respect to an interconnection agreement.

- As I indicated earlier in these reasons, the perceived uncertainty in May 2017 about the impending COD arises from an ambiguity in the EPA. The deadline of two years from the Target COD is set out in s. 8.1(a) but s. 3.9 provides that the deadline may be altered. However, the mechanism for that alteration is not clear and, in the circumstances that existed in June 2017, it was very unclear. The power generating facilities were substantially complete but the interconnection work had run into problems caused in no small part by BC Hydro. The parties had been working to finalize the Estimated Interconnection Facilities Completion Date, but there was no mechanism to make that happen other than to continue the work. The meeting of June 6 was the Receiver's opportunity to find out if the September deadline was firm or would be extended so the work could continue. They received their answer from the BC Hydro representatives.

- The suggestion that the Receiver's representatives misunderstood the comments made or took the statements out of context again ignores the circumstances and the position of the Receiver. BC Hydro made it clear that it would be difficult to finish the work in the fall even though that was the Receiver's intent. BC Hydro cannot rely on an alleged assumption the work would be done before the deadline to explain the statements made by its representatives.

- I also note that the statements made by Ms. Lui at the June 14 meeting are consistent with the statements made to the Receiver on June 6.

- The final point is that it is evident from the material before the Court that BC Hydro decided in the fall of 2017 that it no longer needed the power to be generated by this project. I conclude that its change in policy has coloured its perception of the statements and representations it made to Wedgemount and the Receiver.

[63] Having concluded that BC Hydro made the representations, the next question is whether it is estopped from relying on s. 8.1(a) as a result of those representations. I conclude that it is. In *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57, Mr. Justice Sopinka, writing for the Court, set out the elements of promissory estoppel:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[64] Here, there is no question that the Receiver relied on the representations. It is of some significance that throughout, the Receiver was acting in its role as an officer of the court with the obligation to take into account the interests of all parties. As set out above, it spent in excess of $1.5 million and paid BC Hydro $105,000 to continue with the work. BC Hydro requested and accepted those funds. The Receiver had no obligation to continue the work. Indeed, its duty was to achieve the best return on the assets of the insolvent party, taking into account all of the other interests. If the Receiver had been advised that BC Hydro was relying on the September deadline (or that it did not need the power generated by the project), it would not have taken those steps.

[65] I conclude that BC Hydro's representation that it would not rely on the September 30, 2017 COD deadline was intended to affect the legal relationship and be acted upon. The Receiver relied on the representation to change its position.

[66] I also reject BC Hydro's argument that it did not act inconsistently with its earlier representations, promises or actions, for the reasons I have given above.

[67] In arriving at this conclusion, I have considered *Erickson v. Jones*, 2008 BCCA 379, in which the court discussed the so-called modern approach to estoppel. The court quoted with approval from *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197, in which Madam Justice Newbury accepted the following statement in Halsbury's:

> … the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories. [Emphasis of Madam Justice Newbury.]

[68] That accurately describes what happened here. BC Hydro's statements allowed the Receiver to believe that BC Hydro either did not have a right to terminate the EPA as of September 30, 2017 or would not rely on such a right. The Receiver in its court-appointed role acted on that significant representation. It was not until late September that BC Hydro changed its position and re-asserted a right of termination because of a failure to meet the September 30, 2017 COD deadline. It would be inequitable to allow BC Hydro to rely on such a termination right.

[69] I should note for completeness that in arriving at this conclusion, I have not determined whether the EPA, properly construed, gives BC Hydro the right to terminate on September 30, 2017, absent the representation. I need not decide that contractual interpretation issue given my decision on the estoppel argument.

[70] In summary, I make the following declaration: BC Hydro may not terminate the EPA because of a breach of s. 8.1(a) on the basis of any existing ground or fact.

[71] That concludes my ruling.

"Butler J."