



No. S174308
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 HOLDINGS LIMITED
BRENT ALLAN HARDY
DAVID JOHN EHRHARDT
28165 YUKON INC.
PARADISE INVESTMENT TRUST
SUNNY PARADISE INC.**

DEFENDANTS

APPLICATION RESPONSE

Application response of: Industrial Alliance Insurance and Financial Services Inc. ("IA")

THIS IS A RESPONSE TO the notice of application of British Columbia Hydro and Power Authority ("BCH") filed January 19, 2018.

Part 1: ORDERS CONSENTED TO

The application respondent(s) consent(s) to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: NIL.

Part 2: ORDERS OPPOSED

The application respondent(s) oppose(s) the granting of the orders set out in paragraphs 1 – 2 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent(s) take(s) no position on the granting of the orders set out in paragraphs NIL of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

Background

1. On May 12, 2017, the Honourable Mr. Justice Steeves granted an order (the "**Receivership Order**") appointing Deloitte Restructuring Inc. (the "**Receiver**") as Receiver of Wedgemount Power Limited Partnership ("**Wedgemount LP**"), Wedgemount Power (GP) Inc. ("**Wedgemount GP**"), and Wedgemount Power Inc. (collectively, the "**Wedgemount Entities**").
2. The Wedgemount Entities are the owner and developer of a partly-constructed run-of-river hydro power facility located on Wedgemount Creek, near Whistler, British Columbia (the "**Project**"). The Project was developed with the intention that it would generate electricity which would then be sold to BCH.
3. IA advanced funds to Wedgemount LP under a credit agreement dated June 30, 2015 (the "**Credit Agreement**") and construction loan note dated June 30, 2015 (the "**Note**") for the purpose of Wedgemount LP's developing and constructing of the Project.
4. Wedgemount LP failed to pay the amounts due under the Credit Agreement and Note, despite demand to do so.
5. On May 9, 2017, IA commenced this action to appoint a Receiver over the Wedgemount Entities in order to ensure risks at the Project site are properly managed and to protect the value of the assets for all the creditors of the Wedgemount Entities.

Electricity Purchase Agreement

6. Wedgemount LP, by its general partner Wedgemount GP, and BCH entered into an Electricity Purchase Agreement dated March 6, 2015 (the "**EPA**").
7. Pursuant to the terms and conditions of the EPA, BCH agreed to purchase electricity generated by the Project upon completion of the interconnection process. The EPA defines the "Commercial Operation Date" or "**COD**" as the date on which Wedgemount LP would have satisfied certain conditions necessary to begin selling electricity to BCH. Under the terms of the EPA, COD could occur anytime up to two years after the "Target COD" was set.
8. Section 1.73 of Appendix 1 to the EPA stipulates that the "**Target COD**" was September 30, 2015. However, under section 3.9 of the EPA the Target COD could be amended or postponed. Section 3.9 of the EPA states:

3.9 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.

9. The following terms used in the EPA are defined in Appendix 1 to the EPA as follows:

1.29 "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.

1.32 “Final Interconnection Study Report” means the final report issued to [Wedgemount LP] by the Distribution Authority or the Transmission Authority, as applicable, in respect of the interconnection of the [Project], consisting of a system impact study report and a facilities study report.

10. As a condition of entering into the Credit Agreement and the Note and advancing funds to Wedgemount LP, IA:

- (a) entered into a Lender Consent Agreement with BCH dated June 30, 2015 (“LCA”) whereby BCH agreed that it would not terminate the EPA solely because of the insolvency of Wedgemount LP as long as IA is promptly and diligently prosecuting enforcement proceedings; and
- (b) obtained a comfort letter from BCH (the “**Comfort Letter**”) which stated that the facilities study report would be complete by February 2016 and that the parties would enter into a final interconnection agreement by March 2016.

Draft Facility Study Report

11. On August 16, 2016, BCH issued the “draft” facilities study report for the Project (the “**Draft Report**”) already seven months later than promised in the Comfort Letter.

12. The Draft Report states that the “proposed COD” for the Project is September 29, 2017 but this could be impacted if construction of the Project is delayed, clearly indicating that BCH acknowledged that this date did not represent the “Estimated Interconnection Facilities Completion Date”, as defined in the EPA and that therefore, the Target COD did not remain as September 30, 2015, as was initially set out in the EPA.

13. There were a number of issues that arose from the interconnection proposed by the Draft Report prepared by BCH. Most notably, the facilities design proposed in the Draft Report was unachievable, specifically because the Draft Report proposed an interconnection route through lands that were zoned for use as a regional park owned by the SLRD (the “**SLRD Route**”). The SLRD Route was not feasible because BCH could not be granted an exclusive right of way over the SLRD park land and BCH was not prepared to accept the SLRD Route in any event. All of these issues were within BCH’s knowledge prior to its issuance of the Draft Report

14. BCH has never issued a Final Interconnection Study Report for the Project.

Events During the Receivership Proceedings

15. During a conference call on May 9, 2017, BCH representatives Ryan Hefflick and Vic Rempel informed IA representatives that the Target COD was postponed because the facility study report which forms part of the Final Interconnection Study Report was not completed.

16. On June 6, 2017, Melinda McKie and Paul Chambers, on behalf of the Receiver, attended at BCH’s office along with the Receiver’s engineering consultant Michael Potyok to meet with Mr. Hefflick and Mr. Rempel (the “**June 6 Meeting**”). At the June 6 Meeting, the Receiver indicated that it was hoping to work towards completion of the Project in late summer of 2017. Mr. Hefflick and Mr. Rempel informed the Receiver that achieving COD by the end of the summer of 2017 could be challenging from BCH’s perspective, noting several issues

including prospective permitting timelines for a new route (the "**FSR Route**") to replace the SLRD Route.

17. During the June 6 Meeting, Mr. Hefflick and Mr. Rempel also advised that because the Draft Report was only in draft form the Target COD was postponed and consequently there was no COD deadline of September 30, 2017.

18. As a result of the representations made by BCH, the Receiver understood that until the point at which a Final Interconnection Study Report was issued, there was no hard deadline by which the Project had to reach COD in order for the EPA to remain in effect.

19. On June 14, 2017, a meeting (the "**June 14 Meeting**") was held between representatives of IA and BCH to discuss the Project following the appointment of the Receiver. Mr. Rempel, Mr. Hefflick, Olha Lui and Joanne McKenna attended the meeting on behalf of BCH. Ms. Lui and Ms. McKenna on behalf of the BCH department responsible for EPAs represented during 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 Target COD would be set in the final facilities study report.

Sales Process

20. Following several expressions of interest, on or about June 20, 2017 the Receiver set up a data room for interested parties to review information relating to the Project, subject to receipt by the Receiver of an executed confidentiality agreement.

21. In providing the responses to the additional information requests from parties who expressed an interest in the Project, the Receiver relied on the representations made by BCH in the June 6 Meeting when it informed the interested parties on July 11, 2017 that BCH had verbally confirmed to the Receiver that the EPA will not be terminated as a result of the COD not being ready by September 2017.

22. In early August 2017, following receipt of initial letters of intent from nine different interested parties, the Receiver determined to move ahead with a sales process for the Project (the "**Sales Process**").

Receiver's Activities

23. Relying on the representations made by BCH in the June 6 Meeting and the representations made to IA, the Receiver took further steps and incurred substantial costs to continue the development and construction of the Project. As an officer of the Court with duties to the Court and all stakeholders of the Wedgemount Entities and the Project, the Receiver would not have taken such steps, and the costs would not have been incurred, but for the representations made by BCH.

24. Since its appointment, the Receiver has:

- (a) worked with BCH's interconnections group to significantly advance the engineering design for the Project's distribution line and point of interconnection to BCH's grid for the FSR Route;

- (b) negotiated a revised Impact Benefit Agreement (the "IBA") with the First Nations who stand to benefit from royalties (among other things) under this IBA when the Project is complete;
- (c) pursued the Sales Process;
- (d) hired and retained engineering, forestry and environmental consultants and professionals to advance the engineering design, permitting and environmental monitoring of the Project;
- (e) engaged suitable parties to advance the construction of the Project; and
- (f) expended funds in excess of \$1,400,000.00 in furtherance of the Project, including \$105,000 requested by BCH to cover its costs for work going forward from the date of the Receivership Order.

25. IA relied on the comments from BCH representatives that BCH would not terminate the EPA if COD was not achieved by September 30, 2017 when deciding to continue to advance funds for the Project, including those funds which were to be advanced by the Receiver to BCH.

26. Following the June 6 Meeting, BCH continued to correspond and meet with the Receiver and the Receiver's consultants in order to advance the Project's distribution line and point of interconnection. Based on the work performed and cost incurred by BCH during this period, in addition to the representations made by BCH in the June 6 Meeting, the Receiver had no reason to believe that BCH would not continue to work with the Receiver to advance the Project to COD until it received an email from Ms. McKenna on September 19, 2017 and attended a meeting on September 25, 2017 wherein BCH representatives indicated to the Receiver that BCH was in the process of reviewing its rights under the EPA.

27. Following the meeting on September 25, 2017, the Receiver discussed the Target COD issue with BCH in good faith while the Receiver and its engineering consultants continued to work with BCH to advance the interconnection engineering design.

28. During a meeting on November 20, 2017 between BCH representatives, including Bruce Chow, and the Receiver (the "**November 20 Meeting**"), Mr. Chow indicated that BCH would likely require some amendments to the terms of the EPA that would resolve BCH's termination rights under the EPA. He stated that a number of changes may be required to the EPA, but was not willing to provide any details prior to the execution of an acceptable non-disclosure agreement. He acknowledged the desire of the Receiver to resolve the EPA as swiftly as possible in order that the Project and the Sales Process could continue to advance and indicated that, subject to the execution of a satisfactory non-disclosure agreement, BCH expected to be able to provide a proposal in relation to an amended EPA in approximately two (2) weeks' time. Mr. Chow also indicated that he expected that a mark-up of the EPA would be provided to the Receiver as part of BCH's proposal.

29. Following the November 20 Meeting, the Receiver, BCH and IA negotiated a mutually acceptable non-disclosure agreement (the "**NDA**") which the Receiver and IA executed and delivered to BCH's counsel on December 8, 2017.

30. On December 12, 2017, Ms. McKenna responded to a request for an update from the Receiver by indicating that BCH needed more time internally to consider the EPA and her team's mandate.

31. On January 10, 2018, the Receiver again requested a timeline for when the Receiver would receive the BCH proposal for amendments to the EPA.

32. On January 19, 2018, the Receiver's counsel was served with BCH's Notice of Application dated January 19, 2018 and supporting affidavit of Mr. Chow. That same day, Ms. McKenna informed the Receiver that BCH had decided not to proceed with the EPA but was not able to respond to the Receiver's inquiry as to what had led to the change of BCH's position since the November 20 Meeting.

33. Until January 19, 2018 the Receiver understood that BCH would not seek to terminate the EPA if the Project was not completed by September 30, 2017.

34. There are many stakeholders in the Project including all the creditors, the First Nations who stand to benefit under the IBA, the Wedgemount Entities, the guarantors on the Project, the many professionals and contractors working on the Project, and 28165 Yukon Inc., the owner and developer of the WedgeWoods subdivision on whose land the Project's powerhouse is situated.

35. The Sales Process in this matter has been robust and has engaged several interested parties. Absent termination of the EPA, it is likely that a sale of the Project to a credible purchaser can be completed with a substantial realization for several of the stakeholders. If BCH is permitted to terminate the EPA, it is uncertain whether any bidders will be interested in purchasing the Project (and/or what the impact on the value of the Project would be). Further, if the Project is abandoned, returning the lands to their natural state will require millions of dollars of environmental remediation.

Part 5: LEGAL BASIS

1. BCH's application for leave to terminate the EPA is based on its alleged contractual right to terminate the EPA because the Project has not reached COD within two years after the Target COD.

2. However, BCH possesses no such contractual right to terminate the EPA because the Target COD has been postponed pursuant to section 3.9 of the EPA. Consequently, there is no basis to grant the leave sought by BCH to terminate the EPA.

3. If BCH in fact has the right to terminate the EPA, then the totality of the circumstances and relative prejudice to the stakeholders in the Project weigh in favour of this Court declining to exercise its discretion to permit BCH to terminate the EPA.

4. The Receiver and IA have reasonably relied on BCH's representations that it would not terminate the EPA if the Project failed to reach COD within two years after the initial Target COD. BCH is therefore estopped from relying on such failure to terminate the EPA.

5. BCH has breached its duty to perform the EPA honestly and in good faith by purporting to rely on the fact the Project has not reached COD within two years of the Target COD to terminate the EPA when, in fact, BCH is responsible for the delays in achieving COD.

6. If BCH is permitted to terminate the EPA, the Sales Process will likely fail and the Project will not be completed, causing significant environmental remediation issues.

Receivership Order

7. Pursuant to paragraphs 8 and 9 of the Receivership Order, BCH may not exercise any rights and remedies against the Wedgemount Entities, the Receiver or the Project or terminate the EPA without the Receiver's consent or leave of the Court.

8. The stay provisions in paragraphs 8 and 9 of the Receivership Order are an essential part of the Receivership Order which are intended to give the Receiver the opportunity to manage the Project and realize upon the assets of the Wedgemount Entities without interference.

9. BCH bears the burden of convincing this Court that the stay should be lifted so that it can terminate the EPA: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 199 ("**Ford Credit #1**"), at para. 13; citing *Village Green Lifestyle Community Corp., Re* (2007), 27 CBR (5th) 199 (Ont. SCJ).

10. Whether BCH has a contractual right to terminate the EPA is a threshold question and not determinative on its own as to whether this Court should exercise its discretion to lift the stay and permit BCH to terminate the EPA: *Ford Credit Canada v. Welcome Ford Sales Ltd.*, 2010 ABQB 798.

11. The totality of the circumstances and the relative prejudices to the parties, including the stakeholders in the Project, must be considered in determining whether to lift the stay and permit BCH to terminate the EPA: *Ford Credit #1*, at para. 14; *Scanwood Canada Ltd., Re*, 2011 NSSC 189, at para. 26.

12. BCH has failed to establish that it is materially prejudiced by the stay such that the stay must be lifted in order to permit BCH to terminate the EPA.

Contractual Interpretation of the EPA

13. BCH is unable to satisfy the threshold issue of whether it has a contractual right to terminate the EPA.

14. The EPA must be read as whole, giving the words used their ordinary and grammatical meaning consistent with the commercial context and factual matrix: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, at para. 47.

15. The intention of the parties to the EPA is clearly expressed in the EPA. Any interpretation of the EPA must be consistent with the language of the EPA: *0930032 B.C. Ltd. v. 3 Oaks Dairy Farms Ltd.*, 2015 BCCA 332, at para. 6; and *Mee Hoi Bros. Company Ltd. v. Bovring Investments (Canada) Ltd.*, 2017 BCSC 1910, at para. 166.

16. BCH relies on section 8.1(a) of the EPA, which grants BCH the right to terminate the EPA "if COD does not occur by the second anniversary of the Target COD." This termination right has not yet been triggered as the Target COD has been amended or postponed pursuant to section 3.9 of the EPA.

17. The EPA initially stipulated that the "Target COD" was September 30, 2015. However, under section 3.9 of the EPA the Target COD is postponed if the Estimated Interconnection Facilities Completion Date is later than 90 days prior to September 30, 2015. Thereafter, the Target COD shall be postponed to the Estimated Interconnection Facilities Completion Date plus 90 days.

18. As defined under the EPA, "**Estimated Interconnection Facilities 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 [Wedgemount LP] by the Distribution Authority or Transmission Authority, as applicable, in respect of the interconnection of the [Project], consisting of a system impact study report and a facilities study report.

19. BCH has never issued the Final Interconnection Study Report for the Project. As a result, the Target COD has been postponed until BCH completes the Final Interconnection Study Report and setting out the Estimated Interconnection Facilities Completion Date. The Target COD and any corresponding termination rights are postponed under the terms of the EPA.

20. Moreover, the commercial context and factual matrix supports the foregoing interpretation of the EPA. The EPA is a standard form agreement drafted by BCH and presented to independent power producers ("**IPPs**") through BCH's Standing Offer Program for the purchase of electricity generated by IPPs. The ability of the Project to achieve COD within two years of Target COD is dependent on BCH completing certain steps to ensure the Project can be interconnected to the BCH grid.

21. In that context, BCH may have intended section 3.9 of the EPA to give it the ability to set the Target COD (by issuing a Final Interconnection Study Report setting out the Estimated Interconnection Facilities Date) in order to ensure the Project was not ready to achieve COD until BCH was able to complete the steps necessary for interconnection. It is noted that BCH revised section 3.9 of the standard form EPA in March 2016 to stipulate that a change in Target COD requires the IPP to request the change in writing which BCH may, in its discretion, grant if the IPP is not responsible for any delay in completing the relevant study or relevant interconnection work.

22. If there is any ambiguity, then subsequent conduct of the parties is relevant: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, at para. 56. Here, the subsequent conduct supports the conclusion that the Target COD was postponed pursuant to section 3.9 of the EPA. On more than one occasion, BCH representatives informed the Receiver and IA that the upcoming second anniversary of Target COD was not an issue because of the EPA's language in section 3.9. The Receiver and IA reasonably concluded that BCH believed that Target COD was postponed until it completed the Final Interconnection Study Report setting out the Estimated Interconnection Facilities Date.

23. Moreover, any ambiguity in the terms of the EPA must be resolved in favour of the Receiver and the Wedgemount Entities in accordance with the principles of *contra proferentum* since the EPA is a standard form agreement drafted by BCH: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 SCR 888, 1979 CarswellQue 157.

24. If BCH is not granted leave to terminate the EPA, it may unilaterally set a new Target COD pursuant to section 3.9 (by issuing a Final Interconnection Study Report setting out the

Estimated Interconnection Facilities Date). Thereafter, BCH may rely on its right to terminate under section 8.1(a) if the Project has not reached COD within two years of the amended Target COD. Section 3.9 does not operate to turn the EPA into an agreement with an indefinite term.

Effect of the LCA

25. The LCA provides that BCH “shall not, provided that there is no other [BCH] termination event under the EPA, terminate the EPA based on either or both of the [Wedgemount Entities] becoming Bankrupt or Insolvent if [IA] 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; ...”

26. BCH does not have a termination right arising from the Target COD deadline, and pursuant to the terms of the LCA, BCH cannot terminate the EPA solely on the grounds of insolvency. IA is promptly and diligently pursuing enforcement proceedings through the receivership and the Receivership Order has not expired.

27. The principle that a contract is to be interpreted as a whole also requires consideration of all related contracts. Related contracts are to be interpreted to make the parts work harmoniously together to achieve the overall goal: *Samson Cree Nation v. O’Reilly & Associés*, 2014 ABCA 268 at para. 82.

28. The EPA and LCA should be interpreted together and, given the overall goal and commercial context, BCH cannot rely on the termination provisions of the EPA in light of the agreement set out in the LCA.

Estoppel

29. Further, and in the alternative, BCH is estopped from terminating the EPA. BCH has, by words and conduct, made promises and assurances intended to affect the legal relationship between BC, the Receiver and IA. BCH intended these representations to be acted on. The Receiver and IA relied on BCH’s representations, to their detriment: *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 SCR 50, at para. 13; and *Ryan v. Moore*, 2005 SCC 38, at paras. 4-5.

30. BCH representatives informed the Receiver and IA on separate occasions in June 2017 that the upcoming second anniversary of the Target COD was not a concern because of the operation of section 3.9 to postpone the Target COD until BCH completed the Final Interconnection Study Report setting out the Estimated Interconnection Facilities Date.

31. The Receiver and IA reasonably relied on such representations when they incurred significant expenses with respect to the Project and the Sales Process. Absent the representations from BCH that the Project did not need to reach COD by September 30, 2017, such expenses would not have been incurred by the Receiver and IA.

Good Faith

32. BCH, both through its own actions, and the acts of their agent, AMEC, caused delays in the completion of the Project. In breach of their duty to perform the EPA honestly and in good faith, BCH now seeks leave to terminate the EPA on the basis the Project has not achieved

COD within the two year anniversary of the Target COD, notwithstanding the fact that BCH is, in part, liable for such failure: *Bhasin v. Hrynew*, 2014 SCC 71 ("*Bhasin*").

33. Permitting BCH to terminate the EPA on the basis that the Project has not reached COD within two years after the Target COD is contrary to the principle of good faith between contracting parties recognized in *Bhasin*. BCH seeks to rely on an alleged breach of the EPA which they were, in part, liable and which BCH also represented to the Receiver and IA that it did not intend to rely on. BCH's conduct exacerbates the fact it drafted the EPA to suit its needs and by the relative inequality in power between BCH, IA and the Receiver.

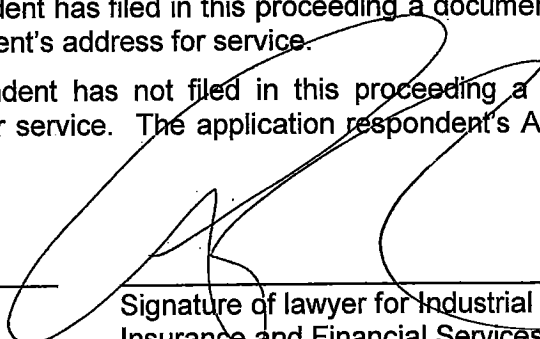
Part 6: MATERIAL TO BE RELIED ON

1. Order of the Honourable Mr. Justice Steeves made May 12, 2017.
2. Affidavit #1 of Bruce Chow, made on January 19, 2018.
3. Affidavit #2 of Luc Fournier, made on March 13, 2018.
4. Affidavit #1 of Melinda Mckie, made on March 12, 2018.
5. Affidavit #1 of Paul Chambers, made on March 13, 2018.
6. Affidavit #1 of Michael Potyok, made on March 13, 2018.
7. Affidavit #1 of Stefanie Leduc, made on March 13, 2018.
8. Affidavit #1 of Maxime Duvirage, made on March 13, 2018.
9. Affidavit #1 of Michele Hay, made on March 12, 2018.
10. Report of the Receiver, to be filed.
11. Such further and other material as counsel may advise and this Honourable Court may permit.

The application respondent(s) estimate(s) that the application will take 1 day.

- The application respondent has filed in this proceeding a document that contains the application respondent's address for service.
- The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is: N/A

Date: March 23, 2018


Signature of lawyer for Industrial Alliance
Insurance and Financial Services Inc.,
Colin Brousson

THIS APPLICATION RESPONSE was prepared by Colin Brousson, of the firm of Gowling WLG (Canada) LLP, Barristers & Solicitors, whose place of business and address for delivery is 2300 - 550 Burrard Street, Vancouver, B.C. V6C 2B5, Telephone: 604-683-6498; Fax: 604-683-3558.