

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: Deloitte Restructuring Inc. (the “**Receiver**”)

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

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: None.

Part 2: ORDERS OPPOSED

The application respondent(s) oppose(s) the granting of the orders set out in paragraphs 1 and 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 the following paragraphs of Part 1 of the notice of application: None.

Part 4: FACTUAL BASIS

1. By Order dated May 12, 2017 (the “**Receivership Order**”), made on the application of the Plaintiff, Industrial Alliance Insurance and Financial Services Inc. (“**IA**”), the Receiver was appointed as receiver, without security, of all of the assets, undertakings and properties of Wedgemount Power Limited Partnership (“**Wedgemount LP**”), Wedgemount Power (GP) Inc. and Wedgemount Power Inc. (collectively, the “**Wedgemount Entities**”).
2. The Wedgemount Entities are the owner and developer of a partly-constructed independent, run-of-river power project located on Wedgemount Creek, near Whistler, British Columbia (the “**Project**”).
3. Wedgemount LP, by its general partner, Wedgemount Power (GP) Inc., is party to an Electricity Purchase Agreement with BCH dated March 6, 2015 (the “**EPA**”).
4. Pursuant to the EPA, BCH agreed to purchase electricity generated by the Project upon completion of construction and connection to the BCH grid (a process known as ‘interconnection’).
5. The EPA refers to the “Commercial Operation Date” or “COD”, meaning the date on which Wedgemount LP was to have satisfied certain conditions necessary to begin selling electricity to BCH. Pursuant to the EPA, COD could occur any time up to two years after the “Target COD” was set.

6. Section 1.73 of Appendix 1 of the EPA defines Target COD to mean “September 30, 2015, as revised pursuant to either or both of sections 3.9 and 3.11, if applicable”.

Section 3.9 of the EPA states:

“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.”

7. The EPA defines:

- (a) “Estimated Interconnection Facilities Completion Date” to mean “the most recent estimated date for completing the Interconnection Network Upgrades, as set forth in the Final Interconnection Study Report”; and

- (b) “Final Interconnection Study Report” to mean “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.”

8. On May 18, 2017, representatives of the Receiver had the first of several discussions with BCH regarding the Project and the EPA.

9. On May 24, 2017, BCH provided the Receiver with a copy of the Draft Interconnection Facilities Study and Project Plan for the Project, dated August 16, 2016 (the “**Draft Report**”). To the best of the Receiver’s knowledge, no Final Interconnection Study has ever been issued for the Project.

10. The Receiver met with representatives of BCH on June 6, 2017 (the “**June 6 Meeting**”). During the June 6 Meeting, BCH representatives advised the Receiver, among other things, that:

- (a) completion of the Project in the late summer of 2017 may be challenging from BCH’s perspective;

- (b) BCH would require immediate funding from the Receiver in order for BCH to re-engage its interconnection and properties projects teams;
 - (c) the Draft Report was still only in draft form, that the scope and route of interconnection had changed since the Draft Report had been issued, and that the Final Interconnection Study Report would not be issued until the route of interconnection was finalized and the interconnection engineering design work was further developed; and
 - (d) because the Draft Report was still in draft form, no Target COD had been set, and therefore there was no COD deadline of September 30, 2017.
11. The Receiver again met with representatives of BCH on June 15, 2017 (the “**June 15 Meeting**”). During the June 15 Meeting, BCH discussed various issues regarding the Project, including interconnection routing and related permitting.
12. Prior to the June 15 Meeting, the Receiver was aware that BCH had met with representatives of IA on June 14, 2017. After the June 15 Meeting, the Receiver was informed by IA that BCH had made similar representations to IA as BCH had made to the Receiver during the June 6 Meeting regarding the EPA and the lack of a hard deadline by which the Project had to reach COD in order for the EPA to remain in effect.
13. In reliance on the representations made by BCH, the Receiver:
- (a) disbursed \$105,000 to BCH in respect of its costs for work to be done from the date of the Receivership Order;
 - (b) 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; and
 - (c) expended significant time and incurred costs of in excess of \$1,400,000.00 in connection with:

- (i) the retention of various consultants and contractors necessary for the maintenance, permitting, monitoring and furtherance of construction of the Project;
- (ii) the conduct of a sales process in respect of the Project, including establishing a virtual data room and answering extensive due diligence requests from interested parties;
- (iii) negotiations with various third parties regarding the Project, including the Lil' Wat and Squamish Nations (together, the "**Nations**") in respect of the revised Impacts and Benefits Agreement; and
- (iv) application for and obtaining necessary permits and approvals from various governmental agencies.

BCH was aware of many of the Receiver's activities.

14. As a result of the sales process with respect to the Project, the Receiver had received a number of offers for the purchase of the Project which were conditional upon written confirmation that the Draft Report remained in draft and that the Estimated Interconnection Facilities Completion Date remained subject to change pursuant to section 3.9 of the EPA.
15. Therefore, as September 30, 2017 (i.e. the second anniversary of the Target COD) approached, and out of an abundance of caution, on September 11, 2017, the Receiver requested by email confirmation from BCH that, based on BCH's previous representations to the Receiver, the termination provision in paragraph 8.1(a) of the EPA is not applicable because the Draft Report remained in draft form and the Estimated Interconnection Facilities Completion Date remained subject to change pursuant to section 3.9 of the EPA. The Receiver also advised BCH that the Receiver was continuing to advance planning and design for the interconnection.
16. On September 19, 2017, BCH advised the Receiver that it required further information and was not able to provide the confirmation sought by the Receiver at that time, but that

receipt of the necessary information was imminent. This was the first indication the Receiver had that BCH may attempt to resile from the representations it had made to the Receiver regarding the EPA and the Target COD.

17. On September 25, 2017, the Receiver met with BCH, which informed the Receiver that BCH was in the process of reviewing its rights under the EPA and required more time to complete that analysis. The Receiver also provided BCH with updates regarding the status of the Project, the interconnection design and permitting, and the sales process.
18. On September 29, 2017, BCH wrote to the Receiver stating that BCH:
 - (a) was only “aware of the receivership generally”;
 - (b) had not made any assurances to the Receiver;
 - (c) had concerns about the sales process with respect to the Project; and
 - (d) had an impending termination right with respect to the EPA.
19. The Receiver continued to meet and correspond with BCH throughout October, November and December 2017, during the course of which, among other things:
 - (a) the Receiver responded to requests from BCH for information regarding the sales process, and provided status updates regarding the interconnection design and negotiations between the Receiver and the Nations;
 - (b) BCH indicated that it did not need the energy that would be produced by the Project once it was completed, but that BCH was prepared to consider its position in relation to the EPA and that changes may be required to the EPA to resolve BCH’s termination rights;
 - (c) at BCH’s request, the Receiver, BCH and IA negotiated (and the Receiver and IA executed) a non-disclosure agreement to allow discussions regarding the EPA to continue;

- (d) at a meeting on November 20, 2017, BCH informed the Receiver that it expected to be able to provide a proposal (including a mark up of the existing document) in relation to an amended EPA within approximately two weeks; and
 - (e) (until on or about December 11, 2017) BCH continued to work with the Receiver to advance the interconnection design and permitting and to provide input on information being uploaded to the data room for the benefit of interested parties.
20. On January 19, 2018, BCH filed and served the Application. Until that time, on the basis of the representations and conduct of BCH, the Receiver had understood that BCH would not terminate the EPA on the basis that the Project was not operational by the Target COD.

Part 5: LEGAL BASIS

1. BCH seeks the leave of the Court to lift the stay of proceedings imposed by paragraph 9 of the Receivership Order for the purpose of exercising certain alleged termination rights in respect of the EPA.
2. In *Romspen Investment Corporation v. Courtice Auto Wreckers*, 2016 ONSC 1808 (“*Romspen*”), Mr. Justice Wilton-Siegel (at para 18) referred with authority to the decision in *Ma v. Toronto-Dominion Bank*, [2001] O.J. No. 1189 (C.A.) (“*Ma*”) at paras 2 and 3, noting that on applications to lift the stay imposed by a receivership order, the court will be guided by the principles applied on an application pursuant to 69.4 of the *Bankruptcy and Insolvency Act* to lift a stay. The Ontario Court of Appeal in *Ma* stated:

“... lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that ‘there are sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*’ to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are ‘sound reasons’ for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.”

3. Referring to the above cited passage, Mr. Justice Wilton-Siegel (at para 19 of the *Romspen* decision) noted:

“It is therefore understood that, in its consideration of whether sound reasons exist that are consistent with the purpose of the receivership to justify lifting the stay, the Court should look at the totality of the circumstances. This necessarily requires a consideration of the interest of the party looking to lift the stay relative to the interests of the remaining creditors.”

4. “The purpose of a general receivership is to enhance and facilitate the preservation and realization of the [debtor’s] assets for the benefit of all of the creditors, including secured creditors”: *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliff Parks Ltd.* [1995] O.J. No. 1482 (Gen. Div.). The stay provisions of the Receivership Order help to facilitate that purpose.
5. As acknowledged by BCH in the Application, the EPA is fundamental to the value of the Project, and the termination of the EPA would have an adverse effect on the Wedgemount Entities, their creditors, and various other stakeholders, including the Nations.
6. Given the significance of the EPA to the Project, the Receiver took steps to determine BCH’s position with respect to the EPA at the outset of the receivership. BCH made clear representations to the Receiver, most notably at the June 6 Meeting, to the effect that there was no COD deadline of September 30, 2017. The ongoing conduct of BCH, to and including December 2017, was consistent with those representations.
7. The Receiver has expended significant time and expense in reliance on BCH’s representations and conduct. Given that BCH’s representations were consistent with the express language of the EPA, the Receiver submits that it acted reasonably in relying on those representations.
8. The position taken by BCH in the Application directly contradicts its previous representations, including with respect to the correct interpretation of the provisions of the EPA. In the circumstances, the Receiver submits that BCH would not be permitted to

terminate the EPA on the basis of section 8.1(a) of the EPA. Therefore it would be futile to lift the stay to permit termination of the EPA on that ground.

9. Further, it would entirely defeat the purpose of the stay provisions of the Receivership Order (and the broader purpose of the receivership generally) if BCH were permitted to terminate the EPA on the basis of the insolvency of the Wedgemount Entities (pursuant to section 8.1(f) of the EPA).
10. As stated in *Romspen*, in deciding whether sound reasons exist to justify lifting the stay, the Court should look at the totality of the circumstances and consider the interest of not just BCH, but also the relative interest of the remaining creditors. The creditors and various other stakeholders of the Wedgemount Entities and the Project would suffer significant detriment if the relief sought by BCH were granted. By contrast, BCH would merely be required to honour a commercial agreement which it entered into freely. The Receiver submits that the fact that the electricity that the Project would supply to BCH's grid may now be surplus to BCH's requirements is not a matter of sufficient gravity to justify the corresponding prejudice to numerous other stakeholders that would arise if the relief sought by BCH were granted.

Part 6: MATERIAL TO BE RELIED ON

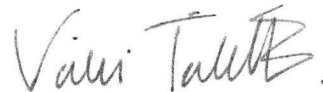
1. 1st Affidavit of Melinda McKie sworn March 12, 2018;
2. 1st Affidavit of Paul Chambers sworn March 13, 2018;
3. 1st Affidavit of Michael Potyok sworn March 13, 2018;
4. 1st Affidavit of Stephanie Leduc sworn March 13, 2018;
5. 2nd Affidavit of Luc Fournier sworn March 13, 2018;
6. 1st Affidavit of Maxime Durivage sworn March 13, 2018;
7. First Report of the Court Appointed Receiver and Manager dated April 2, 2018;

8. Confidential Supplement to the First Report of the Court Appointed Receiver and Manager dated April 2, 2018 (to be filed under seal); and
9. Such further and other material as counsel may advise and this Honourable Court may permit.

The Receiver estimates that the application will take one day.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: April 2, 2018



Signature of Vicki Tickle
Lawyer for application respondent, Deloitte
Restructuring Inc.

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APPLICATION RESPONSE

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