



No. S-174308  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

**BETWEEN:**

**INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC.**

**PLAINTIFF**

**AND:**

**WEDGEMOUNT POWER LIMITED PARTNERSHIP, WEDGEMOUNT POWER (GP) INC., WEDGEMOUNT POWER INC., THE EHRHARDT 2011 FAMILY TRUST, POINTS WEST HYDRO POWER LIMITED PARTNERSHIP by its general partner POINTS WEST HYDRO (GP) INC., CALAVIA HOLDINGS LTD., SWAHEALY HOLDING LIMITED, BRENT ALLAN HARDY, DAVID JOHN EHRHARDT, 28165 YUKON INC., PARADISE INVESTMENT TRUST and SUNNY PARADISE INC.**

**DEFENDANTS**

### **APPLICATION RESPONSE**

**Application response of:** British Columbia Hydro and Power Authority (“BCH” or the “Application Respondent”)

THIS IS A RESPONSE TO the notice of application Deloitte Restructuring Inc. (the “Receiver”) filed April 3, 2018 (the “Receiver’s Application”).

#### **Part 1: ORDERS CONSENTED TO**

The Application Respondent consents 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 opposes the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: all.

#### **Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Application Respondent takes 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**

### **Procedural History**

1. Industrial Alliance Insurance and Financial Services Inc. (“**IA**”) commenced these proceedings in May of 2017 to enforce debts owed to it by Wedgemount Power Limited Partnership (“**Wedgemount LP**”) pursuant to a credit agreement and to enforce security granted to it by Wedgemount LP and Wedgemount Power (GP) Inc. (“**Wedgemount GP**”). In the Notice of Civil Claim filed in these proceedings, IA states that Wedgemount LP owes IA approximately \$21 million, with interest accruing at a rate of 25% per annum.

2. In addition to seeking judgment on the credit agreement and guarantees, IA sought the appointment of the Receiver as receiver and manager of Wedgemount LP, Wedgemount GP and Wedgemount Power Inc. (collectively, the “**Wedgemount Entities**”).

3. On May 12, 2017, this Honourable Court made an order (the “**Receivership Order**”) appointing the Receiver as receiver and manager of the Wedgemount Entities. Pursuant to Paragraphs 8 and 9 of the Receivership Order, among other things:

- (a) all rights and remedies against the Wedgemount Entities or affecting their property are stayed and suspended, except with the Receiver’s consent or leave of the Court; and
- (b) no person shall terminate any right, contract or agreement held by the Wedgemount Entities without the Receiver’s consent or leave of the Court.

### **The EPA**

4. BCH is a party to an electricity purchase agreement dated March 6, 2015 with Wedgemount LP, by its general partner Wedgemount GP (the “**EPA**”).

5. The EPA provides for a “Target COD” dated of September 30, 2015. The Target COD was the date by which the project was anticipated to reach commercial operations and was selected by Wedgemount.

6. Section 8.1(a) of the EPA provides that BCH may terminate the EPA “if COD does not occur by the second anniversary of Target COD [the “**COD Deadline**”] for any reason

whatsoever (including Force Majeure), provided [BCH] may terminate the EPA under this provision only if [BCH] delivers a termination notice prior to COD.”

7. Section 3.9 provides a mechanism to extend Target COD. Section 3.9 provides:

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.

8. The EPA defines “Estimated Interconnection Facilities Completion Date” as:

The most recent estimated date for completing the Interconnection Network Upgrades, as set forth in the Final Interconnection Study Report.

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

10. The project still has not reached commercial operation. The parties agree that no Final Interconnection Study Report has been issued, and that the study remains in draft form.

11. There is no provision in the EPA that permits Wedgemount to cure a termination right triggered by either section 8.1(a) or 8.1(f). On the contrary, the cure rights provided in the EPA specifically exclude any of BCH’s termination rights arising from either the COD Deadline being missed or Wedgemount being Bankrupt or Insolvent.

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

### **The LCA**

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

14. Pursuant to the LCA, BCH agreed that it would not terminate the EPA solely as a result of Wedgemount's insolvency (if the lenders were promptly and diligently enforcing their security) and that, where the EPA required that BCH deliver a notice of termination that would entitle it to terminate, those termination rights would be effective 45 days after BCH issued its notice of termination (or immediately for other termination events).

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

#### **Receiver's Application for declaration that BCH has no right to terminate the EPA**

16. The Receiver's Application seeks:

- (a) an order abridging the time for service such that the Receiver's Application is returnable on April 6, 2018; and
- (b) a declaration that BCH may not terminate the EPA on the basis of "any existing ground or fact".

17. In effect, the Receiver's Application seeks a permanent injunction against BCH in respect of its contractual rights under the EPA, without identifying the specific rights to be affected or the basis for the Court doing so.

18. BCH submits that it would be inappropriate for this Honourable Court to exercise its jurisdiction to make the declaration sought by the Receiver.

#### **Technical Requirements to meet COD**

19. In order for a project to reach commercial operations, it requires, among other things, an interconnection study which sets out the schedule and cost for connecting the project to the BCH system. An interconnection facility study is issued in draft to the IPP, and becomes final when it is accepted by the IPP.

20. In August 2016, BCH delivered the draft interconnection facilities study (the "**Draft IC Study**") to Wedgemount.

21. Shortly after receiving the Draft IC Study, Wedgemount advised BCH that it was in financial difficulty, and wanted to explore alternate route options to make the project less

expensive. Between September 2016 and May 2017, there were various discussions among BCH, Wedgemount and IA regarding alternate routes. These discussions and the changes to the route and connection point rendered the Draft IC Study obsolete.

### **The Discussions**

22. The Receiver asserts that shortly after its appointment BCH verbally advised the Receiver and/or IA that because the Draft IC Study was in draft, and not finalized, there was “no hard deadline” by which the project had to reach operations in order for the EPA to remain in effect, or that the deadline would be set by a final interconnection facility study. The Receiver further advises that this advice was consistent with the Receiver’s understanding of the terms of the EPA.

23. There is no correspondence confirming these alleged representations or statements.

24. The BCH representatives present at the meetings with the Receiver and IA deny having made the statements attributed to them, and their recollections are consistent with the meeting minutes and their contemporaneous handwritten notes of the meetings. The BCH representatives further say that they would not have made the statements attributed to them because they are incorrect, and that it appears there was a misunderstanding.

25. Further, the discussions shortly after the Receiver’s appointment took place in the context of the Receiver’s advice to BCH that it intended the project to be operational by October 2017. In order to achieve that operation date, the route would need to be determined, and the interconnection facility study finalized, shortly after the meetings in May and June 2017.

### **Part 5: LEGAL BASIS**

26. The Receiver’s application is based an interpretation of the EPA that is contested. The terms of the EPA are clear and unambiguous – Target COD may be extended, but only by a “Final Interconnection Study Report”. There is no such report for this project. As noted above the Draft IC Study was not finalized because Wedgemount and IA sought modifications to the route.

27. BCH submits that the interpretation proposed by the Receiver is not consistent with the language in the EPA.

28. In the alternative, the Receiver may assert that BCH waived, or is estopped from exercising, its termination rights under the EPA section 8.1(a) as a result of representations made to the Receiver or IA. This is inconsistent with the position that the interpretation of the EPA, on its terms, prevents BCH from terminating.

29. Finally, the alleged representations are contested. BCH denies having made the alleged representations. Further, each time that Wedgemount or the Receiver asked BCH in writing to confirm that it would not terminate the EPA, BCH advised that it could not give that assurance, and reserved its rights under the EPA.

**Part 6: MATERIAL TO BE RELIED ON**

30. The Affidavit #1 of Bruce Chow made January 19, 2018;

31. The Affidavit #1 of Joanne McKenna made March 28, 2018;

32. The Affidavit #1 of Frank Lin made March 29, 2018;

33. The Affidavit #1 of Olha Lui made March 29, 2018;

34. The Affidavit #2 of Melinda McKie made April 2, 2018;

35. The Affidavit #1 of May Chong made April 3, 2018;

36. The Affidavit #1 of Ryan Hefflick made April 20, 2018;

37. The Affidavit #1 of Vic Rempel made April 20, 2018;

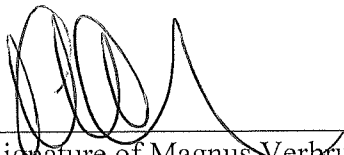
38. The pleadings and orders in these proceedings, including the Notice of Civil Claim and the Receivership Order; and

39. Such further and other material as counsel for the Application Respondent may advise and this Honourable Court may permit.

The Application Respondent estimates that the application will take 1 ½ days.

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

Date: April 27, 2018



Signature of Magnus Verbrugge/Lisa Hiebert

application respondent

lawyer for Application Respondent

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PLAINTIFF

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WEDGEMOUNT POWER LIMITED PARTNERSHIP,  
WEDGEMOUNT POWER (GP) INC., WEDGEMOUNT POWER  
INC., AND OTHERS

DEFENDANTS

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APPLICATION RESPONSE

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