



No. S174308  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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 April 3, 2018 (the “Second BCH 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 paragraph 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: Paragraph 1.

**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 Receivership Order, among other things:
  - (a) expressly empowers and authorizes the Receiver to:
    - (i) “initiate, prosecute and continue the prosecution of any proceedings ... with respect to the Wedgemount Entities, the Property or the Receiver...” (paragraph 2(a));
    - (ii) “market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate” (paragraph 2(k));
    - (iii) “report to, meet with and discuss with such affected Persons ... as the Receiver deems appropriate on all matters relating to the Property and the receivership and to share information, subject to such terms as to confidentiality as the Receiver deems advisable (paragraph 2(n)); and

- (iv) “take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations” (paragraph 2(s)); and
  - (b) provides that “[t]he Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder”.
- 3. 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**”).
- 4. 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**”).
- 5. 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’).
- 6. BCH made various representations to the Receiver (and others) regarding the EPA, in reliance upon which the Receiver expended significant time and money in connection with the Project and the conduct of a sale process in respect of the Project (the “**Sale Process**”).
- 7. In the course of the Sale Process, the Receiver has received two binding offers, and four non-binding offers, for the purchase of the Project. Several of those offers are subject to conditions regarding the continuation of the EPA.
- 8. On January 19, 2018, BCH filed and served its Notice of Application (the “**First BCH Application**”) seeking leave under Paragraphs 8 and 9 (the “**Stay Provisions**”) of the Receivership Order, in order to allow it to exercise its purported termination rights. Both the Receiver and IA oppose the relief sought in the First BCH Application.
- 9. It is BCH’s position that any dispute relating to the EPA must be dealt with via arbitration.

10. Due to the impending snow melt in Whistler and other urgent matters that must be dealt with in the next few weeks, the Receiver filed its Notice of Application on April 3, 2018 (the “**Receiver’s Application**”) seeking a declaration that BCH may not terminate the EPA on the basis of any existing ground or fact.
11. BCH seeks to stay the Receiver’s Application.

## **Part 5: LEGAL BASIS**

1. BCH relies on section 15 of the *Arbitration Act*, R.S.B.C. c. 55 (the “**Act**”), which provides that:
  - (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivering any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.
  - (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
2. The Alberta Court of Appeal (“**ABCA**”) considered the operation of section 15 of the Act in the context of proceedings under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) in *Smoky River Coal Ltd, Re*, 1999 ABCA 179 (“*Smoky River*”). In dismissing an appeal from the decision of the chambers judge to refuse a stay pursuant to section 15 of the Act, the ABCA noted that:
  - (a) arbitration is not necessarily an expeditious process, and thus the efficacy of the CCAA proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-CCAA arbitration (at paragraph 33); and
  - (b) it is important to consider the nature of and extent to which a party’s contractual rights may be compromised if no stay were granted and the arbitration clause not enforced (at paragraph 71). At paragraph 72 of the *Smoky River* decision, Hunt, J.A. on behalf of the ABCA stated:

“I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely effects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the CCAA proceedings”

3. The Receiver submits that these considerations apply equally in a receivership pursuant to the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3, as amended (the “BIA”). The Supreme Court of Canada has recognized the desirability of harmonizing the schemes under the CCAA and the BIA to the extent possible (*Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60).
4. While a receivership may not be a restructuring proceeding (like CCAA proceedings or proposal proceedings pursuant to the BIA), certain of the same considerations apply. This is evidenced by the Stay Provisions in the Receivership Order, which reflects the court’s ability to compromise the contractual rights of parties in order to allow the court to maintain control of its proceeding, preserve its role as “a supervisor over the preservation and realization of the debtor’s assets”, and “protect the receiver’s powers in order to bring about an orderly administration of the receivership” (*Bennett on Receiverships*, Third Edition, pages 284 and 292).
5. Similarly, the BIA itself contains several provisions which interfere with the contractual rights of third parties in furtherance of the purpose of the BIA, including subsection 65.1(5) which provides that any contractual provision that has the effect of providing for or permitting anything that, in substance, is contrary to subsections 65.1(1) to (3) is of no force or effect.
6. The broad jurisdiction of the court in respect of BIA receivership was recognized in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, 1994 CarswellOnt 294. That case involved an interim receiver that, the court noted, was acting in many practical aspects as a quasi receiver and manager of the defendant’s mine in Faro, Yukon. Mr. Justice Farley (at paragraph 22) stated that “[w]hile the BIA is generally a very fleshed out piece of legislation when one compares it to the CCAA”, provisions like section 243 of the BIA (which authorizes the court to appoint a receiver “if it considers it just and convenient to do so” to “take any ... action that the court

considers advisable”) are not detailed codes and “do not take away any inherent jurisdiction from the court”.

7. The Receiver submits that it is within the Court’s jurisdiction to decline to grant the stay pursuant to the Act sought in the Second BCH Application, and that the Court should do so in this case. It is imperative that the status of the EPA be resolved as promptly as possible, given the various time-sensitive matters that are outstanding. An arbitration is of unknown duration and not subject to the supervision of this court. As such the court would not be in a position to protect its officer in the exercise of its powers.
8. To grant the stay would constrain the Receiver’s powers conferred by the Receivership Order and the BIA, prejudice the interests of third parties and effectively give a contract counterparty the ability to disrupt and frustrate the receivership proceedings.
9. By contrast, if the stay were refused, BCH would not lose the ability to assert its right to terminate the EPA; it would simply change the forum for the determination of that issue from arbitration to these receivership proceedings.
10. To the extent that there is conflict between the provisions of the Act and the BIA, the provisions of the BIA must prevail (*Smoky River*, at paragraph 75; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51).

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

1. 1<sup>st</sup> Affidavit of Melinda McKie sworn March 12, 2018;
2. 1<sup>st</sup> Affidavit of Paul Chambers sworn March 13, 2018;
3. 1<sup>st</sup> Affidavit of Michael Potyok sworn March 13, 2018;
4. 1<sup>st</sup> Affidavit of Stephanie Leduc sworn March 13, 2018;
5. 2<sup>nd</sup> Affidavit of Luc Fournier sworn March 13, 2018;
6. 1<sup>st</sup> 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);
9. 2<sup>nd</sup> Affidavit of Melinda McKie sworn April 2, 2018; and
10. Such further and other material as counsel may advise and this Honourable Court may permit.

The Receiver estimates that the application will take one hour.

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

Date: April 5, 2018



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