VANCOUVER
JUN 22 2018
COURT OF APPEAL
REGISTRY

Court of Appeal File No.	CA45325
Supreme Court File No.	S-174308
Supreme Court Registry	Vancouver

COURT OF APPEAL

BETWEEN:

INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC.

Respondent
(Plaintiff)

AND:

WEDGEMOUNT POWER LIMITED PARTNERSHIP, WEDGEMOUNT POWER (GP) INC. and WEDGEMOUNT POWER INC.

Respondents
(Defendants)

AND:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Appellant
(Application Respondent)

WRITTEN SUBMISSIONS OF THE APPELLANT BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Robert Deane and
Lisa Hiebert

Borden Ladner Gervais LLP
1200 – 200 Burrard St
Vancouver BC V7X 1T2
604.640.4198/604.632.3425

Counsel for British Columbia Hydro and Power Authority

Colin Brousson and Jeffrey Bradshaw

Gowling WLG Canada
2300 – 550 Burrard St
Vancouver BC V6C 2B5
604.891.2286

Counsel for Industrial Alliance Insurance and Financial Services Inc.

Vicki Tickle

McMillan LLP
1500 – 1055 W Georgia St
Vancouver BC V6E 4N7
236.826.3022

Counsel for the Receiver, Deloitte Restructuring Inc.

1. These proceedings concern the appeal by British Columbia Hydro and Power Authority ("**BC Hydro**") with respect to an application by Deloitte Restructuring Inc., in its capacity as the Court-appointed Receiver of the Wedgemount entities ("**Deloitte**") seeking declarations with respect to contractual rights, and an application by BC Hydro pursuant to the *Arbitration Act*, R.S.B.C. c.55 on the basis that Deloitte's application fell within the scope of an arbitration agreement, which the Court below was bound to enforce under section 15 of the *Arbitration Act*.

2. Although the underlying proceedings concern, in part, a receivership, they were commenced by Notice of Civil Claim and Deloitte was appointed pursuant to the *Law and Equity Act*. R.S.B.C. c.253, as well as the *Bankruptcy and Insolvency Act,* R.S.C. 1985 c.B-3. The chambers judge is not seized of the underlying proceedings, and there was no statement – by the chambers judge or any of the parties - that the underlying applications were made pursuant to the BIA or that the Court was sitting in bankruptcy on the applications. Accordingly, the *Court of Appeal Rules* apply, the appeals were timely brought, and Deloitte's application to quash the appeals ought to be dismissed.

3. In the alternative, this Court should exercise its discretion under section 10(2) of the *Court of Appeal Act* to allow the Notices of Appeal to stand as Applications for Leave and, if necessary, extend the time for BC Hydro to file such applications. The proposed appeals have merit, and BC Hydro submits that it would be inequitable for its rights of appeal to be frustrated.

4. Capitalized terms used in this written argument and not otherwise defined have the meaning set out in the written argument of IA filed June 18, 2018.

A. The Court below was not sitting "in bankruptcy"

5. IA asserts that the Decisions were made "in the context of an ongoing and active BIA receivership", and BC Hydro's right to appeal is limited by the BIA. However, the authorities IA relies upon are cases in which the court was plainly sitting in

bankruptcy and, indeed, in some cases, was administering an estate. Such is not the case here.

Orthoschaf Inc., Re (1985), 57 C.B.R. (N.S.) 281
2003945 Alberta Ltd. v. 1951584 Ontario Inc., 2018 ABCA 48

6. IA chose to commence the underlying proceedings by Notice of Civil Claim, and to have Deloitte appointed as receiver under both the BIA and the *Law and Equity Act*. Consistent with this approach, the style of cause in the proceedings below does not reference the Court sitting "in bankruptcy" or "in receivership", as would be required under BIA and the Bankruptcy Rules. The consequence is that in the underlying proceedings, the Court was not sitting in bankruptcy. The usual appeal rules apply.

Bankruptcy and Insolvency General Rules ("**Bankruptcy Rules**") Rule 9

7. This is also consistent with the nature of the proceedings below. The underlying applications sought determinations of contractual rights, not the administration of an estate. Although Deloitte referenced the BIA in its application and the judgments below reference the BIA that cannot and does not convert the underlying proceedings into bankruptcy proceedings. Nor does the mere fact that a receiver is involved or the parties cite the BIA as authority trigger the limited appeal rights of the BIA and the Bankruptcy Rules. Not every proceeding in which a receiver is involved is a proceeding in which the Court below is sitting in bankruptcy.

B. The time can and should be extended

8. In the alternative, this is an appropriate case for this Court to exercise its discretion to deem the Notices of Appeal to be Applications for Leave and to extend the time for filing such Applications.

I.J. v. J.A.M., 2013 BCSC 430

9. The primary factors to be considered on this application are whether there is a reasonable explanation for the delay, whether there is prejudice to the Respondents and whether the proposed appeals have merit.

2003945 Alberta Ltd. v. 1951584 Ontario Inc. 2018 ABCA 48 at para 36

10. First, BC Hydro advised Deloitte on May 23, 2018 – within 5 days of the final substantive judgment below on May 18 – that it may appeal.

11. Second, IA's evidence outlines various steps that have been taken, but does not identify any resulting prejudice from BC Hydro being allowed to pursue its appeal. In particular, the evidence does not establish that the work would not have been undertaken if BC Hydro had sought leave within the 10 day period, or that the work was not required in any event. Such evidence is insufficient to find the Respondents will suffer prejudice. The proposed appeals are irrelevant to the steps taken by Deloitte and/or IA, as evidenced by the fact they began within the 10 day period following the May 18 Decision, without any certainty that BC Hydro would not appeal (and in the face of its advice that it may appeal).

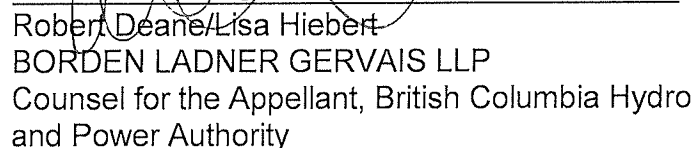
12. Finally, BC Hydro's proposed appeals have merit. The judgments below are based on errors of law. In particular, the May 4 judgment relies upon Deloitte's right to disclaim contracts, although the arbitration agreement is contained within an agreement that was not disclaimed, and from which Deloitte and IA seek to benefit. The May 4 Decision cites no authority permitting a receiver to disclaim part of a contract, much less an arbitration agreement which the Legislature has directed be enforced under s. 15 of the Arbitration Act. Further, the May 18 Decision – which never should have been made in the face of the arbitration agreement disregarded in the May 4 Decision, and ought to be set aside on that basis alone – is based on a misapprehension of the record. Accordingly, it would be inequitable to deny BC Hydro its right to pursue the appeals.

C. NATURE OF ORDERS SOUGHT

13. BC Hydro seeks an Order that IA's application to quash the appeals be and is dismissed. In the alternative, BC Hydro seeks an Order that its Notices of Appeal stand as Notices of Application for Leave to Appeal and that the time for filing such applications be and is extended.

All of which is respectfully submitted.

DATED: June 21, 2018



Robert Deane/Lisa Hiebert
BORDEN LADNER GERVAIS LLP
Counsel for the Appellant, British Columbia Hydro and Power Authority