

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1392752 B.C. LTD.

PETITIONER

AND:

SKEENA SAWMILLS LTD.
SKEENA BIOENERGY LTD.
ROC HOLDINGS LTD.

RESPONDENTS

NOTICE OF APPLICATION

Filed by: The Trustees of the IWA – Forest Industry Pension Plan and the Trustees of the IWA – Forest Industry LTD Plan

To: On notice to the Service List, a copy of which is attached hereto as Schedule “A”

TAKE NOTICE that an application will be made by the Applicant to the Honourable Madam Justice Blake at the Courthouse at 800 Smithe St., in the city of Vancouver, in the Province of British Columbia on October 30, 2023 at 10:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. The contributions owed to the Trustees of the IWA – Forest Industry Pension Plan and the Trustees of the IWA – Forest Industry LTD Plan totaling \$101,966.30 are paid out to Applicants from Skeena Sawmills Ltd. pre-receivership bank account;
2. The contributions owed to the Trustees of the IWA – Forest Industry Pension Plan and the Trustees of the IWA – Forest Industry LTD Plan totaling \$101,966.30 are preserved in a trust from the pre-receivership account of Skeena Sawmills Ltd. until the trust claim of Trustees of the IWA – Forest Industry Pension Plan and the Trustees of the IWA – Forest Industry LTD Plan can be determined by the Court.

Part 2: FACTUAL BASIS

Total Contributions Owed

3. The Trustees of the IWA – Forest Industry Pension and LTD Plans (the “Plans”) are owed contributions totaling \$101,966.30.

4. Skeena Sawmills Ltd. last reported contribution hours to the Plans on August 26, 2023. The contributions owed at that time totaled \$71,092.86. Skeena Sawmills Ltd. also owes the Plans contributions for all hours worked by members of the Plans from August 27, 2023 to their termination on or around September 21, 2023. These hours have not been reported to the Plans.

Affidavit #2 of Gary Luddu at Exhibit A

5. Contributions from September 1 to September 20 total \$30,873.44 according to the Affidavit #1 of Gui Hua Hu.

Affidavit #1 of Gui Hua Hu at Exhibit D

Contributions are Trust Funds

6. Skeena Sawmills Ltd., by its authorized signatory Xiaopeng Cui, agreed in the Pension and LTD Plan Participation Agreements to be bound by the terms of the Trust Agreements. Skeena Sawmills Ltd. is also bound by the collective agreement with the United Steelworkers Local 1-1937 to participate in the Plans. It is a “Participating Employer” under the Plans.

Affidavit #1 of Gary Luddu at Exhibit B, C, D

7. The Pension and LTD Trust Agreements establish Skeena Sawmills Ltd. trust obligations with respect to contributions to the Pension and LTD Plans.

Affidavit #1 of Gary Luddu at Exhibit E and G

8. Section 17(b) of the Pension Trust Agreement reads:

All contributions deducted from payroll for Eligible Employees and all contributions due from a Participating Employer are deemed to be held in trust for the Trustees by the Participating Employer.

Affidavit #1 of Gary Luddu at Exhibit E

9. Section 6.5(c) of the LTD Trust Agreement reads:

All Contributions deducted from payroll and all Contributions due are deemed to be held in trust by the Participating Employer.

Affidavit #1 of Gary Luddu at Exhibit G

10. The \$101,966.30 owed to the Plans are trust funds. The trust funds are not part of Skeena Sawmills Ltd.'s estate and should not be available for distribution in the receivership.

Funds held in an Account by Skeena Sawmills Ltd.

11. Counsel for the receiver has provided the following details about the accounts in the Form 87. Skeena Sawmills Ltd. has a pre-receivership bank account containing approximately \$107,000. These funds are being used to fund the costs of the receivership.

Affidavit #2 of Gary Luddu at Exhibit B

Part 3: LEGAL BASIS

Contributions are Trust Funds

12. The Participation Agreements signed by Mr. Cui along with the Plans' Trust Agreements create trusts over the contributions held by Skeena Sawmills Ltd. in favour of the Plans.
13. The Court has accepted in the following instances that contributions to the Plans are held in trust by participating employers for the Plans:
 - (a) *Trustees of the IWA - Forest Industry Pension Plan v. Leroy*, 2017 BCSC 158 at paras 100 to 101.
 - (b) *Trustees of the IWA v. Wade*, 2019 BCSC 1085 at paras 59-60
14. In addition to the trusts, the contributions to pension plans are protected by a statutory trust pursuant to section 81.6 of the *BIA* and section 58 of the *PBSA*.
15. The Plans rely on the terms of the Pension Trust Agreement, the LTD Trust Agreement, the Pension Plan, the LTD Plan, and the Participation Agreements.
16. The Plans further rely on the Supreme Court Civil Rules, the *Pension Benefits Standards Act*, SBC 2012, c 30, the *Pension Benefits Standards Regulation*, BC Reg 71/2015, and the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

Preserving Trust Funds

17. Where a case is not provided for in the *Bankruptcy and Insolvency Act* or in the *Bankruptcy and Insolvency General Rules*, Rule 3 of the *General Rules* permits the Court to rely on its ordinary procedure.

18. Rule 10-1(1) and (2) of the Supreme Court Civil Rules read:

Property that is the subject matter of a proceeding

(1)The court may make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.

Fund that is the subject matter of a proceeding

(2)If the right of a party to a specific fund is in dispute in a proceeding, the court may order the fund to be paid into court or otherwise secured.

19. In *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420, the BC Court of Appeal restated the requirements of Rule 10-1 as follows:

a) Is there a claim on the evidence and not just the pleadings to a propriety interest in property?

b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?

c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?

d) Does the balance of convenience favour granting the order?

20. The Court has permitted funds over which there is a disputed trust claim, to be preserved by being placed in a trust in the context of a receivership.

Bison Properties Ltd. (Re), 2016 BCSC 793 at para 134-135

Sunny Corner Enterprises Inc. v. St. Anne-Nackawic Pulp Co., 2005 NBQB 29

Is there a claim on the evidence and not just the pleadings to a propriety interest in property?

21. As outlined above, there is evidence to support a finding that the contributions are held in trust by Skeena Sawmills Ltd. for the Plans.

Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?

22. Counsel for the Receiver has advised that the funds in the pre-receivership account will be used to fund the receivership.

Is there a substantial question to be decided as to the plaintiff's entitlement to the property?

23. The Applicants maintain that the contributions owed to the Plans are held in trust by Skeena Sawmills Ltd. The contributions should not be used in the distribution under the receivership.

24. The Applicants' trust claim will not be heard until after costs are incurred in the receivership.

Does the balance of convenience favour granting the order?

25. If the funds in the pre-receivership account are used to fund the receivership, there will be significant prejudice to the Plans trust claims over contributions.

26. While a statutory trust exists over the Pension contributions, the LTD contributions are only protected by the trust established by the Plan and Trust documents and the participation agreements. The merits of the trust claim will not be addressed before further costs of receivership are incurred putting the funds in the pre-receivership account at risk.

27. If the funds in the pre-receivership account are exhausted, based on the available information from the receiver, there may be no other account or funds to which the Contributions could be traced.

28. Considering the receiver's fees in the context of trust claims, the Supreme Court of Newfoundland and Labrador has commented that it will be rare for a receiver's fees to be paid by trust claimants.

Price Waterhouse Coopers v. Bank of Montreal, [2017] N.J. No. 82 at para 74

Part 4: MATERIAL TO BE RELIED ON

29. Affidavit #1 of G. Luddu affirmed September 19, 2023;

30. Affidavit #2 of G. Luddu affirmed October 24, 2023;

31. Affidavit #1 of Gui Hua (Jenny) Hu sworn September 19, 2023;

32. Other materials filed in this proceeding;

33. Such further and other material as counsel may advise.

The applicant estimates that the application will take 20 minutes

This matter is within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application, or, if this application is brought under Rule 9-7, within 8 business days after service of this application

- a. file an application response in Form 33,
- b. file the original of every affidavit, and of every other document, that
 - i. you intend to refer to at the hearing of this application, and
 - ii. has not already been filed in the proceeding, and
- c. serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - i. a copy of the filed application response;
 - ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: October 25, 2023



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Signature of lawyer for the Trustees of the IWA –
Forest Industry Pension Plan and the Trustees of the
IWA – Forest Industry LTD Plan,
Heather McMahon

Filing parties' address for service:

2100 – 3777 Kingsway
Burnaby, BC, V5H 3Z7

Fax number address for service (if any):

604-433-7897

E-mail address for service (if any):

heather.mcmahon@iwafibp.ca

Filing parties' lawyer, if any: Heather McMahon

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of

Part 1 of this notice of application

with the following variations and additional terms:

Date: _____

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

none of the above

Schedule "A"

No. S236214
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1392752 B.C. LTD.

PETITIONER

AND:

SKEENA SAWMILLS LTD.
SKEENA BIOENERGY LTD. and
ROC HOLDINGS LTD.

RESPONDENTS

SERVICE LIST

(Last Updated: October 5, 2023)

<p>Fasken Martineau DuMoulin LLP</p> <p>Attention: Kibben Jackson Mishaal Gill Suzanne Volkow</p> <p>Email: kjackson@fasken.com mgill@fasken.com svolkow@fasken.com</p> <p><i>Counsel for the Receiver, Alvarez & Marsal Canada Inc.</i></p>	<p>Alvarez & Marsal Canada Inc.</p> <p>Attention: Anthony Tillman Pinky Law Taylor Poirier</p> <p>Email: atillman@alvarezandmarsal.com pinky.law@alvarezandmarsal.co tpoirier@alvarezandmarsal.com</p> <p><i>The Receiver</i></p>
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