NO. S-236214
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

WRITTEN SUBMISSIONS OF HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

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I. OVERVIEW

1. The Receiver's notice of application seeks a reverse vesting order (the "**Skeena RVO**"), which would bless a proposed transaction under which Cui Family Holdings Inc. ("**Cui Holdings**") would retain shares and certain desirable assets of the Skeena Entities (defined below) while (i) vesting unwanted assets and liabilities (including two Bill 13 contracts) into a new corporation which would then be bankrupted, and (ii) granting broad releases that insulate Cui Holdings and the Skeena Entities from liability.

2. The Province opposes the Skeena RVO on two grounds, each of which is an independent basis to dismiss this application.

3. *First,* the court has no jurisdiction in the context of this receivership to approve a reverse vesting order. The Receiver relies only on s. 183 of the *BIA*,[1] a non-descript provision which does not expressly provide the court with jurisdiction to make a reverse vesting order.[2] Commentators have termed the lack of jurisdiction under s. 183 as "an inconvenient elephant in the insolvency room".[3] Properly interpreted, s. 183 does not grant the jurisdiction necessary to approve the Skeena RVO in this receivership.

4. The above point is true in any case, but it bears particularly on this case, where the effect of the Skeena RVO would be to trample on provincial legislation (specifically, the *Forest Act*[4] and the regulatory processes enacted under that statute). Under any other structure, transfer of the forest licences would require (i) approval by the Minister of Forests (a process which involves consideration of the public interest and consultation with potentially affected First Nations) and (ii) that the two associated Bill 13 contracts also be transferred to the purchaser (per *Forest Act,* s. 54(2)(d.1)).

5. The Receiver touts avoidance of "regulatory delay" as a virtue of the Skeena RVO.[5] More appropriate wording may be "avoidance of validly enacted provincial legislation". Any jurisdiction that could arise under s. 183 must be read down to avoid trampling on provincial legislation.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 [***BIA***]
[2] Receiver's Notice of Application, Part 3, para. 7
[3] Aminollah Sabzevari, "A Hill Too Far: Reverse Vesting Orders in BIA Receiverships", February 26, 2024, CanLII Connects (https://canliiconnects.org/en/commentaries/93579) [**Sabzevari Article**], p. 3
[4] *Forest Act,* RSBC 1996, c. 157 [***Forest Act***]
[5] Receiver's Notice of Application, Part 3, para. 9(b)

6. *Second,* even if there were jurisdiction to grant the Skeena RVO, that jurisdiction should not be exercised in this case. "The case authorities are clear that RVOs are only to be granted in extraordinary circumstances following close judicial scrutiny and only after the applicant, purchaser, and court's officer have established that the factors set out in the case authorities are satisfied."[6]

7. This is not the exceptional case which might justify a reverse vesting order. Unlike in the vast majority of cases where a reverse vesting order has been employed, a restructuring attempt (through the BIA's proposal process, or under the CCAA) has not preceded this receivership. That makes it inherently difficult here to assess the necessity of the Skeena RVO. Nor is there even a commitment from Cui Holdings that it will continue to operate the Skeena Entities after the transaction. Further, there are a list of parties who submit they are worse off under the Skeena RVO than they would otherwise be – including First Nations and Bill 13 contractors under the *Forest Act* (who will lose the value and term of their otherwise replaceable contracts).

8. The Receiver's application should be dismissed.

II. BACKGROUND

A. Parties

9. The Skeena Entities consist of Skeena Sawmills Ltd. ("**Sawmills**"), Skeena Bioenergy Ltd. ("**Bioenergy**"), and ROC Holdings Ltd. ("**ROC**").

10. ROC and Bioenergy are wholly owned subsidiaries of Cui Holdings, which is owned by Shenwei Wu and certain family trusts that are ultimately controlled by Xiao Peng Cui. Sawmills is a wholly owned subsidiary of ROC.[7]

11. Ms. Wu and Mr. Cui are also the principals and sole shareholders of the petitioner.[8]

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[6] *PaySlate Inc. (Re)*, 2023 BCSC 608 [***PaySlate #1***], para. 144; subsequent reasons at 2023 BCSC 977 [***PaySlate #2***]

[7] First Report of the Receiver filed October 25, 2023 ("**Report #1**"), paras. 3.1 and 3.4; First Supplemental Report to Fourth Report of the Receiver dated March 6, 2024 ("**Report #5**"), para. 2.1

[8] Affidavit #1 of Shenwei Wu filed March 15, 2024, paras. 1-2

B. Property

12. The property of the Skeena Entities consists of the following:[9]

a) five parcels of property owned by ROC and located in Terrace, BC (the "**Skeena Lands**");

b) a sawmill operation, which includes an industrial sawmill, a certified weight log scale, a natural gas kiln, two bay garage mobile shop, a millwright shop, and various tools and equipment (owned and leased) (the "**Sawmill Operation**"). The Sawmill Operation is located at 5330 Highway 16 West, Terrace, BC;

c) the bioenergy operation, which includes the pellet plant and various tools and equipment (owned and leased) (the "**Bioenergy Operation**"). The Bioenergy Operation is located at 5402 Highway 16 West, Terrace, BC;

d) the main office building in Terrace, BC;

e) various forest tenures and licences, including a replaceable Tree Farm Licence (TFL 41) and two replaceable forest licences (RFLs), A16882, and A16885 (together with TFL 41, the "**Licences**"), and various cutting permits and road permits;

f) inventory on site and located at the port of Prince Rupert; and

g) accounts receivable.

13. Sawmills is a party to two replaceable timber harvesting contracts:[10]

a) a contract with Terrace Timber Ltd. ("**Terrace Timber**") in respect of TFL41 (the "**Terrace Timber Bill 13 Contract**"); and

b) a contract with Timber Baron Contracting Ltd. ("**Timber Baron**") in respect of RFL A16882 (the "**TBC Bill 13 Contract**"),

[9] Report #1, para. 3.5
[10] Report #5, para. 2.2; see also Affidavit #1 of Matthew Thomson filed March 12, 2024, paras. 7-8 and Ex. "A"; and Affidavit #1 of Walker Main filed March 8, 2024, paras. 4-6 and Ex. "A"

(together, the "**Bill 13 Contracts**").

14. The TBC Bill 13 Contract has been in place since 1999.[11] The relationship between Terrace Timber and TFL41 has been in place since 1997.[12]

15. The Sawmill Operation and the Bioenergy Operation ceased operations in July 2023.[13]

C. Receivership Order

16. On September 20, 2023, the court ordered that A&M be appointed as receiver of the Skeena Entities – and specifically, over six real properties listed in Schedule "B" to the Receivership Order (the "**Lands**") as well as all of the assets, undertakings and property of the Skeena Entities and proceeds thereof (the "**Property**") (the "**Receivership Order**").[14]

17. The Receivership Order empowered the Receiver to take certain specific actions in relation to the Property, including the following:[15]

> (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
>
> > (i) without the approval of this Court in respect of a single transaction for consideration up to $100,000 provided that the aggregate consideration for all such transactions does not exceed $500,000 and
> >
> > (ii) with the approval of this Court in respect of any transaction in which the individual or aggregate purchase price exceeds the limits set out in subparagraph (i) above,
>
> and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required;
>
> (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers, free and clear of any liens or encumbrances;

D. Skeena Entities' Obligations

18. As of October 11, 2023, the Skeena Entities had a total of approximately $161.5 million of

[11] Affidavit #1 of Matthew Thomson filed March 12, 2024, para. 9
[12] Affidavit #1 of Walker Main filed March 8, 2024, paras. 4-6
[13] Report #1, paras. 3.7 and 3.8
[14] Order of Madam Justice Blake made September 20, 2023 ("**Receivership Order**")
[15] Order of Madam Justice Blake made September 20, 2023 ("**Receivership Order**"), s. 2

liabilities, including approximately $13.7 million owed to unsecured creditors.[16]

19. Amounts owed by Sawmills to unsecured creditors include various trade claims, amounts due to the union, and termination pay or severance pay due to former employees and union members.[17]

20. Amounts owed by Bioenergy to unsecured creditors include approximately $4.9 million owing to the Province, as represented by the Minister of Environment and Climate Change Strategy ("**CleanBC**"), pursuant to a funding agreement dated March 17, 2022 (the "**Bioenergy Funding Agreement**") between Bioenergy and the Province in respect of a planned geothermal direct heating project to dry Bioenergy pellets.[18]

21. The Receiver collected from the Skeena Entities' bank accounts $1.6 million advanced by the Province to Bioenergy under the Bioenergy Funding Agreement (the "**CleanBC Funds**").[19]

22. On October 3, 2023, the Receiver notified CleanBC that the Receiver had taken possession of the CleanBC Funds and that they were subject to the receivership charges under the Receivership Order and would be used to pay the ongoing costs of these proceedings.[20]

E. Sales Process

23. The Receiver began a sales process on October 31, 2023.[21]

24. Eight non-binding expressions of interest ("**EOIs**") were submitted by six interested parties by the offer deadline on December 8, 2023. An additional EOI was received shortly after the offer deadline and was accepted by the Receiver as a qualified EOI.[22]

25. Upon review of the nine EOIs, the Receiver invited the petitioner and three other parties (together, the "**Qualified Parties**"), to participate in Phase II of the Sales Process.[23]

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[16] Report #1, para. 3.15
[17] Report #1, para. 3.20
[18] Report #1, para. 3.23
[19] Report #1, para. 6.2
[20] Report #1, para. 6.2
[21] Second Report of the Receiver filed December 13, 2023 ("**Report #2**"), para. 6.1
[22] Report #2, para. 6.6
[23] Report #2, paras. 6.7 and 6.10

F. Receiver's Discussions with Ministry of Forests

26. Between early-October and mid-December 2023, representatives of the Receiver and representatives of the Ministry of Forests discussed the Licences, how they potentially could be transferred, and the different requirements and considerations that would be engaged when the Minister assessed an application for transfer. The Receiver did not ultimately submit an application for transfer of the Licences.[24]

G. Relief Sought by Receiver

27. On February 29, 2024, the Receiver filed this notice of application.

28. The Receiver's application seeks court approval of the Skeena RVO, the terms of which are set out in full at Schedule "C" of the Receiver's application. (An amended draft of the order sought was circulated by the Receiver on March 26, 2024). In brief, the Skeena RVO as proposed by the Receiver would:

a) approve an agreement between Cui Holdings and the Receiver (the "**Transaction**"), whereby Cui Holdings would retain its shares in ROC and Bioenergy (defined therein as the "Retained Shares") and vest out the "Excluded Liabilities" (the "**Retention Agreement**");

b) affirm that, on closing of the Transaction, title to the "Retained Assets" would remain with the Skeena Entities, free and clear of all "Encumbrances" except the "Permitted Encumbrances";

c) release the Skeena Entities from the "Excluded Liabilities", and release Cui Holdings, the Receiver, the Skeena Entities and the "Retained Assets" from any and all claims relating to these receivership proceedings or the proposed transaction;

d) vest the Skeena Entities' "Excluded Assets" and "Excluded Liabilities" (which include the Bill 13 Contracts) in a new company to be incorporated ("**ResidualCo**"); and

[24] Affidavit #1 of Jacques Bousquet filed March 7, 2024

e) remove the Skeena Entities as respondents in this action, add ResidualCo as a respondent, and authorize and direct the Receiver to assign ResidualCo into bankruptcy.

29. An unsigned and unexecuted copy of the Retention Agreement is attached as Schedule "B" to the Skeena RVO. (A signed amendment to that agreement dated March 21, 2024 – the "**Amended Retention Agreement**" – is attached as Exhibit "A" to the Affidavit #2 of Anthony Tillman filed March 22, 2024.)

H. Retained Assets and Retained Liabilities

30. "Retained Assets" is defined in the Retention Agreement as follows:[25]

> "**Retained Assets**" means:
>
> (i) the Sawmills Shares; and
>
> (ii) all the Companies' [i.e., the Skeena Entities'] right, title and interest, in and to their assets and properties, including, without limitation:
>
> (A) the Approved Contracts;
>
> (B) the Bioenergy Cash;
>
> (C) the Business Records;
>
> (D) the Intellectual Property;
>
> (E) the Inventory;
>
> (F) the Machinery and Equipment;
>
> (G) the Permits and Licenses;
>
> (H) the Lands and Buildings; and
>
> (I) the Warranties.

31. "Approved Contracts" is defined in the Amended Retention Agreement as:[26]

> "**Approved Contracts**" means the following Contracts:
>
> (i) the CBA;

[25] Retention Agreement, s. 1.1(ddd)
[26] Amended Retention Agreement, s. 2(a)

(ii) the land leases between ROC, as owner of the Lands, and Sawmills and Bioenergy, as tenants;

(iii) all property, excess property, general liability, equipment breakdown, stock throughput insurance policies purchased by or on behalf of any of the Companies or in respect of which a Company is a beneficiary, which by its terms can be retained upon completion of the Transaction; and

(iv) all of the Permits and Licenses which are Contracts, including, but not limited to, any licence of occupation granted by a Governmental Authority to any one or more of the Companies;

32. "Permits and Licenses" is defined exhaustively in the Amended Retention Agreement to include TFL 41, RFL A16882, RFL A16885, and certain other specified road and bridge permits, licenses, and other permits.[27]

33. "Retained Liabilities" is defined in the Amended Retention Agreement as follows:[28]

"Retained Liabilities" means:

(i) any Liabilities of the Companies under the Approved Contracts, the Permits and Licenses and the Permitted Encumbrances;

(ii) the debts owing by the Companies to Cui under the Promissory Notes (as assigned by the Petitioner to Cui), which are recognized as outstanding for the purposes of setting those debts off against the Price pursuant to Section 2.4;

(iii) all other debts (other than the Promissory Notes assigned to Cui) owing by the Companies as of the Closing Date to the Petitioner or to Cui or any of their respective affiliates or other parties with whom the Companies are not at arm's length, including Shenwei Wu and Xiaopeng Cui and any trust of which either or both of such individuals are trustees;

(iv) any Liability of the Companies under Environmental Laws in respect of the Lands; and

(v) Liability for property taxes payable in respect of the Lands for 2024.

I. Excluded Assets and Excluded Liabilities

34. "Excluded Assets" is defined in the Retention Agreement as follows:[29]

"Excluded Assets" means: (i) Contracts which are not Approved Contracts; (ii) the rights of the Companies and the Receiver under this Agreement; (iii) corporate

[27] Amended Retention Agreement, s. 2(d)
[28] Amended Retention Agreement, s. 2(e)
[29] Retention Agreement, s. 1.1(aa)

income taxes receivable and GST refunds; (iv) cash and cash equivalents other than the Bioenergy Cash; and (v) the Canter Line.

35. Excluded Liabilities is defined in the Retention Agreement to include "any and all Liabilities of the [Skeena Entities] that are not Retained Liabilities", and goes on to give a non-exhaustive list of examples that includes (i) any taxes payable in respect of any period prior to the Closing Date, (ii) any claims relating to any event or circumstance occurring prior to the Closing Date, and (iii) "any Liabilities for a breach or non-compliance with any applicable law".[30]

J. Skeena RVO Release Provisions

36. "Claims" was initially defined – broadly, and without temporal limit – in s. 2(b)(ii) of the Skeena RVO as follows:[31]

> the [Skeena Entities] shall be released from any and all debts, claim, liability, duty, responsibility, obligations, commitment, assessment, cost, expense, loss, expenditure, charge, fee, penalty, fine, contribution or premium of any kind or nature whatsoever, whether known or unknown, asserted or unasserted, absolute or contingent, direct or indirect, or due or to become due and regardless of when sustained, incurred or asserted or when the relevant events occurred or circumstances existed (all of which are collectively referred to as the "**Claims**"), whether secured, unsecured or otherwise, including without limitation any and all claims arising out of or relating to: (1) the Excluded Liabilities; (2) the insolvency of any of the Companies prior to the Closing Date; and (3) the commencement or existence of these proceedings, but excluding the Retained Liabilities (as defined in the Retention Agreement);

37. Sections 13 and 14 of the Skeena RVO initially contained the following broad release provisions:

> 13. Upon delivery of the Receiver's Certificate, all persons shall be absolutely and forever barred, estopped, foreclosed and permanently enjoined from pursuing, asserting, exercising, enforcing, issuing or continuing any steps or proceedings, or relying on any rights, remedies, claims or benefits in respect of or against the Receiver, its directors, officers, employees, counsel, advisors and representatives, Cui Holdings, the Companies or the Retained Assets, in any way relating to, arising from or in respect of:
>
> (a) any and all Claims and Encumbrances and the Excluded Liabilities against or relating to the Retained Assets;
>
> (b) the insolvency of the Companies;

[30] Retention Agreement, s. 1.1(bb)
[31] Skeena RVO, s. 2(b)(ii)

(c) the commencement or existence of these receivership proceedings; or

(d) the completion of the Transaction.

14. From and after the delivery of the Receiver's Certificate, the Receiver, its directors, officers, employees, counsel, advisors and representatives shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any taxes (including penalties and interest thereon), as well as penalties for failure to file returns pursuant to section 162 of the *Income Tax Act* (Canada) (the "**ITA**"), or that relate to the Companies, including without limiting the generality of the foregoing all taxes, penalties and interest that could be assessed against the Companies or Cui Holdings (including its affiliates and any predecessor corporations) pursuant to section 160 of the ITA, as amended, or any provincial equivalent, in connection with the Companies (provided, as it relates to the Companies, such release shall not apply to (a) transaction taxes, or (b) taxes in respect of the business and operations and conducted by the Companies after completion of the Transaction). For greater certainty, nothing in this paragraph shall release or discharge any Claims with respect to taxes or obligations in respect thereof that are transferred to ResidualCo.

38. On March 26, 2024, the Receiver circulated an updated draft of the Skeena RVO which amended the above release provisions to read as follows (the "**Release Provisions**"):

2. Upon delivery by the Receiver to Cui Holdings of a certificate (the "**Receiver's Certificate**"), substantially in the form attached as Schedule "C" hereto, confirming receipt by the Receiver of the full amount of the Price (as defined in the Retention Agreement), the following shall occur and be deemed to have occurred on the Closing Date (as defined in the Retention Agreement) in the following sequence:

b. second: …

ii. the Companies shall be released from any and all claims comprising the Excluded Liabilities and any and all claims arising out of or relating to: (1) the insolvency of any of the Companies prior to the Closing Date; and (2) the commencement or existence of these proceedings, but, for clarity, the Companies shall not be released from any of the Retained Liabilities (as defined in the Retention Agreement); and …

13. Upon delivery of the Receiver's Certificate, all persons shall be absolutely and forever barred, estopped, foreclosed and permanently enjoined from pursuing, asserting, exercising, enforcing, issuing or continuing any steps or proceedings, or relying on any rights, remedies, claims or benefits in respect of or against the Receiver, its directors, officers, employees, counsel, advisors and representatives, Cui Holdings, the Companies or the Retained Assets, in any way relating to, arising from or in respect of: the insolvency of the Companies, the commencement or existence of these receivership proceedings or the completion of the Transaction.

K. Opposition to Relief Sought

39. There are various interested parties appearing before the court in opposition to the relief sought by the Receiver, including the following:

a) the Gitanyow Nation, the Haisla Nation, and the Kitsumkalum First Nation who have outstanding claims to aboriginal rights and title over lands which would be affected by the Skeena RVO (and for which, but-for the Skeena RVO, a transfer of the Licences would require ministerial review and thus consultation with First Nations);

b) the Bill 13 Contractors – Terrace Timber and Timber Baron – who by virtue of the Skeena RVO would lose their rights to their otherwise replaceable Bill 13 contracts (which absent the Skeena RVO would continue);

c) logging industry organizations – the Truck Loggers Association, and the Interior Logging Association – who advocate for members of the provincial forest community. These groups emphasize the importance to the British Columbia logging industry as a whole of ensuring that Bill 13 contracts are not separated from their associated licences;

d) the Attorney General of Canada, which opposes the order on, among other grounds, the basis that the Skeena RVO ignores amounts owed to the Federal Crown which have priority over the petitioners' claims;[32] and

e) the Province.

40. Cui Holdings purports, in its responding materials, to provide more detail in respect of the contemplated transaction. It is to be noted, however, that its evidence is aspirational – and qualified by what it "intends to do" and "plans to develop". This evidence does not commit Cui Holdings to this course of action and the Skeena RVO does not carry with it any repercussions for Cui Holdings if its plans change.

[32] Application Response of the Attorney General of Canada filed March 19, 2024

III. ISSUES

41. There are two issues before the court for consideration:

a) whether the court has jurisdiction to approve an RVO in this proceeding; and, if so,

b) whether the court should approve the Skeena RVO.

IV. ARGUMENT

A. No Jurisdiction to Approve Skeena RVO

42. The court does not have jurisdiction to grant the Skeena RVO. Further, even if such jurisdiction could arise, it does not in this case – where the effect of the Skeena RVO is to usurp valid provincial legislation (namely, the *Forest Act* and associated regulations).

i. No Jurisdiction Under *BIA* Section 183

43. As the Receiver notes, "there is no specific jurisdiction in the BIA or the LEA for the approval of a reverse vesting order in receivership proceedings". Rather, the Receiver relies only on the court's inherent jurisdiction under s. 183 of the *BIA*.[33]

44. The Province submits that the court does not have jurisdiction under *BIA* s. 183 to approve an RVO in a receivership. The matter distills to an issue of statutory interpretation.

a) Principles of statutory interpretation

45. As in all questions of statutory interpretation, the dominant principle in ascertaining the meaning of s. 183(1) – and thus what statutory jurisdiction it provides – is determining legislative intent. When interpreting a statute, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[34]

46. The plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms.[35] Indeed, an interpretation based on plain meaning alone is not determinative and "cannot prevail if it is at

[33] Receiver's Notice of Application, Part 3, para. 7
[34] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 (SCC), para. 21
[35] *La Presse inc. v. Quebec*, 2023 SCC 22, para. 23

odds with the purpose and context".[36]

47. The text of s. 183 of the *BIA* has in substance been unchanged since first enacted in 1920 under *The Bankruptcy Act*.[37] Section 183 provides the Supreme Court of British Columbia (and other superior courts) with the following jurisdiction:[38]

> 183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
>
> …
>
> (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

48. By its terms, s. 183 is general in nature. Indeed, it is difficult to conceive of a provision that could be more general. The general nature of the provision emphasizes the need to look to the context, purpose, and relevant legal norms.

b) Legislative intent: Parliament's decision not to amend the BIA

49. The jurisdiction existing under s. 183 must be interpreted in light of the interplay between the *BIA* and the *CCAA*. Specifically, Parliament's decision not to enact in the *BIA* a provision parallel to s. 11 of the *CCAA* is an indication that Parliament did not intend for bankruptcy courts to have an equivalent power to approve RVOs.

50. Historically, there was a trend towards convergence of the *BIA* and the *CCAA*. That parallelism "reached its zenith with the coming into force of the 2009 amendments to the *BIA* and *CCAA*".[39] As part of the 2009 amendments, s. 11 of the *CCAA* was amended to provide that a *CCAA* court may, "subject to the restrictions set out in [the *CCAA*], … make any order that it

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[36] *La Presse inc. v. Quebec*, 2023 SCC 22, para. 30

[37] *The Bankruptcy Act*, SC 1919, c. 36, s. 63 ("The following named courts are constituted Courts of Bankruptcy and are invested within their territorial limits as now established, or as these may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers: …")

[38] *BIA,* s. 183

[39] Roderick J. Wood, "'Come a Little Bit Closer': Convergence and its Limits in Canadian Restructuring Law" (2021) 10:1 IIC-ART [**Wood Article**], p.14

considers appropriate in the circumstances".[40] In enacting this amendment, Parliament endorsed a broad reading of *CCAA* authority which had developed in the jurisprudence – to innovate and to sanction measures for which there is no explicit authority in the *CCAA.*[41]

51. Notably, Parliament decided not to enact in the *BIA* – neither in 2009 nor at any time since – a provision equivalent to s. 11 of the *CCAA*:[42]

> There were two important exceptions to this parallelism. First, new rules governing critical suppliers were added only to the *CCAA* and not to the *BIA* restructuring provisions. Second, courts in *CCAA* proceedings were given the power to make any order that it considers appropriate. No equivalent conferral of general judicial power was included in the *BIA.*

52. Commentators have emphasized that Parliament's decision not to include in the *BIA* a provision equivalent to *CCAA* s. 11 is an indication that Parliament intended less judicial discretion under the *BIA*:[43]

> If Parliament wanted to confer courts with similar discretion in *BIA* proceedings, it could have included a provision identical to section 11 of the *CCAA*. Without such a provision, it can just as easily be argued that Parliament envisioned less judicial discretionary power in *BIA* proposal proceedings.

53. In the *CCAA* context, the authority to grant an RVO is grounded in the s. 11 stay, a provision with no equivalent in the *BIA*. Indeed, in 2019 – well after the advent of RVOs in *CCAA* proceedings in 2015 – Parliament made various amendments to both the *BIA* and the *CCAA*, in several instances introducing parallel amendments to both statutes.[44] If Parliament wanted to confer on a *BIA* court the broad jurisdiction conferred by s. 11 of the *CCAA*, it could have done so on those occasions. That Parliament declined to do so is an indication that it did not intend bankruptcy courts to have the broad powers provided by *CCAA* s. 11.

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[40] *CCAA,* s. 11(1)
[41] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [***Century Services***], paras. 61 and 68
[42] Wood Article*,* p. 4 (footnote omitted)
[43] Jordan Schultz *et al,* "Anything You Can Do, I Can Do Better: Does the *CCAA* Provide Broader Discretionary Relief than the BIA?", 2022 CanLIIDocs 4309 [**Schultz Article**], p. 27 (footnotes omitted)
[44] Pavle Masic, "Has the Statutory Duty of Good Faith Opened a Window to Recognition of Equitable Subordination in Canadian Law?", Canadian Legal Information Institute, 2021 CanLIIDocs 13548 [**Masic Article**], pp. 17-18; see e.g. the identical good faith obligation added to s. 18.6 of the *CCAA* and s. 4.2 of the *BIA*

c) Statutory context: prescriptive nature of BIA

54. That Legislative intent is made all the more clear by the distinction between the *CCAA* and *BIA* – namely, the *CCAA* provides for more judicial discretion, and the *BIA* is rules-based and prescriptive. That RVOs have emerged as an available order in the former does not bear on whether they are available in the latter, owing to the differences inherent in both insolvency regimes.

55. The *BIA* – the main insolvency statute enacted by Parliament[45] – is a self-contained regime providing for both reorganization and liquidation, and is available to insolvent debtors owing $1000 or more. "It is characterized by a rules-based approach to proceedings."[46] Access to the *CCAA* – a second insolvency statute – is more restrictive, as a debtor must be a company with liabilities in excess of $5 million.[47]

56. The *CCAA* contains no provisions for liquidation, and rather is focused on reorganization. "[T]he key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations."[48] Put differently, the *CCAA*'s "distinguishing feature" is "a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives."[49]

57. The *BIA,* unlike the *CCAA,* is prescriptive, detailed and intricate. It carefully weighs competing interests. Allowing an RVO in a *BIA* proceeding – which inherently offers less room for judicial flexibility, and wherein there is no broad grant of authority equivalent to *CCAA* s. 11 – risks upsetting the comprehensive *BIA* scheme chosen by Parliament.

58. In *Canada North Group,* Justice Karakatsanis set out the contrast between the "famously skeletal… nature" of the *CCAA* and the "strictly rules-based" *BIA*:[50]

> To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process. It "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to

[45] *Century Services*, para. 13
[46] *Century Services*, para. 13
[47] *CCAA*, s. 3
[48] *Century Services*, para. 14
[49] *Century Services*, para. 19; see also para. 61
[50] *Canada v. Canada North Group Inc.*, 2021 SCC 30, paras. 135-143 (para. 140 excerpted, citations omitted), Karakatsanis J., concurring

> predetermined priority rules". The *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start. While proposals under the *BIA*'s restructuring regime similarly serve a remedial purpose, "this is achieved through a rules-based mechanism that offers less flexibility".

59. This fundamental difference in the scheme of the two insolvency statutes informs the limits on the jurisdiction arising under the *BIA.*

d) <u>RVOs and the remedial objectives of the CCAA</u>

60. While originally the jurisdiction to grant an RVO was considered to lie in s. 36 of the *CCAA* – a provision authorizing the sale of a business's assets outside the ordinary course of business – over time courts have recognized the RVO structure goes beyond what is contemplated in that section, necessitating that a *CCAA* court avail itself of the broad discretion conferred by s. 11 to authorize such an arrangement.[51] In invoking s.11, courts have acknowledged that the discretion conferred under s. 11 is not unbounded. It must be exercised with a view to the statutory purposes and objectives of the *CCAA* – most notably, the preservation of going concern value for stakeholders involved in a restructuring.[52] Indeed, an RVO structure should not be approved where it does not further the remedial objectives of the *CCAA*.[53]

e) <u>Receiver's caselaw does not govern</u>

61. The Receiver points to two decisions in support of this court's jurisdiction to approve the Skeena RVO. Respectfully, neither decision provides the authority suggested by the Receiver:

a) *Third Eye*, an Ontario decision which concerned a conventional asset vesting order (and not a reverse vesting order).[54] *Third Eye* is not authority for the jurisdiction required to grant the Skeena RVO; and

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[51] *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488, para, 19; *Harte Gold Corp. (Re)*, 2022 ONSC 653 [***Harte Gold***], para. 37; *Proposition de Brunswick Health Group Inc.*, 2023 QCCS 4643 [***Brunswick Health Group***], paras. 39.4-39.7

[52] *Quest University Canada (Re)*, 2020 BCSC 1883 [***Quest***], paras. 154-155 and 171-173, leave to appeal dismissed, 2020 BCCA 364; *Harte Gold*, para. 37

[53] *Quest*, para. 171; *Brunswick Health Group*, para. 39.10

[54] *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 [***Third Eye***]

b) *Peakhill* (a recent decision of Mr. Justice Loo which is under appeal on the question of jurisdiction).[55] *Peakhill,* in turn, relied on *PaySlate #1*, where the court found jurisdiction to approve a reverse vesting order in s. 183 of the *BIA.* However, the analysis in *PaySlate #1* was *obiter* as the court did not in *PaySlate #1* approve an RVO. (The court did later approve a reverse vesting order in *PaySlate #2*, but in that case all parties consented to the order in question and there was no discussion of jurisdiction.)

62. More importantly, *PaySlate #1* involved a proposal proceeding under Part III of the *BIA*, not a receivership.[56] In a proposal proceeding, s. 65.13 of the *BIA* (which is similar to s. 36 of the *CCAA*) confers specific powers on a court to permit the sale of a business's assets outside the ordinary course of business, and make a related vesting order.[57] That section of the *BIA* does not apply to a receivership. Given that different proceedings under the *BIA* were involved, *PaySlate #1* did not (and could not) determine the question of jurisdiction in a receivership (and, by extension, nor did *Peakhill*, which simply adopted *PaySlate #1*).

63. Commentators have expressed concern with the *Peakhill/PaySlate #1* jurisprudence, opining that *BIA* s. 183 does not provide jurisdiction, and that the court's lack of jurisdiction to approve a reverse vesting order in a receivership is "an inconvenient elephant in the insolvency room":[58]

> *Peakhill* cites [*PaySlate #1*] for the availability of RVOs under the BIA, which in turn cites other recent orders, but there is no analysis answering how section 183 provides a way for the court to order a compromise of the debtor's liabilities without having to resort to the statutory requirements for proposals. The answer is that it does not provide that ability, and references to the general objectives of insolvency law can't be used by a court to amend or overrule the statute that provides for insolvency law in the first place. This lack of jurisdiction under section 183 is an inconvenient elephant in the insolvency room.

f) <u>Conclusion</u>

64. The approval of a reverse vesting order through a receivership is an inherently problematic outcome, as it does away with the rights of affected third parties (many of whom may not have

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[55] *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476 [***Peakhill***]
[56] *PaySlate #1,* paras. 2 and 85; *PaySlate #2*, para. 19
[57] Sections 65.13(1) and (7). These sections only apply where the insolvent debtor has first filed a notice of intention under s. 50.4 or a proposal under s. 62(1)
[58] Sabzevari Article, pp. 2-3

notice of the court proceeding). The court should not lightly assume the jurisdiction to approve a reverse vesting order in a receivership, in the absence of express statutory language prescribing that jurisdiction. As set out above, such language exists under s. 11 of the *CCAA*, but it is telling that there is no equivalent provision in the rules-based *BIA*. Professor Janis Sarra – in discussing an equivalently broad provision (*BIA* s. 243) – noted the problematic nature of the court assuming this jurisdiction in a receivership proceeding:[59]

> The approval of an RVO through receivership is even more problematic because there is not the broad statutory authority accorded the court pursuant to the *CCAA*. Further, to date, there appear to be no judgments that discuss the court's authority to bypass creditor rights and endorse such transactions. For example, in *Pure Global Cannabis*, the receiver argued that s. 243(1)(c) of the *BIA* and s. 101 of the *Courts of Justice Act* (Ontario) provided the jurisdiction, which was accepted by the court without any reasons given. Yet there is nothing in the language of s. 243 that suggests such authority, and it seems critically important that transactions that bypass key provisions of the comprehensive insolvency and bankruptcy framework are carefully scrutinized by the courts. The RVO in a receivership context does not involve collective participation or compel the involvement of all creditors.

65. Section 183 – properly construed – is not sufficient to ground jurisdiction. It does not confer a discretion comparable to s. 11 of the *CCAA*. Nor is the *BIA* as a whole – given its strictly rules-based format – structured to confer a broad and flexible authority on the supervising court to make whatever orders it sees fit. That is particularly so where the RVO order is sought outside of the proposal provisions of the *BIA* (which set out a scheme for compromising the claims of other creditors, and in s. 65.13, provides for the sale of a business's assets).

66. The court does not have jurisdiction to approve the Skeena RVO.

ii. Usurping Provincial Legislation (No Jurisdiction in This Case)

67. Alternatively, even if the court could be found to have jurisdiction under *BIA* s. 183 in some other case, that jurisdiction does not arise in this case – where the effect of the Skeena RVO is to usurp valid provincial legislation (specifically, the *Forest Act* and the regulatory processes enacted under that statute).

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[59] Janis P. Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", Canadian Legal Information Institute, 2022 CanLIIDocs 431 [**Sarra Article**], p. 24 (foonote omitted, emphasis added)

a) Receiver cannot contravene laws of general application

68. Any authority that the court may have must be interpreted in light of valid provincial legislation, and that legislation must be respected to the fullest extent possible.[60]

69. Put differently, a receiver's powers do not enable it to contravene laws of general application. This principle is reflected in s. 72 of the *BIA*, which provides that the *BIA* "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with [the *BIA*]".[61]

70. In *T.C.T. Logistics Inc.*, in discussing the powers conferred on an interim receiver under s. 47(2) of the *BIA* (which have since been found applicable to a s. 243 receiver), Justice Abella for the majority observed:[62]

> These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

71. Justice Abella went on to comment that the effect of s. 72(1) is that the *BIA* is "not intended to extinguish legally protected rights unless those rights are in conflict with the [*BIA*]".[63] She explained further:[64]

> If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before

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[60] *Yukon (Government of) v. Yukon Zinc*, 2021 YKCA 2, para. 123; see also *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41, para. 151 ("It is well established that harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility".)

[61] *BIA,* s. 72; see also *GMAC Commercial Credit Corporation Canada v. T.C.T. Logistics Inc*., 2006 SCC 35 [***T.C.T. Logistics***], paras. 43-51 (para. 46: "Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1) of the *Bankruptcy and Insolvency Act*".); and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, para. 57 ("When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.")

[62] *T.C.T. Logistics*, para. 45 (emphasis added)

[63] *T.C.T. Logistics,* para. 47

[64] *T.C.T. Logistics,* para. 51

> such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72.

72. *T.C.T. Logistics* was followed in *Lemare Lake*, a case that held s. 72(1) prevented the appointment of a receiver under s. 243 of the *BIA* when provincial legislation required a certain process be engaged prior to the receiver's appointment. In *Lemare Lake*, the Court held that s. 243 is to be construed such that the powers it affords respect and yield to provincial law:[65]

> ….There is no evidentiary basis for concluding that [s. 243] was meant to circumvent the procedural and substantive requirements of the provincial laws where the appointment is sought. General considerations of promptness and timeliness, no doubt a valid concern in any bankruptcy or receivership process, cannot be used to trump the specific purpose of s. 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation. Construing s. 243's purpose more broadly in the absence of clear evidence that Parliament intended a broader statutory purpose, is inconsistent with the requisite restrained approach to paramountcy and with the fundamental rule of constitutional interpretation referred to earlier in our reasons: paras. 20-21. Vague and imprecise notions like timeliness or effectiveness cannot amount to an overarching federal purpose that would prevent coexistence with provincial laws like the *SFSA*.

73. That the *BIA* is to interface with provincial laws of general application in this way was reiterated again by the Supreme Court of Canada in *Orphan Well*, where Chief Justice Wagner for the majority held that "[b]ankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors."[66]

b) Skeena RVO circumvents provincial legislation and duty to consult

74. The Skeena RVO is designed to, and has the effect of, circumventing Ministerial powers under the *Forest Act* to consider the public interest, preserve "replaceable contracts" associated with the Licences, and require road permit roads (and the associated maintenance and deactivation obligations) to be dealt with in an orderly manner.

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[65] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 [***Lemare Lake***], para. 68

[66] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, para. 160 (emphasis added)

(1) Replaceable contract scheme under the Forest Act

75. "Replaceable contracts" are addressed in the *Forest Act* ss. 152-161 and the *Timber Harvesting Contract and Subcontract Regulation*, BC Reg 22/96 (the "**Replaceable Contract Scheme**").

76. The benefits of the Replaceable Contract Scheme were described by our Court of Appeal in *Cellulose*:[67]

> … In the case of the *Forest Act*, a detailed series of "contractual" terms is required to be incorporated in agreements between the holders of harvesting licences granted by the Crown, and the contractors they in turn retain to carry out the logging. Most aspects of the relationship are either provided for in the mandatory terms or must be resolved by arbitration, the principles and procedures of which are also regulated by the Act. Most importantly, a licence holder must agree that when such an agreement expires, it will be renewed (or in the statutory terminology, "replaced") on terms substantially the same as those of the expired contract, assuming the contractor has performed its obligations thereunder. In this way, the legislation seeks to provide contractors with a degree of "security" analogous to the security of tenure implicit in a Crown harvesting licence, and to achieve greater fairness between the licence holder and its contractors.

77. Since the decision in *Cellulose,* the *Forest Act* was amended to add s. 54(2)(d.1), which provides that a disposition is without effect unless the recipient assumes the obligations under the replaceable contract:[68]

> (2) A disposition of an agreement is without effect unless all of the following conditions have been met:
>
> > (d.1) in the case of a disposition of an agreement in relation to which the holder of the agreement has a replaceable contract with a contractor, all obligations of the holder of the agreement under the replaceable contract are assumed by the recipient of the agreement;

78. The intention of this amendment was to ensure that replaceable contracts are protected in insolvency proceedings:[69]

> Amendments to the *Forest Act* increase the protection for logging contractors when licensees are transferred in insolvency proceedings by requiring the transfer of

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[67] *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344 [***Cellulose***], para. 2 (emphasis added)
[68] *Forest Act,* s. 54(2)(d.1)
[69] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39th Leg, 2nd Session, Volume 19, No. 1 (27 May 2010), at 5850

> associated replaceable logging contracts when a licence is transferred. That is a measure that is here in response to repeated requests for additional protection from those involved, particularly in the logging and harvesting sectors of the forest industry.

79. More generally, the Legislature intends that the Minister of Forests have the authority to consider public interest for licence transactions, including First Nations' interests. Hon. D. Donaldson made this clear at the introduction of 2019 amendments to the *Forest Act*:[70]

> I move that the amendments to the *Forest Act* be introduced and read for the first time now.
>
> Today I introduce changes to the *Forest Act* to give government more oversight of the forest sector. The changes will support a vibrant and diverse forest sector by allowing for more opportunities for participation of First Nations and others.
>
> We want all British Columbians to benefit from the forest industry, large and small — First Nations, workers and communities. The previous legislation governing the disposition of Crown tenures limited government's influence. With the proposed changes to the *Forest Act* that I am announcing today, forest companies will now need approval from government before they dispose of or transfer a tenure agreement to another party.
>
> To approve the transfer, we will first want to understand how it will help the people of British Columbia and encourage diversity in the forest sector. First and foremost, the forests of this province are a publicly held natural resource, and any dispositions of Crown tenure needs to keep this fact at the forefront.
>
> We are making these changes because we want to restore public trust in how our forests are managed, and we want more say on behalf of all people of B.C. in how forest tenures are transferred between parties.

80. Typically, a receivership would involve either a disposition of these contracts, licences and permits (under Part 4, Division 2 of the *Forest Act*)[71] or a change of control (under Part 4, Division 2.1 of the *Forest Act*).[72]

81. Where a disposition is involved, for example:[73]

a) the Minister's written approval is required (s. 54(2)(a));

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[70] British Columbia, *Official Report of the Debates of the Legislative Assembly (Hansard),* 41-4, Issue No. 238, (11 April 2019), at 8374 (emphasis added)
[71] *Forest Act,* ss. 54 – 54.61
[72] *Forest Act.* ss. 54.62 – 54.69
[73] Comparable sections, for a change of control, are found in Part 4, Division 2.1 of the *Forest Act*. A change of control triggers a duty to consult: *Gitxsan v. British Columbia (Minister of Forests)*, 2002 BCSC 1701, paras. 81-82

b) payment of all money due and payable or agreement as to a payment plan is required (s. 54(2)(b)); and

c) where a "replaceable contract" is involved (as is the case here), the recipient must assume all obligations of the holder of the agreement.

82. Before approving a transfer, it is mandatory for the Minister to consider the marketing of fibre in British Columbia and the public interest (recognizing nothing in s. 54.02 is intended to limit the Minister's authority to refuse approval). The Minister would consult with First Nations regarding the approval decision, which would inform the Minister's assessment of public interest, and in the process request any information the Minister considers necessary (s. 54(2.1)) and attach conditions of the approval (s. 54.01(4)).

83. In other words, if the Receiver had proceeded in respect of the Licences with either a transfer or an amalgamation/change of control, the Minister would have to consider the public interest, which would necessarily encompass the interests of affected First Nations. Further, the Bill 13 Contracts would necessarily flow with their associated Licences. The Skeena RVO is an attempt to avoid both of these statutorily-prescribed outcomes.

(2) Skeena RVO attempts to avoid replaceable contract scheme

84. The Receiver did initially engage in discussions with the Minister of Forests and with potentially affected First Nations. As set out in the affidavit of Jacques Bousquet, in October 2023 the Receiver reached out to the Ministry of Forests to discuss the Licences. The Ministry of Forests explained the steps that would need to be undertaken for transfer of a replaceable forest licence, and discussed those steps with the Receiver.[74] Similarly, the Receiver engaged to varying degrees with potentially affected First Nations.

85. The Receiver is now proceeding with the Skeena RVO – a judicial indulgence, and an exceptional remedy – in an apparent attempt to avoid the requirements of the *Forest Act*. The Receiver touts the Skeena RVO as a way to avoid "potential regulatory delay".[75] This appears to be a euphemism for the Skeena RVO's true motivation and effect – to avoid lawful requirements which, but for the RVO, would apply to ensure that the public interest is upheld.

[74] Affidavit #1 of Jacques Bousquet filed March 7, 2024, paras. 1-7
[75] Receiver's Notice of Application, Part 3, para. 9(b)

86. There are good reasons for the statutory obligations that apply to the Licences and the Bill 13 Contracts. Mr. Bousquet sets out how the Receiver's representatives were informed of the Province's oversight role in administering forestry licences and permits pursuant to the *Forest Act* and its responsibility to ensure the public interest is taken into account in its decision-making under the *Forest Act*.[76]

87. The Skeena RVO attempts to defeat those obligations – and defeat the intentions of the Legislature in amending the *Forest Act* to include a mandatory consideration of public interest (which this court has recognized is a broad discretion that involves weighing all competing concerns).[77]

B. Insufficient Basis for a Reverse Vesting Order

88. If this court does find it has the jurisdiction to grant a reverse vesting order in this proceeding, then there remains no basis to exercise that jurisdiction and approve the Skeena RVO.

i. Nature of Relief Sought

89. "RVOs are not the norm and should only be granted in extraordinary circumstances."[78]

90. In *Blackrock Metals,* Chief Justice Paquette explained the nature of RVOs as follows:[79]

> RVOs are a fairly new way to achieve the remedial objective of the *CCAA*: instead of selling the assets of a debtor, a series of transactions will result in i) the purchaser becoming the sole shareholder of a debtor and ii) the unwanted liabilities be vested out to a separate entity, thereby ensuring that the purchaser will not inherit the unwanted liabilities.
>
> Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. In particular, *CCAA* courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and

[76] Affidavit #1 of Jacques Bousquet, para. 6
[77] *Pal Lumber Co. (2007) Ltd. v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2022 BCSC 734, paras. 118 and 120
[78] *PaySlate #1*, para. 87; see also *Harte Gold*, para. 38; and *In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841, para. 58
[79] *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 [***Blackrock Metals***], paras. 85-86 (emphasis added)

> facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

91. Chief Justice Paquette went on to caution that an RVO "should remain the exception and not the rule, and should be approved only in the limited circumstances where it constitutes the appropriate remedy."[80]

92. In assessing a potential reverse vesting order, the Court should "consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it."[81]

93. Professor Sarra expands on the need for caution when considering a reverse vesting order:[82]

> Weighed against these benefits is the concern that the RVO approach bypasses key components of the statutory framework that balances multiple creditor rights and interests, including the ability of creditors to vote on a plan. While one benefit of an RVO is often described as cost-savings if a plan vote is avoided, the cases reveal that RVO can be complex and costly to structure and implement. There is also a question of whether companies will be able to shed substantial environmental remediation and reclamation obligations under this new structure, leaving few assets to satisfy the obligations. In some instances, the RVO offers secured creditors a new "race to the assets" that the statutory stay provisions were originally designed to slow down to give a meaningful opportunity to negotiate with all creditors.

94. These cautions are particularly apposite here – where a restructuring attempt (through the *BIA*'s proposal process, or under the *CCAA*) has not preceded this receivership. Such a restructuring attempt – that would involve the collective participation of all creditors – would enable this Court to better assess the need now for the extraordinary remedy of a reverse vesting order.

ii. Applicable Factors

95. The Province agrees with the Receiver that the factors set out in *Harte Gold* are relevant in considering whether to grant the Skeena RVO:[83]

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[80] *Blackrock Metals,* para. 96
[81] *PaySlate #1,* para. 89 (emphasis added), citing to Sarra Article
[82] Sarra Article, p. 2 (footnote omitted)
[83] *Harte Gold*, para. 38; Receiver's Notice of Application, Part 3, para. 8

a) Why is the reverse vesting order necessary in this case?

b) Does the reverse vesting order structure produce an economic result at least as favourable as any other viable alternative?

c) Is any stakeholder worse off under the reverse vesting order structure than they would have been under any viable alternative?

d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the reverse vesting order structure?

96. Also relevant is the language of associated releases and whether there is any *bona fide* motivation for the reverse vesting order.[84]

97. Applying the above factors leads to the conclusion that the court should not approve a reverse vesting order in the circumstances of this case.

a) Not necessary

98. Reverse vesting orders have been approved where they are the only path forward to resolve the financial affairs of the debtor:[85]

> As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. ...
>
> I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved. [Emphasis in original.]

99. That is not this case. There is no evidence that the Skeena RVO is necessary to preserve a business as a going concern. To the contrary, there were three other *en bloc* definitive bids received by the Receiver – of which little information has been provided to the parties.[86]

100. In *PaySlate #1,* Justice Walker dismissed an application seeking a reverse vesting order

[84] *PaySlate #1*, para. 99
[85] *Quest,* paras. 158-159
[86] Report #5, para. 3.4

where there was insufficient evidence to justify the order.

101. Concerns identified in *PaySlate #1,* which apply equally in this matter, include the following:

a) whether any of the counterparties to the retained contracts have or may have contingent claims that would be caught by the Release Provisions (para. 67);

b) a lack of evidence of service to counterparties, as well as unsecured creditors generally (given that the Release Provisions will affect their rights) (para. 68 and 77); and

c) a lack of fulsome evidence concerning the value of the debtor's assets (paras. 136-142).

102. The lack of evidence on which to assess the Skeena RVO is even more pronounced given the structure of the potential transaction put before the court for approval. There is a paucity of evidence that Cui Holdings will even attempt to continue the Skeena Entities' operations. Approval is sought solely on the basis that "Cui Holdings has owned and operated the Skeena Entities for over 10 years and has expressed an interest in restarting operations and providing working capital to fund the restart".[87]

103. In evidence delivered since this application first came on for hearing, Cui Holdings has adduced vague evidence from Ms. Wu, a principal of the company. Ms. Wu's affidavit states at times that Cui Holdings cannot retain the Bill 13 Contracts (para. 38), but then later implies that Cui Holdings could retain the Bill 13 Contracts but would suffer a financial loss (paras. 63-66). Ms. Wu also speaks to an intention to continue negotiations with First Nations (para. 67), but does not address why prior discussions have stalled.

104. Two points emerge from Ms. Wu's evidence. First, Cui Holdings' intentions are both vague and evolving – Ms. Wu's evidence only emerging shortly before the hearing of this matter. Second, the assertions made in Ms. Wu's evidence – regarding intentions to continue operations, to invest in capital, and to discuss with First Nations – are only assertions. There are no terms in

[87] Fourth Report of the Receiver filed February 29, 2024 ("**Report #4**"), para. 7.9(c) (emphasis added)

the Retention Agreement, or the Skeena RVO, which would bind Cui Holdings to that course of conduct.

105. This uncertainty is not a matter which can be remedied. It is inherent in the structure of the Skeena RVO and the Retention Agreement that the court is being asked to approve – as an exceptional remedy – a highly uncertain transaction (the Retention Agreement itself not even having been executed). The court does not fully know what it is being asked to approve.

106. It cannot be found that the Skeena RVO is necessary in the sense contemplated in the authorities. This factor weighs against approving the Skeena RVO.

b) Release provisions are overbroad

107. As indicated in *PaySlate #1,* the scope of the releases sought under a reverse vesting order must be considered by the court on any application to approve a reverse vesting order. In considering whether to exercise the discretion to approve release provisions, courts have considered the following factors (termed the "***Lydian* Factors**"):[88]

a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) whether the plan could succeed without the releases;

d) whether the parties being released were contributing to the plan; and

e) whether the release benefitted the debtors as well as the creditors generally.

108. Applying the *Lydian* Factors, the releases proposed under the Skeena RVO are not reasonable and appropriate in the circumstances:

a) not necessary: As set out below, the Receiver has not put forward information concerning the three other Definitive Bids which would be required to assess whether the Release Provisions are in fact necessary. However, in light of the

[88] *PaySlate #1,* para. 143; see also *Harte Gold,* paras. 78-86

breadth of the Release Provisions (discussed below) it appears unlikely that they would be necessary;

b) released claims not rationally connected to purpose of plan: The Release Provisions are exceptionally broad such that the released claims are not rationally connected to any *bona fide* purpose. By way of example only:

   i. the Skeena Entities are to be released from all "claims comprising the Excluded Liabilities and any and all claims arising out of or relating to (1) the insolvency of any of the Companies prior to the Closing Date; and (2) the commencement or existences of these proceedings…". "Excluded Liabilities" are defined broadly in s. 1.1(bb) of the Retention Agreement, as set out above, and include "any Liabilities for a breach or non-compliance with any applicable law";[89] and

   ii. under s. 13 of the Skeena RVO (as circulated in draft on March 26, 2024 by the Receiver), on delivery of the Receiver's Certificate, "all persons" – including those without any notice of this proceeding – are barred from advancing any claims against the Skeena Entities, Cui Holdings, or the Retained Assets in respect of the "insolvency of the Companies, the commencement or existence of these receivership proceedings or the completion of the Transaction".

c) benefit of release provisions: The Release Provisions benefit solely Cui Holdings, its shareholders and related parties (the Skeena Entities and the petitioner). There is no broader benefit – indeed, the Release Provisions prejudice potential claims that could otherwise be advanced (e.g. by the Province for return of the CleanBC Funds, or for breach of the Bioenergy Funding Agreement).

109. The breadth of the Release Provisions is compounded by the broad definition of "Excluded Liabilities" (which would pass to ResidualCo and be bankrupted) – defined in the Retention Agreement to include "any and all Liabilities of the Companies that are not Retained Liabilities".[90] The definition includes liabilities of the Skeena Entities up to the Closing Date – thus insulating Cui Holdings and the Skeena Entities from post-filing liabilities. Further, the definition includes

[89] Skeena RVO circulated by Receiver in draft on March 26, 2024, s. 2(b)(ii)
[90] Retention Agreement, s. 1(1)(bb)

"any Liabilities for a breach or non-compliance with any applicable law…", thus apparently insulating the parties from any breach of provincial or federal legislation (admittedly, the new definition of "Retained Liabilities" contained in the Amended Retention Agreement may allow certain environmental statutes to have continued application – it is at best unclear – but at the least all non-environmental statutes would be captured by the definition of "Excluded Liabilities" and thus barred).

110. Professor Sarra's article warns of the risks of broad releases of the nature proposed by the Receiver:[91]

> Also of concern are the broad releases in respect of potential liability claims being granted against directors, officers, insolvency professionals, and third-parties, without the reasoning that usually underpins such broad releases, including contributions to the value of the assets that remain to satisfy creditors' claims. …
>
> … in a number of the RVO cases, releases are being granted in respect of a broad range of statutory claims without discussion of potential prejudice from such releases or reference to the developed jurisprudence. As one commentary observes, courts have granted broad releases in RVO transactions, thereby achieving third-party releases without creditors being asked to vote on this issue, undermining one of the key criteria for approval that the courts have used.

111. Professor Sarra also cautions against approving releases which would allow a company to shed obligations and transfer costs to taxpayers:[92]

> There is also a question of whether companies will be able to shed substantial environmental remediation and reclamation obligations under the RVO, leaving few assets to satisfy the obligations and transferring these costs ultimately to taxpayers. In most cases, the relevant regulator has not been involved at the stage the court is being asked to approve the RVO, which means the court is not receiving important information on possible implications for regulatory oversight legislation. The court should not be approving any transaction that ignores or misdirects responsibilities for environmental liability, given the critically important nature of these issues.

112. The nature and effect of the Release Provisions is thus a factor weighing against the court exercising its discretion to grant the relief sought.

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[91] Sarra Article, p. 23
[92] Sarra Article, p. 24 (footnotes omitted)

c) Economic result produced by Skeena RVO is unclear

113. At this juncture, it is difficult to assess the economic result of the Skeena RVO as against the three other Definitive Bids received by the Receiver.[93] The effect of these ambiguities is that the court is being asked to approve a completely uncertain transaction.

114. What is clear is that the economic result of the Skeena RVO does not account for the value of the Bill 13 Contracts – all of which will be lost to the Bill 13 Contractors if the Skeena RVO is approved.

115. The onus rests with the applicant, purchaser, and court's officer to provide the requisite evidence to demonstrate that the tests for issuing a reverse vesting order have been met.[94] That onus has not been met.

116. This factor weighs against approving the Skeena RVO.

d) Parties are worse-off under the Skeena RVO

117. Similarly, at this juncture it is difficult to fully assess the impact of the Skeena RVO. However, what is known definitively is:

a) the Skeena RVO would usurp the Province's role in regulating the forestry industry and thus guarding the public interest. On the Receiver's own assertions, it appears that the Skeena RVO is a deliberate attempt to avoid triggering statutory requirements and obligations;

b) the Skeena RVO avoids the interests of the potentially affected First Nations, with whom the Province would otherwise consult in respect of the transfer of the Licences;

c) the Bill 13 Contractors are worse-off under the Skeena RVO than they would be under any other transaction, where their respective Bill 13 contracts would retain their value;

[93] Report #4, para. 7.2
[94] *PaySlate #1,* para. 138

d) the interests of the logging industry as a whole, as well as the Federal Crown, are also prejudiced;

e) the sheer breadth of the Release Provisions, and the structure of the Skeena RVO as a whole, will result in various stakeholders (including Bill 13 contractors, as well as parties to contracts generally which Cui Holdings decides not to retain as "Approved Contracts") being unable to advance any claims for recovery; and

f) the Release Provisions attempt to bar the application of provincial legislation and regulations.

118. In the circumstances, there is clear prejudice. This factor thus also weighs against approving the Skeena RVO.

e) Value of consideration proposed to be paid

119. In the absence of any information regarding the other Definitive Bids – and without knowing definitively what intangible assets would be preserved under the Skeena RVO (or, indeed, whether any at all will be preserved – as the Skeena RVO and Retention Agreement offer no commitment that Cui Holdings will restart operations) – this factor weighs against approving the Skeena RVO.

120. For the above reasons, there is no basis to approve the Skeena RVO.

V. CONCLUSION

121. The Receiver's application should be dismissed.

All of which is respectfully submitted this 27th day of March, 2024.

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