NO. S236214
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1392752 B.C. LTD.

PLAINTIFF

AND:

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

DEFENDANT

WRITTEN SUBMISSION OF THE INTERIOR LOGGING ASSOCIATION

1. The Interior Logging Association is a non-profit society that has existed for more than 40 years. It represents the interests of logging contractors. It has approximately 300 members.

2. Evidently when a court is considering whether to grant a Reverse Vesting Order ("RVO") one factor for consideration is the public interest. The Interior Logging Association proposes to speak to that issue.

3. As well, from a broader perspective, the application before the court will be precedent-setting, having the potential to jeopardize Bill 13 replaceable contracts in the case of future licensee insolvencies. Today's determination by the court will impact others, beyond the scope of the parties presently before the court.

4. What is especially concerning in the case at bar is the notion that a licensee might retain its forest licences, but shed itself of its Bill 13 replaceable contracts, simply on the basis of its own subjective, unsubstantiated evidence that the logging rates charged by those contractors are excessive, and that it desires to pay a cheaper rate.

Background

5. The vast majority of standing timber in the province is on crown land and owned by the province itself. The province licences out the right to harvest that timber through forest licences and tree farm licences. In that respect, the province enjoys jurisdiction

over the timber-harvesting process both as owner through contract, and as government through legislation.

6. In a broader sense, a social contract exists between government and licensees. Pursuant to that social contract, licensees commit to building and operating sawmills which convert timber into lumber. Those licensees make significant capital investments in mills in order to do that. They employ workers and contractors. They support local economies. Those licensees commit, as well, to paying stumpage to the province, which is a significant source of provincial revenue.

7. In order to support their significant capital investments, licensees have demanded and received what is effectively an assurance of an indefinite source of timber. This comes in the form of the "renewable forest license" and "renewable tree farm license". These renewable licenses are assignable, i.e., sellable, by licensees. They are valuable assets in the hands of the licensees. See the Forest Act, "Division 2—Disposition of Agreements", commencing at section 54. (As a side note, cannabis growing licences are not assignable, which makes an RVO an attractive option in the case of grower insolvency.)

8. There is a third partner to this relationship, namely the harvesting sector. The harvesting sector is made up of contractors that are hired by the licensees, and who enter the forest with their workers and equipment to harvest the timber and to haul that timber to the sawmills.

9. In the 1950's, as a matter of government policy, it was decided that renewable forest licences would contain "contractor clauses", which would obligate the licensees to use contractors to harvest at least 50% of the timber that was harvested under the licence, i.e., as opposed to the licensee using its own workers and equipment to perform that task under what is known as a "company crew". Those obligations persist to today, and are to be found in Skeena's renewable licences. As a matter of practice, in the interior, all harvesting is performed by contractors, and none by company crews. (On the coast, company crews are more prevalent. And, on the coast, the percentage that must be harvested under contract may be higher.)

Bill 13

10. In the early 1990's there was government recognition that the harvesting sector also made significant capital investments in equipment and engaged a significant workforce, akin to what the licensees had done. But, those contractors lacked that same security of tenure to support those capital investments and hiring decisions. They were at risk of having their work taken away from them by the licensees on little notice and for no reason. They were at a bargaining disadvantage with their much larger employers.

11. In 1991, in order to give the harvesting sector an assurance of work that was equivalent to the licensees' assurance of timber, "Bill 13" became the law. At its most basic, Bill

13 created the "replaceable logging contract." Such a contract provides the logging contractor with an assurance of indefinite work. It links that replaceable contract to the renewable tree farm/forest license. It is assignable, i.e., sellable, by the logging contractor. The regulation created a dispute resolution method, by mediation and arbitration, to settle rate and other disputes.

12. Section 152 of the Forest Act defines the "replaceable contract".

13. It is to be noted that the replaceable contract only relates to that 50% of the cut for which the licensees are obligated to employ contractors. For that other 50%, licensees are entitled to cut using their own company crews or to engage whatever contractor they choose. (These are interior percentages. They may differ on the coast.)

14. For a good description of the underlying policy behind this legislation, see *Hayes Forest Services Limited, v. Pacific Forest Products Limited*, 2000 BCCA 66, at paras. 17 and 18.

15. Although Bill 13 has seen a number of revisions and amendments from time to time, in substance it remains the same.

16. Over the years the "rate test" in the regulation has changed. In its current iteration, effective in 2021:

> ***26.01*** *The rate for the timber harvesting services to be provided by a contractor must be a rate that a willing licence holder and a willing contractor acting reasonably and at arm's length from each other in similar circumstances would agree*
>
> > *(a) is competitive by industry standards, and*
> >
> > *(b) would permit a contractor operating in a manner that is reasonably efficient in the circumstances, in terms of costs and productivity, to earn a reasonable profit.*

17. In other words, because the licensee is compelled to hire the Bill 13 contractor, and because the Bill 13 contractor is compelled to perform work for that licensee, a mechanism has been put in place to fix a fair rate, if the parties are unable to reach agreement between themselves. Neither of the parties is in a position to take advantage of the other.

18. Due to the structure described above, there exists what is known as the "non-replaceable volume". Non-replaceable volume need not be given to any particular contractor; there is no long term assurance of work for that non-replaceable contractor. Failing agreement on the logging rate the work is simply not done—there is no ability to arbitrate the rate. Rates negotiated for non-replaceable work would inform that "competitive by industry standards" element of the rate test for replaceable work.

19. But, as well, one obvious candidate to perform non-replaceable work is the replaceable contractor. Efficiencies of scale and cost-savings might be achieved by having that contractor harvest twice its replaceable volume in any given year. This creates an incentive on the part of licensees and contractors to negotiate a rate for all harvesting work, and to avoid the cost of a rate arbitration.

20. In 2004, it became the case that existing replaceable contracts were "grandfathered"; licensees were not compelled to issue any new ones. See s. 12(3) of the regulation. Thus, if this court were to grant the order sought, the replaceable contracts lost would not be re-issued to the existing contractors, nor to others.

21. Under the Timber Harvesting Contract and Subcontract Regulation, a replaceable contract "pertains" to a replaceable tree farm licence or replaceable forest licence.

22. A replaceable logging contract is a valuable asset to a logging contractor. In addition to providing an assurance of future work, it also stands as an asset which may be bought and sold.

23. There is evidence before the court as to the value of such an asset. Suffice it to say that, generally, interior replaceable contracts have a value exceeding $10 per m3, referring to the number of cubic metres to be harvested annually under the contract. Thus, a 60,000 m3 replaceable contract will be worth at least $600,000. (Coastal contracts are thought to have a higher value.)

2010 amendment

24. Prior to 2010, Bill 13 contractors often fared poorly before this honourable court in the case of licensee insolvencies. Undoubtedly the court will be presented, by other counsel, with those precedent cases. Essentially, then, provincial government policy was undermined. In part, submits this respondent, this was because federal insolvency legislation, such as CCAA, trumps the provincial laws.

25. All of those cases involved ordinary vesting orders, i.e., the forest licence vested to the buyer but the Bill 13 contract remained with the insolvent debtor (who no longer had any right to harvest Crown timber).

26. In an effort at preventing further occurrences of this, in 2010 the provincial government amended the Forest Act to provide:

> *54(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;*

An "agreement" includes a tree farm licence and a forest licence, per ss. 12 and 53. "Disposition" is defined in s. 53(1).

27. See also s. 54.61(1), which permits the minister to suspend rights under the licences when "(a) the holder purports to dispose of the agreement when a condition set out in section 54 (2) is not met;".

28. The concept behind this subsection, of course, is that the purchaser of a replaceable forest licence would need to take with it the Bill 13 contracts. Such obligation would apply in the ordinary course of business, but also in the case of an ordinary vesting order in a licensee insolvency.

29. This counsel is aware of no post-2010 case of licensee insolvency in which Bill 13 contracts have been lost.

30. An RVO will allow an end run around this provincial legislation. It will leave those logging contractors without those replaceable contracts and without the assurance of future work. The fact that Bill 13 contracts have been "grandfathered" means that the license holder is not obliged to issue replaceable logging contracts in respect of that very timber to be harvested under its replaceable tree farm license and replaceable forest licenses. That imbalance in the relationship between licensee and contractor will be returned to.

31. Given that the "contractor clause" continues to exist in the renewable licences, and that those obligations will persist if a reverse vesting order is made, one must ask: what is the harm or cost to the licensee of having replaceable logging contracts persist? Not only do replaceable logging contracts benefit the contractors, they also benefit the licensees. They ensure that there are stable, long-term, properly staffed and properly equipped harvesting contractors working for them.

32. If this assertion is disputed, one would think that the licensee would produce some objective evidence of same.

Recap

33. To recap, important legislative milestones here are:

1950's the contractor clause requirement in licenses became the law, and licensees were then required to use contractors to harvest at least 50% of their volume (maybe more on the coast).

1991 first version of Bill 13 becomes the law;

1996 second version of Bill 13 becomes the law;

2004 pursuant to the provincial government's "Forestry Revitalization Plan", among other things existing Bill 13 contracts are grandfathered but no new ones need be issued; and,

2010 section 54 (2)(d.1) is added to the Forest Act which provides:

> (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.

34. The "bottom line", from the Interior Logging Association's perspective, is that no Bill 13 contractor should be in the position of feeling that its Bill 13 contract is at risk of being lost in the case of licensee insolvency. It, and its work force, needs the security of knowing that if timber is to be harvested under a renewable forest licence, then it and its fellow contractors will be the ones doing a percentage of that harvesting. These assurances permit contractors to purchase equipment, and indeed to purchase renewable contracts from others, without the risk of those being lost. Indeed, the loss of those renewable contracts could well lead to the insolvency of the contractors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Date: March 26, 2024

Signature: **JOHN M. DRAYTON**