No. S236214
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1392752 B.C. LTD.

AND:

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

RESPONDENTS

Written Submissions of Alvarez & Marsal Canada Inc., in its capacity as Receiver

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Application for Approval and Vesting Order

March 27, 2024

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A. Overview

1. These written submissions are prepared by the Receiver in respect of its application for an approval and vesting order which, among other things:

(a) approves the transaction (the "**Transaction**") contemplated by the payment and retention agreement dated February 29, 2024 (the "**Retention Agreement**") between the Receiver and Cui Family Holdings Ltd. ("**Cui Holdings**"); and

(b) vests the Excluded Assets and the Excluded Liabilities (as each of those terms is defined in the Retention Agreement) in a new company to be incorporated by Cui Holdings or the Receiver ("**ResidualCo**").

2. The application is opposed by, among others, two holders of replaceable contracts and His Majesty the King in Right of the Province of British Columbia (the "**Province**").

3. Capitalized terms not defined herein have the meanings ascribed to them in the Retention Agreement.

4. A comprehensive summary of the background to these proceedings can be found in the Receiver's reports (collectively the "**Reports**"), including the fourth report of the Receiver dated February 29, 2024 (the "**Fourth Report**"), the supplemental report to the fourth report of the Receiver dated March 6, 2024 (the "**Supplemental Report**") and the second supplemental report to the fourth report of the Receiver dated March 11, 2024 (the "**Second Supplemental Report**").

B. Procedural History and Relevant Facts

5. On September 20, 2023, Justice Blake of the Supreme Court of British Columbia (the "**Court**") granted an order (the "**Receivership Order**") appointing Alvarez & Marsal Canada Inc. as receiver of all of the assets, undertakings and property, including real property (collectively, the "**Property**"), of Skeena Sawmills Ltd. ("**Sawmills**"), Skeena Bioenergy Ltd. ("**Bioenergy**"), and ROC Holdings Ltd. ("**ROC**", and together with Sawmills and Bioenergy, the "**Skeena Entities**" or the "**Company**").[1]

[1] Fourth Report at para. 1.1.

6. The Property comprises, among other things, inventory and work in progress, equipment, a sawmill, a bioenergy plant and three forest tenures and licences: TFL 41 , FLA 16882 and FLA 16885 (collectively, the "**Licences**").[2]

7. Since its appointment, the Receiver has taken steps to, among other things, sell certain assets (i.e. finished lumber), collect accounts receivable, preserve and maintain the sawmill, bioenergy plant and equipment, and market the Company's assets for sale. The holding costs relating to the preservation and maintenance of the Company's assets, along with the professional costs incurred in relation to advancing the receivership proceeding, total approximately $300,000 per month.[3]

Dealing with the Licences

8. As noted above, Sawmills holds three Licences. If the Licences are transferred to another party, or there is a change of control of the holder of the licence, among other things, the approval of the Minister of Forests is required. According to the Province, that process, which includes consultation with relevant First Nations, takes at least 15 weeks and can take up to 36 weeks (i.e. about four to nine months).[4] In addition, any transferee of the Licences would have to assume the obligations of Sawmills under any replaceable contracts associated with the Licences.

Bill-13 Replaceable Contracts

9. Replaceable contracts are governed by the *Forest Act*, R.S.B.C. 1996, c 157 (the "**Forest Act**") and the regulations made thereunder, including the *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/96 (the "**Regulations**") and are colloquially referred to as "Bill-13 contracts" in reference to the 1991 Bill amending the *Forest Act* to provide for the creation and implementation of the Regulations.

10. Sawmills is party to two replaceable "stump to dump" contracts (together, the "**Replaceable Contracts**", and each a "**Replaceable Contract**") as follows:[5]

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[2] Supplemental Report at para. 1.1

[3] Second Supplemental Report at para. 2.2(e).

[4] 1st Affidavit of Jacques Bousquet made March 7, 2024 at Exhibit "C".

[5] Supplemental Report at para. 2.2; 1st Affidavit of Shenwei (Sandra) Wu made on March 15, 2024 (the "**Wu Affidavit**") at paras. 39 and 45 and Exhibits "I" and "L".

(a) a five-year term replaceable coast stump to dump timber harvesting contract dated January 1, 2015 entered into with Terrace Timber Ltd. ("**Terrace Timber**") in respect of the harvesting of timber allowable under Tree Farm Licence 41 and other ancillary activities related thereto (the "**Terrace Timber Contract**"); and

(b) a five-year term replaceable interior timber harvesting contract dated January 1, 2016 entered into with Timer Baron Contracting Ltd. ("**Timber Baron**" and together with Terrace Timber, the "**Contractors**") in respect of the harvesting of timber allowable under Forest Licence A16882 and other ancillary activities related thereto (the "**Timber Baron Contract**").

11. Historically, the Company has suffered substantial losses, part of which the Company attributes to the higher provisional rates payable to the Contractors under the Replaceable Contracts when compared to what would otherwise be payable in a non-replaceable, or "market", contract.[6]

12. Both of the Replaceable Contracts have expired, and Sawmills and the Contractors failed to come to terms on the basis of which either contract would be replaced.[7]

13. No work has been performed by Timber Baron on the lands covered by Licence A16882 since July 2022.[8]

14. When the Receivership Order was granted, the Company and Timber Baron were in the midst of arbitration in relation to various disputes arising from the Timber Baron Contract, consisting of: (i) a rate dispute in respect of nine different cut blocks; (ii) claims for work performed based on provisional rates; and (iii) a claim against the Company for alleged breach of its obligations in respect of the amount of work provided to Timber Baron.

15. On October 5, 2023, counsel to Timber Baron delivered a letter to the Receiver's counsel outlining its various claims against the Company, quantifying its alleged claim against the Company in relation to the Timber Baron Contract at $3,142,291.67.

[redacted]

[7] Wu Affidavit at paras. 40 and 46.

[8] Wu Affidavit at para. 41.

[redacted]

18. No work has been performed by Terrace Timber on the lands covered by TFL-41 since at least May 2023.[11]

19. Cui Holdings is of the view that retaining the Replaceable Contracts is "unsustainable" and "detrimental to the long-term economic viability of the business" and, accordingly, the Transaction is conditional on the RVO being granted, including the vesting of the Replaceable Contracts in ResidualCo.[12]

20. Further details on the Replaceable Contracts and the Contractors can be found in the Supplemental Report and the Wu Affidavit.

Sale Process

21. As detailed in the Reports, the Receiver commenced the sale process on October 31, 2023 (the "**Sale Process**"). It received nine non-binding expressions of interest ("**EOIs**") from seven interested parties by the EOI deadline of December 8, 2023. After the Receiver conducted its review of the EOIs, four parties were invited to participate in Phase II of the Sale Process and each submitted a definitive bid (each a "**Definitive Bid**") by the bid deadline of January 12, 2024. All of the Definitive Bids were discussed in further detail in the first confidential report of the Receiver to Court dated January 19, 2024.[13]

[redacted]

[11] Wu Affidavit at para. 49.

[12] Wu Affidavit at para. 38.

[13] Fourth Report at para. 7.1.

22. Of the bids received by the Receiver, whether in the form of an EOI or a Definitive Bid, only one contemplated the assumption of either of the Replaceable Contracts. That bid (an EOI) was from a party related to Terrace Timber. It contemplated the acquisition of two parcels of real property and TFL 41, along with the assumption of the Terrace Timber Contract. The Receiver did not advance the bid because, among other things: (i) the purchase price under the bid was effectively nil (meaning the Receiver could only have completed the transaction at a loss); and (ii) removing TFL 41 from the assets available for sale would jeopardize any *en bloc* sale.[14]

23. One of the Definitive Bids submitted was for FLA16882. It did not specify whether the purchaser intended to assume the associated Replaceable Contract. In any event, the offer was not actionable given the proposed purchase price for the Licence and the fact that selling that asset alone would likely eliminate the possibility of selling the remaining assets *en bloc.*[15]

24. None of other bids received, including the *en bloc* bids, contemplated the retention of either of the Replaceable Contracts.[16]

The Transaction

25. At a high level, the Transaction, to be implemented by way of reverse vesting order, contemplates: (i) Cui Holdings retaining its shares in ROC and Bioenergy (collectively, the "**Shares**"); (ii) the Skeena Entities retaining certain specified assets, including the Licences; and (iii) the vesting of the Excluded Assets, including the Replaceable Contracts, and Excluded Liabilities, including the amounts alleged as due and owing under the Replaceable Contracts, out of the Skeena Entities and in to ResidualCo.[17]

26. The Transaction, as structured, contemplates payment by Cui Holdings in consideration for the retention of the Shares by Cui Holdings and the retention by the Skeena Entities of the Retained Assets free and clear of all encumbrances, other than certain Permitted Encumbrances. Notably, as there is no change in the shareholders of the Skeena Entities or of Cui Holdings, there is no change of control of any of the entities.

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[14] Supplemental Report at paras. 3.2 and 3.3.

[15] Supplemental Report at para. 3.4.

[16] Supplemental Report at para. 3.4.

[17] Fourth Report at para. 7.7.

27. The consideration payable by Cui Holdings under the Retention Agreement, assuming a closing date of the Transaction of April 19, 2024, can be summarized as follows:[18]

(a) credit bid of approximately $8,931,000, consisting of:

(i) $8,000,000 of principal and interest due and owing to the Petitioner (and now Cui Holdings) under two grid promissory notes; and

(ii) $931,000 due and owing to the Petitioner (and now Cui Holdings) in respect of the amounts advanced under the Receiver's Certificates to fund these proceedings;

(b) payment of approximately $4,098,000 in respect of priority claims consisting of:

(i) $1,800,000 due and owing to the City of Terrace in respect of property tax arrears;

(ii) $1,177,000 due and owing to Province in respect of stumpage fees;

(iii) $82,000 due and owing to Canada Revenue Agency ("CRA") in respect of unremitted source deductions; and

(iv) $1,040,000 due and owing to equipment lessors in respect of various equipment to be retained by the Company;

(c) payment of $400,000 in respect of work-in-progress inventory; and

(d) payment of $30,000 in respect of the fees and costs expected to be incurred in the administration of the bankruptcy of ResidualCo.

28. Subject to obtaining court approval, it is anticipated that the Transaction can complete in a timely manner.

Restarting the Company's Operations

29. Cui Holdings seeks to complete the Transaction in an effort to restart the Company's operations after which it expects to employ the same number of people (approximately 150) and procure goods and services from the same number of businesses (approximately 200) as it had previously.[19]

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[18] Second Supplemental Report at para. 2.1.

[19] Wu Affidavit at paras. 17-20.

30. Cui Holdings notes that significant capital expenditures and cost-cutting measures will be required in order to restart and operate the Company's business. Cui Holdings intends to implement a strategic plan to achieve these goals to improve the likelihood of the Company's long-term financial viability.[20]

31. Cui Holdings estimates that, over the course of 36 months, it, along with certain investors, will make the following capital investments in furtherance of its strategic plan:

(a) $1.5 million for the initial restart period;

(b) $12 million for the first six months following the restart period; and

(c) $13 million over a three year period following operational restart.[21]

32. According to Ms. Wu, Cui Holdings' cost-cutting measures include the vesting off of the Replaceable Contracts and the Company's obligations thereunder as the rates sought to be charged by the Contractors are higher than would otherwise be charged for contractors doing the same or similar work.[22] in Ms. Wu's view

C. Legal Submissions

The Court's Jurisdiction Generally

33. There is no specific jurisdiction in any insolvency legislation, including the BIA and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"), authorizing courts to grant a reverse vesting order ("**RVO**").

34. Courts across Canada, including in B.C., have, nevertheless granted RVOs in the context of CCAA proceedings, proposal proceedings (under the BIA) and receivership proceedings[23].

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[20] Wu Affidavit at paras. 27-34.

[21] Wu Affidavit at para. 28.

[redacted]

[23] *2056706 Ontario Inc. v Pure Global Cannabis Inc. et al.* (January 7, 2021) Toronto CV-20-00638503-00CL (O.S.C.J.); *KW Capital Partners Limited v Vert Infrastructure Ltd.* (June 8, 2021) Toronto CV-20-00642256-00CL (O.N.S.C.); *Tallinn Capital Energy et al. v Elcano Exploration Inc. et al.* (March 11, 2022) Calgary 2101-08818 (A.B.K.B.); *National Bank Of Canada v Balanced Energy Oilfield Services Inc. et al.* (March 30, 2022) Calgary 2201-02699 (A.B.K.B.); *ATB Financial v Jam Hospitality Inc. et al.* (May 9, 2022) Calgary 2101-05667 (A.B.K.B.); *1951584 Ontario Inc. v Pulse RX Inc. and Family Pharmacy Clinic Inc.* (May 24, 2022) Ontario CV-21-006611434-00CL (O.N.S.C.); Cortland Credit Lending Corporation v Genesis Integration Inc. and 365591 Alberta Ltd. (September 13, 2022) Calgary 2201-10223 (A.B.K.B.); *In the Matter of the Receivership of*

35. In *Quest University Canada (Re)*, 2020 BCSC 1883 ("***Quest***"), Madam Justice Fitzpatrick cited *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.K.B.). ("***JMB Crushing***") as authority for the underlying purpose of reverse vesting orders in insolvency proceedings:

> [142] In JMB Crushing, the monitor relied on the orders granted in *Plasco Energy, Stornoway Diamond, Wayland Group* and *Beleave*, arguing that the RVO structure was justified in those circumstances:
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> ...
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> 24. In recent CCAA proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to "cleanse" the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
>
> 25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same CCAA proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.
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> (emphasis added)

36. In CCAA proceedings, the courts have identified the source of their jurisdiction as being the statutory discretion afforded them under section 11,[24] which reads as follows:

> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Robus Resources Inc. (December 14, 2022) Calgary 2201-01016 (A.B.K.B.) ; *Forage Subordinated Debt LP III v Enterra Feed Corporation et al.* (March 2, 2023) Calgary 2201-12935 (A.B.K.B.).

[24] *Harte Gold Corp. (Re)*, 2022 ONSC 653 ("*Harte Gold*") at paras. 28-32; *Quest* at para. 155.

37. From the Responses filed herein, there does not seem to be any dispute that the court has the jurisdiction to grant an RVO in the context of CCAA proceedings. However, the Province (at least) takes the position that RVOs cannot be granted in receivership proceedings.[25]

38. Courts in B.C. have granted RVOs in at least one proposal proceeding, *PaySlate Inc. (Re)*, 2023 BCSC 977 ("**Payslate**"), and three receivership proceedings, *Peakhill Capital Inc. v Southview Gardens Limited Partnership*, 2023 BCSC 1476 ("**Peakhill**"), *1351486 B.C. Ltd. v Port Capital Group Inc. et al.* (October 27, 2023), Vancouver S229506 (B.C.S.C.) and *Royal Bank of Canada v iFLY Vancouver Inc. et al.* (March 15, 2024) Vancouver S220275 (B.C.S.C.).

39. The cases in Canada in which RVOs have been granted in proposal or receivership proceedings describe the source of their jurisdiction variously as follows:

(a) in *PaySlate Inc. (Re)*, 2023 BCSC 608, where the Honourable Justice Walker decided against granting an RVO on the basis that counterparties whose rights were rights were affected were not provided adequate notice:[26]

> [84] Although many of the case authorities discussing the circumstances in which RVOs may be issued are in the context of the CCAA, RVOs are available tools in other insolvency cases as well. Similar considerations apply in the context of the BIA.
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> [85] In the BIA, s. 183 confers jurisdiction in accordance with legal and equitable principles to give effect to its purpose: *Re Olympia & York Developments Ltd.*, 1997 CanLII 12400 (ON SC), [1997] O.J. No. 591 at paras. 7, 10 (Gen. Div., in Bankruptcy); *Re Residential Warranty Company of Canada Inc. (Bankrupt)*, 2006 ABQB 236 at para. 26. Those purposes include those applying to proposals such as s. 65.13(4).
>
> [86] In addition to *Blackrock Metals*, *Harte Gold*, and *Quest*, there are other case authorities finding jurisdiction to order RVOs, including a notice of intention to make a proposal under the BIA (case name is underlined), and receivership proceedings, such as: *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00 (Ont. S.C.J. [Comm. List]); *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]); *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]); *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]); *Beleave Inc.* (September 18, 2020), Toronto, CV-20-642097 (Ont. S.C.J. [Comm. List]); *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.K.B.); *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488; *In the Matter of a Plan of Compromise or Arrangement of Clearbeach Resources Inc. and Forbes Resources Corp.*, 2021

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[25] The Province does not indicate whether it is of the view that an RVO can be granted in the context of proposal proceedings under the BIA. The paper the Province cites in its Response, Professor Aminollah Sabzevari, "*A Hill Too Far: Reverse Vesting Orders in BIA Receiverships*", February 26, 2024, CanIII Connects (https://canliiconnects.org/en/commentaries/93579) seems to accept that RVOs can be granted in proposal proceedings under the BIA but not in receivership proceedings under the BIA, despite the BIA including no specific authority for either.

[26] The RVO was subsequently granted in those proceedings in *Payslate* after notice of the application had been provided to the parties affected.

ONSC 5564; *In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc.* (November 8 and December 20, 2021, Toronto, CV-31-2774500 (Ont. S.C.J. [Comm. List]; *Port Capital Development (EV) Inc. (Re),* 2022 BCSC 1464, leave to appeal ref'd *1296371 B.C. Ltd. v. Domain Mortgage Corp.*, 2022 BCCA 331; *In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841; *In the Matter of CannaPiece Group Inc.* (February 10, 2023), Toronto CV-22-689631-00CL (Ont. S.C.J. [Comm. List]); *Credit Suisse AG, Cayman Islands Branch v. Southern Pacific Resource Corp. et. al.* (May 13, 2022), Calgary 1501-05908 (A.B.K.B.).

(b) In *Peakhill*:

[22] In my view, the issue of whether this Court has jurisdiction to grant RVOs in proceedings under the BIA was raised squarely and decided in PaySlate #1. In my respectful view, the decision of Justice Walker was both correct and determinative of the issue.

...

[25] In my view, this argument is met by PaySlate #1. As stated, Justice Walker has decided that the general words of s. 183 are sufficient to ground jurisdiction.

(c) in *Proposition de Brunswick Health Group Inc.*, 2023 QCCS 4643:

[42] Paragraphs 65.13(1) and 65.13(4) of the BIA are a mirror of paragraphs 36(1) and 36(3) of the CCAA. Hence, since paragraphs 36(1) and 36(3) CCAA do not, in of themselves, anchor the jurisdiction to issue an RVO in a CCAA proceeding, s. 65.13 also is an insufficient basis to issue an RVO in a BIA proceeding. Resort must be had to some other general power under the BIA. As stated, in a CCAA proceeding, the power set out at S. 11 CCAA can be relied on. This power is "vast".

[43] In *Century Services Inc.*, the Supreme Court of Canada observed that the BIA serves the same remedial purpose as the CCAA: permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. It noted that in the BIA context, this is achieved through a rules-based mechanism that offers less flexibility. Indeed, the CCAA is "famously more skeletal in nature".

...

[45] Very recently, in *Chronométriq*, Justice Schrager writing for the Court of Appeal, examined whether the findings in *Canada North* regarding the power of a judge to order that the interim financing charge prime the *Income Tax Act* ["ITA"] deemed trust, could also be applied in a BIA setting.

[46] At the outset, he made this observation: "proposal provisions in the BIA serve, inter alia, the same remedial purpose as those in the CCCA – i.e., the financial rehabilitation of an insolvent corporate debtor. [...] To the extent possible, the two statutes should be treated in a harmonized fashion."

[47] He then proceeded to carry out the statutory interpretation of the BIA and concluded that the judge did indeed have the explicit power to order the interim financing charge to prime over the ITA deemed trust using sub-paragraph 50(6)(3) BIA.

[48] He then presented a subsidiary justification to support the judge's power to so order, in the event that his statutory interpretation was wrong. He concluded that, similarly to the general power granted by s. 11 BIA, the Superior Court has the inherent jurisdiction to order the charge to prime, under s. 183 BIA, as well as by application of art. 49 of the Quebec Code of Civil Procedure.

> [49] Justice Schrager did however call for the exercise of caution when invoking this inherent jurisdiction: 'the inherent jurisdiction must be used sparingly and with caution because of its broad and loosely defined nature. Inherent jurisdiction cannot be used in contravention of statutory provisions. It is also limited by the nature of the BIA."[27] He concludes as follows:
>
> > [60] I would point out that inherent jurisdiction attaches to the Superior Court, such that the same inherent jurisdiction exists whether the CCAA or the BIA is applied. Historically, inherent jurisdiction has been exercised more often upon application of the CCAA, presumably because its skeletal nature makes for more gaps than is the case for the BIA, which offers a detailed rules-based regime. That being said, when a gap is identified upon applying the BIA, the inherent jurisdiction allows the gap to be filled when and as appropriate.
>
> [50] Courts have issued RVO orders in a BIA setting, but not necessarily with reasons. Justice Walker did provide detailed reasons in *PaySlate*. He concluded that he had jurisdiction under the BIA to issue an RVO. He invoked s. 183 BIA to give effect to the BIA's purposes, including those purposes applying "to proposals such as s. 65.13(4)".
>
> [51] Taking all this into consideration, given the similarity between s. 65.13 BIA and s. 36 CCAA, given *PaySlate* and given the Superior Court's inherent jurisdiction as defined in *Chronométriq*, the Court may, in exceptional and unusual circumstances, issue an RVO order.

40. If this court seeks to undertake a comprehensive review of its jurisdiction to grant an RVO in a receivership proceeding, it must consider both the source of such jurisdiction and the breadth of it with regard to, among other things, the policy underlying the legislation itself.

41. As recently affirmed by the Supreme Court of Canada (the "**SCC**") in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 ("**Petrowest**"), the powers granted to superior courts under the BIA are "broad and flexible".[27]

42. In particular, sections 183 and 243 of the BIA provide that provincial superior courts are invested with plenary statutory jurisdiction in relation to bankruptcies and receiverships.[28] Those sections reflect Parliament's conferral of statutory jurisdiction to these courts in relation to their role in overseeing and controlling insolvency proceedings initiated under the BIA.[29] As with any

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[27] *Petrowest* at para. 146.

[28] *Pope & Talbot Ltd. (Re)*, 2009 BCSC 1552 ("*Pope Talbot*") at para 118; *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCCA 283 at para 10.

[29] *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 ("*Third Eye*") at para. 53; G. R. Jackson & J. Sarra, "*Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters*", in J. Sarra, ed., Annual Review of Insolvency Law 2007 (Toronto: Thomson Reuters, 2008) ("**Jackson and Sarra**"); *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92 ("*Sam Levy*") at paras. 17, 20, 31 and 38.

conferral of statutory authority, the breadth thereof is determined with reference to the language, context, and purpose of the provision in question and, more generally, the legislation.[30]

43. The scope of jurisdiction conferred on superior courts under section 183 must be necessarily broad "if it is to accomplish its purpose", as "anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs".[31]

44. Section 243 of the BIA confers equally broad authority on a supervising court in relation to a receivership. This section authorizes a court to appoint a receiver to "do any or all of the following if it considers it to be just and convenient to do so", including to "take possession" of all of the property of the insolvent person and exercise control over that property or "take any other action that the court considers advisable".[32]

45. The Court in Petrowest had the following to say regarding the source and breadth of courts' jurisdiction under the BIA:

> [147] The *BIA* is remedial legislation that is intended, in part, to provide for an orderly and efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives (*Century Services*, at para. 15; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43). Section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters which may be exercised concurrently with their jurisdiction in ordinary civil matters (Houlden, Morawetz and Sarra, at § 8:2; *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333, at para. 8 (CanLII)).
>
> [148] Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, "take any . . . action that the court considers advisable", if the court considers it "just or convenient to do so". This very expansive wording has been interpreted as giving judges the "broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise" in relation to court-ordered receiverships (*DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538, at para. 20; see also Houlden, Morawetz and Sarra, at § 12:18; *Dianor*, at paras. 57-58). Section 243(1)(c) thus permits a court to do not only what "justice dictates" but also what "practicality demands" (*Dianor*, at para. 57; *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. C.J. (Gen. Div.)), at p. 185).

46. Considering the language of sections 183 and 243, and the well recognized objectives of the BIA, it is apparent that Parliament intended to grant courts the broadest of authority to effectively manage insolvency proceedings, including receiverships. These sections are not to be construed narrowly. Both exist within the BIA, remedial legislation which should be interpreted

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[30] Jackson and Sarra.

[31] *Sam Levy* at para 38.

[32] BIA, s. 243.

liberally to ensure its objectives are capable of being met. Courts ought to read these provisions in light of the turbulent business context in which they arise, in each case applying a "pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems".[33]

47. The broad language included in the BIA in relation to the appointment of a receiver is necessary for the receiver to fulfill its mandate to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors".[34] Insolvency courts have the authority to grant not only the orders which are expressly contemplated in section 243 but also those which are practically necessary to fulfill the receiver's mandate. It is for this reason that the model receivership orders of most provinces contain numerous provisions not expressly set out in the BIA, including stays of proceedings, the authority to market and sell assets, the authority to initiate or defend all legal proceedings, orders enjoining parties from terminating contracts, orders governing claims against the receiver, and the authority to cease to perform agreements on behalf of the debtor.[35] These orders are necessarily incidental to a receivership and are designed to ensure the efficacy of the process.

48. As alluded to above, section 243(1) of the BIA includes only very general language relating to the appointment of receivers—it does not even contemplate authorizing a receiver to sell the debtor's assets(!). However, the same section allows the court to authorize the receiver to "take any other action that the court considers advisable."

49. Given that one of the primary mandates of any receiver is to realize on the debtor's assets, that must include granting such powers and orders as may be necessary to achieve that objective. In appropriate circumstances, that would include the authority to grant an RVO, provided such order furthers the objectives of the BIA. Among those objectives is the "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse".[36]

50. In other words, if an RVO will facilitate a transaction for the benefit of the debtor's creditors and promotes the expeditious, efficient and economical resolution of the receivership

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[33] *Third Eye* at paras. 43 and 76; *Pope Talbot* at para. 121.

[34] *Third Eye* at para. 73.

[35] *Third Eye* at paras. 63, 73-74 and 85-86.

[36] *Sam Levy* at para. 17; *Petrowest* at para. 55.

proceeding, the court has the jurisdiction under the BIA to make such order. That is not to say the court should in every instance grant an RVO—that remains extraordinary relief and will depend on the specific circumstances of each case—only that the court has the jurisdiction to do so.

51. Further supporting the proposition that RVOs may be granted in the context of receivership proceedings are the authorities holding that the CCAA and BIA, forming part of an "integrated body of insolvency law", must be read harmoniously in order to further their objectives:[37]

> [17] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [Century Services], the Court stated:
>
> > [24] With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation ...
> >
> > [78] Tysoe J.A. therefore erred in my view by treating the CCAA and the BIA as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the BIA and the CCAA, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108, at paras. 62-63).
>
> [18] Similarly, in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [Callidus] at para. 74, the Court stated:
>
> > [74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements" to those received under the BIA (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73).
>
> (emphasis added)

52. It would at this point appear to be settled law that the courts have the authority to grant RVOs in the context of CCAA proceedings in reliance on the broad jurisdiction vested in courts

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[37] *EncoreFX Inc. (Re)*, 2023 BCSC 39 at paras. 17-19.

under section 11 of that Act. It would be inconsistent with current authorities to hold that RVOs could not similarly be granted in receivership proceedings in reliance on the similarly broad jurisdiction afforded courts under section 183 and 243(1) of the BIA.

RVOs and Section 72(1) of the BIA

53. Terrace Timber and the Province argue that section 72(1) of the BIA precludes a court from granting an RVO which contemplates the retention of the Licences but the vesting out of the Replaceable Contracts. With respect, that assertion is unsupportable with reference to the relevant authorities and legislation, including the *Forest Act* and Regulations.

54. Section 72 of the BIA provides that the provisions of the Act will 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]". It goes on to add that the trustee is "entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by" the BIA. [38]

55. Section 72(1) was enacted to ensure that a trustee has the ability to use provincial and federal laws that may appear to overlap or serve similar purposes. It was also aimed at achieving the "highest possible degree of legal integration of federal and provincial laws".[39] Indeed, there is unavoidable tension between the BIA and some provincial laws. The BIA relies on provincial law for the creation of certain liabilities and rights. At the same time, the BIA cannot help but affect property and civil rights.[40] Section 72(1) is the statutory expression of this tension, and does no more than confirm the constitutional doctrine of paramountcy, as affirmed by the SCC in *Petrowest*:

> [151] I disagree. Section 72(1) merely confirms the constitutional doctrine of federal paramountcy, affirming that the BIA prevails where there is a "genuine inconsistency" between provincial laws relating to property and civil rights and the BIA (Moloney, at para. 40). It is well established that harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility (*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at paras. 64 and 66). Peace River's proposed interpretation of s. 72(1) of the BIA overlooks the fact that a party's "right" to have its dispute referred to arbitration under s. 15 of the Arbitration Act arises only where the court finds that the arbitration agreement at

[38] BIA, s. 72.

[39] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para. 64.

[40] Ibid.

> issue is not void, inoperative, or incapable of being performed. I have already explained that the statutory exception for inoperability may apply in certain insolvency scenarios. In other words, there is no "genuine inconsistency" between the Arbitration Act and the BIA. I therefore agree with both Peace River and the Receiver that the paramountcy doctrine is not engaged.
>
> (emphasis added)

56. In *Petrowest*, the Court held that the statutory jurisdiction arising under ss. 183(1) and 243(1)(c) permitted a court to find an arbitration agreement inoperative, i.e. overriding a contractual right did not conflict with provincial laws relating to property and civil rights.[41]

57. As will be addressed further in the section below, there is no basis on which to elevate a replaceable contract such that it is treated differently from an arbitration agreement or any other contract in the context of insolvency proceedings.

58. Relating to the foregoing, it is notable that receivers may be authorized to disclaim an executory contract even though the effect of doing so is that the contract holder will be left only with a claim for damages against the company.[42]

59. In *bcIMC*, this Court held:[43]

> [60] ... The ability to "market any or all of the Property", the ability to "sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof" and the ability to "apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof" must be taken to allow the Receiver and Manager to disclaim a Contract providing the Receiver and Manager seeks court approval to do so and providing the holders of the Contracts are notified of such an application.

60. Paragraph 3 of the Receivership Order in this case includes identical language.

61. It would, in the Receiver's submission, be an absurdity if it were held that while contracts (including replaceable contracts) can be disclaimed in the context of receivership proceedings, they may not be vested out.

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[41] *Petrowest* at paras. 150-152.

[42] *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 ("*bcIMC*") at paras. 53-54; *New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154 ("New Skeena BCCA") at paras. 16-19; *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 ("*Forjay*"), affirmed *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 251, at paras. 35-39.

[43] *bcIMC* at para 60.

The Interplay Between an RVO and the Licences

62. The *Forest Act* and the Regulations regulate the contractual relationships between licence holders and the holders of replaceable contracts.

63. The Receiver fully accepts the Province and Contractors' submissions to the effect that part of the legislative intention behind the *Forest Act* and Regulations is to protect contractors. However, legislative intention cannot be relied upon to imply provisions into legislation, particularly where doing so would preclude the harmonious interpretation of provincial and federal legislation (in this case the *Forest Act* and Regulations and the BIA).

64. The short answer is that the *Forest Act* and Regulations do not preclude the court from vesting out replaceable contracts as part of an RVO in appropriate circumstances.

65. In an early case concerning the termination of replaceable contracts in the context of CCAA proceedings, the Court of Appeal held as follows:[44]

> [48] ... It is true that the Act and Regulation contemplate a perpetual series of contracts (provided the contractor fulfils its obligations thereunder) and contemplate the termination of a replaceable contract only in the event of a reduction in AAC or the expiration or surrender of the licence. But nothing in the legislation to which we were referred purports to invalidate a termination of a replaceable logging contract by the licence holder or to require that a court make an order for specific performance in the event of such a termination. (In a CCAA context, such an order would be very unlikely, as well as futile.) The licence holder will of course be liable in damages for breach of contract, giving rise to a "claim" against the debtor corporation under the CCAA. The licence holder may also be in breach of one or more of its obligations under the Act; but ultimately, a logging contract is still a "contract" at law, notwithstanding that many of its terms are dictated by the legislation for the protection and security of the contractor.

66. In *New Skeena Forest Products Inc. et al v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818 ("***New Skeena BCSC***"), as affirmed by the Court of Appeal in *New Skeena BCCA,* this court approved the disclaimer of replaceable contracts and vested in a purchaser certain assets, including tree farm licences, free and clear of all encumbrances, including the replaceable contracts held in relation thereto. In approving the disclaimer and vesting the licences free and clear of the

[44] *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344 at para. 48.

replaceable contracts, the lower court held that replaceable contracts do not grant contractors an *in rem* or a proprietary right that runs with the tree farm licence, but rather a contractual right.[45]

67. On appeal, the Court cited *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of Repap British Columbia Inc. et al.* (June 11 1997), Vancouver A970588 (B.C.S.C.), affirming that replaceable contracts are executory contracts capable of being disclaimed:[46]

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the Forest Act. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts....

68. Put simply, a replaceable contract is still just a contract.

69. In response to the New Skeena decisions, the Legislative Assembly of British Columbia (the "**Legislature**") enacted the *Miscellaneous Statutes Amendment Act (No. 3), 2010*, S.B.C. 2010 c. 21 s. 87 (in force June 3, 2010 (Royal Assent)) (the "**Amending Act**") to, among other things, amend section 54(2) of the Act to add subsection (d.1), which reads as follows:

> (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,[47]

70. The legislative intent behind the foregoing amendments to the Forest Act is found in the Official Report of Hansard Debates, Second Session, 39th Parliament, Tuesday, May 27, 2010, Morning Sitting, Volume 19, Number 1:

> **Hon. M. de Jong**: Amendments to the Forest Act increase the protection for logging contractors when licenses are transferred in insolvency proceedings by requiring the transfer of 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.

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[45] *New Skeena BCSC* at paras. 35 and 39.

[46] *New Skeena BCCA* at para 14.

[47] Although the court need not decide the issue on this application, query whether such provision undermines the statutory priority scheme under the BIA and is, therefore, void (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC) at paras. 10-39 and 86-87)

71. The amendments dealt with the disposition of replaceable contracts, including in the context of insolvency proceedings. Among other things, the amendments ensure that in the event of a disposition of the licence, the transferee of the licence assumes all obligations under any replaceable contracts relating to such licence. The revisions plainly did not alter what replaceable contracts are at their core, i.e. executory contracts and nothing more.

72. Section 54.6 of the *Forest Act*, which is also relied upon by the Contractors, includes no prohibition on the transfer of licences or the disclaimer or vesting out of licences. It provides only that the transferee of a licence is liable for any outstanding obligations under that licence at the time of transfer.

73. The Legislature did not revise the *Forest Act* to deal with the disclaimer of replaceable contracts or the vesting off of such contracts, including under a restructuring process or under a reverse vesting order where the applicable licence is not transferred.[48] Although the rule of implied exclusion alone is not conclusive when interpreting legislation, it is a tool to be applied when determining statutory intent.[49] Accordingly, it can be inferred that in drafting the Amending Act, the Legislature did not intend to address the disclaimer of replaceable contracts or the vesting off of such contracts.

74. The sections of the *Forest Act* identified by the Province and the Contractors as precluding the court from vesting out replaceable contracts—including section 54(2)(d.1)—are not engaged on the present application. They concern the disposition of such contracts to another party; they do not in any way address the vesting out of such contracts. The same can be said for s. 33.8 of the Regulations, which not only concerns the disposition of replaceable contracts, it is also the same as was before the courts in the New Skeena decisions.

75. Similarly, Division 2.1 (Corporate Changes of Control and Amalgamations) of Part 4 of the *Forest Act* has no application in the present case. That part of the *Forest Act* arises only upon a change of control of a licence holder.

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[48] The Receiver notes that reverse vesting orders were not likely on the Legislature's mind when enacting the Amending Act.

[49] R. Sullivan, "*Sullivan on the Construction of Statutes*", 7th ed. (Markham, Ont.: LexisNexis, 2022) at pgs. 247-250.

Approval of the Transaction and the Granting of the RVO is Appropriate

76. The Receiver accepts that RVOs are extraordinary relief and are not the norm. As noted in the Province's Response, "generally, an RVO transaction is used because it is the only viable option that will provide the greatest recovery to the debtor's creditors."[50]

77. In the Receiver's submission, the Transaction is indeed the only viable option and provides the greatest recovery for the Skeena Entities' creditors and the best available outcome for its stakeholders generally.

78. In considering whether to approve the Transaction and grant the RVO, at all stages of the sale process, the Receiver was cognizant of the following circumstances:

(a) a transfer of the any of the Licences, or a change of control of the holder of the Licences (Sawmills) would require the approval of the Minister of Forests, which could take anywhere from three to nine months or more, with no certainty that such approval would be granted;

(b) a transfer of any of the Licences would likely require the transferee to assume the Company's obligations under the Licences; and

(c) the costs of maintaining the Property was in the order of $300,000 per month, and there was no certainty of funding to permit the completion of the approval process for the transfer of the Licences.

79. Accordingly, any offer contemplating the acquisition and transfer of one or more of the Licences was at risk of not completing if the Minister of Forests did not approve the transfer, and the transferee (or someone else) would have to fund the receivership pending the outcome of the approval process, i.e. it would have to fund $900,000 to $2.7 million or more.

80. Ultimately, the sales process resulted in only one EOI which contemplated the acquisition of a Licence with the corresponding replaceable contract, that being an offer from a party related to the replaceable contract holder, i.e. Terrace Timber. The purchase price under the offer was insufficient to warrant consideration (it would have cost the Receiver money to complete, let alone fund the receivership during the approval process) and it was not, accordingly, a viable offer.

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[50] Jennifer Stam et al, "*Putting it in Reverse: A Possible Path to US Chapter 15 Recognition of Reverse Vesting Order and Cannabis Filings*", 2022, 20th Annual Review of Insolvency Law, 2022 CanLIIDocs 4299 at p. 6

81. No other offers contemplated the preservation of the Replaceable Contracts.

82. The Transaction as contemplated does, however, preserve the Property and facilitate the recommencement of the operations, including by preserving the Licences, along with the other permits and licences necessary for the operation of the sawmill and the bioenergy plant. This at least leaves open the possibility of many or all of the 129 union members and other employees employed in the operation of those facilities being rehired.[51]

83. Apart from the foregoing, the Transaction, if completed, will also result in the payment of approximately:

(a) $1.8 million in property taxes to the City of Terrace;

(b) $82,000 to CRA on account of unremitted source deductions;

(c) $1.177 million to the Province for unpaid stumpage fees;

(d) $1.04 million on account of amounts owing to equipment lessors under their financing leases; and

(e) $400,000 on account of raw log inventory owned by Sawmills.

84. This Court has held, in the context of a receivership, that "there is no doubt that a common use of RVOs is to preserve a going concern or to maintain licenses and permits which cannot be transferred easily".[52]

85. The Ontario Superior Court of Justice has further held that the preservation of licences and permits, mitigating unnecessary risky, delay and costs in a receivership, are valid reasons for the granting of a reverse vesting order:[53]

> [71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

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[51] Wu Affidavit at paras. 19-20.

[52] *Peakhill* at paras. 20-22 and 39.

[53] *Harte Gold* at para 71.

86. Similarly, in the case at hand, the RVO is necessary and warranted. The RVO ensures the preservation of the Licences, along with many other licences and permits, without any transfer thereof or change of control, and thereby allows for the completion of the Transaction without potential regulatory approvals that would necessarily involve avoidable risk, delay and significant cost.[54]

87. Turning to the *Harte Gold* factors to be considered in determining whether an RVO is appropriate in the circumstances:

(a) Why is the RVO necessary in this case?

The RVO is necessary in order to ensure the preservation of the Licences without the delay, risk and costs of undertaking the approval process which would be triggered in the event of a transfer of the Licences, or a change in control.

As held in both *Harte Gold* and *Peakhill*, the consideration when determining whether an RVO is appropriate is not whether a licence is capable of being transferred, but whether, in the circumstances, it can be transferred easily and efficiently to avoid protracted proceedings to the detriment of the stakeholder group, as is squarely the case in this proceeding.

By retaining the Licences and vesting off the Replaceable Contracts, an RVO preserves and maximizes the value of the Company's assets, a factor to take into consideration as held in *Harte Gold*.[55] If an RVO is not granted, the alternative, as evidenced by the results of the Sale Process, is the liquidation of the Skeena Entities' assets on a piecemeal basis which will undoubtedly result in significantly impaired returns for all stakeholders.

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

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[54] In its response, Terrace Timber concedes that the delay factor in effecting a traditional transaction is present in this case.

[55] *Harte Gold* at para. 77.

The evidence included in the Reports is decisive in respect of this factor. The Transaction produces an economic result which is superior, and in all but one instance significantly superior, to that available under any other offers received, whether by way of RVO or any alternative process. The Transaction cannot be completed—and is not available—except in an RVO structure.

The Transaction, if implemented, sees the greatest recovery for the most stakeholders in comparison to that available under any other offer and is the only viable offer that facilitates the recommencement of operations of the sawmill and bioenergy plant.

In its Third Supplemental Report, the Receiver notes that on March 22, 2024, the Receiver received a new offer from Kitsumkalum First Nation (the "**Kitsumkalum Offer**"), which contemplated the acquisition of the same assets as under the Transaction. The offer contemplated the transfer of the Licences (without the Replaceable Contracts) and, therefore, the approval of the Province would be required. The Receiver has concluded that the offer is inferior to the PRA as there is risk it may not close and the net proceeds under the offer would be less than under the RPA taking into account the funding required during the approval process. For those reasons, the Receiver does not consider the Kitsumkalum Offer to be a viable offer.

Cui Holdings' evidence is that it intends to make substantial investments to restart the Company's business and expects to employ the same number of people (approximately 150) and procure products and services from businesses (around 200 people and local businesses) at roughly the same level as it had previously.[56]

(c) Is any stakeholder worse off under the RVO structure than they would have been under any viable alternative?

The word "viable" is critical in assessing this factor.

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[56] Wu Affidavit at para.

This is best approached by considering the various types of stakeholders:

(i) The Province – It is receiving all stumpage fees due to it (~$1,177,000). No other viable offer contemplated the payment of stumpage. The Province also has an unsecured claim arising from a bioenergy funding agreement entered into with Bioenergy. There were no offers, and there is no realistic scenario, under which unsecured creditors of the Skeena Entities would receive anything on account of their claims. Accordingly, the Province could not have done better under any alternative transaction or structure.

(ii) The First Nations – At least one of the First Nations asserts that the RVO structure eliminates the opportunity for them to be consulted in the context of a proposed transfer of one of the Licences. However, as there was no viable alternative which would have resulted in a transfer of any of the Licences, no First Nation with consultation rights can be considered to be any worse off under the RVO structure.

(iii) The Contractors – Under the RVO structure, the Replaceable Contracts will be vested out to ResidualCo, which will subsequently be bankrupted, meaning those contracts will, for all intents and purposes, be terminated. Again, however, there is no viable alternative that would have resulted in the preservation of either of the Replaceable Contracts, meaning neither of the Contractors are worse off under the RVO structure.

(iv) Former and current employees – Under the Transaction, the collective bargaining agreement will continue, and the four remaining union employees will remain employed (though on temporary layoff). Cui Holdings has adduced evidence to the effect that it intends to recapitalize and recommence operations, meaning there is a likelihood 129 union members and dozens of other employees will retain their jobs or be rehired. Two other offers (one an EOI and the other a Definitive Bid) contemplated the acquisition of all or substantially all of the operating assets, though: (i) neither was considered a viable offer; and (ii) neither specified that they

intended to continue operating the business. In any event, the former and current employees are certainly no worse off under the Transaction.

(v) The equipment lessors – The equipment lessors are being paid the full amounts owing to them, less their proportionate share of the receivership costs. No other offer which included the equipment contemplated anything different, and, accordingly, the equipment lessors would not be any better off under any other transaction.

(vi) Lien claimants and creditors with security interests in current assets (i.e. cash, work in progress) – All current assets have already been sold by the Receiver with the exception of certain raw log inventory of Sawmills and fibre of Bioenergy. Under the Transaction, $400,000 is being paid on account of both, with the funds being allocated to the raw log inventory (in which creditors other than the Petitioner have a priority claim). There was one other offer which included the acquisition of the raw log inventory, though it was not considered a viable offer and did not indicate how much of its offer was allocated to the raw log inventory. No one has offered to acquire just the raw log inventory.

(vii) The community of Terrace – Outstanding property taxes will be paid in full under the Transaction. In addition, Cui Holdings intends to restart the Company's operations and expects to employ roughly the same number of people it had in the past and procure goods and services from over 200 business, many of which are located in Terrace or the surrounding areas.

(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 RVO structure?

As there is no allocation provision in the Retention Agreement, it is impossible to identify the consideration ascribed to the Licences under the Transaction. However, what is readily apparent form the evidence available to the court, including in the confidential report, is that the going concern sale of the assets, *en bloc*, including

the Licences, under the Retention Agreement and through an RVO structure generates significantly more value than under a piecemeal sale of the individual assets.

Only one other Definitive Bid contemplated a going concern sale (which included the Licences but expressly contemplated the vesting out of the Replaceable Contracts). That offer was for an amount similar to the consideration under the Retention Agreement, however the offer was incapable of being advanced due to significant conditions and other issues.[57]

The Contractors

88. The Receiver acknowledges the Contractors' position that the granting of the RVO, as sought, causes them financial harm. There is, however, no alternative which avoids that result.

89. The reality of insolvency proceedings such as these is that there is no outcome that will satisfy all parties, as each carries its own internal seeds of chaos, unpredictability and instability.[58] The role of the Receiver is to balance the interests of all parties and proceed with what it views to be the best course of action.

90. As an officer of the Court, the Receiver is tasked with considering the interests of all stakeholders when bringing a transaction to Court for approval and, inevitably, certain stakeholders will not be satisfied with its decision:[59]

> [40] ... Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others.... The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision...
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> [emphasis added]

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[57] The Kitsumkalum Offer also contemplates consideration similar to that under the PRA, but if it were to close the net proceeds under such offer would be less than under the RPA.

[58] *Pope Talbot* at paras. 121-122

[59] *In Ravelston Corp., Re (2005)*, 2005 CanLII 63802 (ON CA), 24 C.B.R. (5th) 256 (Ont. C.A.) (WL), at para. 40.

91. In the Receiver's view and as explained herein, the Transaction provides the greatest benefit to the broadest number of stakeholders, particularly when weighing it against the alternatives, none of which are viable in the circumstances.

Retention of Assets by Existing Shareholder

92. One or more of the parties opposing the Receiver's application and the Transaction generally argue that it is unseemly or inappropriate for Cui Holdings to retain its shares under the RVO when it should have proceeded by way of a proposal under the BIA or plan of arrangement under the CCAA.

93. This argument is largely answered by the comments of the courts in *JMB Crushing* and *Quest*, where the purpose of an RVO was described as being to cleanse a debtor company by transferring and vesting out all unwanted assets and liabilities to another company to facilitate a transaction where it was not practical to compromise claims by way of a traditional plan of arrangement.[60]

94. Cui Holdings could acquire the assets subject to its security by way of a traditional approval and vesting order, however, for the reasons set out above, that is impractical in this case. There is no rational basis, then, for precluding Cui Holdings from implementing the Transaction under an RVO. Certainly there is no indication in any of the authorities that a creditor cannot utilize an RVO structure to implement a transaction simply by virtue of the fact that it is related to one or more of the debtor companies.

95. In the present case, there is no scenario where unsecured creditors might make any recovery so as to necessitate a plan of arrangement, and the delay and cost associated with a plan are not justified in the circumstances.

96. As to "seemliness" of Cui Holdings retaining its interest in the debtors' shares and, indirectly, their assets, the worst that can be said of it is that it was unable to run its business at profit (or even break even in doing so) in the past. There is no suggestion that in doing so Cui Holdings did anything improper. The Receiver also notes that despite operating at a substantial

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[60] Quest at para. 142.

loss for years, it was relatively current in its obligations to CRA and its employees, and those parties will be made whole under the Transaction (with the exception of termination pay).

97. In the Receiver's view, the fact that Cui Holdings is related to the Skeena Entities and under the Transaction retains its interest therein is not a factor weighing against the granting of the RVO.

Releases

98. One or more of the parties opposing the Receiver's application and the Transaction have argued that the releases contemplated in the RVO are overly-broad and unnecessary in the circumstances. In an effort to address those concerns, the Receiver, with the consent of Cui Holdings, has significantly pared back the releases sought.

99. Releases such as those included in the RVO are commonly included in approval and vesting orders granted in insolvency proceedings, particularly those commenced under the CCAA[61], despite there being no express provision in the CCAA permitting the granting of such order:

> [77] The CCAA does not contain any express provisions either permitting or prohibiting the granting of releases, including third party releases, as part of a plan of compromise or arrangement. Nevertheless, there is authority to the effect that the court may approve releases found in a plan of arrangement while exercising its statutory jurisdiction under the CCAA. The leading decision is *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, leave to appeal to S.C.C. refused (2008), 390 N.R. 393 (note). At paras. 40-52 of Metcalfe, a plan containing third party releases was sanctioned. At para. 46, the court stated that such jurisdiction may be exercised where the releases are "reasonably related to the proposed restructuring".[62]

100. Similar releases have also been granted in proceedings commenced under the BIA, including *Kitchener Frame,* where, in the context of a proposal under the BIA, the Court approved a broad release in favour of the applicants and certain third parties, once again reaffirming the harmonious interpretation of the CCAA and the BIA required to achieve consistency and coherence in insolvency legislation:

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[61] *8640025 Canada Inc. (Re)*, 2021 BCSC 1826; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 ("*Metcalfe*"), leave to appeal to S.C.C. refused (2008), 390 N.R. 393; *Bul River Mineral Corporation (Re)*, 2015 BCSC 113 ("*Bul River*"); *Walter Energy Canada Holdings, Inc. (Re)*, 2018 BCSC 1135; *Kitchener Frame Limited (Re)*, 2012 ONSC 234.

[62] Bul River at para. 77.

> [46] In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the BIA would defeat the purpose of the legislation. See *NTW Management Group (Re)* (1994), 29 CBR (3d) 139; *Olympia & York Developments Ltd.* (Re) (1995), 1995 CanLII 7380 (ON SC), 34 CBR (3d) 93; *Olympia & York Developments Ltd.* (Re) (1997), 1997 CanLII 12400 (ON SC), 45 CBR (3d) 85.
>
> [47] Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24. This principle militates in favour of adopting an interpretation of the BIA that is harmonious, to the greatest extent possible, with the interpretation that has been given to the CCAA.
>
> ...
>
> [78] It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the BIA as a prohibition against third-party releases in a BIA proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a BIA proposal proceeding should differ from a CCAA proceeding.

101. In *Kitchener Frame*, the Court summarized the requirements that justify third party releases:

> [80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify third-party releases are:
>
> a) the parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) the claims to be released are rationally related to the purpose of the Plan ...and necessary for it;
>
> c) the Plan ... cannot succeed without the releases;
>
> d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan...; and
>
> e) the Plan ... will benefit not only the debtor companies but creditors generally.
>
> ...
>
> [82] No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

102. The Receiver submits that the *Metcalfe* factors are equally applicable in determining whether releases should be granted as part of an RVO and, taking the foregoing factors into consideration, the releases sought are justified in the circumstances:

(a) The parties to be released are necessary and essential to the restructuring of the debtor:

The RVO contemplates certain discrete releases in favour of the Skeena Entities, the Receiver (and its affiliates) and Cui Holdings, all of which are necessary to include for the efficacy of the Transaction.

(b) The claims to be released are rationally related and necessary:

The RVO contemplates the release of the Skeena Entities from any claims comprising the Excluded Liabilities and Encumbrances as against the Retained Assets, which are required in the context of any vesting order in an insolvency proceeding.

Additionally, the RVO contemplates the release of specific claims against the Receiver (and its affiliates), Cui Holdings, the Skeena Entities and the Retained Assets. The scope of such releases are narrow in that they only relate to claims arising from or in respect of the insolvency of the Skeena Entities, the commencement or existence of these receivership proceedings or the completion of the Transaction, preserving any claims that arose prior to the commencement of these proceedings.

Lastly, the RVO includes a release of the Receiver and its employees and representative from any claims that may arise from carrying out the Transaction, which includes the standard carve-out for any gross negligence or wilful misconduct on the part of the Receiver. This release should be unobjectionable is the Transaction is otherwise approved by the Court.

(c) the Transaction cannot succeed without the releases:

The Transaction, and thus the Skeena Entities' future as a going concern, is not capable of being completed without the releases sought in the RVO. The Company is incapable of operating without the vesting off of the Excluded Liabilities or the Encumbrances against the Retained Assets. Simply put, the Company requires a cleansing by transferring and vesting out all unwanted assets and liabilities in order to be financially viable. Additionally, the releases in favour of the Receiver, Cui Holdings and the Retained assets relating to the Company's insolvency, the

Transaction or these proceedings, are required to provide a level of certainty to those parties involved in the Transaction upon the granting of the RVO.

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way:

Cui Holdings, the Receiver and the Company are integral to these proceedings and the Transaction. Without appropriate releases in favour of the foregoing parties, the Transaction is incapable of completing.

(e) the Transaction will benefit not only the debtor companies but creditors generally:

As set out above in these submissions, the Transaction provides the most value to the greatest number of stakeholders in the circumstances.

D. Conclusion

103. To the extent that the parties opposing the Receiver's application are of the position that the Transaction should proceed in a manner other than by RVO, that is not available.

104. As held in *Quest*, "it is not up to the Court to dictate the terms and conditions that are included in an offer", as the Court must consider the offer that is in front of it for approval.[63] Similar to the circumstances in *Quest*, the Transaction is the only viable transaction that has emerged to resolve the financial affairs of the Company as:

(a) the Transaction is the only option that can complete in a timely manner, thereby limiting additional costs which might be incurred as a result of any delay in the conclusion of these receivership proceedings;

(b) without the granting of the RVO, the Transaction will not complete, resulting in uncertainty and delay in the resolution of these proceedings to the detriment of all parties;

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[63] Quest at para 158.

(c) no other Definitive Bid, or any of the EOIs for that matter, provides anywhere near as much value to the Company's stakeholders as that contemplated by the Retention Agreement, and the Kitsumkalum Offer is not viable due to closing risk and, in any event, the sale proceeds thereunder would be materially less than the consideration under the Transaction;

(d) none of the *en bloc* Definitive Bids contemplated retention of the Replaceable Contracts; and

(e) stakeholders, including many former employees, contractors, suppliers and customers as well as the City of Terrace, will benefit from the Transaction, including if the Company recommences operations, as Cui Holdings proposes to do.[64]

105. For the reasons set out herein, the Receiver submits that the court should grant the RVO on the terms sought, including the approval of the Transaction and the vesting out the Excluded Assets and Excluded Liabilities.

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

Kibben Jackson counsel for
Alvarez & Marsal Canada Inc.,
in its capacity as Receiver

[64] Wu Affidavit at paras. 18-20.