



No. S236214  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1392752 B.C. LTD.

PETITIONER

AND:

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

RESPONDENTS

## **APPLICATION RESPONSE**

*FORM 33 (RULE 8-1(10))*

Application response of: The Gitanyow Nation, as represented by its Hereditary Chief, Malii also known as Glen Williams in his capacity as a Gitanyow Hereditary Chief, and on behalf of all members of the Gitanyow Nation (hereinafter the “**Gitanyow**”, the “**Gitanyow Nation**” or the “**application respondent**”)

THIS IS A RESPONSE TO the notice of application of Alvarez & Marsal Canada Inc. as receiver (the “**Receiver**”) of all of the assets, undertakings and property, including real property of Skeena Sawmills Ltd., Skeena Bioenergy Ltd., and ROC Holdings Ltd., filed February 29, 2024.

The application respondent estimates that the application will take three days.

### **PART 1: ORDERS CONSENTED TO**

Nil

### **PART 2: ORDERS OPPOSED**

The Gitanyow oppose the granting of the order sought in paragraph 1 of Part 1 of the notice of application.

### **PART 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Gitanyow take no position on the granting of the order sought in paragraph 2 of Part 1 of the notice of application.

### **PART 4: FACTUAL BASIS**

#### **Overview**

#### **Gitanyow Nation**

1. The Gitanyow is an Indigenous Nation whose unceded traditional territory is located on the Kitwanga River 8km south of Kitwancool Lake, at the confluence of Kitwancool Creek in the mid-Nass River and Kitwanga River watershed in northwestern British Columbia (hereinafter the “**Territory**”).<sup>1</sup>
2. The Gitanyow Nation consists of Malii also known as Glen Williams, Gwaas Hla’am also known as George Phillip Daniels, Luuxhon also known as Don Russell, Gamlaxyeltxw also known as Wilhelm Marsden, Sindihl also known as Robert Good, Watakhayetsxw also known as Agatha Bright, Gwinuu also known as Phyllis Haizimsque, Wii’litsxw also known as Gregory Rush, Haizimsque also known as Ken Russell, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all members of the Gitanyow Nation.
3. The Receiver’s Notice of Application seeks a reverse vesting order (the “**Reverse Vesting Order**”). As part of the Reverse Vesting Order, the Skeena Entities and the Cui Holdings, as both are defined in the Notice of Application, seeks to retain, among others, Forest License A16882 dated for reference May 23, 2017 (the “**License**”) as a Retained Asset.<sup>2</sup>
4. The Gitanyow assert Aboriginal title to the timber resources in its unceded traditional Territory, including the timber subject to the License.

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<sup>1</sup> Affidavit of Joel Starlund (“Starlund Affidavit”), pg. 2, para 4. Ex. A: Affidavit #1 of Parisa Shariati (“Shariati Affidavit”), pg. 1, para 2, Ex. A

<sup>2</sup> Payment and Retention Agreement at Schedule B to Notice of Application of the Receiver, filed February 29, 2024

5. The Gitanyow Nation has commenced a claim against the Province of British Columbia for Aboriginal title and Aboriginal rights to an approximate 6,200 square kilometer area, which area includes all of its Territory and timber subject to the License. The Aboriginal rights and title lawsuit is scheduled for hearing before the Supreme Court of British Columbia commencing in October, 2024.<sup>3</sup>
6. The structure of the proposed Reverse Vesting Order transaction is intended to and does avoid triggering the Province's requirements around the disposition of the Licence under the *Forest Act*, and eliminates the required consultation with affected First Nations, which would include the Gitanyow.<sup>4</sup>
7. The Gitanyow oppose the Reverse Vesting Order on the basis that the Gitanyow are a stakeholder who will be worse off if the Reverse Vesting Order is granted because it disregards the consultation process in respect of their interests in the timber resources in their Territory.

### **The License**

8. The Licence grants the Licensee, Skeena Sawmills Ltd., rights to harvest timber during the term of the License from the Nass Timber Supply Area.<sup>5</sup>
9. A significant portion of the Nass Timber Supply Area lies within Gitanyow Territory.<sup>6</sup>
10. The Gitanyow estimate that the Gitanyow Territory holds over 70% of the timber harvesting land base in the Nass Timber Supply Area.<sup>7</sup>
11. Pursuant to the License, the Licensee and its predecessor, have harvested timber almost exclusively on Gitanyow Territory for several reasons including:
  - (a) it is the closest hauling distance to the Skeena sawmill;

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<sup>3</sup> *Malii v. British Columbia*, 2024 BCSC 85: Shariati Affidavit, pg. 2, para 3. Ex. B

<sup>4</sup> *Forest Act*, [RSBC] 1996, c. 157

<sup>5</sup> Affidavit of #1 Jacques Bousquet ("Bousquet Affidavit"), Ex. E, pg. 46, clause 1.02(a)

<sup>6</sup> Starlund Affidavit, pg. 2, para. 6. Ex. B

<sup>7</sup> Starlund Affidavit, pg. 2, para. 7

- (b) proximity to the Highway 37 corridor; and
- (c) it provides the best available timber in the Nass Timber Supply Area.<sup>8</sup>

12. Accordingly, the Gitanyow have a direct and substantial interest in the disposition of the Licence in the Receivership and its effect on the timber harvesting in its Territory.

13. The express language of the License itself makes it clear that the Gitanyow have a significant interest in the lands subject to the License.

14. Recital D of the License states that:

“The Government of British Columbia acknowledges that Justice Tysoe of the British Columbia Supreme Court has found that the Gitanyow...have a good prima facie claim of aboriginal title and a strong prima facie claim of aboriginal rights to at least part of the areas included within the lands covered by the Forest License”.<sup>9</sup>

15. Recital E of the License states that:

“The Government of British Columbia acknowledges, that this license has been granted over a landbase on which First Nations have had a historical presence and that it owes a continuing duty to consult and where appropriate accommodate those First Nations in circumstances defined by the courts. The Government of British Columbia acknowledges that part of this duty includes, in certain contexts consideration of the Wilp system of governance as an integral and defining feature of Gitanyow society.”<sup>10</sup>

16. Clause 16.02 states that in this License, unless the context otherwise requires:

“aboriginal interest” means a potential aboriginal right and/or aboriginal title that has not been proven through a court process.”<sup>11</sup>

17. Section 2.05 of the Licence requires that the Licensee:

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<sup>8</sup> Starlund Affidavit, pg. 3, para. 8

<sup>9</sup> Bousquet Affidavit, Ex. E, pg. 1

<sup>10</sup> Bousquet Affidavit, Ex. E, pg. 1

<sup>11</sup> Bousquet Affidavit, Ex. E, pg. 17

“...will include the Gitanyow Wilp boundaries on maps shared with the Gitanyow First Nation depicting planned forest operations and that the inclusion of Wilp boundaries on these maps will facilitate information sharing and assist future Crown consultation with the Gitanyow First Nation.”<sup>12</sup>

### **Gitanyow communications with Province and Receiver regarding the Licence**

18. There were some discussions between the Gitanyow and Skeena Sawmills in March 2023 regarding a proposed partnership involving the License. However, these were not advanced negotiations as it was obvious to the Gitanyow that Skeena Sawmills did not want a true partnership with the Gitanyow Nation. These discussions were rejected by the Gitanyow Nation.<sup>13</sup>
19. The Gitanyow held a Teams meeting with the Receiver on December 13, 2023 in which they stated the Gitanyow’s position as set out herein that they assert Aboriginal title to part of the lands that the License encompasses as well as timber in their Territory and that there is an obligation to consult with them.<sup>14</sup>
20. By letter dated December 14, 2023, the Gitanyow formally alerted the B.C. Ministry of Forests and all potential licensees to the position of the Gitanyow that they would contest any attempt to transfer the License to a non-Gitanyow entity. The Gitanyow also asserted that the License was intricately tied to the Gitanyow ancestral lands and its transfer posed an obvious and high potential for substantial adverse impact on the Gitanyow’s constitutionally protected rights.<sup>15</sup>
21. On December 14, 2023, the Gitanyow also issued a press release setting out the Gitanyow position.<sup>16</sup>
22. By email sent January 31, 2024, Jevan Hanchard, Regional Executive Director, Skeena Region-Ministry of Forests responded to the Gitanyow’s December 14, 2023 letter and

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<sup>12</sup> Bousquet Affidavit, Ex. E, pg. 4

<sup>13</sup> Starlund Affidavit, pg. 3, para 9

<sup>14</sup> Affidavit of Parisa Shariati, pg. 1, para 2 Ex. A; Starlund Affidavit, pg. 3, para. 10

<sup>15</sup> Starlund Affidavit, pg. 3, para 11. Ex. C

<sup>16</sup> Starlund Affidavit, pg. 3, para 13. Ex. E

confirmed that in considering any disposition of the License the Ministry is obligated to consult with potentially affected First Nations prior to a decision being made.<sup>17</sup>

## **PART 5: LEGAL BASIS**

1. The Gitanyow is an Indigenous Nation and asserts Aboriginal rights and title with respect to the timber in its Territory and to the Territory itself. As set out in the License itself, the Gitanyow have a direct interest in what happens with the timber in its Territory.
2. The Gitanyow are a stakeholder in these proceedings. The Courts have long recognized social stakeholders in CCAA proceedings<sup>18</sup>, including First Nations interests in respect of Aboriginal and treaty rights<sup>19</sup>.
3. The Reverse Vesting Order is an exceptional remedy. One of the factors to be considered in deciding whether to grant the Reverse Vesting Order is whether any stakeholder would be worse off under the Reverse Vesting Order structure than it would be under any viable alternative.<sup>20</sup>
4. Typically, a receivership would involve a disposition of licenses under Part 4, Division 2 of the *Forest Act* or a change of control under Part 4, Division 2.1 of the *Forest Act*.<sup>21</sup>
5. Before approving the transfer, it is mandatory for the Minister to consider the public interest. The Minister would consult with First Nations regarding the approval decision, which would inform the Minister's assessment of public interest. If the Receiver had proceeded with either a transfer or an amalgamation/change of control, the Minister would have to consider the public interest, which would necessarily encompass interests of affected First Nations.<sup>22</sup>

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<sup>17</sup> Starlund Affidavit, pg. 3, para. 12, Ex. D

<sup>18</sup> *Canadian Red Cross Society (2000)* 19 C.B.R. (4th) 158 Ont S.C.J

<sup>19</sup> *Bloom Lake g.p.l.* 2015 QCCS 1920 at paras 80-89

<sup>20</sup> *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 38

<sup>21</sup> Application Response of His Majesty the King in the Right of the Province of British Columbia, filed March 7, 2024 ("Province's Response"), part 5, para 52

<sup>22</sup> Province's Response, part 5, para 53

6. The Receiver has submitted that the transaction as structured does not require any regulatory consultation under the *Forest Act* in relation to the License, as there would be no disposition or change of control. In fact, the Receiver touts the avoidance of “potential regulatory delay” as one of the benefits of the Reverse Vesting Order.<sup>23</sup>
7. The potential regulatory delay referenced by the Receiver is the mandated approval process under the *Forest Act* which requires that the Province consult with the Gitanyow as to the disposition of the License which substantially affects their Territory and their title claims to their Territory and the timber resources thereon.
8. The effect of the Reverse Vesting Order is to blatantly circumvent the required approval of a disposition or change in control which a Receivership would typically trigger and thereby avoid consultation between the Gitanyow Nation and the Province with respect to the disposition of the License.
9. If the Reverse Vesting Order is granted, the Gitanyow Nation is a stakeholder that will be worse off since they will not be consulted with respect to the disposition/change of control of the License and the harvesting of timber in the Gitanyow territory especially in light of the upcoming scheduled trial for Aboriginal title and rights to the Territory.<sup>24</sup>

#### **PART 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Parisa Shariati, made March 19, 2024;
  2. Affidavit #1 of Joel Starlund, made March 19, 2024;
  3. The pleadings and proceedings filed herein; and
  4. Such further and other material as counsel may advise.
- The application respondents have not filed in this proceeding a document that contains an address for service. The application respondents' ADDRESS FOR SERVICE is:

HARPER GREY LLP  
Barristers & Solicitors  
3200-650 West Georgia Street  
Vancouver, BC V6B 4P7

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<sup>23</sup> Notice of Application of the Receiver, part 3, para 9(b), and part 2, para 12

<sup>24</sup> *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 38

Attention: Drew Lawrenson/Kristina Davies  
Phone: 604 895 2807/604 895 2904  
Email: dlawrenson@harpergrey.com/kdavies@harpergrey.com

Date: March 19, 2024



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HARPER GREY LLP  
(Per Kristina Davies)  
Lawyer for the Gitanyow Nation