NO. S-236214
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1392752 B.C. LTD.

PETITIONER

AND:

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

RESPONDENTS

APPLICATION RESPONSE

Application response of: **Terrace Timber Ltd. (the "application respondent")**

THIS IS A RESPONSE TO the Notice of Application of Alvarez & Marsal Canada Inc. as receiver of all of the assets, undertakings and property, including real property, of Skeena Sawmills Ltd., Skeena Bioenergy Ltd., and ROC Holdings Ltd., filed the 29th day of February, 2024.

The application respondent estimates that the application will take one (1) day.

PART 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: None.

PART 2: ORDERS OPPOSED

The application respondents opposes the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: Paragraph 1 (Reverse Vesting Order, Schedule "C" to the Notice of Application).

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: Paragraph 2 (Increased Borrowings Order, Schedule "D" to the Notice of Application).

PART 4: FACTUAL BASIS

Receivership Proceedings and Background

1. On September 20, 2023, upon the application of 1392752 B.C. Ltd. (the "**Petitioner**"), this Honourable Court granted a receivership order (the "**Receivership Order**") pursuant to which, *inter alia*, Alvarez & Marsal Canada Inc. was appointed as the receiver (the "**Receiver**") of all of the assets, undertakings, and property (collectively, the "**Property**") of Skeena Sawmills Ltd. ("**Skeena Sawmills**"), Skeena Bioenergy Ltd. ("**Bioenergy**"), and ROC Holdings Ltd. ("**ROC**", and collectively with Skeena Sawmills and Bioenergy, the "**Skeena Entities**").

   Order Made After Application pronounced by the Honourable Madam Justice Blake on September 20, 2023.

2. Each of the Skeena Entities is a direct or indirect wholly-owned subsidiary of Cui Family Holdings Ltd., which is owned by Shenwei (Sandra) Wu and certain family trusts that are ultimately controlled by Xiao Peng (Teddy) Cui. The Skeena Entities and the Petitioner are related parties and all controlled by the Cui family.

   First Report of the Receiver, dated October 25, 2023 at para. 3.1 [First Report].

3. The lands upon which the Skeena Entities operated were acquired, by the Cui family, from West Fraser Timber Co. Ltd. in or around 2011.

   First Report at para. 3.3.

4. The Skeena Entities have suffered substantial losses since their acquisition, which historically were funded by unsecured shareholder loans, which the Petitioner (as assignee of such loans) has asserted totaled $135.6 million. These have not been proven and a debt vs. equity analysis has not been completed.

   First Report at para. 3.10.

5. Following a demand for repayment made by the Petitioner, the Skeena Entities, the Petitioner, and Bright Future International Trading Ltd. entered into a Forbearance Agreement dated January 31, 2023.

First Report at para. 3.10;

Affidavit of Xiao Peng Cui, made on September 8, 2023, at Exhibit "B" [Cui Affidavit #1].

6. Following execution of the Forbearance Agreement, the Petitioner advanced approximately $7.6 million in consideration to the Skeena Entities (the "**Additional Consideration**"). In turn, the Skeena Entities and the Petitioner entered into various guarantee and securities agreements which purported to secure all of the pre-Forbearance Agreement debts as well as the Additional Consideration.

First Report at paras. 3.12 - 3.14;

Cui Affidavit #1 at Exhibits "B", "C", and "G".

7. Numerous stakeholders raised concerns regarding the propriety of the Petitioner's efforts to obtain priority in respect of previously-unsecured antecedent advances, pursuant to security and guarantee arrangements granted to the Petitioner by an insolvent related party in circumstances where all involved parties were controlled by the same persons.

First Report at paras. 8.1(f), 8.2, 8.3.

8. The Petitioner ultimately brought an application to determine the validity and enforceability of its security in respect of the Additional Consideration. The Petitioner did not seek similar declarations regarding advances prior to the execution of the Forbearance Agreement.

9. On January 25, 2024, on the Petitioner's application, this Honourable Court granted an order (the "**January 25 Order**"), among other things, declaring that the Petitioner's security and guarantees are valid and enforceable with respect to the Additional Consideration.

Order Made After Application pronounced by the Honourable Madam Justice Blake on January 25, 2024, at paras. 1 - 5 [January 25 Order].

10. While the January 25 Order permitted the Petitioner to seek further declarations regarding the validity and enforceability of its security and guarantees in relation to pre-2023 advances, the Petitioner has not done so.

January 25 Order at para. 6.

Terrace Timber and the Bill 13 Contract

11. The Application Respondent, Terrace Timber Ltd. ("**Terrace Timber**") is a subsidiary of Main Logging Ltd. ("**Main Logging**").

Affidavit of Walker Main, made on March 5, 2024 at para. 2 [Main Affidavit].

12. Main Logging and its subsidiaries have operated on North and South Vancouver Island, in the Okanagan, Cariboo, northern Interior, North Coast (off-shore), northwestern BC (Kitimat to Iskut), Haida Gwaii, and Northern Alberta. In the past, Main Logging and subsidiaries having harvested more than one million cubic metres annually.

Main Affidavit at para. 3.

13. In 1997, Main Logging was selected by West Fraser Timber to purchase West Fraser Timber Skeena Sawmills woods division. The purchase was for the harvesting rights of Tree Farm License 41 ("**TFL 41**") which had previously been harvested by West Fraser Timber Skeena Sawmills (woods division), an USW bargaining unit. Terrace was incorporated in 1997 to facilitate the successorship of the bargaining unit and continue the harvest work on TFL 41.

Main Affidavit at paras. 4 - 5.

14. Terrace Timber and Skeena Sawmills are parties to a replaceable stump-to-dump timber harvesting contract dated January 1, 2015 for TFL 41 (the "**Bill 13 Contract**").

Main Affidavit at para. 6 and Exhibit "A".

15. The Bill 13 Contract has a five-year term from January 1, 2015 to December 31, 2019, and is a replaceable contract under the provisions of the *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/96 (the "***Regulation***").

Main Affidavit at para. 7.

16. As a replaceable contract, Skeena was obligated to offer to Terrace Timber a replacement contract for the Bill 13 Contract on substantially the same terms and conditions as the Bill 13 Contract. Skeena to date has yet to offer a replacement contract on substantially the same terms. For this reason, despite the expiry of its term on its fact, the parties continued to operate under the Bill 13 Contract from 2019 pursuant to the *Regulation*. Harvesting activities actively occurred on TFL 41 until the appointment of the Receiver in these proceedings.

Main Affidavit at para. 8.

17. A key term of a replaceable contract is the security of future work, subject only to satisfactory performance. On this basis, contractors such as Terrace Timber can invest in equipment necessary to complete the work.

Main Affidavit at para. 9.

18. Under the terms of the Bill 13 Contract, Terrace Timber completes the harvesting, hauling, and road maintenance work in relation to the harvest of 100% of the volume harvested from TFL 41 each year (the "**Bill 13 Work**"). It is Skeena's obligation under the Bill 13 Contract to allocate the Bill 13 Work to Terrace Timber; it is Terrace Timber's obligation under the Bill 13 Contract to have the equipment and manpower available to complete the Bill 13 Work.

Main Affidavit at para. 10.

19. TFL 41 has an AAC (Annual Allowable Cut) of 128,000 m^3, although this volume has not been achieved by Terrace Timber since 2019 due to work cessations directed by Skeena Sawmills. This harvest volume does not include work-in-progress specifically on Block Kit009 and Kit007, both of which are part of TFL 41. The work-in-progress has not been measured because scaling does not occur until the wood is delivered to scales by Terrace, but the estimated outstanding payment for work-in-progress is approximately $40,000.

Main Affidavit at para. 12.

20. In addition to nonpayment for the work-in-progress yet to be delivered to scales, Terrace Timber is owed more than $3,000,000 on account of harvesting performed at historical, outdated harvesting rates. This debt has not yet been ascertained as a result of Skeena Sawmills' position that provisional harvesting rates paid since 2017 remain reasonable.

Main Affidavit at para. 13.

21. To date, Terrace Timber has accumulated more than $200,000 in legal and expert costs preparing for arbitration with Skeena Sawmills as required under the Bill 13 Contract – a process which has been stayed due to Skeena Sawmills' insolvency. The arbitration process and retroactive rate adjustments is specifically contemplated and required under the Bill 13 Contract and the *Regulation* for rate disputes.

Main Affidavit at para. 13.

The Proposed Transaction and Reverse Vesting Order

22. On October 31, 2023, the Receiver commenced a sale process in respect of the Property.

Fourth Report of the Receiver, dated February 29, 2024, at para. 1.2 [Fourth Report].

23. The sale process concluded on January 12, 2024. The Receiver selected the bid submitted by Cui Family Holdings Ltd., a party related to the Petitioner and the Skeena Entities, as the winning bid.

Fourth Report at paras. 7.1 0 7.2.

24. The Receiver's Application seeks the approval of a Payment and Retention Agreement, dated February 29, 2024 (the "**PRA**"), proposed to be entered into by the Receiver and Cui Family Holdings Ltd. (in such capacity, the "**Purchaser**").

Fourth Report at para. 2.1(d) and Appendix "B" (PRA).

25. The PRA contemplates, among other things, that: (i) prior to the closing of the PRA, the Petitioner will assign all indebtedness owed to it by the Skeena entities, and all security held by it in respect of such indebtedness, to the Purchaser; (ii) the Purchaser will retain its shares in ROC (which is the sole shareholder of Skeena Sawmills) and Bioenergy; (iii) the Skeena Entities will retain certain specified assets; and, (iii) the "**Excluded Assets**" and "**Excluded Liabilities**" (each as defined in the PRA) will be vested in and transferred to a newly-incorporated entity referred to as "**ResidualCo**". The foregoing steps are to be accomplished by way of a reverse vesting order (an "**RVO**").

26. The purchase price contemplated by the PRA and RVO is:

(a) a credit bid of the amounts owing in respect of the Additional Consideration;

(b) an amount sufficient to pay any claim against the Skeena Entities which ranks in priority to the claims of the Petitioner, including outstanding property taxes; outstanding stumpage fees; outstanding source deduction remittances; and, equipment leases (subject to certain exceptions);

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

(d) $30,000 in respect of fees and expenses to be incurred by the Receiver for the assignment in bankruptcy of ResidualCo.

Fourth Report at para. 7.8 and Appendix "B" at s. 2.3 (definition of "Price").

27. The PRA and the proposed RVO contemplate that all contracts which are not "Approved Contracts" under the PRA, and all corresponding liabilities, will be transferred to, and vest in, ResidualCo.

Fourth Report at para. 7.8 and Appendix "B", ss. 1.1(b) (definition of "Approved Contracts"), 1.1(aa) (definition of "Excluded Assets"), 1.1(bb) (definition of "Excluded Liabilities").

28. The Petitioner's counsel has advised that the Bill 13 Contract is not an Approved Contract. However, TFL-41 is expressly included as part of the "Permits and Licenses" to be retained under the PRA. Accordingly, if the RVO is approved, TFL-41 will be retained by Skeena Sawmill without the corresponding Bill 13 Contract, which will vest in ResidualCo.

Fourth Report at Appendix "B", s. 1.1(pp) (definition of "Permits and Licences").

Effect of the Proposed Reverse Vesting Order

29. Terrace Timber exists only to complete Bill 13 Work. It is a highly specialized cable logging operation with specialized USW crews.

Main Affidavit at para. 11.

30. Since commencing operations in 1997, Terrace Timber and its parent company, Main Logging, have continued to regularly invest in its operation including for equipment, safety, training, office space, facilities, renovations, preventative maintenance and

laydown facilities. The estimated value of these investments to ensure that Timber can continue operations on TFL 41 exceeds $10,000,000 since 1997.

Main Affidavit at para. 15.

31. If the Bill 13 Contract is terminated, Terrace Timber would be forced to liquidate its equipment and assets with no work to perform. As a result, Terrace Timber stands to lose all investments it has made since 1997 as well as the asset of the Bill 13 Contract itself, which was previously valued at $3,070,000. The valuation is based on 10% of the average stump to dump cubic meter rate with a multiplier of 4. This calculation was and is utilized by the government when allocating payout to Bill 13 Contract holders under the *Forestry Revitalization Act*.

Main Affidavit at para. 16.

32. Furthermore, all hourly employees of Terrace Timber would be terminated and would be unlikely to secure similarly paying jobs elsewhere.

Main Affidavit at para. 17.

33. All of Terrace Timber's employees are generational local people with families and strong ties to the local community.

Main Affidavit at para. 14.

34. Terrace Timber employs 15 hourly USW employees from the local Terrace Timber community. These individuals work solely on the harvesting of TFL 41. Most have worked for Terrace Timber since 1997 and 3 - 4 employees previously worked on TFL 41 for West Fraser Timber.

Main Affidavit at para. 14.

PART 5: LEGAL BASIS

The *Forest Act* and Key Protections for Replaceable Contracts

35. Part 4 of the *Forest Act*, R.S.B.C. 1996, c. 157 (the "***Forest Act***") governs dispositions of "agreements", which are defined in section 53(1) of the *Forest Act* as follows:

> "agreement" means an agreement in the form of a licence, permit or agreement referred to in section 12;

Forest Act, R.S.B.C. 1996, c. 157, at s. 53(1), definition of "agreement" [*Forest Act*].

36. Section 12 of the *Forest Act* sets out the forms of agreement which may be entered into on behalf of the government, granting rights to harvest Crown timber, including, *inter alia*, a "tree farm licence". TFL-41 (which is a tree farm licence) is a creation of the *Forest Act* and any disposition of it is governed by Part 4 of the *Forest Act*.

Forest Act, at s. 12(d).

37. As described below, the *Forest Act*, as amended, incorporates various restraints on any disposition of a tree farm licence; including with respect to the liability of the transferor and transferee in respect of any replaceable contracts, such as the Bill 13 Contract.

38. In *New Skeena Forest Products Inc. et al v Kitwanga Lumber Co. Ltd.* ("***New Skeena***"), this Honourable Court permitted the disclaimer, by a receiver, of certain replaceable contracts with respect to a tree farm licence referred to as "**TFL-1**", along with the vesting of TFL-1 and certain related assets in an arm's-length purchaser.

New Skeena Forest Products Inc. et al v Kitwanga Lumber Co. Ltd., 2004 BCSC 1818 at paras. 39 - 40 [*New Skeena*].

39. The Court in *New Skeena*:

(a) confirmed the equitable nature of disclaimer relief, and the Court's supervisory role in balancing the equities of a proposed disclaimer; and,

New Skeena at paras. 22 - 23.

(b) considered that the statutory requirement to enter into a replacement contract following termination, under the *Forest Act* as it then was, did not apply in the case of bankruptcy or insolvency and was triggered only in the event of a contractor default. This aspect of the statutory scheme was a critical aspect of the Court's balancing of the equities, in the circumstances, to permit the disclaimer and vesting sought by the receiver. Specifically, the Court held that the then-current *Forest Act* sections addressing the requirement to enter into replaceable contracts following termination on contractor default did not "confer a statutory right or a right greater than a simple contractual right for the benefit of the contractors".

New Skeena at paras. 33 - 35, 39.

40. At the time *New Skeena* was decided, the applicable section of the regulation stated:

> If a replaceable contract has been terminated by a licence holder for default by the contractor, that licence holder must enter into one or more replaceable contracts with other contractors, which contracts must in aggregate specify an amount of work equal to or greater than the amount of work specified in the terminated contract.
>
> *New Skeena* at para. 17.

41. Following the decision in *New Skeena*, the *Forest Act* was amended to add additional provisions with respect to replaceable contracts. This was expressly done to address what happens to forest licences and Bill 13 contracts in an insolvency. Introducing the legislation, the Attorney General noted:

> Amendments to the Forest Act increase the protection for logging contractors when licensees 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.
>
> British Columbia, Legislative Assembly, *Hansard*, 39th Leg, 2nd Sess, Vol 19, No 1 (27 May 2010) at 5850.

42. The provisions in force currently include, among others, the following:

> **Transfer of agreements permitted**
>
> 54 (1) Subject to subsection (2) and to section 54.4, the holder of an agreement may dispose of the agreement to another person.
>
> (2) A disposition of an agreement is without effect unless all of the following conditions have been met:
>
> [...] (d.1) in the case of a disposition of an agreement in relation to which the holder of the agreement has a replaceable contract with a contractor, all obligations of the holder of the agreement under the replaceable contract are assumed by the recipient of the agreement;
>
> [...]
>
> **Dispositions exempt from certain requirements**
>
> 54.3 (1) In this section, "security interest" means an interest, in an agreement, that secures payment or performance of an obligation.
>
> (2) Sections 54 (2) and 54.2 do not apply to the following dispositions:

(a) the granting, in good faith, of a security interest in an agreement;

(b) the transmission of an interest in an agreement

(i) to a trustee in bankruptcy of the holder of the agreement, or

(ii) from the estate of a deceased holder of an agreement to the deceased holder's personal representative.

(3) Within 3 months after a disposition referred to in subsection (2) (b), the trustee or personal representative referred to in that subsection must provide to the minister written notice of the disposition.

(4) For certainty, subsection (2) (a) does not include a disposition resulting from the enforcement of a security interest.

Effect of disposition on obligations

54.6 (0.1)In this section, "outstanding liability", in relation to an agreement, means a liability referred to in subsection (1)

(a) accrued or accruing as of the date on which a disposition of the agreement is completed, and

(b) still outstanding as of that date.

(1) Subject to subsection (1.1), on completing a disposition of an agreement, the person who acquired the agreement under the disposition becomes liable in the person's capacity as the holder of the agreement

(a) for payment of all money in respect of the agreement that

(i) is required to be paid to the government under the circumstances set out in section 130, whether before or after the date of completion, and

(ii) is due and payable to the government under that section after the date of the completion or under an arrangement for payment under section 54 (2) (b) (iv),

(b) to perform all obligations under the agreement, including but not limited to obligations accrued or accruing as of the date of completion and still outstanding as of that date, and

(c) to perform all other obligations in respect of the agreement, including but not limited to obligations

> (i) accrued or accruing as of the date of completion of the disposition and still outstanding as of that date, and
>
> (ii) imposed with respect to the agreement under this Act, the Forest and Range Practices Act or the Wildfire Act.
>
> (1.1) Subsection (1) does not apply to a person who acquires an agreement under a disposition referred to in section 54.3 (2).
>
> (2) The following persons, as applicable, continue to be liable, jointly and severally with the person referred to in subsection (1) who acquires an agreement under a disposition, for all outstanding liabilities in relation to the agreement:
>
> (a) the person who disposed of the agreement, other than a trustee in bankruptcy or a personal representative referred to in section 54.3 (2) (b);
>
> (b) a person who held the agreement, if the agreement was disposed of
>
> (i) by the trustee in bankruptcy, referred to in section 54.3 (2) (b) (i), of the person, or
>
> (ii) by the personal representative, referred to in section 54.3 (2) (b) (ii), of the person.
>
> [Emphasis added]

Forest Act, at ss. 54(2)(d), 54.3, 54.6.

43. The legislative intention with respect to section 54(2)(d) and 54.3 of the *Forest Act* is clear; the Legislature wishes to protect the interests of contractors under replaceable contracts, and any purchaser or transferee of a licence is required to abide by the terms of the existing replaceable contracts. This includes in the context of an insolvency.

44. The *Regulation* similarly provides, in section 33.8, that:

> **Licence transfer**
>
> 33.8 A replaceable contract must provide that if the licence[1] that the contract pertains to is transferred, the licence holder must require, as a condition of such transfer, that the transferee either
>
> (a) assume the licence holder's obligations under the contract, or

[1] "Licence" is defined in the regulations as "an agreement entered into under Part 3 of the *Forest Act*;", which includes a tree farm licence. Section 12 of the *Forest Act* is included in Part 3 thereof.

> (b) offer a new replaceable contract to the contractor on substantially the same terms and conditions as the original replaceable contract.
>
> *Timber Harvesting Contract and Subcontract Regulations,* BC Reg 22/96 at s. 33.8.

45. Accordingly, under the *Forest Act* regime, a timber licence cannot be transferred by the company, through enforcement of security, or by a trustee in bankruptcy, without the acquirer assuming the associated Bill 13 contract and the obligations thereunder. These provisions were expressly amended to reflect the Court's decision in *New Skeena*.

The BIA Is Informed by Provincial Law

46. Subsection 72(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") provides:

> **Application of other substantive law**
>
> 72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and 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 this Act.
>
> [Emphasis added]
>
> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 at s. 72(1).

47. The Supreme Court of Canada has consistently held that subsection 72(1) of the BIA means exactly what its plain language meaning would suggest: provincial law is applicable within bankruptcy proceedings except to the extent of a specific conflict between the federal BIA and the provincial legislation. In fact, the rights of parties within insolvency proceedings must be determined with reference to provincial law. As stated in *Re Giffen*:

> 64 Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the BIA is dependent on provincial property and civil rights legislation in order to inform the terms of the BIA and the rights of the parties involved in the bankruptcy. Section 72(1) of the BIA contemplates interaction with provincial legislation.
>
> 65 This Court has recognized the important role that provincial legislation plays in the event of bankruptcy in *Husky Oil*. Gonthier J. stated, at p. 481:

> It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself.

And I stated the following for the minority in *Husky Oil*, at p. 531:

> [P]rovincial legislation is deeply involved in determining the priority, registration, and amount of indebtedness in the bankruptcy process. In fact, the proprietary and contractual rights that are regulated by the bankruptcy process are usually created by virtue of provincial law.

[Emphasis added]

Re Giffen, [1998] 1 S.C.R. 91 at paras. 64 - 65.

48. In *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.* ("**GMAC**"), the Court applied this principle to the jurisdiction of a court exercising its jurisdiction to direct the conduct of an interim receiver appointed under the *BIA* (which, post-amendments to the *BIA* is similar to the receiver in this case). In the context of a dispute regarding whether a trial court overseeing an interim receiver's activities could exercise the jurisdiction of a labour relations board to designate a successor employer, the Court held that this was inappropriate as the provincial statute governed. Specifically, Abella J., writing on behalf of the majority, held that:

> 45 These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.
>
> 46 Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1) of the *Bankruptcy and Insolvency Act*, which states:
>
> > 72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and 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 this Act.
>
> 47 The effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in

conflict with the *Bankruptcy and Insolvency Act*. The right in issue here is the right found in s. 69 of the Ontario *Labour Relations Act, 1995* to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:

> . . . the first half of [s. 72] clearly states that the *BIA* will not abrogate or supercede any provincial law unless that law is in conflict with the *BIA*. The language of s. 47(2) of the *BIA* does not conflict with the successor employer sections of the *LRA* and therefore does not abrogate or supercede that Act. [para. 30]

[...] 51 If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(c). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72. As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3:

> . . . explicit statutory language is required to divest persons of rights they otherwise enjoy at law. . . . [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

The language of s. 47(2) falls well short of this standard. The bankruptcy court can undoubtedly mandate employment-related conduct by the receiver, but as s. 47(2) of the *Bankruptcy and Insolvency Act* is presently worded, the court cannot, on its own, abrogate the right to seek relief at the labour board.

[Emphasis added]

GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc., [2006] 2 S.C.R. 123 at paras. 45 - 47, 51.

49. In *Yukon (Government of) v Yukon Zinc Corporation*, the Court of Appeal of Yukon confirmed that this general principle applies to contractual and property rights. The receiver in that case sought to effectively expropriate the property rights of a lessor under an equipment lease, by disclaiming part the lease and continuing to retain the right to use a portion of the leased equipment based on a contractual rate the receiver sought to impose upon the lessor. In holding that the receiver could not proceed in this manner, Justice Tysoe followed *GMAC* in stating, for a unanimous court:

> [114] *In T.C.T. Logistics*, an interim receiver was appointed under s. 47(1). The order appointing the interim receiver provided that it was not a

successor employer within the meaning of the *Labour Relations Act*, 1995, S.O. 1995, c. 1. The union applied under s. 215 of the BIA for leave to continue with an application before the Labour Relations Board for a declaration that the interim receiver and the company which purchased the assets from it were successor employers. The judge amended the order to somewhat limit the scope of the provision, but denied the request for leave.

[115] The Supreme Court of Canada held that the bankruptcy court did not have jurisdiction to decide whether the interim receiver was a successor employer and that leave should have been granted to the union under s. 215 to continue with its application before the Labour Relations Board. After quoting s. 47(2) of the BIA, Justice Abella, for the majority, said the following:

> [45] These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

[116] After quoting s. 72(1) of the BIA, Abella J. commented that the effect of s. 72(1) was "not intended to extinguish legally protected rights unless those rights are in conflict with the [BIA]". She explained further:

> [51] If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(c). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72.

T.C.T. Logistics was followed in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 [*Lemare Lake*], in which it was held that s. 72(1) prevented the appointment of a receiver under s. 243 of the BIA when provincial legislation required a notice period and a mediation process before enforcement proceedings could be commenced with respect to farm land.

[...] [121] The right of a third party to possess its own property is not in conflict with the BIA and, hence, it is protected under s. 72(1). Explicit language would be required in the BIA to interfere with this right.

[...] [131] The difficulty with the judge's holding is that it is apparent she considered the Court to be unfettered in doing what it considers to be dictated by justice and demanded by practicality. This is contrary to para. 51 of *T.C.T. Logistics* (quoted above). The discretion afforded by s.

> 243(1)(c) is constrained by s. 72(1), which preserves substantive property rights that are not in conflict with the provisions of the BIA.
>
> [Emphasis added]
>
> *Yukon (Government of) v Yukon Zinc Corporation*, 2021 YKCA 2 at paras. 22, 27, 114 - 116, 121, 131.

50. Based on the foregoing, this Court does not have the jurisdiction to grant relief that permits the Bill 13 Contract to be severed from TFL 41. The Receiver is appointed pursuant to the *BIA*, which contains the express prohibition in section 72(1), and the *Law and Equity Act*, which is provincial legislation, and subject to the *Forest Act*.

A Reverse Vesting Order is Inappropriate in the Circumstances

51. As noted by the Receiver, the BIA does not expressly provide for the issuance of RVOs. An RVO is an equitable remedy.

> *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para. 32 [*Harte Gold*];
>
> *In the Matter of the Companies' Creditors Arrangement Act and CannaPiece Group Inc. et al*, 2023 ONSC 841 at para. 58.

52. Moreover, an RVO is an extraordinary remedy, subject to heightened judicial scrutiny. This is, in large part, because an RVO permits an insolvent company to avoid dealing with unwanted obligations in any manner. As described by Justice Walker in *Payslate Inc. (Re)*:

> Reverse vesting orders ("RVOs") are a relatively new method used in insolvency cases to avoid the purchaser assuming the insolvent debtor's unwanted assets and liabilities. Typically, an RVO contemplates the sale of the debtor company's shares through a transaction structured so that "unwanted" assets and liabilities (including in this case, certain unsecured creditor claims) are removed and vended to a residual company while the "good assets" remain with the debtor. RVOs are not the norm. They have been used in appropriate circumstances to preserve non-transferrable assets such as licenses, permits, intellectual property, and non-transferrable tax attributes.
>
> … the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny.

> ... RVOs are not the norm and should only be granted in extraordinary circumstances.
>
> [Emphasis added]

Payslate Inc. (Re), 2023 BCSC 608 at paras. 1, 38, 87.

53. Justice Walker's words of caution have been echoed in numerous other reported decisions. For instance, among others:

(a) in *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, McEwen J. stated that: "Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances"; and,

(b) in *Quest University Canada (Re)*, Justice Fitzpatrick stated: "I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA."

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 6354 at para. 33;

Quest University Canada (Re), 2020 BCSC 1883 at para. 171 [emphasis added], leave to appeal ref'd 2020 BCCA 364.

54. Courts across Canada, including in this province, have followed the factors set out by Justice Penny in *Harte Gold Corp. (Re)*, in determining whether an RVO is appropriate in the circumstances. Those factors are:

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

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

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

(d) does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure?

Harte Gold at para. 38;

NextPoint Financial, Inc. (Re), 2023 BCSC 2378 at para. 19, citing *Harte Gold*;

Peakhill Capital Inc. v Southview Gardens Limited Partnership, 2023 BCSC 1476 at para. 42 [*Peakhill*], appeal pending (2023 BCCA 368), citing *Harte Gold*.

55. With respect to each of the *Harte Gold* factors:

(a) **A reverse vesting order is not "necessary in this case":** There is no evidence that the debtor companies' licences, including TFL-41, could not be transferred, in the ordinary course and subject to regulatory requirements, under a standard vesting order. TFL-41 is not a non-transferrable licence, and there is a transfer regime. The implicit purpose of the reverse vesting order is to avoid applicable provisions in provincial legislation, and specifically the *Forest Act* licence transfer requirements, which would require any transferee to assume, *inter alia*, the Bill 13 Contract.

The circumstances are distinguishable from cases where the justification for an RVO is that a traditional transfer is not possible, or would cause too significant a delay, and the RVO mechanism will simply avoid delay without causing prejudice to any parties. While the delay factor is present in the case at bar, there will be direct prejudice to creditors and stakeholders as a result of the transfer mechanism itself. The prospect of some regulatory delay should not overcome the fact that the only "necessary" aspect of the proposed reverse vesting order is that it is "necessary" in order to abrogate provincial laws and prevent Timber Terrace from exercising its statutory rights under the *Forest Act* and regulations.

(b) **The reverse vesting order structure does not "provide an economic result at least as favourable as any viable alternative":** The Fourth Report contains limited analysis of the economic result of the reverse vesting order structure. The Receiver has advised that the transaction "offers a favourable outcome for many

stakeholders" as it "increases the likelihood of the Skeena Entities operating in the near term, which will (or can) provide economic and other benefits to stakeholders". There is no evidence that the purchaser in fact (i) has sufficient funds available to recommence operations, (ii) intends to do so in the near term, or at all, or (iii) will retain the assets in the long-term, rather than simply marketing TFL-41 and other licences "free and clear" of the corresponding obligations removed by the reverse vesting order (including the Bill 13 Contract). This is the same ultimate party that was unable to successfully operate previously, and entered an insolvency proceeding leaving numerous parties unpaid. Furthermore, this speculative benefit is in no way as direct as the consequences that will occur for Terrace Timber, and other stakeholders, if their statutory rights are disregarded and vested out of the Skeena Entities and into an insolvent ResidualCo.

Fourth Report at para. 7.11(a).

(c) **Multiple stakeholders are "worse off under the RVO structure then they would have been under any other viable alternative":** The law is clear. Outside of an RVO, in a typical vesting order, the *Forest Act* would impose an obligation on any purchaser of TFL-41 to enter into new replacement contracts with the Skeena Entities' contractors or continue performance on the existing terms, as well as to resolve monetary defaults and cure costs. The affected parties' recoveries are reduced from full recovery to no recovery. Terrace Timber is only one of the affected parties. The reverse vesting order is inequitable in this respect.

(d) **The consideration being paid for the debtor's business does not "reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure":** There is no evidence, whatsoever, that the RVO has been accounted for in the proposed purchase price. In fact, that seems impossible. Paragraph 7.8 summarizes the proposed consideration as including:

(i) a credit bid of all of the obligations to the Purchaser which this court has held are valid and enforceable; which by its nature cannot and does not account for specific assets' values or the preservation of any particular assets;

(ii) the payment of priority claims, which is inherent in a credit bid and thus also does not account for the preservation of any assets;

(iii) $400,000 for work-in-progress inventory, which is a physical asset that can be transferred under a traditional vesting order; and,

(iv) $30,000 in respect of fees and expenses to be incurred by the Receiver in the subsequent bankruptcy of "ResidualCo". These funds are earmarked for anticipated fees and clearly do not ascribe any value to the intangible assets such as TFL-41.

Fourth Report at para. 7.8.

Additionally, TFL-41 is capable of being conveyed by a standard vesting order and so the reverse vesting order is not "preserving" anything that would not be preserved in an ordinary receivership transaction. It is simply granting additional benefits to the purchaser, to the prejudice of numerous stakeholders, for no additional consideration.

56. Furthermore, from the perspective of balancing the equities, an RVO is not appropriate in the circumstances because:

(a) the proposed Purchaser is controlled by the same parties that own the debtor companies, and whose control and oversight led to the debtors' financial circumstances. Acquiring the debtor companies through an RVO, free and clear, is equivalent to obtaining the benefits of a plan of arrangement or proposal, without complying with any of the statutory requirements for same, such as a creditor vote. The high level of opposition expressed by creditors with respect to the proposed RVO underscores the fact that this transaction would likely not be approved if creditors were given an opportunity to vote on its acceptance. This is not an appropriate use of the RVO structure as it seeks to avoid both provincial law (*i.e.* the *Forest Act* and *Regulation*) and the ordinary insolvency process;

(b) the entire purpose of the reverse vesting order is to do indirectly what the purchaser could not do directly: obtain TFL-41 while leaving behind the replaceable contracts, including the Bill 13 Contract. It is respectfully submitted that this is a clear attempt to complete an end run around validly enacted and

directly-applicable provincial law, which is otherwise enforceable in bankruptcy proceedings, and should not be countenanced by the Court; and,

(c) the equities are also influenced by the fact that the benefit of the RVO structure, as compared with a standard vesting order, will accrue to the Petitioner and the Cui family (who as noted above have sole control over the Petitioner and the Skeena Entities and have had such control for over a decade while the Skeena Entities have incurred obligations they now seek to avoid), while resulting in the loss of numerous jobs in a vulnerable community.

Main Affidavit at paras. 11, 14 - 16.

57. The facts are distinguishable from the decision in *Peakhill Capital Inc. v Southview Gardens Limited Partnership* ("***Peakhill***"), where this Court approved an RVO over the objections of the Province that certain property transfer taxes should be paid in accordance with provincial legislation. In *Peakhill*, the provincial legislation at issue expressly contemplated that the transfer taxes would not come due upon a change of control, and the Court accepted that purchasers outside of an insolvency context would frequently obtain title by transfer of the beneficial interest in a nominee corporation; accordingly, the reverse vesting order did not contradict provincial law, and instead allowed in the insolvency proceeding what could otherwise be done outside the insolvency proceeding. The Court concluded that: "In the circumstances of this case, and particularly in the absence of any suggestion that an RVO in this case would prejudice the rights of creditors, I find that the RVO sought ought to be granted, on the basis that the RVO will preserve and maximize the value of the assets available to creditors" [emphasis added].

Peakhill at paras. 64 - 65, 69.

58. As set out above, unlike in *Peakhill*: (i) the *Forest Act* contemplates continuing liability under a replaceable contract where a licence is transferred, which would apply outside of insolvency proceedings or in a traditional vesting order; and, (ii) there is clear prejudice to the statutory rights of creditors of the debtor companies. Accordingly, the equities favour dismissal of the RVO application.

59. For the foregoing reasons, Terrace Timber respectfully requests that this Honourable Court dismiss the application for an RVO.

PART 6: MATERIALS TO BE RELIED ON

1. Affidavit #1 of Walker Main, made on March 5, 2024.

2. First Report of the Receiver, Alvarez & Marsal Canada Inc., dated October 25, 2023.

3. Fourth Report of the Receiver, Alvarez & Marsal Canada Inc., dated February 29, 2024.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

DATED: March 7, 2024

H. Lance Williams and Nathan Stewart
Counsel for Terrace Timber Ltd.