



No. S236214  
Vancouver Registry

**In the Supreme Court of British Columbia**

BETWEEN:

1392752 B.C. LTD

PETITIONER

AND:

SKEENA SAWMILLS LTD.  
SKEENA BIOENERGY LTD.  
ROC HOLDINGS LTD

RESPONDENTS

**APPLICATION RESPONSE**

**Application Response of:** The Trustees of the IWA – Forest Industry Pension Plan and the Trustees of the IWA – Forest Industry LTD Plan (the “Application Respondents”)

**This is a Response to:** the Notice of Application of 1392752 B.C. LTD (the “Applicant”) filed January 5, 2024.

This Application Respondents agree with the Applicant’s time estimate.

**Part 1: ORDERS CONSENTED TO**

NONE

**Part 2: ORDERS OPPOSED**

The Application Respondents do not oppose the Applicant’s motion, except to the extent the Applicant seeks priority to certain funds in the amount of \$101,966.30 (the “Fund”) now being held in a segregated trust account by the Receiver (the “Segregated Account”).

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

NIL

**Part 4: FACTUAL BASIS**

**Pension and LTD Plans**

1. The Application Respondents, through an administrator (the “Plan Office”), administer a pension plan (the “Pension Plan”) and a long-term disability plan (the “LTD Plan” and, collectively with the Pension Plan, the “Plans”), which provide pension and disability benefits for unionized employees of participating employers.

2. The terms governing the Plans are set out in a pension trust agreement (the "**Pension Trust Agreement**") and an LTD trust agreement (the "**LTD Trust Agreement**") and, collectively with the Pension Trust Agreement, the "**Trust Agreements**").
3. On or about September 29, 2011, the Respondent Skeena Sawmills Ltd. ("**Skeena Sawmills**") and the Plan Trustees entered into an agreement called the IWA-Forest Industry Pension Plan Participation Agreement (the "**Pension Agreement**"), pursuant to the material terms of which Skeena Sawmills agreed to be bound by the terms of the Pension Trust Agreement.

Affidavit #1 of Gary Luddu ("Luddu #1"),  
**Exhibit "B"**, p.3 (Pension Agreement, cl. 2)

4. On or about September 30, 2011, Skeena Sawmills and the Plan Trustees entered into an agreement called the IWA-Forest Industry LTD Trust and Plan Participation Agreement (the "**LTD Agreement**", and collectively with the Pension Agreement, the "**Plan Agreements**"). Pursuant to the terms of the Plan Agreements, Sawmills agreed to be bound by the terms of the LTD Trust Agreement.

Luddu #1, **Exhibit "C"**, p.8 (LTD Agreement, cl. 3)

5. Skeena Sawmills is also bound by the terms of its collective agreement with the United Steelworkers Local 1-1937 to participate in the Plans.

Luddu #1 at **Exhibit "D"**, pp. 13-15 (Collective Agreement)

6. Pursuant to the terms of the Plan Agreements, Skeena Sawmills agreed:
  - a. to make pension and LTD contributions to the Pension Plan and the LTD Plan for the benefit of its eligible employees, at certain agreed-upon rates and times; and
  - b. to periodically report to the Plan Office the number of applicable hours (the "**Contribution Hours**") worked by its employees, for the purpose of calculating pension and LTD contributions due in applicable reporting periods.

Luddu #1, **Exhibit "F"**, pp.17-25 (Pension Plan, s. 5)  
Luddu #1, **Exhibit "C"**, p. 8 (LTD Agreement, cl. 5)

7. Further pursuant to the Plan Agreements, Skeena Sawmills agreed to hold all contributions deducted, and all contributions owed, in trust for the Plan Trustees.

Luddu #1, **Exhibit "E"**, p. 16 (Pension Plan, s. 17)

Luddu #1, **Exhibit "H"**, p.28 (LTD Plan, s. 6.5)

### Total Contributions Owed

8. Between July and September 2023, Skeena Sawmills failed to make the required pension and LTD contributions to the Plans.
9. Skeena Sawmills last reported Contribution Hours on August 26, 2023. The contribution owed at that time totalled \$71,092.86.

Affidavit #2 of Gary Luddu

10. Skeena Sawmills also owes the Plan Office contributions for all hours worked by its employees but unreported from August 27, 2023, to their termination on or around September 21, 2023.
11. Since the commencement of these proceedings, the Plan Office has learned that the required but unremitted contributions from August 27 to October 7, 2023, totalled \$12,655.35.

Affidavit #3 of Gary Luddu

12. In total, therefore, the Plan Office is owed contributions totalling \$83,748.21 (the **"Contributions Owed"**).

### Receivership and Preservation Orders

13. On September 20, 2023, Alvarez & Marsal Canada Inc (the **"Receiver"**) was appointed Receiver of all property of Skeena Sawmills pursuant to section 243 of the *Bankruptcy and Insolvency Act*, [RSC 1985], c. B-3 (the **"BIA"**).
14. By order made October 30, 2023 (the **"Preservation Order"**), the Receiver was directed to set aside the sum of \$101,966.30 (the **"Fund"**) from the Skeena Accounts and retain the Fund in a separate account (the **"Segregated Account"**), on account of the amount claimed by the Plan Office and **"pending further order of this court, without prejudice to the claims of any of [the Respondents'] stakeholders with respect to their interest in [the Fund]"**.

### Interest and Costs

15. The Contributions Owed accrue interest at a rate of 1.5 times the prime interest rate as set by HSBC on the first business day of the calendar quarter in which the due date falls (the **"Accrued Interest"**).

Luddu #1, **Exhibit "F"**, p. 23 (Pension Plan, s. 5.11)

Luddu #1, **Exhibit "G"**, p. 31 (LTD Plan, s. 6.9)

16. Further, pursuant to the terms of the Trust Agreements, the Plan Office is entitled to be indemnified for legal and other costs incurred by the Plan Office to collect the Contributions Owed (the "**Enforcement Costs**").

Luddu #1, **Exhibit "G"**, p.31 (LTD Agreement, cl. 6.10)

Luddu #1, **Exhibit "F"**, p. 23 (Pension Plan, s. 5.09)

17. Such Enforcement Costs, at least as they relate to the enforcement of the Pension Agreement, are deemed to form part of the contributions due from Skeena Sawmills.

Luddu #1, **Exhibit "B"**, p. 3 (Pension Agreement, s. 6)

## **Part 5: LEGAL BASIS**

### **Overview**

18. The Plan Office understands that neither the Applicant nor the Receiver claims any entitlement to the Fund on this application. Assuming that to be a correct assumption, the Plan Office takes no position on this application.
19. By way of a separate Notice of Application, the Plan Office will seek an order that the Fund be paid to the Plan Office on account of the Contributions Owed, together with Accrued Interest and Enforcement Costs.

### **Funds Held in Trust**

20. Having entered into the Plan Agreements, Sawmills became a Participating Employer under the Plans.
21. The Plan Agreements, which incorporate the terms of the Trust Agreements, clearly provide that Skeena Sawmills holds the Contributions Owed (or indeed any contributions owed) in trust for the benefit of the Plans. Thus, Section 17(b) of the Pension Trust Agreement provides:

All contributions deducted from payroll for Eligible Employees and all contributions due from a Participating Employer are deemed to be held in trust for the Trustees by the Participating Employer.

Luddu #1, **Exhibit "E"**, pg. 16

22. Similarly, section 6.5(c) of the LTD Trust Agreement provides:

All Contributions deducted from payroll and all Contributions due are deemed to be held in trust by the Participating Employer.

Luddu #1, **Exhibit "G"**, pg. 28

23. In *Trustees of the IWA – Forest Industry Pension Plan v. Leroy*, 2017 BCSC 158, and *Trustees of the IWA v. Wade*, 2019 BCSC 1085 ("**Wade**"), both of which considered agreements essentially identical to the Plan and Trust Agreements in issue here, this court held that unremitted pension and LTD contributions were held in trust by the participating employers in those cases.
24. The "Contributions Owed", as that term is defined above, are clearly impressed with a trust in favour of the Plan Trustees. The respective terms of the Trust Agreements meet the common-law test of the three certainties of intention, object and subject-matter. Thus, there is certainty of intention and object in the language of the Trust Agreements to create trusts for the benefit of the respective Plans. Moreover, there is certainty of subject-matter, because the Contributions Owed were ascertainable by the formulae created by the terms of the Trust Agreements: *Edmonton Pipe Industry Pension Plan Trust Fund v. 350914 Alberta Ltd.*, 2000 ABCA 146 ("*Edmonton Pipe*"). The fact that the Contributions Owed may have been commingled does not per se destroy the trust under common law: *Edmonton Pipe* at 30; *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9 at 99; *Wade, supra*, at paras. 68-69.

### **Statutory Deemed Trust**

25. Further, or the in the alternative, Skeena Sawmills holds some or all of the Contributions Owed in trust for the Plan Trustees pursuant to section 58 of the *Pension Benefits Standards Act*, SBC 2012, c 30 (the "**PBSA**"), which provides:

#### **Deemed trust**

58 (1) A participating employer in a pension plan is deemed to hold the following in trust for members of the plan, and for any other persons entitled to benefits under the plan, in accordance with their respective interests under the plan:

- (a) all contributions that are due or owing to the plan by the participating employer;
- (b) all amounts that have been deducted by the participating employer from members' remuneration as contributions to the plan and that have not yet been remitted as required under section 56 (1);

6

(c) all contributions to the plan that have been received by the participating employer with respect to members and that have not yet been remitted as required under section 56 (1).

(2) An administrator who is required to remit contributions under section 56 (2) is deemed to hold in trust for the members of the pension plan and for the other persons entitled to benefits under the plan an amount equal to those contributions that remain to be so remitted.

(3) Subsections (1) and (2) apply whether or not the contributions have been kept separate and apart from other money or property of the participating employer or the administrator.

(4) If there is, in respect of a participating employer, a proceeding

(a) under the Companies' Creditors Arrangement Act (Canada),

(b) under the Winding-up and Restructuring Act (Canada) or similar provincial legislation,

(c) in relation to liquidation, receivership or secured creditor enforcement, or

(d) in relation to insolvency other than under the Bankruptcy and Insolvency Act (Canada),

an amount equal to the amounts deemed to be held in trust under subsection (1) is deemed to be separate and apart from, and to form no part of, the estate of the participating employer, whether or not that amount has in fact been kept separate and apart from the participating employer's own assets or from the assets of the estate.

26. A statutory trust was imposed over the Trust Funds in the possession of Skeena Sawmills. They are the property of the Plan Trustees and must be paid to the Plan Office: *Edmonton Pipe Industry Pension Plan Trust Fund v. 350914 Alberta Ltd.*, 2000 ABCA 146.

### **Statutory Priority**

27. Still further, and as necessary in the alternative, the Plan Office claims as a statutory secured creditor pursuant to section 81.6(1) of the *BIA*:

**Security for unpaid amounts re prescribed pensions plan —  
receivership**

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

...

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,

(i.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the Pension Benefits Standards Regulations, 1985, that would have been required to be paid by the employer to the fund referred to in section 81.5 and this section to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

(i.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund,

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament, and

(iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act.

### **Rank of security**

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.



28. To the extent the Fund is comprised of the amounts described in s. 81.6(1) of the BIA, the Plan Office claims priority: *Anthony Capital Corporation (Re)*, 2021 NLSC 91.

**Accrued Interest**

29. In addition to the Contributions Owed, the Plan Office is entitled to the Accrued Interest and the Enforcement Costs.

30. With regard to Enforcement Costs, section 6 of the Pension Agreement provides that Skeena Sawmills shall reimburse the Plan Office for all legal and other costs actually incurred to collect the Contribution Owed, and such cost incurred shall be deemed to be part of the contribution in the next payment cycle:

6. The Applicant acknowledges and agrees that if it fails to pay any amount which it owes to the Pension Fund, it shall reimburse the Pension Fund for and indemnify the Pension Fund against all legal and other costs actually incurred by the Trustees in order to collect the unpaid amount, and the amount of such costs shall be deemed to be part of the next **Employer's Contribution due from the Applicant in addition to the amount otherwise due pursuant to the Plan as the Applicant's Employer's Contribution.**

Luddu #1, **Exhibit "B"** (Pension Agreement), p. 4

31. The Plan Office is entitled to Enforcement Costs, and at least that the portion of the Enforcement Costs which relate to the enforcement of the claim for unpaid pension contributions has the same priority status as any other Contributions Owed.


**Part 6: MATERIAL TO BE RELIED ON**

1. The pleadings, affidavits, and other court documents filed herein.

The Application Respondents' address for service is:

Turner & Co Attention: Scott Turner  
#1600 – 409 Granville Street  
Vancouver BC ~~V7V 2W1~~ **V6C 1T2**

Date: 22/January/2024



**Signature of Lawyer for the Application Respondent**

The Trustees of the IWA – Forest Industry Pension Plan and  
the Trustees of the IWA – Forest Industry LTD Plan

Turner & Co  
**DING MAU** for Per: Scott Turner