NO. S-236214
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

WRITTEN SUBMISSIONS OF TERRACE TIMBER LTD.
Re: Application for a Reverse Vesting Order and other relief

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Hearing Date:	**April 2-4, 2024**
Time:	**10:00 a.m.**
Place:	**Vancouver, BC**
Method:	**In Person Attendance**
Before:	**Honourable Justice Walker**
Time Estimate:	**3 days**
Submissions provided by:	**McCarthy Tétrault LLP**

TABLE OF CONTENTS

PART I - INTRODUCTION 1

PART II - FACTUAL BASIS 3

A. The Receivership Proceedings 3

B. Terrace Timber and the Bill 13 Contract 5

C. The Transaction and the RVO 13

D. Effect of the Proposed RVO 15

PART III - LEGAL BASIS 16

A. Jurisdiction to Grant the RVO Within Receivership Proceedings 16

B. An RVO Founded on Inherent Jurisdiction Cannot Alter Provincial Legislation 18

C. The proposed RVO is inequitable and inappropriate in the circumstances 28

PART I - INTRODUCTION

1. These written submissions are provided by Terrace Timber Ltd. ("**Terrace Timber**") in response to the application (the "**Application**") by Alvarez & Marsal Canada Inc. ("**A&M**"), in its capacity 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**"), seeking, *inter alia*:

(a) approval of the transaction (the "**Transaction**") contemplated by the Payment and Retention Agreement, dated February 29, 2024 (the "**PRA**"), proposed to be entered into by the Receiver and Cui Family Holdings Ltd. ("**Cui Holdings**" and, in such capacity, the "**Purchaser**"); and,

(b) a reverse vesting order ("**RVO**") pursuant to which certain Excluded Assets and Excluded Liabilities (as defined in the PRA) will be vested in a new corporation ("**ResidualCo**") to be incorporated by the Receiver or Cui Holdings.

2. The proposed RVO has attracted a flurry of opposition from a wide range of stakeholders, including contractual counterparties and contractors, governmental entities, and affected First Nations. This is unsurprising, as not only will the RVO trample upon numerous stakeholders' rights, but it appears to be intentionally crafted for that purpose. The Transaction, in the form proposed, is simply not in the best interests of the Skeena Entities' creditors and stakeholders. If the Transaction is approved, the entire benefit of the proposed RVO structure will accrue to the Purchaser; which is a party related to and exercising control over the petitioning creditor, 1392752 B.C. Ltd. (the "**Petitioner**"), as well as the Skeena Entities. In short, it is an inside job. On the basis of the existing court record, there are numerous factors indicating that these proceedings were manufactured for the purpose of permitting the Purchaser to retain control of the Skeena Entities after cleansing them of valid claims and encumbrances, all of which were ultimately incurred at the Purchaser's direction.

3. This Honourable Court's jurisdiction to grant the RVO within these receivership proceedings is, at best, unclear. Leaving aside threshold jurisdictional issues, on its merits, the Transaction should not be approved by way of an RVO, as:

(a) on the Purchaser's own evidence, the clear purpose of the RVO is to escape the reach of validly-enacted provincial law by ridding Skeena Sawmills of the Bill 13 Contracts (as defined below), which is otherwise not capable of being vested and would bind any purchaser of the Property. The Purchaser seeks to have the Court exercise its inherent jurisdiction to re-write valid provincial legislation, which is simply not possible as a matter of law, and as expressly stipulated by the relevant statues;

(b) the terms of the RVO are inequitable when considered as a whole. There is no reasonable justification for the use of an RVO to complete the Transaction, and the attendant prejudice which this structure will visit upon vulnerable parties, particularly given the public policy concerns inherent in utilizing an RVO to avoid the legislature's stated goal of preserving Bill 13 Contracts in insolvency proceedings;

(c) the RVO does not meet the common law test for the approval of a reverse vesting order, as it: (i) is not necessary, as the Property is capable of being vested (subject to the Bill 13 Contract and certain other statutory claims or obligations); (ii) does not produce an economic result at least as favourable as any other viable alternative, such as a standard vesting order; (iii) will leave multiple stakeholders worse off than a viable alternative; and, (iv) does not include consideration reflective of the importance and value of the intangible assets to be preserved under the RVO structure; and,

(d) the evidence provided with respect to the future of the Skeena Entities' operations is deficient and uncertain. Given the Skeena Entities' history of mismanagement, there is no reason to believe – and there is no evidence beyond unsubstantiated assertions - that future operations will be more successful, under the existing management, than the past results.

4. None of the additional evidence tendered by the Purchaser or the Receiver is sufficient to justify such an extraordinary remedy. The use of an RVO structure, in this case, is fundamentally flawed and unfair.

PART II - FACTUAL BASIS

A. The Receivership Proceedings

(a) The Receivership Order

5. On September 20, 2023, upon the application of the Petitioner, this Honourable Court granted a receivership order (the "**Receivership Order**") pursuant to which, *inter alia*, A&M was appointed as the Receiver of the Property.

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

(b) The Skeena Entities and the Petitioner

6. Each of the Skeena Entities is a direct or indirect wholly-owned subsidiary of Cui Holdings, 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].

7. 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.

(c) The Skeena Entities' Indebtedness and Insolvency

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

First Report at para. 3.10.

9. During recent years, lumber and cedar log prices were at historic highs and the economic conditions were most conducive to success. Specifically, lumber prices were at record highs from August 2020 – July 2022, peaking at $1600 USD per board foot; lumber prices were also at very high averages prior to and following that period, compared with other years. Cedar

log prices started to rise in 2016 and have continued to remain strong since. Despite this, the Skeena Entities, under the control of the Cui family, consistently failed to make a profit. Many other forestry operations involving Bill 13 Contracts (as defined below) were able to turn a profit during this period.

Affidavit of Walker Main, made on March 25, 2024 at paras. 41 - 42 [Main Affidavit #2].

10. 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. Given the parties are all related, this was a blatant "inside job" to try and enhance the position of the Cui family's contributions ahead of third-party trade creditors.

First Report at para. 3.10;
Affidavit of Xiao Peng Cui, made on September 8, 2023, at Exhibit "B" [Cui Affidavit #1].

11. 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".

12. 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.

13. 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.

14. 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].

15. 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.

B. Terrace Timber and the Bill 13 Contract

(a) Background

16. 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 #1].

17. 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 harvested more than one million cubic metres annually.

Main Affidavit #1 at para. 3.

18. 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 #1 at paras. 4 - 5.

(b) The Bill 13 Contract

19. 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 #1 at para. 6 and Exhibit "A".

20. 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 #1 at para. 7.

21. As a replaceable contract, Skeena Sawmills 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 Sawmills 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 face, 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 #1 at para. 8.

22. 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 #1 at para. 9.

23. 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 Sawmills' 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 #1 at para. 10.

24. 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.

Main Affidavit #1 at para. 12.

25. In addition to nonpayment for the work-in-progress yet to be delivered to scales (approximately $40,000), 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 #1 at para. 13.

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

Main Affidavit #1 at para. 13.

(c) The Rate Dispute and steps leading to the Rate Arbitration

27. The Rate Dispute has been ongoing for years, and follows previous rate disputes between Skeena and Terrace Timber which date back to 2020.

Main Affidavit #2 at para. 6.

28. Skeena Sawmills first initiated a rate dispute in or around May 2020, for five blocks harvested by Terrace Timber under the Bill 13 Contract (the "**2020 Rate Dispute**"). Skeena Sawmills requested, and Terrace Timber agreed, to delay negotiations for rates on future blocks pending the outcome of the 2020 Rate Dispute (the "**Rate Dispute Pause**").

Main Affidavit #2 at para. 7.

29. The 2020 Rate Dispute was ultimately resolved by negotiations in November 2022. Prior to the resolution of the 2020 Rate Dispute, Skeena Sawmills and Terrace Timber failed to agree on rates for eight other blocks which were subsequently harvested under the Bill 13 Contract (the "**Original Disputed Blocks**")

Main Affidavit #2 at paras. 8 - 9.

30. With no agreed upon rate for the Original Disputed Blocks, Terrace Timber completed Bill 13 Work on the Original Disputed Blocks, and Skeena Sawmills paid Terrace Timber for Bill 13 Work on the Original Disputed Blocks at provisional rates, based upon the last agreed rate

established in 2017 (the "**Provisional Rates**") pending determination of the applicable rates at the conclusion of the Rate Dispute Pause.

Main Affidavit #2 at para. 10.

31. In July 2022, in an effort to mitigate against the costs which would be incurred by the parties if a full arbitration process was pursued with respect to the Rate Dispute, Terrace Timber and Skeena Sawmills jointly contracted with Timber Tracks Inc. ("**TTI**"), pursuant to a Professional Services Agreement (the "**PSA**"), to have TTI determine logging rates for the Original Disputed Blocks.

Main Affidavit #2 at paras. 12 - 13.

32. Terrace Timber continued harvesting operations for Skeena Sawmills following the execution of the PSA.

Main Affidavit #2 at para. 14.

33. In November 2022, Skeena Sawmills and Terrace Timber agreed that three additional blocks, referred to as Block 6-20-5, Block 6-30-3, and Block KIT005 (collectively, the "**Additional Blocks**"), would be added to TTI's analysis concerning the Rate Dispute. Bill 13 Work performed by Terrace Timber on the Additional Blocks was also paid for by Skeena Sawmills at the Provisional Rates.

Main Affidavit #2 at para. 15.

34. In November 2022, the founder and president of TTI, Aaron Sinclair ("**Mr. Sinclair**"), requested various data and cost information, which was tracked in harvesting the Additional Blocks, from Terrace Timber. This information was provided to Mr. Sinclair, by Terrace Timber, between November 2022 and early January 2023.

Main Affidavit #2 at para. 16.

35. On December 22, 2022, Mr. Sinclair issued a report in which he provided his determination of the rates for the blocks in dispute (the "**TTI Report**") on behalf of TTI.

Main Affidavit #2 at para. 18(b) and Exhibit "A" (Affidavit of Aaron Sinclair).

36. In preparing the TTI Report, TTI undertook various steps to determine the applicable rates, including physical viewings of the applicable cutblocks, and review of payroll data for the limited purpose of comparing Terrace Timber's phase productivity relative to industry standards.

The methodology to determine the applicable rate included three components: (i) a quantitative analysis using time sheet data from Terrace Timber, with industry-standard charge-out rates applied to determine the costs to log the subject blocks; (ii) a quantitative analysis applying phase productivity rates for the coastal BC region to the amount harvested, to confirm how many hours, under normal working conditions, it would take for the machines used to complete the work; and, (iii) a qualitative analysis with reference to the communication and background information provided by Skeena Sawmills and Terrace Timber to develop a comprehensive understanding of the working relationship between the two parties.

Main Affidavit #2 at para. 18(c) and Exhibit "A" (Affidavit of Aaron Sinclair at Exhibit "F").

37. In the email delivering the TTI Report to Skeena Sawmills and Terrace Timber, Mr. Sinclair confirmed that the TTI Report was "a preliminary report and we intend to finalize shortly after receiving final details from Terrace Timber on the three final blocks". Similar language was incorporated in the TTI Report.

Main Affidavit #2 at para. 18(d) and Exhibit "A" (Affidavit of Aaron Sinclair at paras. 21 - 22).

38. Following receipt of the TTI Report, which primarily found in favour of Terrace Timber, Skeena Sawmills unilaterally terminated TTI's engagement. Skeena Sawmills stated that it was concerned that the methodology used by the TTI Report was inconsistent with the framework established by the Regulation. Skeena Sawmills did not provide any details regarding its objections and did not specify what part or parts of the TTI Report it considered to be inconsistent with the Regulation. Skeena Sawmills at no point provided any indication to Terrace Timber or to TTI, that it had any concerns, whatsoever, with respect to TTI's methodology, until after the delivery of the TTI Report; which indicated that the Rate Dispute would be resolved in Terrace Timber's favour.

Main Affidavit #2 at paras. 18(e), 21.

39. Mr. Sinclair subsequently clarified that "the report was only preliminary in so far as I had not yet received the payroll data for the Additional Blocks requested from Terrace Timber in November 2022. My determination of the Rates for the original 8 cutblocks was final and not subject to change …".

Main Affidavit #2 at para. 19 and Exhibit "A" (Affidavit of Aaron Sinclair at para. 23).

40. Terrace Timber provided the final components of the information requested by TTI, with respect to the Additional Blocks, on January 3, 2023. Following the provision of that information, Mr. Sinclair confirmed on behalf of TTI that the rates determined for the Additional Blocks, and the weighted average for all 11 cutblocks, would not change as a result of the additional information.

Main Affidavit #2 at para. 20 and Exhibit "A" (Affidavit of Aaron Sinclair at para. 24).

(d) Decision of Justice Chan

41. Terrace Timber registered a contractor lien and charge (the "**Terrace Timber Charges**") against Skeena Sawmills in January 2023, with respect to certain amounts subject to the Rate Dispute. In April 2023, the Honourable Justice Chan pronounced an order discharging the Terrace Timber Charges on the basis that the TTI Report was a preliminary report and not binding upon Skeena Sawmills due to Skeena Sawmills's termination of TTI's engagement before the finalization of the report. Justice Chan did not make any determination as to whether the rates were reasonable, the methodology used in the TTI Report was correct, or any similar issues.

Main Affidavit #2 at paras. 38 - 39 and Exhibit "D"; Affidavit of Shenwei (Sandra) Wu, made on March 15, 2024, at paras. 56 - 58 [Wu Affidavit].

42. As a result, the Rate Dispute continued following Justice Chan's decision.

Main Affidavit #2 at para. 40.

(e) The Rate Arbitration

43. Following the termination of TTI's engagement, and Justice Chan's decision, Terrace Timber proceeded with the Rate Arbitration process, as required by the Bill 13 Contract and the Regulation in the event of a rate dispute.

Main Affidavit #2 at para. 22.

44. The Regulation requires that the parties first exchange rate proposals, which would have permitted negotiations to commence prior to a formal Rate Arbitration. Skeena Sawmills refused to follow this process. Specifically, Terrace Timber made a rate proposal on June 2, 2023 with respect to fourteen (14) blocks, consisting of the Original Disputed Blocks, the Additional Blocks, and three additional blocks (Block KIT009A, Block KIT007C, and Block KIT002,

collectively, the "**2023 Blocks**") harvested by Terrace Timber, under TFL 41 and the Bill 13 Contract, following the termination of TTI's engagement. Skeena Sawmills rejected Terrace Timber's proposals with respect to the 2023 Blocks and provided counterproposals for the 2023 Blocks, but never responded to the proposals with respect to the Original Disputed Blocks or the Additional Blocks.

Main Affidavit #2 at para. 23.

45. On July 11, 2023, Skeena Sawmills and Terrace Timber agreed to forego a preliminary mediation and to appoint John Logan, K.C. ("**Mr. Logan**") of Jenkins Marzban Logan LLP as the arbitrator for the Rate Arbitration.

Main Affidavit #2 at para. 24.

46. The Rate Arbitration concerned the Original Disputed Blocks, the Additional Blocks, and the 2023 Blocks. As a result, there were a total of fourteen (14) blocks subject to the Rate Arbitration; all of which had already been partially or fully harvested by Terrace Timber.

Main Affidavit #2 at para. 25.

47. Scheduling discussions between Terrace Timber and Skeena Sawmills, through their respective counsel, and Mr. Logan, occurred through September 5, 2023. The Rate Arbitration process agreed to by the parties contemplated that Terrace Timber would bring a preliminary application to determine whether Skeena Sawmills should be deemed to have accepted Terrace Timber's rate proposal on certain cutblocks (the "**Preliminary Application**") or if a rate dispute existed concerning same; specifically, the Original Disputed Blocks and the Additional Blocks.

Main Affidavit #2 at para. 26.

48. Terrace Timber delivered the Preliminary Application to Skeena Sawmills and Mr. Logan on September 5, 2023.

Main Affidavit #2 at para. 27.

49. Following the delivery of the Preliminary Application, further discussions occurred regarding the timing of Skeena Sawmills's response.

Main Affidavit #2 at para. 28.

50. The Rate Arbitration was cut short by the pronouncement of the Receivership Order on September 20, 2023, following which counsel to Skeena Sawmills advised that the arbitral

proceedings were stayed. A similar rate arbitration process, between Timber Baron Ltd. ("**Timber Baron**") and Skeena Sawmills, was scheduled to begin a few days after the date of the Receivership Order but was also stayed as a result of the order.

Main Affidavit #2 at paras. 29 - 31.

51. In connection with the Rate Arbitration, Terrace Timber's external counsel for the Rate Arbitration, McLean & Armstrong LLP ("**McLean**"), had engaged Jim Girvan, MBA RPF, of Industrial Forestry Service Ltd., to prepare an expert report.

Main Affidavit #2 at para. 33 and Exhibit "B".

52. In July 2023, Mr. Girvan finalized his report (the "**Girvan Report**"). The Girvan Report concluded that the rates charged by Terrace Timber were more expensive than rates charged for other blocks, but that this was largely due to mismanagement by Skeena Sawmills. Specifically, section 7 of the Girvan Report, titled "Overall Conclusions", states in part:

> "It is my opinion that virtually all issues that were identified by Terrace Timber in advance of logging that had the potential to affect productivity and cost that Skeena Sawmills chose not to consider, or remedy, were confirmed once logging was complete and full view of the harvest block was possible. Many, if not all issues reduced productivity and increased costs. Examples include:
>
> - Roads not complete when the block harvest started.
> - Roads in the process of being built when the harvest started.
> - Roads and/or landings were not built as shown on the harvest appraisal maps.
> - Inadequate deflection and/or lack of tail holds to support grapple yarding.
> - Concerns over snow loads on site.
> - Concerns about small volumes associated with specific sorts (chip and saw).
> - Concerns about scale closures and restrictions on pulp log deliveries.
> - Administratively separated blocks with an engineering rationale that did not fully support the split.
>
> The lack of consistent, forward looking logging plans from Skeena Sawmills prevented Terrace Timber from fully optimizing their equipment and manpower resources in advance. An example included scheduling harvest in a stand with a

> large piece size (Kitt 007) only to be moved to a block with small piece size (Kit 003) on short notice.
>
> These types of issues reduced productivity and increased costs.
>
> It appears to me that Terrace Timber consistently tried to make recommendations to Skeena Sawmills on how to improve productivity and reduce costs but received in return little to no acknowledgement or support from Skeena Sawmills. […]
>
> My opinion is that certain circumstances seen over the course of my review would seem to indicate that Skeena Sawmills was actively trying to prevent Terrace Timber from working in an efficient and cost-effective manner, given the circumstances, and to create situations where Terrace Timber was at risk of material default on their logging contract.
>
> […] My opinion is that Terrace Timber operated in a manner that was reasonably efficient in terms of cost and productivity given the circumstances reviewed on a block-by-block basis.
>
> I am aware of my duty to assist the Arbitrator, remain impartial and unbiased and not be an advocate for any party. I have prepared my report in conformity with this duty. If I am called on to give oral or written testimony, I will give that testimony in conformity with this duty."

Main Affidavit #2 at paras. 34 - 35 and Exhibit "C".

53. The Girvan Report is not the only evidence indicating that Skeena Sawmills, at best, was mismanaged; and at worst, set out to ensure its Bill 13 contractors would fail. Timber Baron's representative has attested to numerous operational decisions taken by Skeena Sawmills which increased costs and reduced efficiency, as well as unreasonable positions taken by Skeena Sawmills in relation to Timber Baron's efforts to resolve resulting rate disputes.

Affidavit #2 of Matthew Thomson, made on March 26, 2024 at paras. 14 - 16, 35 [Thomson Affidavit #2].

54. It is noteworthy that the Cui related parties sought the Receivership Order on the eve of these arbitrations that they were likely to lose, and now seek the RVO to eliminate the Bill 13 Contracts in their entirety. If nothing else, this goes to the equities.

C. The Transaction and the RVO

55. 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].

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

Fourth Report at paras. 7.1 0 7.2.

57. The Receiver's Application seeks the approval of the PRA, to be completed by way of an RVO.

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

58. The PRA and proposed RVO contemplate, 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 the newly-incorporated, insolvent ResidualCo.

59. 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").

60. 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").

61. 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").

D. Effect of the Proposed RVO

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

Main Affidavit #1 at para. 11.

63. 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 #1 at para. 15.

64. 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 #1 at para. 16.

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

Main Affidavit #1 at para. 17.

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

Main Affidavit #1 at para. 14.

67. 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 #1 at para. 14.

PART III - LEGAL BASIS

A. Jurisdiction to Grant the RVO Within Receivership Proceedings

68. The Receiver was appointed pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("**BIA**") and section 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

Receivership Order at recitals and s. 2.

69. It is well-established that an RVO may be granted within proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). Section 11 of the CCAA incorporates a broad grant of jurisdiction to make any order that the Court considers "appropriate in the circumstances". The vast majority of RVOs have been granted within CCAA proceedings and there is no dispute that this jurisdiction exists under section 11 of the CCAA.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 at s. 11.

70. The BIA does not grant broad authority similar to section 11 of the CCAA.

71. In contrast, little consideration has been given to whether a court exercising its bankruptcy jurisdiction may grant a reverse vesting order. Most reported decisions considering whether such jurisdiction exists, under the BIA, were in the context of proposal proceedings under Division I of Part III of the BIA, where no party challenged the jurisdiction.

72. The BIA does not expressly refer to RVOs. The potential source of jurisdiction to grant an RVO under the BIA is found in section 183(1), which states, in pertinent part:

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

[…] (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

[Emphasis added]

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 at s. 72(1) [BIA].

73. In *Payslate Inc. (Re)* ("***Payslate #1***"), the Honourable Justice Walker held that an RVO was available within BIA proposal proceedings on the basis that, "In the BIA, s. 183 confers jurisdiction in accordance with legal and equitable principles to give effect to its purpose" [emphasis added].

Payslate Inc. (Re), 2023 BCSC 608 at para. 85 [*Payslate* #1].

74. In proposal proceedings, the purpose of the BIA is shared with the CCAA:

"…the purpose of the CCAA — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the BIA may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules"

[Emphasis added]

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 at para. 15.

75. In receivership proceedings, that remedial purpose is absent, as is the statutory basis for the granting of an RVO. To the contrary, as set out in further detail below, the proposed RVO in this case would cause significant social and economic costs which would not be present under a standard approval and vesting order.

76. There is one reported decision in which this Honourable Court held that the jurisdiction to grant an RVO exists within receivership proceedings: *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476 ("***Peakhill***"), which is currently under appeal.

The Court in *Peakhill* heavily relied upon the decision in *Payslate #1* in holding that s. 183 of the BIA provides sufficient jurisdiction to grant an RVO:

> "[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.
>
> [23] The Province raises two arguments regarding jurisdiction.
>
> [24] First, it argues that the words of s. 183 of the *BIA* (or s. 243 which deals with receiverships) are insufficient to ground jurisdiction to grant an RVO.
>
> [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."

Peakhill Capital Inc. v. Southview Gardens Limited Partnership, 2023 BCSC 1476 at paras. 23 - 25 [*Peakhill*], appeal pending (2023 BCCA 368), citing *Payslate #1*.

77. For the reasons stated above, the reasoning in *Payslate #1* does not support the granting of an RVO within receivership proceedings. Even assuming that such jurisdiction exists under the BIA generally, the underlying policy rationale is not present. An RVO simply does not give effect to the purpose of a BIA receivership.

78. Nonetheless, it is not necessary for this Honourable Court to determine whether it has jurisdiction to grant an RVO within receivership proceedings in order to resolve the Application. Even if such jurisdiction exists generally to grant an RVO, it does not exist to grant an RVO that alters rights under valid provincial legislation.

B. An RVO Founded on Inherent Jurisdiction Cannot Alter Provincial Legislation

79. The RVO in this case is specifically intended to exclude the Bill 13 Contract and other *Forest Act* replaceable contracts to which Skeena Sawmills is a party. The Purchaser's evidence in this regard is that "Cui Holdings' completion of the Retention Agreement is conditional on its ability to exclude the Bill 13 Contracts, failing which, Cui Holdings does not intend to complete the Retention Agreement".

Wu Affidavit at para. 66.

80. The RVO cannot be granted as it is intended to circumvent otherwise-valid provincial law, which is effective in bankruptcy and receivership proceedings and not in conflict with the BIA.

(a) The *Forest Act* and the statutory framework for replaceable contracts

81. The RVO seeks to short-circuit clear and unambiguous statutory provisions.

82. 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*].

83. 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 an agreement and 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).

84. 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.

85. 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*].

86. 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.

87. 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.

88. 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.
>
> [Emphasis added]
>
> British Columbia, Legislative Assembly, *Hansard*, 39th Leg, 2nd Sess, Vol 19, No 1 (27 May 2010) at 5850.

89. The revised provisions in force were expressly implemented to deal with insolvency decisions in *New Skeena* and others, and 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.

90. 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.

91. 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
>
> (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 Regulation, BC Reg 22/96 at s. 33.8.

92. 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*. Absent an insolvency, a company can't dispose of its Bill 13 contract without complying with the *Forest Act* and the Regulation.

93. As a result, the stated purpose of the RVO - according to the Purchasers' own affiant - is to avoid the effect of valid provincial legislation, which would, in the absence of an RVO,

[1] "Licence" is defined in the Regulation 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.

unambiguously apply to require any purchaser of TFL-41 to become bound by the existing Bill 13 Contract or an equivalent replacement contract on substantially the same terms.

(b) The BIA is informed by provincial law and the *Forest Act* regime applies in proceedings under the BIA

94. The *Forest Act* is not in conflict with the BIA, nor is the BIA intended to override provincial jurisdiction over property and civil rights. To the contrary, the BIA incorporates and is informed by provincial laws affecting property, which form the basis for parties' rights in proceedings under the BIA.

95. Subsection 72(1) of 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]

BIA at s. 72(1).

96. 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. 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 SCR 91 at paras. 64 - 65.

97. In *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.* ("***GMAC***"), the Court applied this principle to 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 s. 243 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.

98. 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.

99. 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*.

C. The proposed RVO is inequitable and inappropriate in the circumstances

100. Further, even should this Court find jurisdiction to grant an RVO on equitable grounds, such equities do not exist.

101. The BIA does not expressly provide for the issuance of RVOs, which are 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.

102. 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 #1*:

> 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 #1 at paras. 1, 38, 87.

103. 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.

104. 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 at para. 42, citing *Harte Gold*.

105. 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 RVO, as confirmed by Ms. Wu's evidence, 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. That is not a matter of *necessity* but of convenience.

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 Terrace Timber from exercising its statutory rights under the *Forest Act* and Regulation.

Given a reverse vesting is an extra-ordinary remedy, the onus is on the party seeking it to show why it is necessary. That the Purchaser wants it is simply not enough.

(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 RVO structure, and the supplemental reports to the Fourth Report have focused on the comparative *value* of the bid itself, as compared with other bids received in the sale process, without consideration of whether *the use of an RVO* to give effect to the Transaction promotes a favourable economic result.

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).

There is evidence that the Cui parties have mismanaged the business. The Purchaser is related to the same ultimate party that was unable to successfully operate previously, sought to bolster its secured position through a questionable "forbearance", and entered an insolvency proceeding leaving numerous parties unpaid, despite favourable market conditions.

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);
Main Affidavit #2 at paras. 41 – 42;
Cui Affidavit #1.

(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; Timber Baron is similarly affected. The reverse vesting order is inequitable in this respect. In addition, other application respondents have raised similar concerns, such as the issues raised by the Gitanyow Nation concerning the effect of the RVO, which includes avoiding mandatory consultation requirements affecting interested First Nations.

(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 of the Fourth Report 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.

106. 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 Purchaser has stated that it is committed to restarting operations, which is the source of any economic benefits which may, allegedly, accrue to stakeholders from the Transaction. However, the Purchaser's evidence in this regard is weak. Ms. Wu attests that "…Cui Holdings has sourced private investors to provide about $10 million of the funds to be used by Cui Holdings for capital investments…" but that such funds are at risk and "…If Cui Holdings losses [sic] these investor funds, it will delay the ability to restart the Business…". There is no proof of the purported investments, nor any evidence that Cui Holdings (which is bidding for the Property by way of a credit bid, without any new cash) has sufficient outside financing to restart operations. Again, this the party that mismanaged the business in the first place;

Wu Affidavit at paras. 69 - .70

(c) further, the Purchaser's evidence refers to various profit-maximizing initiatives which the Purchaser states will be undertaken if it retains control of the Skeena

Entities, including cost-cutting initiatives, the purchasing of additional equipment, and focusing on contacts in Asia to find new markets for the Skeena Entities' products. What is missing is any explanation as to why the Purchaser - which controlled both the Petitioner and the Skeena Entities at all relevant times - failed to undertake these initiatives prior to the entry of the Receivership Order. The Purchaser's evidence is not credible; if the Skeena Entities could be profitable under its management and oversight, they would have been so when market prices were more favourable. The most feasible alternative explanation is that the Skeena Entities' controlling minds had developed these plans prior to the commencement of these receivership proceedings, but determined that they would first need to rid the Skeena Entities of the debts that they ran up in the decade-long period since the Cui family's acquisition. In any event, there is not sufficient evidence regarding future profitability to justify wiping out existing debts by way of an RVO, based upon a speculative hope that the Skeena Entities may suddenly become profitable under existing management;

Wu Affidavit at paras. 21 - 34.

(d) 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;

(e) the timing of the Receivership Order in this case is suspect. The Purchaser has stated that the RVO is intended to rid Skeena Sawmills of the Bill 13 Contracts. The Rate Arbitration, and the similar arbitration involving Timber Baron, were both anticipated to involve significant steps in the near term when the Petitioner (at the direction of the Cui family) brought its petition for the appointment of the Receiver;

(f) 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, the Purchaser, and the Cui family (who as noted above have sole control over the

Purchaser, 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; and,

(g) the conclusions set out in the Girvan Report make this potential result all the more troubling. As stated in the Girvan Report, it appears that Skeena Sawmills set out to "…create situations where Terrace Timber was at risk of material default on their logging contract". The evidence filed by Timber Baron is to similar effect. When considered alongside Ms. Wu's evidence regarding the necessity of Skeena Sawmills escaping the Bill 13 Contracts, there is evidence that such intention may extend beyond the strict terms of the PRA, and relate back to the initial petition seeking the Receivership Order.

Main Affidavit #1 at paras. 11, 14 - 16;
Main Affidavit #2 at paras. 34 - 35 and Exhibit "C";
Thomson Affidavit #2 at paras. 14 - 16, 33 - 35.

107. The facts are distinguishable from the decision in *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 or beneficial interest, and the Court accepted that purchasers outside of an insolvency context would frequently obtain title by transfer of the beneficial interest through the sale of shares in a nominee corporation, and if the province wished for property transfer tax to apply on the sale of a beneficial interest, it could amend the legislation. Accordingly, the RVO in that case 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.

108. 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.

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

DATED at Vancouver, British Columbia, this 27th day of March, 2024.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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