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. and
ROC HOLDINGS LTD.

RESPONDENTS

APPLICATION RESPONSE

Application Response of: His Majesty the King in Right of the Province of British Columbia (the "**Province**")

THIS IS A RESPONSE TO the notice of application of Alvarez & Marsal Canada Inc. ("**A&M**"), in its capacity as court-appointed receiver and manager (in such capacity, the "**Receiver**") filed February 29, 2024.

The Province estimates that the application will take one day.

This matter is not within the jurisdiction of an associate judge.

PART 1: ORDERS CONSENTED TO

Nil.

PART 2: ORDERS OPPOSED

The Province opposes the order sought in paragraph 1 of Part 1 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Province takes no position on the order sought in paragraph 2 of Part 1 of the notice of application.

PART 4: FACTUAL BASIS

Overview

1. The Receiver's notice of application seeks a reverse vesting order (the "**Skeena RVO**"), which would bless a proposed transaction under which Cui Family Holdings Inc. ("**Cui Holdings**")

would retain shares and certain desirable assets of the Skeena Entities (defined below) while (i) vesting unwanted assets and liabilities into a new corporation which would then be bankrupted, and (ii) granting broad releases that insulate Cui Holdings and the Skeena Entities from liability.

2. The Province opposes the Skeena RVO on two principle grounds, each of which is an independent basis to dismiss this application.

3. *First,* the court has no jurisdiction in the context of this receivership to approve a reverse vesting order. The Receiver appears to rely only on s. 183 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 [***BIA***], a non-descript provision which does not expressly provide the court with jurisdiction to make a reverse vesting order. Commentators have termed the lack of jurisdiction under s. 183 as "an inconvenient elephant in the insolvency room".[1]

4. The above point is true in any case, but it bears particularly on this case, where the effect of the Skeena RVO would be to trample on provincial legislation (specifically, the *Forest Act,* RSBC 1996, c. 157 and the regulatory processes enacted under that statute), and where the Skeena RVO appears as an attempt to avoid triggering a duty to consult First Nations which will be affected by the order. Any jurisdiction that could arise under s. 183 must be read down to avoid trampling on provincial legislation.

5. *Second,* even if there were jurisdiction to grant the Skeena RVO, that jurisdiction should not be exercised in this case. "The case authorities are clear that RVOs are only to be granted in extraordinary circumstances following close judicial scrutiny and only after the applicant, purchaser, and court's officer have established that the factors set out in the case authorities are satisfied."[2]

6. The Receiver's application is at best premature, and various factors identified in the authorities are left unaddressed such that the court is not now in a position to perform the necessary analysis. Relatedly, the proposed transaction is inherently non-determined, seeking the court's approval before Cui Holdings determines which contracts, licenses, and assets it is prepared to retain. Nor is there even a commitment from Cui Holdings that it will continue to operate the Skeena Entities after the transaction.

7. On the merits (as they can now be assessed), this is not an exceptional case which might justify a reverse vesting order.

Parties and Property

8. The Skeena Entities consist of Skeena Sawmills Ltd. ("**Sawmills**"), Skeena Bioenergy Ltd. ("**Bioenergy**"), and ROC Holdings Ltd. ("**ROC**").

9. ROC and Bioenergy are wholly owned subsidiaries of Cui Holdings. Sawmills is a wholly

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[1] Professor Aminollah Sabzevari, "A Hill Too Far: Reverse Vesting Orders in BIA Receiverships", February 26, 2024, CanLII Connects (https://canliiconnects.org/en/commentaries/93579)
[2] *PaySlate Inc. (Re)*, 2023 BCSC 608 [***PaySlate #1***] at para. 144; subsequent reasons at 2023 BCSC 977 [***PaySlate #2***]

owned subsidiary of ROC.[3]

10. The petitioner is a corporation related to Cui Holdings (the extent and nature of this relationship is not before the court).[4]

11. The property of the Skeena Entities consists of the following:[5]

a) five parcels of property owned by ROC and located in Terrace, BC (the "**Skeena Lands**");

b) a sawmill operation, which includes an industrial sawmill, a certified weight log scale, a natural gas kiln, two bay garage mobile shop, a millwright shop, and various tools and equipment (owned and leased) (the "**Sawmill Operation**"). The Sawmill Operation is located at 5330 Highway 16 West, Terrace, BC;

c) the bioenergy operation, which includes the pellet plant and various tools and equipment (owned and leased) (the "**Bioenergy Operation**"). The Bioenergy Operation is located at 5402 Highway 16 West, Terrace, BC;

d) the main office building in Terrace, BC;

e) various forest tenures and licences, including Tree Farm Licence 41, two forest licences (together, the "**Licences**") and various cutting permits;

f) inventory on site and located at the port of Prince Rupert; and

g) accounts receivable.

12. The Sawmill Operation ceased operating in July 2023. As of September 2023, the Sawmill Operation employed 102 people, of which 76 were bound by a collective bargaining agreement (the "**CBA**") between the United Steelworkers Local 1-1937 (the "**Union**") and Sawmills.[6]

13. The Bioenergy Operation also ceased operations in July 2023. As of September 2023, the Bioenergy Operation employed 27 people.[7]

Receivership Order

14. On September 20, 2023, the court ordered, pursuant to s. 243(1) of the *BIA*, that A&M be appointed as receiver of the Skeena Entities – and specifically, over 6 real properties listed in Schedule "B" to the Receivership Order (the "**Lands**") as well as all of the assets, undertakings and property of the Debtors and proceeds thereof (the "**Property**") (the "**Receivership Order**").

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[3] First Report of the Receiver filed October 25, 2023 ("**Report #1**"), para. 3.4
[4] Report #1, para. 3.1
[5] Report #1, para. 3.5
[6] Report #1, para. 3.7
[7] Report #1, para. 3.8

15. The Receivership Order empowered the Receiver to take certain specific actions in relation to the Property, including the following:[8]

> (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
>
> (i) without the approval of this Court in respect of a single transaction for consideration up to $100,000 provided that the aggregate consideration for all such transactions does not exceed $500,000 and
>
> (ii) with the approval of this Court in respect of any transaction in which the individual or aggregate purchase price exceeds the limits set out in subparagraph (i) above,
>
> and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required;
>
> (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers, free and clear of any liens or encumbrances;

Skeena Entities' Obligations

16. As of October 11, 2023, the Skeena Entities had a total of approximately $161.5 million of liabilities, including approximately $13.7 million owed to unsecured creditors.[9]

17. Amounts owed by Sawmills to unsecured creditors include various trade claims, amounts due to the Union, and termination pay or severance pay due to former employees and Union members.[10]

18. Amounts owed by Bioenergy to unsecured creditors include approximately $4.9 million owing to the Province, as represented by the Minister of Environment and Climate Change Strategy ("**CleanBC**"), pursuant to a funding agreement dated March 17, 2022 (the "**Bioenergy Funding Agreement**") between Bioenergy and Her Majesty the Queen in the Right of the Province of British Columbia in respect of a planned geothermal direct heating project to dry Bioenergy pellets.[11]

19. The Receiver collected from the Skeena Entities' bank accounts $1.6 million advanced by the Province to Bioenergy under the Bioenergy Funding Agreement (the "**CleanBC Funds**").[12]

20. On October 3, 2023, the Receiver notified CleanBC that the Receiver had taken possession of the CleanBC Funds and that they were subject to the receivership charges under

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[8] Order of Madam Justice Blake made September 20, 2023 ("**Receivership Order**"), s. 2
[9] Report #1, para. 3.15
[10] Report #1, para. 3.20
[11] Report #1, para. 3.23
[12] Report #1, para. 6.2

the Receivership Order and would be used to pay the ongoing costs of these proceedings.[13]

Sales Process

21. The Receiver began a sales process on October 31, 2023.[14]

22. Eight non-binding expressions of interest ("**EOIs**") were submitted by six interested parties by the offer deadline on December 8, 2023. An additional EOI was received shortly after the offer deadline and was accepted by the Receiver as a qualified EOI.[15]

23. Upon review of the nine EOIs, the Receiver invited the petitioner and three other parties (together, the "**Qualified Parties**"), to participate in Phase II of the Sales Process.[16]

Meetings Between Receiver and Minister of Forests

24. Between early-October and mid-December 2023, representatives of the Receiver and representatives of the Minister of Forests discussed the Licenses, how they potentially could be transferred, and the different requirements and considerations that would be engaged when the Minister assessed an application for transfer. The Receiver did not ultimately submit an application for transfer of the Licenses.[17]

Relief Sought on this Application

25. On February 29, 2024, the Receiver filed this notice of application. The notice of application was set for hearing on March 8, 2024, five clear business days later. (No order for short leave was sought prior to filing the application, nor is any such order sought in the notice of application itself.)

26. The Receiver's application seeks court approval of the Skeena RVO, the terms of which are set out in full at Schedule "C" of the Receiver's application. In brief, the Skeena RVO would:

a) approve an unexecuted agreement between Cui Holdings and the Receiver (the "**Transaction**"), whereby Cui Holdings would retain its shares in ROC and Bioenergy (defined therein as the "Retained Shares") and vest out the "Excluded Liabilities" (the "**Retention Agreement**");

b) affirm that, on closing of the Transaction, title to the "Retained Assets" would remain with the Skeena Entities, free and clear of all "Encumbrances" except the "Permitted Encumbrances";

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[13] Report #1, para. 6.2
[14] Second Report of the Receiver filed December 13, 2023 ("**Report #2**"), para. 6.1
[15] Report #2, para. 6.6
[16] Report #2, paras. 6.7 and 6.10
[17] Affidavit #1 of Jacques Bousquet

c) release Cui Holdings, the Receiver, the Skeena Entities and the "Retained Assets" from any and all "Claims" or "Encumbrances" (except the "Permitted Encumbrances");

d) terminate the employment of all employees (both Union and non-Union) as of the Closing Date;

e) vest the Skeena Entities' "Excluded Assets" and "Excluded Liabilities" in a new company to be incorporated ("**ResidualCo**"); and

f) remove the Skeena Entities as respondents in this action, add ResidualCo as a respondent, and authorize and direct the Receiver to assign ResidualCo into bankruptcy.

27. An unsigned and unexecuted copy of the Retention Agreement is attached as Schedule "B" to the Skeena RVO.

Retained Assets and Retained Liabilities

28. "Retained Assets" is defined in the Retention Agreement as follows:[18]

> **"Retained Assets"** means:
>
> (i) the Sawmills Shares; and
>
> (ii) all the Companies' [*i.e.*, the Skeena Entities'] right, title and interest, in and to their assets and properties, including, without limitation:
>
> (A) the Approved Contracts;
>
> (B) the Bioenergy Cash;
>
> (C) the Business Records;
>
> (D) the Intellectual Property;
>
> (E) the Inventory;
>
> (F) the Machinery and Equipment;
>
> (G) the Permits and Licenses;
>
> (H) the Lands and Buildings; and
>
> (I) the Warranties.

29. "Approved Contracts" is defined in the Retention Agreement as "those Contracts which

[18] Retention Agreement, s. 1.1(ddd)

Cui [Holdings] has approved in writing on or before the Closing Date."[19] The "Closing Date", in turn, is "30 days after the date the [Skeena RVO] is pronounced by the Court".[20]

30. "Permits and Licenses" is defined in the Retention Agreement as follows:[21]

> **"Permits and Licenses"** means all licenses, approvals, authorizations, permits, consents or other rights entered into or obtained by any of the Companies or the Receiver from any Governmental Authority, and used in connection with the Business or in respect of any of the Retained Assets, including, without limitation various forest tenures and licenses, including Tree Farm Licence 41, two forest licences A16882 and A16885 and various cutting permits.

31. "Retained Liabilities" is defined in the Retention Agreement as follows:[22]

> **"Retained Liabilities"** means:
>
> > (i) any Liabilities of the Companies under the Approved Contracts, the Permits and Licenses and the Permitted Encumbrances;
> >
> > (ii) the debts owing by the Companies to Cui under the Promissory Notes (as assigned by the Petitioner to Cui), which are recognized as outstanding for the purposes of setting those debts off against the Price pursuant to Section 2.4;
> >
> > and
> >
> > (iii) all other debts (other than the Promissory Notes assigned to Cui) owing by the Companies as of the Closing Date to the Petitioner or to Cui or any of their respective affiliates or other parties with whom the Companies are not at arm's length, including Shenwei Wu and Xiaopeng Cui and any trust of which either or both of such individuals are trustees.

Excluded Assets and Excluded Liabilities

32. "Excluded Assets" is defined in the Retention Agreement as follows:[23]

> **"Excluded Assets"** means: (i) Contracts which are not Approved Contracts; (ii) the rights of the Companies and the Receiver under this Agreement; (iii) corporate income taxes receivable and GST refunds; (iv) cash and cash equivalents other than the Bioenergy Cash; and (v) the Canter Line.

33. Excluded Liabilities is defined in the Retention Agreement to include "any and all Liabilities of the [Skeena Entities] that are not Retained Liabilities", and goes on to give a non-exhaustive list of examples that includes (i) any taxes payable in respect of any period prior to the Closing

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[19] Retention Agreement, s. 1.1(b)
[20] Retention Agreement, s. 1.1(m)
[21] Retention Agreement, s. 1.1(pp)
[22] Retention Agreement, s. 1.1(eee)
[23] Retention Agreement, s. 1.1(aa)

Date, (ii) any claims relating to any event or circumstance occurring prior to the Closing Date, and (iii) "any Liabilities for a breach or non-compliance with any applicable law".[24]

Skeena RVO Release Provisions

34. "Claims" is defined – broadly, and without temporal limit – in s. 2(b)(ii) of the Skeena RVO as follows:[25]

> the [Skeena Entities] shall be released from any and all debts, claim, liability, duty, responsibility, obligations, commitment, assessment, cost, expense, loss, expenditure, charge, fee, penalty, fine, contribution or premium of any kind or nature whatsoever, whether known or unknown, asserted or unasserted, absolute or contingent, direct or indirect, or due or to become due and regardless of when sustained, incurred or asserted or when the relevant events occurred or circumstances existed (all of which are collectively referred to as the "**Claims**"), whether secured, unsecured or otherwise, including without limitation any and all claims arising out of or relating to: (1) the Excluded Liabilities; (2) the insolvency of any of the Companies prior to the Closing Date; and (3) the commencement or existence of these proceedings, but excluding the Retained Liabilities (as defined in the Retention Agreement);

35. Sections 13 and 14 of the Skeena RVO contains broad release provisions (the "**Release Provisions**"):

> 13. Upon delivery of the Receiver's Certificate, all persons shall be absolutely and forever barred, estopped, foreclosed and permanently enjoined from pursuing, asserting, exercising, enforcing, issuing or continuing any steps or proceedings, or relying on any rights, remedies, claims or benefits in respect of or against the Receiver, its directors, officers, employees, counsel, advisors and representatives, Cui Holdings, the Companies or the Retained Assets, in any way relating to, arising from or in respect of:
>
> (a) any and all Claims and Encumbrances and the Excluded Liabilities against or relating to the Retained Assets;
>
> (b) the insolvency of the Companies;
>
> (c) the commencement or existence of these receivership proceedings; or
>
> (d) the completion of the Transaction.
>
> 14. From and after the delivery of the Receiver's Certificate, the Receiver, its directors, officers, employees, counsel, advisors and representatives shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any taxes (including penalties and interest thereon), as well as penalties for failure to file returns pursuant to section 162 of the *Income Tax Act* (Canada) (the "**ITA**"), or that relate to the Companies, including without limiting the generality of the foregoing all taxes, penalties and

[24] Retention Agreement, s. 1.1(bb)
[25] Skeena RVO, s. 2(b)(ii)

interest that could be assessed against the Companies or Cui Holdings (including its affiliates and any predecessor corporations) pursuant to section 160 of the ITA, as amended, or any provincial equivalent, in connection with the Companies (provided, as it relates to the Companies, such release shall not apply to (a) transaction taxes, or (b) taxes in respect of the business and operations and conducted by the Companies after completion of the Transaction). For greater certainty, nothing in this paragraph shall release or discharge any Claims with respect to taxes or obligations in respect thereof that are transferred to ResidualCo.

PART 5: LEGAL BASIS

Application is Premature

36. The Province submits that the Receiver's application is, at best, premature. (It is telling that the application was set for hearing, absent short leave, on only five clear business days notice to some (and not all) of parties potentially affected by the order sought.)

37. The materials before the court do not address various considerations with which the court will need to engage before it can assess whether to grant the extraordinary remedy of a reverse vesting order.

38. In *PaySlate #1,* Justice Walker dismissed an application seeking a reverse vesting order where there was insufficient evidence to justify the order.

39. Concerns identified in *PaySlate #1,* which apply equally in this matter, include the following:

a) whether any of the counterparties to the retained contracts have or may have contingent claims that would be caught by the Release Provisions (para. 67);

b) a lack of evidence of service to counterparties, as well as unsecured creditors generally (given that the Release Provisions will affect their rights) (para. 68 and 77); and

c) a lack of fulsome evidence concerning the value of the debtor's assets (paras. 136-142).

40. The lack of evidence on which to assess the Skeena RVO is even more pronounced given the structure of the potential transaction put before the court for approval. By way of example, the following ambiguities exist in the materials:

a) the contracts to be retained by the Skeena Entities (the "Approved Contracts") – some of which are governed by provincial legislation, and at least one of which is with the Province (the Bioenergy Funding Agreement) – are defined subjectively as those "which Cui [Holdings] has approved in writing on or before" a "Closing Date" which is a date *after* the Skeena RVO is approved by the court;

b) the assets to be retained by the Skeena Entities (the "Retained Assets") are defined to include the "Approved Contracts", as well as the Skeena Entities' "Permits and Licenses". The Permits and Licenses are defined to include, in part, those used "in respect of any of the Retained Assets..." Thus, because it is uncertain which contracts are Approved Contracts (and thus a Retained Asset), it is uncertain which Permits and Licenses are also intended to be retained;

c) the definitions of "Excluded Liabilities" and "Retained Liabilities" also rely on the definitions of "Approved Contracts" and "Permits and Licenses". As a result, it is ambiguous which liabilities are intended to be excluded and which are intended to be retained; and

d) the Retention Agreement attached to the notice of application is unexecuted, and indeed the Receiver does not propose to have the Retention Agreement executed until after the Skeena RVO is approved (raising questions as to how a party can seek the court's indulgence to approve a contract prior to that contract's execution).

41. Justice Walker's reasoning applies even more strongly in this case than in *PaySlate #1*. The application should be dismissed as premature.

No Jurisdiction to Approve Skeena RVO

42. The Province says that the court does not have jurisdiction to grant the Skeena RVO. Further, even if such jurisdiction could arise, it does not in this case – where the effect of the Skeena RVO is to usurp valid provincial legislation (namely, the *Forest Act* and associated regulations).

A. No Jurisdiction

43. As the Receiver notes, "there is no specific jurisdiction in the BIA or the LEA for the approval of a reverse vesting order in receivership proceedings".[26]

44. Rather, the Receiver relies on the court's inherent jurisdiction under s. 183 of the *BIA* (Notice of Application, Part 3, para. 7). The Receiver points to two decisions:

a) *Third Eye*, an Ontario decision which concerned a conventional asset vesting order (and not a reverse vesting order).[27] *Third Eye* is not authority for the jurisdiction required to grant the Skeena RVO; and

b) *Peakhill* (a recent decision of Mr. Justice Loo which is under appeal on the question of jurisdiction).[28] *Peakhill,* in turn, relied on *PaySlate #1*, where the court found

[26] Receiver's notice of application, Part 3, para. 7
[27] *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 [***Third Eye***]
[28] *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476 [***Peakhill***]

jurisdiction to approve a reverse vesting order in s. 183 of the *BIA*. However, the analysis in *PaySlate #1* was not considered, and the court's comments regarding *BIA* s. 183 are arguably *obiter* as the court did not in *PaySlate #1* approve an RVO. (The court did later approve a reverse vesting order in *PaySlate #2*, but in that case all parties consented to the order in question and there was no discussion of jurisdiction.)

45. Commentators have expressed concern with the *Peakhill* decision, opining that *BIA* s. 183 does not provide jurisdiction, and that the court's lack of jurisdiction to approve a reverse vesting order in a receivership is "an inconvenient elephant in the insolvency room":[29]

> *Peakhill* cites [*PaySlate #1*] for the availability of RVOs under the BIA, which in turn cites other recent orders, but there is no analysis answering how section 183 provides a way for the court to order a compromise of the debtor's liabilities without having to resort to the statutory requirements for proposals. The answer is that it does not provide that ability, and references to the general objectives of insolvency law can't be used by a court to amend or overrule the statute that provides for insolvency law in the first place. This lack of jurisdiction under section 183 is an inconvenient elephant in the insolvency room.

46. The approval of a reverse vesting order through a receivership is an inherently problematic outcome, as it does away with the rights of affected third parties (many of whom may not have notice of the court proceeding). The court should not lightly assume the jurisdiction to approve a reverse vesting order in a receivership, in the absence of express statutory language prescribing that jurisdiction (such language exists under s. 11 of the *CCAA*, but it is telling that there is no equivalent provision in the rules-based *BIA*). Professor Janis Sarra – in discussing an equivalently broad provision (*BIA* s. 243) – noted the problematic nature of the court assuming this jurisdiction in a receivership proceeding:[30]

> The approval of an RVO through receivership is even more problematic because there is not the broad statutory authority accorded the court pursuant to the *CCAA*. Further, to date, there appear to be no judgments that discuss the court's authority to bypass creditor rights and endorse such transactions. For example, in *Pure Global Cannabis*, the receiver argued that s. 243(1)(c) of the *BIA* and s. 101 of the *Courts of Justice Act* (Ontario) provided the jurisdiction, which was accepted by the court without any reasons given. Yet there is nothing in the language of s. 243 that suggests such authority, and it seems critically important that transactions that bypass key provisions of the comprehensive insolvency and bankruptcy framework are carefully scrutinized by the courts. The RVO in a receivership context does not involve collective participation or compel the involvement of all creditors. [Footnote omitted, emphasis added.]

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[29] Professor Aminollah Sabzevari, "A Hill Too Far: Reverse Vesting Orders in BIA Receiverships", February 26, 2024, CanLII Connects (https://canliiconnects.org/en/commentaries/93579)

[30] Janis P. Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", Canadian Legal Information Institute, 2022 CanLIIDocs 431 [**Sarra Article**], p. 24

47. The court does not have, and should not assume, jurisdiction to approve the Skeena RVO.

B. Usurping Provincial Legislation

48. Alternatively, even if the court could be found to have jurisdiction in some other case, that jurisdiction does not arise in this case – where the effect of the Skeena RVO is to usurp valid provincial legislation.

49. Any authority that the court may have must be interpreted in light of valid provincial legislation, and that legislation must be respected to the fullest extent possible.[31]

50. Put differently, a receiver's powers do not enable it to contravene laws of general application. This principle is reflected in s. 72 of the *BIA*, which provides that the *BIA* "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 [the *BIA*]".[32]

51. The RVO has the effect of circumventing Ministerial powers under the *Forest Act* to consider the public interest, preserve "replaceable contracts" associated with the Licences, and require road permit roads (and the associated maintenance and deactivation obligations) to be dealt with in an orderly manner.

52. Typically, a receivership would involve a disposition of these contracts, licenses and permits (under Part 4, Division 2 of the *Forest Act*)[33] or change of control (under Part 4, Division 2.1 of the *Forest Act*).[34] Where a disposition is involved, for example:

> (a) the Minister's written approval is required (s. 54(2)(a);
>
> (b) payment of all money due and payable or agreement as to a payment plan is required (s. 54(2)(b)); and

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[31] *Yukon (Government of) v. Yukon Zinc*, 2021 YKCA 2 at para. 123; see also *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26 at para. 22; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para. 160 ("Bankruptcy is not a licence to ignore rules ... The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the BIA is built."); and *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para. 151 ("It is well established that harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility".)

[32] *BIA,* s. 72; see also *GMAC Commercial Credit Corporation Canada v. T.C.T. Logistics Inc.,* 2006 SCC 35, paras. 43-51 (para. 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*".); and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, para. 57 ("When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.")

[33] *Forest Act,* ss. 54 – 54.61

[34] *Forest Act.* ss. 54.62 – 54.69

(c) where a "replaceable contract" is involved (as is the case here), the recipient must assume all obligations of the holder of the agreement.[35]

53. Before approving the transfer, it is mandatory for the Minister to consider the public interest (recognizing nothing in s. 54.02 is intended to limit the Minister's authority to refuse approval). The Minister would consult with First Nations regarding the approval decision, which would inform the Minister's assessment of public interest, and in the process request any information the Minister considers necessary (s. 54(2.1)) and attach conditions of the approval (s. 54.01(4)). In other words, if the Receiver had proceeded with either a transfer or an amalgamation/change of control, the Minister would have to consider the public interest, which would necessarily encompass the interests of affected First Nations.

54. As set out in the affidavit of Jacques Bousquet, the Receiver started down this path between October and December 2023. The Receiver has now instead sought the Skeena RVO – a judicial indulgence, and an exceptional remedy – in an apparent attempt to avoid abiding by the requirements of the *Forest Act* and to avoid triggering the Minister's duty to consult.

55. There is good reason for the statutory requirements: Mr. Bousquet sets out how the Receiver's representatives were informed of the Province's oversight role in administering forestry licences and permits pursuant to the *Forest Act* and its responsibility to ensure the public interest is taken into account in its decision-making under the *Forest Act*.

56. The Skeena RVO thus defeats the intentions of the Legislature in enacting recent amendments to the *Forest Act* to include a mandatory consideration of public interest (which this court has recognized is a broad discretion that involves weighing all competing concerns).[36]

Insufficient Basis for a Reverse Vesting Order

57. If this court does find it has the jurisdiction to grant a reverse vesting order in this proceeding, then there remains no basis to exercise that jurisdiction and approve the Skeena RVO.

A. Nature of Relief Sought

58. "RVOs are not the norm and should only be granted in extraordinary circumstances."[37]

59. In *Blackrock Metals,* Chief Justice Paquette explained the nature of RVOs as follows:[38]

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[35] Comparable sections, for a change of control, are found in Part 4, Division 2.1 of the *Forest Act*. A change of control triggers a duty to consult: *Gitxsan v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 at paras. 81-82

[36] *Pal Lumber Co. (2007) Ltd. v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2022 BCSC 734 at paras. 118 and 120

[37] *PaySlate #1* at para. 87; see also *Harte Gold Corp. (Re)*, 2022 ONSC 653 [***Harte Gold***] at para. 38; and *In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841 at para. 58

[38] *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 [***Blackrock Metals***] at paras. 85-86

> RVOs are a fairly new way to achieve the remedial objective of the *CCAA*: instead of selling the assets of a debtor, a series of transactions will result in i) the purchaser becoming the sole shareholder of a debtor and ii) the unwanted liabilities be vested out to a separate entity, thereby ensuring that the purchaser will not inherit the unwanted liabilities.
>
> Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. In particular, *CCAA* courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool. [Emphasis added.]

60. Chief Justice Paquette went on to caution that an RVO "should remain the exception and not the rule, and should be approved only in the limited circumstances where it constitutes the appropriate remedy."[39]

61. In assessing a potential reverse vesting order, the Court should "consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it."[40]

62. Professor Sarra expands on the need for caution when considering a reverse vesting order:[41]

> Weighed against these benefits is the concern that the RVO approach bypasses key components of the statutory framework that balances multiple creditor rights and interests, including the ability of creditors to vote on a plan. While one benefit of an RVO is often described as cost-savings if a plan vote is avoided, the cases reveal that RVO can be complex and costly to structure and implement. There is also a question of whether companies will be able to shed substantial environmental remediation and reclamation obligations under this new structure, leaving few assets to satisfy the obligations. In some instances, the RVO offers secured creditors a new "race to the assets" that the statutory stay provisions were originally designed to slow down to give a meaningful opportunity to negotiate with all creditors. [Footnote omitted.]

63. "Generally, an RVO transaction is used because it is the only viable option that will provide the greatest recovery to the debtor's creditors."[42]

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[39] *Blackrock Metals* at para. 96
[40] *PaySlate #1* at para. 89 (emphasis added), citing to Sarra Article
[41] Sarra Article at p. 2
[42] Jennifer Stam et al, "Putting it in Reverse: A Possible Path to US Chapter 15 Recognition of Reverse Vesting Order and Cannabis Filings", 2022, *20th Annual Review of Insolvency Law*, 2022 CanLIIDocs 4299 at p. 6

B. Applicable Factors

64. The Province agrees with the Receiver that the factors set out in *Harte Gold* are relevant in considering whether to grant the Skeena RVO:[43]

a) Why is the reverse vesting order necessary in this case?

b) Does the reverse vesting order structure produce an economic result at least as favourable as any other viable alternative?

c) Is any stakeholder worse off under the reverse vesting order structure than they would have been under any viable alternative?

d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the reverse vesting order structure?

65. Also relevant is the language of associated releases and whether there is any *bona fide* motivation for the reverse vesting order.[44]

66. Applying the above factors leads to the conclusion that the court should not approve a reverse vesting order in the circumstances of this case.

i. *Not Necessary*

67. Reverse vesting orders have been approved where they are the only path forward to resolve the financial affairs of the debtor:[45]

> As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. ...
>
> I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved. [Emphasis in original.]

68. That is not this case. There is no evidence that the Skeena RVO is necessary to preserve a business as a going concern.

69. Indeed, there is a paucity of evidence that Cui Holdings will even attempt to continue the Skeena Entities' operations. Approval is sought solely on the basis that "Cui Holdings has owned

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[43] *Harte Gold* at para. 38; Receiver's notice of application, Part 3, para. 8
[44] *PaySlate #1* at para. 99
[45] *Quest University Canada (Re)*, 2020 BCSC 1883 at paras. 158-159, leave to appeal dismissed, 2020 BCCA 364

and operated the Skeena Entities for over 10 years and has expressed an interest in restarting operations and providing working capital to fund the restart".[46]

70. In the absence of an express commitment by Cui Holdings to restart sawmill operations, it cannot be found that the Skeena RVO is necessary in the sense contemplated in the authorities. This factor weighs against approving the Skeena RVO.

ii. Release Provisions are Overbroad

71. As indicated in *PaySlate #1,* the scope of the releases sought under a reverse vesting order must be considered by the court on any application to approve a reverse vesting order. In considering whether to exercise the discretion to approve release provisions, courts have considered the following factors (termed the "***Lydian* Factors**"):[47]

a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) whether the plan could succeed without the releases;

d) whether the parties being released were contributing to the plan; and

e) whether the release benefitted the debtors as well as the creditors generally.

72. Applying the *Lydian* Factors, the releases proposed under the Skeena RVO are not reasonable and appropriate in the circumstances:

a) Not Necessary: As set out below, the Receiver has not put forward information concerning the three other Definitive Bids which would be required to assess whether the Release Provisions are in fact necessary. However, in light of their breadth (discussed below) it appears unlikely that they would be necessary.

b) Released Claims Not Rationally Connected to Purpose of Plan: The Release Provisions are exceptionally broad such that the released claims are not rationally connected to any *bona fide* purpose. By way of example only:

i. the Skeena Entities are to be released from all "Claims" – defined without any temporal limitation, to include, in effect, any and all liabilities of any kind;[48] and

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[46] Fourth Report of the Receiver filed February 29, 2024 ("**Report #4**"), para. 7.9(c) (emphasis added)
[47] *PaySlate #1* at para. 143; see also *Harte Gold* at paras. 78-86
[48] Skeena RVO, s. 2(b)(ii)

ii. under s. 13 of the Skeena RVO, on delivery of the Receiver's Certificate, "all persons" – including those without any notice of this proceeding – are barred from advancing any claims against the Skeena Entities, Cui Holdings, or the Retained Assets;

c) Benefit of Release Provisions: The Release Provisions benefit solely Cui Holdings, its shareholders and related parties (the Skeena Entities and the petitioner). There is no broader benefit – indeed, the Release Provisions prejudice potential claims that could otherwise be advanced (e.g. by the Province for return of the CleanBC Funds, for breach of the Bioenergy Funding Agreement, or environmental remediation claims).

73. The breadth of the Release Provisions is compounded by the broad definition of "Excluded Liabilities" (which would pass to ResidualCo and be bankrupted) – defined in the Retention Agreement to include "any and all Liabilities of the Companies that are not Retained Liabilities".[49] The definition includes liabilities of the Skeena Entities up to the Closing Date – thus insulating Cui Holdings and the Skeena Entities from post-closing liabilities. Further, the definition includes "any Liabilities for a breach or non-compliance with any applicable law...", thus apparently attempting to insulate the parties from any breach of legislation, or indeed from environmental regulation at all.

74. Professor Sarra's article warns of the risks of broad releases of the nature proposed by the Receiver:[50]

> Also of concern are the broad releases in respect of potential liability claims being granted against directors, officers, insolvency professionals, and third-parties, without the reasoning that usually underpins such broad releases, including contributions to the value of the assets that remain to satisfy creditors' claims. ...
>
> ... in a number of the RVO cases, releases are being granted in respect of a broad range of statutory claims without discussion of potential prejudice from such releases or reference to the developed jurisprudence. As one commentary observes, courts have granted broad releases in RVO transactions, thereby achieving third-party releases without creditors being asked to vote on this issue, undermining one of the key criteria for approval that the courts have used. [Footnotes omitted.]

75. Professor Sarra also cautions against approving releases which would allow a company to shed environmental obligations and transfer costs to taxpayers:[51]

> There is also a question of whether companies will be able to shed substantial environmental remediation and reclamation obligations under the RVO, leaving few assets to satisfy the obligations and transferring these costs ultimately to taxpayers. In most cases, the relevant regulator has not been involved at the stage the court is being asked to approve the RVO, which means the court is not

[49] Retention Agreement, s. 1(1)(bb)
[50] Sarra Article at p. 23
[51] Sarra Article at p. 24

receiving important information on possible implications for regulatory oversight legislation. The court should not be approving any transaction that ignores or misdirects responsibilities for environmental liability, given the critically important nature of these issues.

76. The nature and effect of the Release Provisions is thus a factor weighing against the court exercising its discretion to grant the relief sought.

iii. Economic Result Produced by Skeena RVO is Unclear

77. At this juncture, it is difficult to assess the economic result of the Skeena RVO as against the three other Definitive Bids received by the Receiver.[52] (See the ambiguities set out above at paragraphs 39-40.)

78. The effect of these ambiguities is that the court is being asked to approve a completely uncertain transaction. Further, the parties to the contracts in question do not know (nor can the court assess) – because of the subjective definition of "Approved Contracts" – how the parties to the contracts will be affected by the Skeena RVO.

79. As set out above, this ambiguity bears on the Province's claim to the CleanBC Funds – the Receiver has laid claim to the CleanBC Funds, but it is unclear whether Cui Holdings will assume the Bioenergy Funding Agreement. Further, the ambiguity bears on the Province's role in regulating and protecting the forestry industry through Bill 13 contracts (*i.e.* a "replaceable contract") – detailed above – as it is unclear whether Cui Holdings would decide to assume all, some, or none of the Skeena Entities' Bill 13 Contracts.

80. The onus rests with the applicant, purchaser, and court's officer to provide the requisite evidence to demonstrate that the tests for issuing a reverse vesting order have been met.[53] That onus has not been met.

81. This factor weighs against approving the Skeena RVO.

iv. Stakeholders are Worse-Off Under the Skeena RVO

82. Similarly, at this juncture it is difficult to fully assess the impact of the Skeena RVO. However, what is known definitively is:

a) the Skeena RVO would usurp the Province's role in regulating the forestry industry and thus guarding the public interest;

b) in light of the fall 2023 discussions between the Ministry of Forests and the Receiver, it appears that the Skeena RVO is an attempt to avoid triggering statutory requirements and obligations;

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[52] Report #4, para. 7.2
[53] *PaySlate #1* at para. 138

c) the sheer breadth of the Release Provisions, and the structure of the Skeena RVO as a whole, will result in various stakeholders (including Bill 13 contractors, as well as parties to contracts generally which Cui Holdings decides not to retain as "Approved Contracts) being unable to advance any claims for recovery; and

d) that the Release Provisions equally appear to bar claims for environmental remediation.

83. In the circumstances, there is clear prejudice to stakeholders. This factor thus also weighs against approving the Skeena RVO.

v. Value of Consideration Proposed to be Paid

84. In the absence of any information regarding the other Definitive Bids – and without knowing what intangible assets would be preserved under the Skeena RVO (or, indeed, whether any at all will be preserved – as Cui Holdings offers no commitment that it will continue operations) – this factor weighs against approving the Skeena RVO.

85. For the above reasons, there is no basis to approve the Skeena RVO.

Conclusion

86. The Receiver's application should be dismissed.

PART 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Jacques Bousquet made March 7, 2024.

2. Affidavit #1 of San Chan made March 7, 2024.

3. The pleadings and proceedings filed herein.

4. Such further and other material as counsel may advise.

The Province has not filed in this proceeding a document that contains an address for service.

The Province's address for service in this proceeding is:

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Dated: March 7, 2024

Counsel for His Majesty the King in Right of the Province of British Columbia
Owen James / Ray Power
Dennis James Aitken LLP

THIS APPLICATION RESPONSE is prepared and delivered by Owen James and Ray Power of the firm Dennis James Aitken LLP, whose place of business and address for service is 800 – 543 Granville Street, Vancouver, British Columbia, V6C 1X8. Telephone: 604-659-9479. Email: ojames@djacounsel.com and rpower@djacounsel.com