

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

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**WRITTEN SUBMISSIONS OF TIMBER BARON CONTRACTING LTD.**

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and Truck Loggers Association

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## PART 1 OVERVIEW

1. These written submissions are in response to an application by the Receiver, Alvarez & Marsal Canada Inc. (the “**Receiver**”), for an order approving the transaction contemplated by the Retention and Payment Agreement dated February 29, 2024 (the “**Proposed Sale**”), between Cui Family Holdings Ltd (“**Cui Holdings**”) and the Receiver, for substantially all of the assets of Skeena Sawmills Ltd. (“**Skeena Sawmills**”), Skeena Bioenergy Ltd. (“**Skeena Bioenergy**”), and Roc Holdings Ltd. (“**Roc Holdings**”, and collectively with Skeena Sawmills and Skeena Bioenergy, the “**Debtors**”).

2. The Proposed Sale is contemplated to be effected by a reverse vesting order (“**RVO**”) transaction.
3. Skeena Sawmills Ltd. holds two forest licences, FLA 16882 and FLA 16885, and Tree Farm Licence 41.

4<sup>th</sup> Report of the Receiver, para. 7.9(b)

4. Timber Baron Contracting Ltd. (“**Timber Baron**”) is a logging company that operates in northern British Columbia.
5. Timber Baron and Skeena Sawmills are parties to a replaceable timber harvesting contract (the “**Bill 13 Contract**”) made under the Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96 (the “**Regulation**”) in respect of forest licence FLA 16882 (the “**Licence**”).

Timber Baron Application Response, Part 4, para. 4

6. Under the provisions of the RVO as submitted, the Bill 13 Contracts are proposed to be separated from the Licences and effectively terminated.

Cui Application Response, para. 20

7. Timber Baron is also a holder of a *Forestry Service Providers Protection Act*, SBC 2010, c. 16 (the “**FSPPA**”) lien (the “**Lien**”). The Lien attaches to Skeena Sawmills’ inventory and accounts.

Timber Baron Application Response, Part 4, para. 6

8. The total amount of the Timber Baron secured claim under the FSPPA Lien is \$3,957,686.59.

Timber Baron Application Response, Part 4, para. 7

9. Under the provisions of the RVO, Timber Baron will receive no payment for the Lien.

Timber Baron Application Response, Part 4, para. 8

10. In summary, under the terms of the RVO, the result for Timber Baron will be as follows:
- a) loss of approximately \$4.0 million for Skeena's failure to pay the Lien;
  - b) loss of approximately \$20 to \$25 million in total revenue over the next five (5) years;
  - c) forced termination of 15-20 hourly employees from the local Terrace community which ordinarily would support the Bill 13 Contract operations; and
  - d) forced liquidation of the equipment and assets Timber Baron has invested to continue operations on the Licence since 1999.

## **PART 2      FACTS**

### **A.      *Timber Baron's Bill 13 Contract***

11. The Bill 13 Contract has been in place since 1999, and work under the Bill 13 Contract comprises approximately half of Timber Baron Contracting's business.

Affidavit #1 of M. Thomson, para. 9

12. The Bill 13 Contract's scope of work is as follows:
- a) stump to dump timber harvesting (the "**Harvest Operation**");
  - b) road building services to construct roads, including the installation or construction of culverts and, but excluding the supply, installation or construction of bridges (the "**Road Building Operation**"); and
  - c) all related services and obligations as described in, or allocated by Skeena Sawmills under the contract on lands subject to the Licence.

Affidavit #1 of M. Thomson, para. 10

13. Timber Baron employs 15-20 hourly employees from the local Terrace community to support the Bill 13 Contract operations. Many of these individuals have worked on the Licence with Timber Baron since 1999.

Affidavit #1 of M. Thomson, para. 11

14. Timber Baron's Bill 13 Contract is a replaceable contract under the Regulation. As such, when its term expires, Skeena Sawmills is obligated to offer a replacement contract on substantially the same terms.
15. Due to the nature of the Bill 13 Contract, and the security of tenure provided by the Regulation and the *Forest Act*, Timber Baron has been able to make substantial investments in its operations, including, among other things, investments for:

- a) equipment;
- b) safety and training;
- c) office space and other facilities;
- d) camps for workers;
- e) preventative maintenance; and
- f) laydown facilities.

Affidavit #1 of M. Thomson, para. 12

16. The value of Timber Baron's Bill 13 Investments to continue operations on the Licence since 1999 exceeds \$10 million.

Affidavit #1 of M. Thomson, para. 13

17. The Bill 13 Contract is also advantageous for Skeena Sawmills. Under the Bill 13 Contract and the Regulations, Skeena Sawmills provides work specifications, which include:
- a) the services they require Timber Baron to complete;
  - b) the estimated quantity of work Timber Baron is required to perform;
  - c) the location of the area (the "**Cutblock**") where the work is to be performed; and
  - d) the proposed start and end dates for the services.

Affidavit #2 of M. Thomson, para. 5

18. When Skeena Sawmills allocates work to Timber Baron pursuant to the Bill 13 Contract, Timber Baron must perform the work as directed, in the area specified by Skeena Sawmills and in the time frame determined by Skeena Sawmills. Effectively Timber Baron cannot refuse to do the work, which is one of the advantages to licence holders attached to a Bill 13 Contract.

Affidavit #2 of M. Thomson, para. 6;  
Affidavit #2 of R. Brash, para. 8

**B. Timber Baron Rate Setting Process**

19. At the time the work is allocated by Skeena Sawmills, Timber Baron has 15 days to propose a rate for the allocated work, based on a number of factors detailed below.

Affidavit #2 of M. Thomson, para. 7

20. Timber Baron considers the specifics of the work and the Cutblock to determine its rates and it uses its actual costs to determine its rate offers, as required under the Regulation.
21. Each block within a forest license's area is unique and has its own attributes which affect the fair market rates for harvesting, including, among other things:
  - a) distance from the nearest scale yard;
  - b) the quality of the roads to access the block;
  - c) whether the block is in a potential snow belt, as harvesting is more difficult and costly in the winter and while snow is present;
  - d) the terrain and slope;
  - e) piece size of timber;
  - f) the percentage of merchantable logs in the block; and
  - g) the gross timber volume in the block

(collectively, the "**Cutblock Factors**").
22. In addition to the Cutblock Factors, Timber Baron's rates to harvest timber under the Bill 13 Contract for specific Cutblocks were based on operational factors specific to Skeena, including, among others:
  - a) Skeena Sawmills' repeated allocation of work to Timber Baron in areas that are known to be in snow belts, even though:
    - i. Timber Baron informed Skeena Sawmills that the cost to harvest timber in those areas at that time of year would be higher than in other circumstances, and that Timber Baron would need to increase their rates to sustain the way in which Skeena Sawmills directed them to operate; and
    - ii. road building costs in the fall and winter are significantly higher than in the summer due to weather conditions;
  - b) repeated closures and curtailments reducing Timber Baron's ability to be efficient; and
  - c) repeated non-payment for services provided.
  - d) Skeena Sawmills' decision in or about June 2019 to pause saw log deliveries, which required Timber Baron to pause work in a Cutblock, and demobilize its equipment to be used elsewhere, and the corresponding additional costs incurred to remobilize the equipment and return to the Cutblock;

- e) Skeena Sawmills' direction to obtain as much saw log as possible within a Cutblock, while assigning work to Timber Baron in areas with a higher percentage of pulp logs, requiring additional work and cost to access the saw logs; and
- f) the volume of work assigned to Timber Baron Contracting being at or below the minimum amount required by the Bill 13 Contract resulting in operating costs being correspondingly higher as a result of being spread over a lower volume.

(collectively, the "**Skeena Operational Decisions**").

- 23. The Skeena Operational Decisions necessitated increased rates for Timber Baron to harvest in the designated Cutblocks.
- 24. In addition to the Cutblock Factors and the Skeena Operational Decisions, there are public rates set by Timber Tracks Inc. ("**Timber Tracks**") which are often used to inform the proposed rates for Bill 13 Contracts.
- 25. Timber Tracks is a third-party service provider which provides information on market rates and reasonable rates related to the use of particular types of forestry equipment and it is well respected in the British Columbia forestry industry. Timber Track rates are widely used and publicized.
- 26. The Timber Tracks rates for the use of forestry equipment can be compared to a Kelly Blue Book value for the value of a vehicle; while there are always individual circumstances which might necessitate an increased or decreased rate, including the Cutblock Factors, and the Skeena Operational Decisions, the Timber Tracks rates are considered a good indication of competitive rates for the use of the equipment, to which a contractor's other costs must be added to determine a fair rate.
- 27. Timber Baron used Timber Tracks rates to set and support that its proposed rates for work allocated by Skeena Sawmills were fair and competitive by industry standards.
- 28. Skeena relied upon its company employees to support and set its rates.
- 29. If Skeena Sawmills disagrees with Timber Baron's proposed rates, it can propose an alternate rate.
- 30. If Skeena Sawmills and Timber Baron are still unable to agree on a rate, the parties must then resolve this dispute according to the Regulation.

**C. Timber Baron Arbitration**

31. The dispute mechanisms in the Regulation often expedite a resolution for the parties to a Bill 13 Contract. However, in the case of the Timber Baron Bill 13 Contract, Skeena Sawmills' took unreasonable positions and forced the dispute to arbitration.

Affidavit #2 of M. Thomson, para. 16

32. Timber Baron's final proposed rates for each Cutblock (the "**Timber Baron Final Rates**"), Timber Baron's written argument supporting the Timber Baron Final Rates and all supporting evidence (collectively, the "**Timber Baron Final Rate Submissions**") were submitted in confidence to the arbitrator and to Skeena Sawmills (the "**Confidential Information**") on September 1, 2023. This Confidential Information can be made available for the Court as necessary on a confidential basis.

Affidavit #2 of M. Thomson, para. 22

33. Timber Baron expected to be successful in the arbitration of the Timber Baron Rate Disputes (the "**Arbitration**"), which was scheduled to take place on or about September 21-25, 2023.

Affidavit #2 of M. Thomson, para. 17

34. However, the Arbitration was stayed when these Receivership Proceedings were commenced by the Petitioner on September 12, 2023.

Affidavit #2 of M. Thomson, para. 18

**D. The Effect of the RVO on the Bill 13 Contract**

35. If the Bill 13 Contract is terminated, Timber Baron's operations would likely be forced to liquidate its equipment and assets and terminate the hourly employees who are currently dedicated to the Bill 13 Contract with no work to perform.

Affidavit #1 of M. Thomson, paras. 11 & 14

36. Timber Baron would also lose the value of the investments it has made specifically to continue operations on the Licence. The estimated investment since 1999 is \$10 million.
37. In addition to the loss of the value of the Bill 13 Investments, Timber Baron would lose the estimated value of the Bill 13 Contract.

Timber Baron Application Response, Part 4, para. 13

38. The estimated value of the Bill 13 Contract to Timber Baron over the next five (5) years is approximately \$20 to \$25 million in total revenue, comprised of:



- a) \$4 million in annual revenues from the Harvest Operation, based on a value of \$10-14 per cubic meter and a total of 50,395 cubic meters; and
- b) \$500,000 to \$1 million in annual revenues from the Road Building Operation, based on a value of \$70-150 per linear meter and an average of 5 to 10 kilometers of road built per year.

Timber Baron Application Response, Part 4, para. 15

### **PART 3 ARGUMENT**

#### **A. Jurisdiction**

39. This Court does not have the jurisdiction to grant relief that permits the Bill 13 Contract to be severed from the License. Timber Baron adopts Terrace Timber's argument related to jurisdiction at paragraphs 45-50 of Terrace Timber's Application Response.

Terrace Timber Application Response, Part 5, paras. 46-50

#### **B. The Harte Gold Factors Are Not Met**

40. The factors for a court to consider when presented with an RVO 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 than 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 licences and permits (or other intangible assets) being preserved under the RVO structure?

*Harte Gold Corp. (Re)*, 2022 ONSC 653 ("**Harte Gold**") at para. 38

41. The *Harte Gold* factors are not met in this case.
42. Generally, in analyzing whether a transaction should be approved, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable.

*Veris Gold Corp. (Re)*, 2015 BCSC 1204 at para. 23

43. A reverse vesting order transaction (“**RVO**”) is neither routine nor in the ordinary course. It is an extraordinary remedy, and approval of the use of an RVO structure should involve close scrutiny.

Harte Gold, at para. 38;  
Payslate Inc. (Re), 2023 BCSC 608 at paras. 1 and 87

44. Preserving the rights of the contractors in insolvency proceedings was the express intent of the Province when s. 54(2)(d.1) was added to the Forest Act in 2010.

Timber Baron Application Response, Part 5, para. 5

45. The Fourth Report of the Receiver, filed February 29, 2024 (the “**Receiver’s Fourth Report**”) makes it explicitly clear that one reason for using an RVO in this case is to avoid regulatory consultations required under the *Forest Act* when a forest agreement is transferred.

**(a) The RVO is Not Necessary**

46. Cui Holdings argues that the RVO is necessary to “restart the business in an economically-viable manner” without retaining the Bill 13 Contracts which are “more costly than current market rates” and “bring along the ongoing, expensive and unresolved rate disputes.”

Cui Application Response, Part 5, para. 65

47. First, the assertion by Cui Holdings that work on the License can likely be provided at lower competitive rates is not substantiated by evidence.

Affidavit #2 of R. Brash, para. 14

48. There is evidence that Bill 13 Contracts are generally able to generate profits for both the Bill 13 Contractor and the licensee. There is no evidence to the contrary provided by either the Receiver, or the Petitioner / Cui Holdings / Skeena Sawmills group.

49. The evidence also demonstrates that Timber Baron has acted reasonably by, for example, using independent third party experts to ensure its rates were competitive by industry standards.

Affidavit #2 of M. Thomson, para. 12

50. Second, Timber Baron was forced to increase its rates as a result of Skeena Sawmills’ mismanagement and questionable operating decisions.

Affidavit #2 of M. Thomson, at para. 14

51. Third, the Arbitration to resolve the Timber Baron Rate Dispute was scheduled to begin just days after these receivership proceedings began.

Affidavit #2 of M. Thomson, at paras. 20-21

52. The fact that the rate dispute with Timber Baron and Skeena Sawmills has not yet concluded is a direct result of the receivership proceedings being commenced by the Petitioner, who is a non-arms length party to Skeena Sawmills, thereby staying the Arbitration.
53. Further, the action taken by the Petitioner to commence these proceedings only began after the Timber Baron Final Rate Submissions was shared confidentially with the arbitrator and with Skeena Sawmills (the “**Confidential Information**”).
54. This Confidential Information was then shared by Skeena Sawmills with the Petitioner, presumably prior to the receivership being commenced, and then with Cui Holdings, the proposed purchaser in the RVO, which is also related to Skeena Sawmills.
55. Most recently, the Petitioner and Cui Holdings shared the Confidential Information with the public at large and when asked by Timber Baron to immediately redact this information from the record it refused to do so.
56. Skeena Sawmills’ mismanagement, delay and its clear breaches of confidentiality should not be relied upon as a justification for the extraordinary remedy of an RVO for its own benefit.

**(b) The Economic Result is Not Favourable**

57. The Purchaser claims that it will be investing in the business of the Debtors “with a view to returning the Business to a fully operational status.”

Cui Application Response, Part 5, para. 71

58. However, there is no evidence that Cui Holdings, a related entity to the Debtors, will not continue the pattern of mismanagement exhibited by the Debtors that resulted in these insolvency proceedings and have left numerous stakeholders unpaid and the Arbitration stayed pending the outcome of the receivership.
59. The speculation by Cui Holdings that there will be economic benefits as a result of the RVO are in no way as direct as the consequences that will occur to Timber Baron and other stakeholders if the Bill 13 Contracts are decoupled from the Licenses.

**(c) Timber Baron is Worse Off Under the RVO Structure**

60. Timber Baron is undoubtedly worse off under the RVO structure than it would be under any other structure.

61. Security of tenure is important to protect logging contractors, who are required to make significant investments and need a measure of security of tenure to ensure ongoing viability in a very highly capital intensive business.

Timber Baron Application Response, Part 5, para. 9;  
*Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, 2000 BCCA 66, at para. 26.

62. Under the RVO structure, the Bill 13 Contract is proposed to be decoupled from the Licence and moved to a residual company, which would then be bankrupted and would effectively terminate the Bill 13 Contract. This deprives Timber Baron of its security of tenure that was intended under the Regulation and the *Forest Act*.

Timber Baron Application Response, Part 5, para. 10

63. In *New Skeena*, one issue was whether the receiver had the power to apply to the court to convey the assets free and clear of the interests of other parties. Specifically, the issue was whether the assets, including agreements under the *Forest Act*, could be disposed of without their respective Bill 13 Contracts. The Court held that the order appointing the receiver conveyed that power.

*New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd.*,  
2005 BCCA 154, at para. 20

64. In response to *New Skeena* and other cases that permitted the decoupling of the Bill 13 Contracts from their respective forest licenses, the Province amended the *Forest Act* specifically to prevent it from continuing (the “**2010 Amendment**”).

TLA Application Response, Part 5, para. 11

65. Following the 2010 Amendment, the *Forest Act* now requires that in any disposition of an agreement in which the holder of the agreement is party to a Bill 13 Contract, the recipient of the agreement must assume the obligations of the Bill 13 Contract.

*Forest Act*, RSBC 1996, c 157, s. 54(2)(d.1)

66. In any non-insolvency context, the Bill 13 Contracts would be required to be assumed by the purchaser of the Licenses.
67. In any other insolvency context, the Bill 13 Contracts would also be required to be assumed by the purchaser of the Licences, as required under the 2010 Amendment.
68. The extraordinary transaction structure of an RVO should not allow a sidestepping of the express intent of the legislature, that the Bill 13 Contracts and the security of tenure they provide to Bill 13 Contractors should be preserved in the insolvency context.

69. In *Peakhill*, the court considered the case of an RVO that was expressly used to avoid the application of property transfer tax (“PTT”) in the context of a real estate transaction.
70. One of the issues raised by the Province in *Peakhill* was that the Province would be worse off if the parties were permitted to avoid PTT by using an RVO. However, the Court in *Peakhill* noted that outside of an insolvency context the parties could arrange for a transaction which avoided the PTT. In *Peakhill* there was no legislation akin to that provided for by the 2010 Amendment in this case.

*Peakhill Capital Inc. v Southview Gardens Limited Partnership*  
(“*Peakhill*”), 2023 BCSC 1476, para. 64-65

71. In short, the Bill 13 Contracts here would not be permitted to be decoupled from the Licenses in a non-insolvency context, unlike the treatment of tax liabilities in *Peakhill*.
72. Further, there is absolutely no doubt that the Bill 13 Contractors and many employees of Timber Baron and Terrace Timber Ltd. would be far worse off under the RVO structure than they would be under any other alternative structure such as an asset vesting order where the *Forest Act* would require the Bill 13 Contracts to be transferred together with the Licenses. The statement in the Vesting Order Application at paragraph 10 of Part 3 is entirely unsupported by any evidence.

**(d) The Consideration Does Not Reflect the Value of the RVO**

73. There is no evidence that the consideration to be paid reflects the value of the RVO.
74. Unlike in *Peakhill*, where the secured creditors would save approximately \$3.5 million under the RVO, there will not be any payment to secured or unsecured creditors as the Proposed Sale is a credit bid to a related party to the original debtor.

*Peakhill*, para. 58

75. There is no evidence submitted by Cui Holdings that the sale price reflects the RVO structure, other than a bald statement that it represents a fair market value for the sale.

Cui Application Response, Part 5, para. 88

**C. The FSPPA Lien is a Priority Payable**

76. The FSPPA gives priority to a contractor’s lien over any other interest in forest products, including timber, whether limbed, bucked or peeled (the “**Inventory**”) and places a contractor’s charge on all accounts due to a forest products owner securing an amount due (the “**Accounts**”).
77. Under the FSPPA, the Timber Baron Lien is a priority payable ranking ahead of the Petitioner’s security interest over Skeena Sawmills’ Inventory and Accounts, with the

exception of the monies the Petitioner advanced within the receivership under the Receiver's Borrowing Certificates (currently \$300,000).

78. In other words, the Petitioner and Cui Holdings cannot necessarily credit bid its secured debt to purchase all the assets of Skeena Sawmills, including its accounts, without first addressing what value has been assigned to these accounts.

**D. Conclusion**

79. There is no jurisdiction for this Court to grant relief that permits the Bill 13 Contract to be severed from the Licence.
80. Even if the jurisdiction to grant an RVO in this case is extant, an RVO is extraordinary relief that is not to be granted without careful consideration of the interests of all the stakeholders.
81. The *Harte Gold* factors simply are not met in this case. Specifically:
- a) the RVO is not necessary, except as a result of the Debtors' mismanagement, which the Purchaser, as a related entity to the Debtors, is attempting to use to its advantage;
  - b) the RVO structure does not produce an economic result at least as favourable as any other alternative; and
  - c) there is no evidence that the consideration being paid for the Debtors' business reflects the importance of the licences and permits being preserved under the RVO structure.
82. Most importantly, the effect of the RVO on Timber Baron and its employees undoubtedly leave these stakeholders worse off than they would be under any other alternative structure. The effect of the RVO and the decoupling of the Bill 13 Contract from the Licence under the RVO would mean that:
- a) Timber Baron will lose:
    - i. approximately 50% of its business;
    - ii. the value of the investments it has made over the last 25 years to work on the Licence, including investments in work camps and specific equipment; and
    - iii. the value of the Bill 13 Contract itself;
  - b) the employees who are employed by Timber Baron specifically to work on the Licence will be terminated and are unlikely to find similarly paying employment elsewhere in the community; and

- c) the security of tenure for logging contractors, which was expressly intended to be protected in an insolvency context, will be severely impacted.
83. Timber Baron submits that the Proposed Sale, effected by means of an RVO, should not be approved by this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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