

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

WRITTEN SUBMISSIONS

Haisla Nation
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April 2-4, 2023
Vancouver Law Courts
Justice Walker

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Written Submissions of the HAISLA NATION

OVERVIEW

1. Crown consultation with Indigenous Nations on decisions about the use and management of land and resources is a critical component of reconciliation in British Columbia.
2. The Haisla Nation opposes the Reverse Vesting Order because it will eliminate the opportunity for the Haisla Nation's interest in the timber in its Territory to be considered as part of Crown consultation and will thus undermine reconciliation.

HAISLA NATION

3. The Haisla Nation is an Indigenous Nation with a Territory which encompasses lands in the Kitimat River Valley, the head of Douglas Channel and Kitimat Arm, as well as areas further down channel. Haisla Nation Territory is shown on the map which shows the overlap of TFL 41

with Haisla Nation Territory.¹

4. Two of the licences held by Skeena Sawmills - TFL 41 and Forest Licence A16885 (the “**Licences**”) – include operable area in Haisla Territory. Approximately 95% of the area included in TFL 41, an area-based licence, is in Haisla Territory.² Forest Licence A16885 is a volume-based licence for cutting timber in the Kalum Timber Supply Area, some of which is in Haisla Nation Territory.³

5. Aboriginal title land includes the timber on that land.⁴ Where the Crown contemplates a decision affecting timber in Haisla Nation Territory, the Crown’s duty to consult is triggered.⁵

6. The Haisla Nation advised the Receiver of its Aboriginal title interest in the timber subject to the Licences and of its expectation that the disposition of the Licences would trigger deep consultation between the Province and the Haisla Nation about the effects of the disposition on the Haisla Nation’s Aboriginal title and rights.⁶

THE REVERSE VESTING ORDER AND THE LICENCES

7. The Receiver describes the benefits of the Reverse Vesting Order, including that the transaction maintains the Licences without any transfer or change in control, allowing for the avoidance of “potential regulatory delay”.⁷

8. The Receiver further explains that the “[T]ransaction ... does not require any regulatory consultation under the *Forest Act* ... as there would be no change in control.”⁸

9. Under the *Forest Act*, a disposition of an agreement, such as the Licences, requires the

¹ Affidavit # 1 of Maria Newton Mason at para 3, Ex. B.

² Affidavit # 1 of Maria Newton Mason at para 3, Ex. B.

³ Affidavit # 1 of Jacques Bousquet at para 10, Ex. F.

⁴ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, at paras 116 and 124.

<https://canlii.ca/t/g7mt9#par116> and <https://canlii.ca/t/g7mt9#par124>

⁵ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*], at paras 35, 64-67.

<https://canlii.ca/t/1j4tq#par64> <https://canlii.ca/t/1j4tq#par35>, <https://canlii.ca/t/1j4tq#par64>

⁶ Affidavit # 1 of Maria Newton Mason at para 2, Ex. A.

⁷ Receiver’s Notice of Application, Part 3, para 9 (b).

⁸ Receiver’s Notice of Application, Part 2, para 12.

approval of the Minister of Forests.⁹ Similarly, under the *Forest Act*, a change of control or amalgamation triggers a requirement to consider the effect of that change on the public interest.¹⁰

10. Under the Reverse Vesting Order, these provisions of the *Forest Act* would not be engaged. This is the relief from “potential regulatory delay” and “regulatory consultation” the Receiver has identified as a key benefit of the Reverse Vesting Order.

HAISLA NATION IS WORSE OFF UNDER THE REVERSE VESTING ORDER

11. Other parties responding to this application are making submissions on the jurisdiction of this Court to issue a Reverse Vesting Order. If this Court determines that it does have the jurisdiction to issue a Reverse Vesting Order, it must still be mindful of the fact that a Reverse Vesting Order is an exceptional remedy.¹¹

12. The factors which must be met before a Reverse Vesting Order can be granted are set out in *Peakhill*.¹² One of the factors is whether any stakeholder is worse off under the RVO structure than they would be under any other viable alternative.

Haisla Nation is a Stakeholder

13. The Haisla Nation must be considered a stakeholder for assessing whether the Reverse Vesting Order should be granted.

14. Through its legislation governing timber rights, the Province has deliberately retained jurisdiction to determine whether a disposition of a licence or a change in control of a licence holder is in the public interest. Both these determinations would trigger the Province’s obligation to consult with the Haisla Nation.¹³

15. The Haisla Nation anticipated that the Province’s legislation would be engaged and that the

⁹ *Forest Act*, RSBC 1996 c 157 s 54.

¹⁰ *Forest Act*, RSBC 1996 c 157 s 54.62 ff.

¹¹ *Harte Gold Corp. (Re)*, 2022 ONSC 653 [*Harte Gold*] at para 38. <https://canlii.ca/t/jmdl6#par38>

¹² *Peakhill Capital Inc. v Southview Gardens Limited Partnership*, 2023 BCSC 1476 [*Peakhill*] at para 76, citing *Harte Gold*. <https://canlii.ca/t/jzvnl#par76>

¹³ *Haida*, *supra* at 5 at para 67. <https://canlii.ca/t/1j4tq#par67>

Province would consult with the Haisla Nation about a transfer of the Licences or a change in control of the holder of the Licences.

16. The Haisla Nation expressly advised the Receiver of its interest in the timber in its Territory and of its expectation that the Province would consult with the Haisla Nation at the deepest level in relation to a disposition of the Licences.¹⁴

17. The Supreme Court of Canada has recognized that the broader public interest may be engaged by a proposed reorganization:

In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).¹⁵

18. This Court has also recognized that the interests of other persons, described as “social stakeholders”, may be considered in insolvency situations.¹⁶ In *Bloom Lake*, the court recognized the standing of several First Nations on the basis of their concerns related to their Aboriginal and treaty rights guaranteed by the Constitution, interests the court likened to those of “social stakeholders”.¹⁷

Haisla Nation Will be Worse Off

19. Under the Reverse Vesting Order structure, the *Forest Act* provisions requiring the Minister’s approval of a disposition or consideration of the public interest in a change of control will not be engaged. This, in turn, means the obligation to consult with the Haisla Nation will not be triggered.

¹⁴ Affidavit # 1 of Maria Newton Mason at para 2, Ex. A.

¹⁵ *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 at para 60.
<https://canlii.ca/t/jz16t#par60>

¹⁶ *Vancouver Coastal Health Authority v Seymour Health Centre Inc.*, 2023 BCSC 1158 at paras 68-72.
<https://canlii.ca/t/jz16t#par68>

¹⁷ *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920 at paras 80-89.
<https://canlii.ca/t/jz16t#par80>

20. Under the Reverse Vesting Order, the Haisla Nation lose this opportunity for consultation with the Province, consultation which may result in changes to the Licences or other accommodation of Haisla Aboriginal title and rights.

21. Alternative approaches to the resolution of the Receivership will likely involve a disposition or a change in control of the Licences, so it is only the Reverse Vesting Order which deals with the Licences in a way which avoids triggering consultation. Thus the Haisla Nation will be worse off under the Reverse Vesting Order.

REVERSE VESTING ORDER UNDERMINES RECONCILIATION

22. The Reverse Vesting Order undermines reconciliation by circumventing Crown consultation with the Haisla Nation and other Indigenous Nations.

23. The Crown's duty to consult is infused with the honour of the Crown¹⁸ and is a process for reconciling interests.¹⁹

24. Consultation may result in changes to the Licences or other accommodation of Aboriginal title and rights.

25. In 2019, British Columbia announced a Forest Policy Modernization process. One pillar of that modernization is to increase the role of Indigenous people in the forest sector.²⁰ Haisla Nation has been pushing for an increased role in the forest sector in its Territory for over 100 years.

26. British Columbia has also committed to implement the *United Nations Declaration on the Rights of Indigenous Peoples*.²¹ This legislation supports a robust interpretation of Indigenous rights.²²

27. The *United Nations Declaration on the Rights of Indigenous Peoples* provides generally

¹⁸ *Haida*, supra note 5 at para 18. <https://canlii.ca/t/1j4tq#par18>

¹⁹ *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 156. <https://canlii.ca/t/hvhcj#par156>

²⁰ Affidavit # 1 of Maria Newton Mason at para 5, Ex. D.

²¹ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019 c 44.

²² *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 [*Thomas and Saik'uz*] at para 212. <https://canlii.ca/t/jlnn6#par212>

that “Indigenous peoples ... have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories” (emphasis added).²³

28. The ability of the provincial government to engage with First Nations about potential impacts of forestry decisions on Aboriginal title and rights is thus an important component of the reconciliation landscape in British Columbia.²⁴

29. The “regulatory consultation” and part of the “potential regulatory delay” referred to in the Receiver’s Notice of Application in support of the Reverse Vesting Order are the Crown’s meaningful engagement with the Haisla Nation as required by the honour of the Crown, the Crown’s Constitutional obligations and the Crown’s adherence to the principles of the *United Nations Declaration on the Rights of Indigenous Peoples*.

30. The Reverse Vesting Order would circumvent the anticipated consultation between the Haisla Nation and other Indigenous Nations and the Crown with respect to the disposition of or change in control of the Licences and thereby undermine reconciliation.

REVERSE VESTING ORDER DOES NOT GUARANTEE PROMISED RESULT

31. Another factor to be considered prior to granting a Reverse Vesting Order is whether the Reverse Vesting Order structure produces an economic result at least as favourable as any other viable alternative.²⁵

32. Cui Family Holdings Ltd. (“**Cui Holdings**”) has described its intentions to return the sawmill and pellet plant held by the Skeena Entities (the “**Businesses**”) to “full operational and economic viability”.²⁶

33. One of the elements identified as important to the ongoing viability of the Businesses is

²³ *Thomas and Saik’uz*, *supra* note 22 at para 208. <https://canlii.ca/t/jlnn6#par208>

²⁴ *Clyde River (Hamlet) v Petroleum Geo Services Inc.*, 2017 SCC 40, at para 19. <https://canlii.ca/t/h51gv#par19>

²⁵ *Peakhill*, *supra* note 12.

²⁶ Application Response of Cui Family Holdings Ltd., para 16.

increasing timber production.²⁷ Ms. Wu, a Director for Cui Holdings has described its “advanced discussions and negotiations with various First Nations” as aimed at increasing timber supply to the sawmill. Ms. Wu has further stated that the “Businesses will also require this additional timber to run economically and it is our intention to pick up and conclude these negotiations with the local First Nations to secure this additional timber supply.”²⁸

34. The Gitanyow First Nation has described negotiations with Skeena Sawmills as terminated because “it became obvious to the Gitanyow that Skeena Sawmills did not want a true partnership with the Gitanyow Nation”.²⁹

35. Further, none of the three Indigenous Nations Ms. Wu has identified as would-be joint venture partners³⁰ are supporting the Reverse Vesting Order and one is actively opposing it.

36. The likelihood of joint ventures with Indigenous Nations thus appears remote, making the economic viability of the Businesses under the Reverse Vesting Order speculative at best.

CONCLUSION

37. The Haisla Nation submits that the Reverse Vesting Order should not be granted. It forecloses the opportunity for Crown consultation with the Haisla Nation and other Indigenous Nations in whose territories the Licences are located and undermines reconciliation, which is not justified in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 27, 2024



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²⁷ Affidavit # 1 of Shenwei (Sandra) Wu, para 29.

²⁸ *Ibid* at para 67.

²⁹ Affidavit #1 of Joel Starlund, para 9.

³⁰ Affidavit # 1 of Shenwei (Sandra) Wu, para 67.

List of Authorities

Cases

Bloom Lake, g.p.l. (Arrangement relatif à), 2015 QCCS 1920.

Century Services Inc. v Canada (Attorney General), 2010 SCC 60 (CanLII), [2010] 3 SCR 379.

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Harte Gold Corp. (Re), 2022 ONSC 653.

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Tsilhqot'in Nation v British Columbia, 2014 SCC 44.

Vancouver Coastal Health Authority v Seymour Health Centre Inc., 2023 BCSC 1158.

Statutes

Declaration on the Rights of Indigenous Peoples Act, SBC 2019 c 44.

Forest Act, RSBC 1996 c 157 s 54.