

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1392752 B.C. LTD.

PETITIONER

AND:

SKEENA SAWMILLS LTD.
SKEENS BIOENERGY LTD. and
ROC HOLDINGS LTD.

RESPONDENTS

WRITTEN SUBMISSIONS OF KITSUMKALUM FIRST NATION

Mike Stewart/Gurpal Sandhu
ATAC Law Corporation
308-8988 Fraserton Court
Burnaby, BC Canada V5J 5H8
T: 778-312-2717
E: mstewart@ataclaw.ca/gsandhu@ataclaw.ca

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Time: 10:00 a.m.
Place: Vancouver Law Courts

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A. OVERVIEW

1. Within this application, Alvarez & Marsal Canada Inc. as receiver (the **“Receiver”**) of all the assets, undertakings and property, including real property of Skeena Sawmills Ltd., Skeena Bioenergy Ltd., and ROC Holdings Ltd. (together, the **“Skeena Entities”**) seeks an order for a reverse vesting order (the **“Skeena RVO”**).
2. Kitsumkalum First Nation (**“Kitsumkalum”**) opposes the granting of the Skeena RVO on the basis that it is not necessary and Kitsumkalum would be worse off if the Skeena RVO were granted because it disregards the consultation process in respect of Kitsumkalum’s interests in its traditional territories.
3. In support of its position, Kitsumkalum delivered an application response to the Receiver’s within application. For the sake of brevity, Kitsumkalum repeats and relies upon the allegations in its application response in support of these written submissions.
4. The purpose of these written submissions is not to reiterate the same points raised by Kitsumkalum in its application response. Those materials speak for themselves.
5. The sole purpose of these written submissions is to point out and address the Receiver’s flawed reasoning set out in the Report with respect to Kitsumkalum’s offer (**“Kitsumkalum’s Offer”**).

B. RECEIVER'S THIRD SUPPLEMENTAL REPORT TO THE FOURTH REPORT OF THE RECEIVER

6. The Receiver filed what it termed its Third Supplemental Report to the Fourth Report of the Receiver (the "**Report**") on March 27, 2024.¹
7. In the Report, the Receiver noted that the purpose of the Report was to provide this Honourable Court with additional information in respect of, among other things:
 - a. The Kitsumkalum Offer; and
 - b. A question posed by the Court during the March 12, 2024 hearing as to the likely outcome in the event the order sought by the Receiver in relation to the payment and retention agreement (the "**PRA**") were not granted.²

C. KITSUMKALUM'S OFFER

8. With respect to Kitsumkalum's Offer, the Receiver began its analysis by comparing this offer to the Cui Family Holdings Ltd. offer (the "**Cui Holdings Offer**") on an applies-to-applies basis and concluded that the "PRA remains the only viable option" (emphasis added).³
9. The Receiver gave two reasons for reaching this conclusion:
 - a. "Closing risk": "as there would be a transfer of [Tree Farm Licence 41 and two forest licence (the "**Tenures**")]] under the Kitsumkalum Offer, the approval of the Province would be required before the Tenures could be transferred. According to the Ministry of Forests, this process (the "**Transfer Process**") may take three (3) to nine (9) months, and there is no assurance that all the Tenures (if any) will be approved for transfer, which could jeopardize the closing of the transaction (the "**Closing Risk Reason**")"; and
 - b. "Lower purchase price": "monthly holding and administration costs of the Receivership Proceedings are estimated at approximately \$300,000, meaning that the additional costs that may be incurred during the Transfer Process range from \$900,000 to \$2.7 million. As the bid price difference between the PRA and the Kitsumkalum Offer is approximately \$700,000.00, it is the Receiver's conclusion that after deducting the ongoing cost of

¹ Third Supplemental Report to the Fourth Report of the Receiver Alvarez & Marsal Canada Inc. March 27, 2024 (the "**Report**").

² *Ibid* at para 1.1.

³ *Ibid* at paras 3.4 and 3.6.

administration while the Transfer Process is concluded, the Kitsumkalum Offer is inferior to the PRA” (the “**Lower Purchase Price Reason**”).⁴

10. Respectfully, Kitsumkalum disagrees with the Receiver’s conclusion that the Cui Holdings Offer is the “only viable option” and the reasoning used in support of this position.
11. To begin, the Cui Holdings Offer is contingent upon this Honourable Court granting the Petitioner the Skeena RVO and there is no guarantee that the Skeena RVO will be granted.
12. In fact, there are a number of stakeholders and impacted parties who have directly opposed the granting of the Skeena RVO suggesting, at the very least, that the Cui Holdings Offer may not be a “viable” option and will certainly not be a viable option should the Skeena RVO fail.
13. Further, in describing the Closing Risk Reason, the Receiver makes the following improper and ungrounded assumption: “there is no assurance that all the Tenures (if any) will be approved for transfer, which could jeopardize the closing of the transaction”.
14. The fact is that there is nothing in the record before this Court which proves that there is even a *possibility* that all or any of the Tenures will not be transferred.
15. Accordingly, the Receiver is asserting its own opinion on the ability of the Tenures to transfer, without any supporting evidence before the Court and, in doing so, and is relying on this unsubstantiated opinion to claim that Kitsumkalum’s Offer is not “viable”.
16. On the contrary, Kitsumkalum has put forth an affidavit in this matter which suggests strongly that the probability is more likely than not that the Tenures will transfer.
17. Rick Brouwer (“**Mr. Brouwer**”), Registered Professional Forester #2094, a consultant to the Kitsumkalum First Nation and related entities, affirmed an affidavit that is before the Court stating the following (emphasis added):

In my work I have been involved with and have personal knowledge of at least twenty forest tenure transfers of various types that were successful. I

⁴ *Ibid* at para 3.6.

do not recall the specific lengths of time that it took for each of those transfers to complete. In all cases, however, the transfers did complete. I am not aware of any transfers which were applied for that did not complete.

...

Forest tenure transfers are subject to a Ministerial decision, and relate to tests under the *Forest Act*. Each transfer decision is unique, and therefore I cannot comment on what conditions might result in a tenure transfer not being successful, though as I noted above, I am not aware of any circumstances where an application to transfer a tenure failed.⁵

18. Accordingly, contrary to the Receiver's unsubstantiated assumption about the lack of assurance that all or any of the Tenures will be approved, Mr. Brouwer's affidavit evidence suggests that it is more likely than not that the Tenures will transfer.
19. The remaining issue then is timing, which leads into the Receiver's second reason for stating that Kitsumkalum's Offer is not "viable": the Lower Purchase Price Reason.
20. Kitsumkalum does not deny that if comparing the Cui Holdings Offer to the Kitsumkalum offer on an apples-to-apples basis, then Kitsumkalum's Offer *may* be lower than the Cui Holdings Offer.
21. However, as Mr. Brouwer states in his affidavit, it is not always the case that the 3-9 month timeline pointed out by the Province is applicable in every Tenure transfer:

I am aware of a particular forest transfer of which I have personal knowledge that completed in two (2) months.

...

I believe that one important factor that will impact the time for completion of a tenure transfer is the process of engagement with First Nations that have an interest or claim in the area subject to the tenure. I am aware that if efforts are made to consult with the relevant First Nations in advance of the Crown's consultation with those groups, the tenure transfer process including the Ministerial decision can be conducted in a relatively short time.

⁵ First Affidavit of Rick Brouwer affirmed March 28, 2024 at paras 3 and 5.

For example, a transfer in 2019 of a Woodlot tenure near Terrace BC was completed within two months.⁶

22. Accordingly, there is an opportunity for Kitsumkalum to complete the transfer process in a shorter time indicated by the Province which would mean Kitsumkalum's Offer amount may in fact be higher than the Cui Holdings Offer amount.
23. Alternatively, even if Kitsumkalum's Offer is lower than the Cui Holdings Offer after the Tenure transfer process, the Receiver does not provide any reasoning why this means the Kitsumkalum's Offer is not "viable".
24. As noted above, the Receiver along with Skeena Entities' operational assets would still be paid off such that there is no downside risk to the Receiver, or the receivership, or the creditors.

D. IMPLICATIONS OF A FAILED SALE PROCESS

25. The Receiver stated that if the PRA or an alternative viable bid is not approved, then it expects to initiate a short sale process seeking liquidation offers for the Skeena Entities' assets on a piecemeal basis.
26. It is unclear why the Kitsumkalum Offer, which included funding for the Receiver, is not a viable option, when seeking liquidation, which requires ongoing funds from a currently unknown sources, and still requires approval of the transfer of the Tenures is an alternative option.
27. In fact, even the Receiver states that "It would also be necessary to source additional fundings to complete such sale process and the receivership proceeding generally" and that there is "no certainty that any additional fundings will be available".
28. To reiterate what is now a repetitive point: the Kitsumkalum Offer would fund the Receiver's costs as well as the holding costs for the Skeena Entities' operating assets. There would be no issues as described by the Receiver if the sale process if not successful.

⁶ *Ibid* at paras 4 and 6.

29. Instead of providing a reasoned analysis comparing the Kitsukalum Offer to the Cui Holdings Offer, the Receiver has deemed the Kitsukalum Offer “not viable” based upon flawed assumptions.

30. As a result of these assumptions, the Receiver has not engaged in an adequate analysis of the Kitsumkalum Offer, and as a result, the Receiver’s recommendations in their present form ought to be rejected.

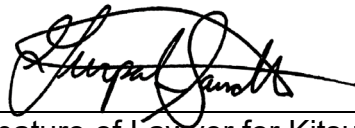
E. CONCLUSION

31. Respectfully, it appears that the Receiver is favouring the Cui Holdings Offer to the detriment of other viable alternatives such as the Kitsumkalum Offer.

32. The Cui Holdings Offer is contingent on the RVO being granted and, despite this rather larger contingency in the face of mounting opposition from the parties in this proceeding, the Receiver continues to claim that the Cui Holdings Offer is “viable”.

33. At the same time, the Receiver claims that the Kitsumkalum Offer is not viable and, in doing so, re relies on an unsubstantiated opinion and flawed reasoning that does not provide a rationale as to why a lower purchase price makes the offer not “viable”.

Date: March 27, 2024



Signature of Lawyer for Kitsumkalum First
Nation, Gurbal Sandhu