

No. S236214
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 OF THE APPLICATION RESPONDENTS,
THE GITANYOW NATION, AS REPRESENTED BY ITS HEREDITARY CHIEF, MALII
ALSO KNOWN AS GLEN WILLIAMS IN HIS CAPACITY AS A GITANYOW
HEREDITARY CHIEF, AND ON BEHALF OF ALL MEMBERS OF THE GITANYOW
NATION

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SUBMISSIONS

I. INTRODUCTION

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. (the “**Skeena Entities**”) seeks an order for a Reverse Vesting Order (“**RVO**”).¹
2. As part of the Reverse Vesting Order, the applicant and the Skeena Entities seek to retain Forest License A16882 dated for reference May 23, 2017 (the “**License**”).²
3. The Gitanyow have opposed the application on the basis that they are a stakeholder who will be in a worse position if the RVO is granted as opposed to any other viable alternative. Under the *Forest Act*, [RSBC 1996] c.157 (“**Forest Act**”), the Province of British Columbia (the “**Province**”) is required to consult with the Gitanyow in respect of any disposition or change of control in respect of the License. The structure of the RVO transaction eliminates the Gitanyow’s rights of consultation which would otherwise occur under traditional asset sale and approval and vesting order.³

II. FACTS

4. The Gitanyow is an Indigenous Nation whose unceded traditional territory is located on the Kitwanga River 8km south of Kitwancool Lake, at the confluence of Kitwancool

¹ Notice of Application of the Receiver, part 1, para. 1.

² Notice of Application of the Receiver. Schedule B. pg.8, Clause 1.1(ddd). and pg. 9, Clause 2.1.

³ Application Response of the Gitanyow Nation filed March 19, 2024 (“Application Response”). part 5, para. 9.

Creek in the mid-Nass River and Kitwanga River watershed in northwestern British Columbia (hereinafter the “**Territory**”).⁴

5. The Gitanyow Hereditary Chiefs are an innovative, traditional Indigenous government mandated to protect Gitanyow Nation’s Territory, resources, and laws.⁵
6. The Gitanyow have never ceded or surrendered title to their Territory, rights to their resources, or the power to make decisions within their Territory.⁶

Gitanyow Aboriginal Title

7. The Gitanyow assert Aboriginal title to the timber resources in its unceded traditional Territory, including the timber subject to the License.⁷ The majority of the timber subject to the License is on lands within the Gitanyow Territory.
8. The Gitanyow Nation has commenced a claim against the Province for Aboriginal title and Aboriginal rights to an approximate 6,200 square kilometer area, which area includes all of its Territory and timber subject to the License (the “Gitanyow Title Claim”). The Gitanyow Title Claim is scheduled for hearing before the Supreme Court of British Columbia commencing in October, 2024.⁸
9. The Gitanyow Title Claim asserts, among other things, that the Gitanyow hold aboriginal rights within and in relation to the Territory including the right to harvest timber and to trade timber and timber by-products on a commercial basis and the right to manage the land and the resources thereon in accordance with Gitanyow laws.⁹
10. The Gitanyow Title Claim also asserts that the Province has unlawfully authorized activities in the Territory by issuing licenses and deriving revenue therefrom, without the consent of the Gitanyow, and that the granting of such licenses infringes the aboriginal title and rights of the Gitanyow by, among other things, having a significant adverse impact on the aboriginal title and aboriginal rights of the Gitanyow.¹⁰
11. The Gitanyow seek, among others, the following remedies:
 - a. A declaration recognizing their existing aboriginal title and rights in and to the Territory;¹¹
 - b. A declaration that their aboriginal title and rights within and in relation to the Territory include the right to manage, conserve, use, harvest from, and benefit from the lands and natural resources and make decisions in relation thereto;¹² and

⁴ Affidavit of Joel Starlund (“Starlund Affidavit”) at para. 4, Ex. A

⁵ Starlund Affidavit at para. 2.

⁶ Starlund Affidavit at para. 2.

⁷ Application Response, part 4, para. 4.

⁸ Affidavit of Parisa Shariati (“Shariati Affidavit”), Ex. B.

⁹ Shariati Affidavit, Ex. B, part 2, para. 2.

¹⁰ Shariati Affidavit, Ex. B, part 3, para. 2.

¹¹ Shariati Affidavit, Ex. B, part 2, para. 1

¹² Shariati Affidavit, Ex. B, part 2, para. 2

- c. An interlocutory and permanent injunction prohibiting the defendants from issuing or renewing any licenses and permits authorizing the use of any resources within the Territory by the defendants, their agents or by third parties which may infringe on the Plaintiff's aboriginal title or rights without the Plaintiffs' consent.¹³

The License

12. The License grants Skeena Sawmills Ltd., as Licensee, rights to harvest timber during the term of the License from the Nass Timber Supply Area.¹⁴
13. The Gitanyow estimate that the Territory holds over 70% of the timber harvesting land base in the Nass Timber Supply Area.¹⁵
14. Pursuant to the License, the Licensee and its predecessor, have harvested timber almost exclusively on Gitanyow Territory.¹⁶
15. Accordingly, the Gitanyow have a direct and substantial interest in the disposition of the Licence and its impact on the timber harvesting in its Territory.¹⁷
16. The express language of the License itself makes it clear that the Gitanyow have a significant interest in the lands subject to the License.¹⁸
17. Recital D of the License states that:

“The Government of British Columbia acknowledges that Justice Tysoe of the British Columbia Supreme Court has found that the Gitanyow...have a good prima facie claim of aboriginal title and a strong prima facie claim of aboriginal rights to at least part of the areas included within the lands covered by the Forest License”.¹⁹

18. Recital E of the License states that:

“The Government of British Columbia acknowledges, that this license has been granted over a landbase on which First Nations have had a historical presence and that it owes a continuing duty to consult and where appropriate accommodate those First Nations in circumstances defined by the courts... .”²⁰

19. Clause 16.02 states that in this License, unless the context otherwise requires:

¹³ Shariati Affidavit, Ex. B, part 2, para. 12.

¹⁴ Affidavit of Jacques Bousquet (“Bousquet Affidavit”), Ex. E, pg. 46. Clause 1.02(a)

¹⁵ Starlund Affidavit at para 7.

¹⁶ Starlund Affidavit at para 8.

¹⁷ Application Response. part 4, para. 12.

¹⁸ Application Response. part 4, para. 13.

¹⁹ Bousquet Affidavit, Ex. E, pg. 1

²⁰ Bousquet Affidavit, Ex. E, pg. 1

“aboriginal interest” means a potential aboriginal right and/or aboriginal title that has not been proven through a court process”.²¹

Forest Act and Requirement to Consult with the Gitanyow

20. The Gitanyow initially had some discussions with Skeena Sawmills Ltd. in March 2023 regarding a proposed partnership involving the License. However, these were not advanced negotiations as it was obvious to the Gitanyow that Skeena Sawmills Ltd. did not want a true partnership with the Gitanyow. These discussions were rejected by the Gitanyow.²²
21. The Gitanyow have notified the Receiver that the License is intricately tied to the Gitanyow ancestral lands and its transfer posed an obvious and high potential for substantial adverse impact on the Gitanyow’s constitutionally protected rights. They have also reiterated to the Province the need for potential transferee’s of the License to understand the Province’s requirement to consult with the Gitanyow prior to a decision being made.²³
22. The Province has confirmed that in considering any disposition of the License the Ministry of Forests is obligated to consult with potentially affected First Nations prior to a decision being made. This includes the Gitanyow.²⁴
23. The Receiver asserts that the License remains in the name of the original holder, Sawmills, and transfers only certain liabilities including the Bill 13 Contracts, to ResidualCo.²⁵
24. The submission made by the Receiver appears to be that since the License will remain with the original holder, Sawmills, the RVO is not a disposition of the License and it does not trigger the need for consultation with First Nations, including the Gitanyow.²⁶
25. However, the Receiver has also stated that the avoidance of the requirements under the *Forest Act* and a lengthy consultation process with First Nations are benefits of the RVO and accordingly, it appears that the RVO is sought because it does avoid triggering the requirements under a disposition or change of control of the License under the *Forest Act*.²⁷
26. The effect of the Reverse Vesting Order is to blatantly circumvent the required approval of a disposition or change in control which a Receivership would typically trigger and thereby avoid consultation between the Gitanyow and the Province with respect to the disposition of the License.²⁸

²¹ Bousquet Affidavit, Ex. E, pg. 17.

²² Starlund Affidavit at para. 9.

²³ Starlund Affidavit at para. 14.

²⁴ Starlund Affidavit, E. D, pg. 2.

²⁵ Notice of Application of the Receiver. part 3, para. 12.

²⁶ Notice of Application of the Receiver. part 3, para. 12.

²⁷ Notice of Application of the Receiver. part 3, para. 9(b). and part 2, para. 12.

²⁸ Application Response. Part 5, para. 8.

27. Whether the treatment of the License within the structure of the RVO can be characterized as a disposition is not a required finding to determine that the Gitanyow are worse off under the RVO structure than they would have been under any other viable alternative.
28. The fact that the RVO doesn't result in a change of control of the Licensee under the License doesn't mean that the Gitanyow are not significantly affected. The Licensee, through its own admissions of financial problems, is arguably incapable of successfully managing the License and timber resources on Gitanyow Territory in a sustainable manner. In addition to the significant issue of Aboriginal rights and title, consultations touch on a wide variety of topics including, but not limited to, silviculture obligations under the License, allowable annual cuts and issuance of cutting permits, timber supply review process, revenue-sharing and the business plans of the entity seeking to obtain the License.
29. It is not disputed that the Gitanyow lose their right to be consulted regarding the License under the RVO structure as opposed to a traditional asset sale and vesting order.

III. LAW AND ANALYSIS

30. The Gitanyow are a stakeholder in these proceedings. The Courts have long recognized social stakeholders in CCAA proceedings, including First Nations interests in respect of Aboriginal and treaty rights.²⁹
31. The Reverse Vesting Order is an exceptional remedy. Two of the factors to be considered in deciding whether to grant the Reverse Vesting Order are 1. why is the RVO necessary and 2. whether any stakeholder would be worse off under the Reverse Vesting Order structure than it would be under any viable alternative.³⁰
32. The Gitanyow would not receive any benefit under the proposed RVO.
33. Typically, a receivership would involve a disposition of licenses under Part 4, Division 2 of the *Forest Act*, or a change of control under Part 4, Division 2.1 of the *Forest Act*.
34. Before approving the transfer, it is mandatory for the Minister to consider the public interest. The Minister would consult with First Nations regarding the approval decision, which would inform the Minister's assessment of public interest. 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 interests of affected First Nations.³¹
35. The Receiver has submitted that the transaction as structured does not require any regulatory consultation under the *Forest Act* in relation to the License, as there would be no disposition or change of control. In fact, the Receiver touts the avoidance of "potential regulatory delay" as one of the benefits of the Reverse Vesting Order. The Receiver also

²⁹ [*Canadian Red Cross Society* \(2000\) 19 C.B.R. \(4th\) 158 Ont S.C.J.](#)

³⁰ [*Bloom lake g.p.l.* 2015 QCCS 1920](#) at paras. 80-89.

³¹ Application Response of His Majesty the King in the Right of the Province of British Columbia filed March 7, 2024 ("Province's Response"), part 5, para 53.

argues that the Licenses cannot be vested in a third party as part of a sale without incurring the time, expense and risk of the consultation process and Provincial oversight that would otherwise be required.³²

36. In *Harte Gold Corp. (Re)* (“*Harte Gold*”), the Court considered that the RVO was appropriate, in part, because it would preserve the existing licenses and permits necessary for operations of the mine whereas under a traditional asset sale the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licenses.³³
37. *Harte Gold* can be distinguished from the facts before the Court herein for several reasons. In *Harte Gold*:
- a. No party opposed the RVO and all parties who appeared at the hearing supported approval of the transaction;³⁴
 - b. The purchaser required the various permits and licenses without delay for continuing operations at the mine³⁵, whereas on the facts herein, the petitioner and Cui Holdings have only stated that the applicant has the “intent of restarting Sawmills and Bioenergy’s sawmill and pellet plant business;³⁶ and
 - c. Unlike the two Forest Licenses and one Tree Farm license at issue in this proceeding, *Harte Gold* required numerous licenses and permits to maintain its operations. In fact, there were 12 material permits and licenses required to maintain its mining operations, 24 active work permits and licenses and many other forest resource licenses, fire permits and the like, all necessary to *Harte Gold*’s continued operations. *Harte Gold* also had some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 25 additional tenures.³⁷
38. It was in this context that the Court in *Harte Gold* noted that a benefit of the RVO was that it would enable the transaction to be completed efficiently and expeditiously without exposure to the material risks, delays and costs associated with the transfer of the licenses.³⁸
39. The potential regulatory delay referenced by the Receiver is the mandated approval process under the *Forest Act* which requires that the Province consult with the Gitanyow as to the disposition of the License which substantially affects their Territory, aboriginal rights and title claims to their Territory and the timber resources thereon.³⁹

³² Notice of Application of the Receiver. part 3, para. 9(b). and part 2, para. 12

³³ [*Harte Gold Corp. \(Re\)*, 2022 ONSC 653](#) (“*Harte Gold*”) at para 77.

³⁴ *Harte Gold* at para. 1.

³⁵ *Harte Gold* at paras. 71-73

³⁶ Application Response of Cui Family Holdings Ltd. filed March 18, 2024, (“Application Response of Cui”). part 4, para. 14.

³⁷ *Harte Gold* at para. 4.

³⁸ *Harte Gold* at para. 73.

³⁹ Application Response. part 5, para. 7.

40. The petitioner and Cui Holdings have given evidence that they intend to invest funds into the business over the next three years with a “view to returning the business to a fully operational status”. The business is not currently operational and there is no timeline for when it will reach fully operational status.⁴⁰
41. The Receiver has not adduced any evidence as to the stated time, expense and risk of the consultation process which would otherwise be required to vest the Licence with a third party.
42. In *PaySlate Inc. (Re)*, 2023 BCSC 608 (“*PaySlate #1*”), the Court canvassed judicial authorities for circumstances in which RVO’s were appropriate and noted that RVO’s have been granted in highly regulated environments where it was difficult or impossible to reassign licenses.⁴¹
43. One of the cases which *PaySlate #1* canvassed was *Just Energy Group Inc. et. al v. Morgan Stanley Group Inc. et al.*, 2022 ONSC 6354 (“*Just Energy*”). In *Just Energy*, the Court reviewed evidence that the RVO structure was the only feasible structure that would permit the business to continue as a going concern as any other structure would risk exposing most of the 89 licenses upon which the Just Energy entities business was founded.⁴²
44. In that case, many of the licenses were non-transferrable and non-assignable. There was also evidence before the Court that if a traditional vesting order was granted, the purchaser would be required to participate in a separate regulatory process in five Canadian provinces, 15 U.S. states and with federal agencies in both Canada and the U.S. to try and obtain transfers of the 89 licenses, authorizations and certifications or the issuance of new ones.⁴³
45. Also, importantly, the RVO would provide for the continued operation of the Just Energy entities, preserving the going-concern value of the business for the benefit of its stakeholders, continuing to supply uninterrupted energy its 950,000 customers and preserving the ongoing employment of more than 1,000 employees.⁴⁴ No stakeholder disputed the evidence or the importance of maintaining the licenses.
46. The facts herein are distinguishable from *Just Energy*. In the within proceeding, there are two Forest Licenses and one Tree Farm license, all of which are transferrable. The transfer of the licenses requires one regulatory process with the Province.
47. There is no evidence before this Court that the License would be difficult or impossible to reassign to a purchaser. No evidence has been adduced as to why, if the regulatory approval process is required, the business can’t be maintained as a going concern.

⁴⁰ [*PaySlate Inc. \(Re\)*, 2023 BCSC 608](#) (“*Payslate #1*”) at paras. 84-88, Application Response of Cui. part 4, para. 71

⁴¹ *Payslate #1* at paras. 87-92

⁴² [*Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354](#) (“*Just Energy*”) at paras. 40-44.

⁴³ *Just Energy* at paras. 40-41.

⁴⁴ *Just Energy* at para. 56.

48. The aboriginal rights and title of the Gitanyow and their rights to be consulted, which have long been recognized by the Courts, should be granted more consideration by this Honourable Court than any vague, unsupported concerns of delay and risk in the process to properly transfer the licenses. This is especially important, where, as in this case, there is no evidence of a clear intention to continue Sawmill's operation or any expressed timeframe to do so and there is significant opposition to the RVO.
49. If the Reverse Vesting Order is granted, the Gitanyow are a stakeholder that will be worse off since they will not be consulted with respect to the disposition/change of control of the License and the harvesting of timber in the Gitanyow territory which materially infringes upon their aboriginal rights and title, especially in light of the upcoming scheduled trial for Aboriginal title and rights to the Territory.⁴⁵

IV. CONCLUSION

50. For the reasons set out herein, the application to grant the RVO should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 27, 2024



Lawyer for The Gitanyow Nation,
Kristina Davies

⁴⁵ Application Response. Part 5, para. 9.