

KING'S BENCH FOR SASKATCHEWAN

Citation: 2024 SKKB 67

Date: 2024 04 18
Docket: QBG-SA-00350-2021
Judicial Centre: Saskatoon

BETWEEN:

BIG RIVER FIRST NATION

Applicant

- and -

A.C. FORESTRY LTD. and WITCHEKAN LAKE FIRST
NATION

Respondents

Docket: QBG-SA-00463-2022
Judicial Centre: Saskatoon

BETWEEN:

BIG RIVER FIRST NATION

Applicant

- and -

A.C. FORESTRY LTD., ANNE THOMAS, PETER BILL and
KENNETH THOMAS

Respondents

Docket: KBG-SA-00057-2023
Judicial Centre: Saskatoon

BETWEEN:

BIG RIVER FIRST NATION

Applicant

- and -

AGENCY CHIEF TRIBAL COUNCIL INC., A.C. REALTY INC., WITCHEKAN LAKE FIRST NATION, PELICAN LAKE FIRST NATION, KEN THOMAS, ANNE THOMAS, PETER BILL, LEE BILL, LESTER JIM, WILLIE THOMAS, and ROGER TIPEWAN

Respondents

Counsel:

Glenn R. MacKay	for Big River First Nation
Nicholas P. Conlon	for A.C. Forestry Ltd.
Gordon Becher	for Witchekan Lake First Nation
Michael W. Marschal	for Big River First Nation
Michael J. Phillips	for Pelican Lake First Nations

FIAT
April 18, 2024

BARDAI J.

Introduction and Background

[1] This dispute has a lengthy and complex procedural history, but at its core, it is a dispute between three First Nations – the Big River First Nation [Big River], the Witchekan Lake First Nation [Witchekan Lake], and the Pelican Lake First Nation [Pelican Lake] – over the allocation of revenues from A.C. Forestry Ltd. [AC Forestry]. Each of the three First Nations are shareholders of AC Forestry. AC Forestry is a company engaged in the harvesting of timber allocations in the Prince Albert Forest Management Agreement Area.

[2] AC Forestry makes use of the timber allocation it is awarded by the Provincial Government in two ways. First, it sells a portion of its allocation to third parties such as NorSask Forest Products Limited Partnership [NorSask], Tolko

Industries Ltd. [Tolko], Carrier Forestry Products Ltd. [Carrier], Paper Excellence Canada Holding Corporation [Paper Excellence] and others and, second, it engages in harvesting of timber directly, using its own forces, sometimes with the assistance of third parties. Tolko, NorSask, Carrier, Paper Excellence and other third parties pay royalties to AC Forestry in exchange for being granted a portion of AC Forestry's timber allocation. Overseeing the operations of AC Forestry is the Agency Chiefs Tribal Council [ACTC]. This is a non-profit corporation whose purpose is to promote the interests of the Member Nations, being Big River, Witchekan Lake and Pelican Lake, collectively [Member Nations].

[3] The issue to be decided at trial is whether AC Forestry is required to pay the royalty payments it receives and/or profits it generates to the three First Nations on a per capita basis which would see Big River receive 59.29% of such monies with Pelican Lake receiving 27.75% and Witchekan Lake getting 12.96% or whether these revenues are to be divided equally among the three Member Nations with each First Nation receiving 33% of such royalties and/or revenue.

[4] This matter was commenced in March 2021, more than three years ago with an originating application by Big River seeking that NorSask pay royalty monies due to AC Forestry into court pursuant to *The Enforcement of Money Judgments Act*, SS 2010, E-9.22 [EMJA]. In May 2021, Clackson J. ordered that this action proceed to trial with mediation, discoveries and pre-trial. Since then, there have been multiple applications for preservation orders, multiple applications by Big River seeking that AC Forestry be held in contempt, a summary judgment application that went to the Court of Appeal, issues of joinder, the addition of parties and other procedural steps. However, after three years, questioning has yet to occur.

[5] As a result of the various preservation orders that have been made, the following moneys have been paid into Court:

- a. \$70,406.38 paid by Paper Excellence and \$665,805.36 by NorSask pursuant to the order of August 12, 2021 (*Big River First Nation v A.C. Forestry Ltd.*, 2021 SKQB 216);
- b. \$180,206.96 paid by AC Forestry in December 2022;
- c. \$1,039,997.84 paid into court pursuant to the Court's order of April 1, 2024. The parties agree that this amount reflects what was owing pursuant to existing preservation orders, which amount had not been paid as of April 1, 2024, but which amount was due and payable. (*Big River First Nation v A.C. Forestry Ltd.* (1 April 2024) Saskatoon, QBG-SA-00350-2021 (Sask KB))

[6] In total, the Court is holding \$1,956,416.54, excluding security paid by Big River.

Pending Applications

[7] There are now multiple applications before the Court. Big River seeks, *inter alia*:

- a. an extension of the preservation order made on December 22, 2022, in relation to \$180,206.96 paid into court;
- b. that the interim *ex parte* preservation order granted by Crooks J. on March 29, 2023, be extended (*Big River First Nation v A.C. Forestry Ltd.* (29 March 2023) Saskatoon, QBG-SA-00350-2021 (Sask KB));
- c. a preservation order in respect of moneys received by AC Forestry on an ongoing basis;
- d. a finding of continuing contempt as against AC Forestry and relief

associated with such a finding; and

- e. that Big River be allowed to file fresh evidence.

[8] AC Forestry meanwhile asks that all preservation orders be brought to an end and that any penalty respecting AC Forestry's contempt be remitted.

[9] This matter came before the Court in December 2023, but before a decision was rendered, the Court received the application of Big River to adduce fresh evidence. The Court also raised concerns with the material filed in that the material did not include adequate particulars from AC Forestry as to their costs and expenses, including interest on credit facilities to allow the Court to assess the ongoing business costs of the company. Further, the material did not adequately detail the steps taken by Big River to move the action forward in a timely way.

[10] A timeline was set on February 7, 2024, for the application of Big River respecting new evidence to be argued and to allow the parties the opportunity to address the two issues identified by the Court. ((*Big River First Nation v A.C. Forestry Ltd.* (7 February 2024) Saskatoon, QBG-SA-00350-2021 (Sask KB)) The Court now has this material and the parties have been heard on these issues.

Issues to be Decided

[11] There are three basic questions to be determined by the various applications that are before the Court, namely:

1. Should Big River's application for fresh evidence be allowed?
2. Should existing preservation orders be extended and further preservation orders granted?
3. Should AC Forestry be found in continuing contempt or not?

Legal Framework for the Determination of Preservation Orders

[12] A preservation order is a remedy that exists to ensure that if a plaintiff succeeds in their action, there is a mechanism to ensure they are able to collect on a judgment. The enactment of the *EMJA* created a legislative framework for the determination of preservation order applications. Sections 5(5), 5(7), 7 and 8 of the *EMJA* state:

5(5) The court may grant a preservation order if the court is satisfied that:

- (a) the action would, if successful, result in:
 - (i) a judgment in favour of the plaintiff; or
 - (ii) an order described in subclause (1)(a)(ii);
- (b) if the preservation order is not granted, the enforcement of a judgment or order against the defendant or transferee is likely to be partially or totally ineffective as a result of the disposition of, damage to, dissipation of, destruction of, concealment of or any dealing with property, other than disposition for the purposes of:
 - (i) meeting reasonable living expenses of the defendant and dependants of the defendant;
 - (ii) carrying on the business of the defendant in the ordinary course; or
 - (iii) acquiring income to pay the expenses of defending or responding to the action; and
- (c) the action will be prosecuted without delay, other than delay caused by the defendant or transferee.

...

(7) A preservation order shall require the plaintiff to provide security in an amount that, in the opinion of the court, is sufficient to compensate the defendant or other person affected by the preservation order for pecuniary loss that may be caused as a result of the preservation order unless, in the court's opinion, requiring the plaintiff to provide security would cause undue hardship to the plaintiff.

...

7(1) Subject to section 8 and subsection (2), a preservation order is terminated on the earliest of the following:

- (a) if granted on an application without notice, on the expiry of 21 days;
- (b) if granted on an application with notice, on the expiry of 60 days;
- (c) on termination or dismissal of the action to which the preservation order relates;
- (d) on the expiry of 15 days after the issuance of a judgment in favour of the plaintiff;
- (e) on the day on which the defendant, transferee or other person provides security to the court or the plaintiff in a form and in an amount considered sufficient by the court or the plaintiff;
- (f) in the case of an action as defined in subclause 5(1)(a)(i), on satisfaction of a judgment obtained against the judgment debtor in the action to which the preservation order relates.

(2) Notwithstanding subsection (1), on application of the plaintiff or judgment creditor, the court may fix any date on which the preservation order terminates.

8(1) A plaintiff, judgment creditor, defendant, judgment debtor or any other person affected by a preservation order may apply to the court to have the preservation order extended, renewed, modified or terminated.

(2) Section 5 applies, with any necessary modification, to an application made pursuant to this section.

(3) In an application to extend, renew, modify or terminate a preservation order, the onus is on the applicant to establish that the preservation order should be extended, renewed, modified or terminated.

(4) On application made pursuant to this section, the court may make any order that the court considers appropriate in the circumstances, including:

- (a) an order doing one or more of the things mentioned in subsection 5(6); and
- (b) an order extending, renewing, modifying or terminating a preservation order.

[13] The statutory framework, while relatively recent, has been the subject of a number of decisions, including *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77, 400 DLR (4th) 193 [*Arslan*], and *2055190 Ontario Ltd. v Zhao*, 2018 SKCA 66, [2019] 12 WWR 401 [*Zhao*]. What emerges from these two cases and the language of the legislation are the following principles:

- a. The *EMJA* sets up a framework for obtaining a preservation order and displaces prior law (*Arslan*, at paras 60 and 67).
- b. The applicant must commence an action that, if successful (meaning, as pled), would result in a money judgment. This threshold in terms of the pleading is quite low and requires that the action rest on a recognized cause of action and not be groundless. An action is not groundless if the factual allegations in the pleading and any affidavit evidence are realistic and borne out (*Arslan*, at paras 61 and 88; *EMJA*, s 5(5)).
- c. The Court retains jurisdiction to require additional support or refuse to grant a preservation order even where the plaintiff has satisfied the requirements of s. 5 because the language of the legislation is permissive allowing the Court to make any order that may be appropriate in the circumstances (*Arslan*, at para 88; *EMJA*, ss 5(9) and 8(4)).
- d. If the preservation order is not granted, the enforcement of a judgment may be partially or totally ineffective (*EMJA*, s 5(5)(b)).
- e. The plaintiff will prosecute the claim without delay (*EMJA*, s. 5(5)(c)).
- f. Preservation orders are intended to be time limited but are subject to

limits the Court may impose (*EMJA*, s 7).

- g. Preservation orders may be renewed on application (*EMJA*, s 8).
- h. Disposition of property is permitted to allow a defendant to meet reasonable living expense, carry on the business or acquire income to pay expenses (*EMJA*, s 5(5)).
- i. Where a defendant is ordered to pay moneys into court, the plaintiff must post security to help safeguard the defendant's loss arising from their inability to access funds they would otherwise be able to access. An undertaking as to damages is not sufficient for meeting this requirement (*Zhao*, at paras 95, 118-140; *EMJA*, s 5(7)).
- j. In determining the quantum of a preservation order, the judge exercises discretion, balancing the evidence and interests of the parties without determining the merits of the claims. The court, of course, plays a supervisory role under the *EMJA*, and preservation orders are not to be used as tactical weapons. (*Zhao*, at paras 103, 109-110).

Summary of the Evidence other than the Fresh Evidence Sought to be Adduced

[14] The evidence of Big River is that AC Forestry has historically been non-compliant in making payments ordered by the Court. Mr. Klein, the Chief Executive Officer of Big River, says that notwithstanding preservation orders made by the Court, AC Forestry simply did not pay. In November 2023, AC Forestry had \$2,193,112.62 in its bank account, was under orders to pay money into Court and simply failed to do so. Instead, his evidence is that AC Forestry has prioritized payments to creditors and others over making payments due in court. Big River disputes AC Forestry's suggestion that funds it has are required to carry on its business in the

ordinary course. Big River says that historically, funds were being paid to shareholders, including Big River.

[15] AC Forestry does not dispute that it has not made the payments ordered by the Court. In fact, the parties are on common ground that as of April 1, 2024, \$1,039,997.84 was due and payable to the Court pursuant to existing preservation orders and had not been paid. The crux of AC Forestry's evidence is that it was using the funds it generated to fund operations and that had the moneys owing to the Court been paid into Court, it would have been out of business.

[16] Karen Sasakamoose, in her affidavit, notes that while she has only been retained by AC Forestry as a consultant recently, a review of the records indicates that in 2022, AC Forestry took in \$3,042,166.08 in revenue and cash injections and spent \$3,148,051.69, resulting in a deficit of \$105,855.61. In 2023, the expenses of AC Forestry were \$3,743,722.91 against revenue and cash injections of \$3,883,272.16, leaving a positive balance of \$139,549.25. One of the reasons for AC Forestry's lack of profitability is that its own operations are not profitable. AC Forestry uses revenues from royalty payments to fund its operations. In 2024, AC Forestry backed off considerably in direct harvesting efforts and so, as of February 23, 2024, AC Forestry's bank account had a balance of \$2,369,825.12 with outstanding expenses of \$204,198.33 and a debt of approximately \$1,100,000 owing to ACTC.

[17] The evidence of AC Forestry, including a review of its financial statements, indicates that its assets and revenue consist of money in the bank, which counsel reports as of the date of hearing to be \$2,333,536.21, its equipment and royalty payments which have yet to be paid.

[18] The position of AC Forestry is that it simply did not have funds until recently to make the payments that had been ordered by the Court given the expenses it was incurring.

Application for Fresh Evidence

[19] The new evidence sought to be adduced by Big River largely amounts to a letter from the Government of Saskatchewan dated December 13, 2023 [Letter], and signed by Minister Jim Reiter (Minister of Energy and Resources) and Minister Christine Tell (Minister of the Environment). The Letter is copied to a host of organizations, including each of Pelican Lake, Witchehan Lake, Big River, Tolko and Carrier. The letter gives notice to AC Forestry of the Provincial Government's intention to terminate and reallocate the AC Forestry Timber Allocation. Paragraphs 1 and 2 of the Letter state:

Please be advised that ACF [AC Forestry] has not remedied the defaults outlined in the Ministers' default letter of July 18, 2003. As a result, the Ministers intend to terminate the Allocation to ACF, dated April 20, 2010, and redistribute the Allocation between the three ACF First Nation (FN) shareholders.

New Allocations will be issued to a corporation registered under The Business Corporations Act, as designated by each FN. The new Allocations will also be conditional on the FN's entering into new timber supply agreements (Agreements) with Tolko Industries Ltd. (Tolko) and Carrier Forest Products Ltd. (Carrier). These new Agreements must be signed within 30 days of the new Allocations being issued and must contain the same price and terms as the two existing Agreements between ACF and Carrier and ACF and Tolko. The existing Agreements with ACF will stay in effect until new Agreements are executed by officials of the corporations identified by each FN.

[20] The question is whether this new evidence should be admitted. The legal test for admitting fresh evidence after a hearing is not in dispute. In assessing this type of application, the Court is guided by the following principles:

- a. the evidence should not be admitted if, by due diligence, it could have been adduced at trial;
- b. the evidence must be relevant in that it bears upon a decisive or

potentially decisive issue in the trial;

- c. the evidence must be credible in the sense that it is reasonably capable of belief; and
- d. it must be such that if believed, when taken with other evidence, it could be expected to affect the result.

[21] There is no dispute that this evidence was not available when the matter initially came before the Court on December 1, 2023. The Letter is dated December 13, 2023. At issue is whether the Letter is relevant or not. AC Forestry argues that the Letter is not relevant and will delay the proceedings. AC Forestry says that Big River's claim is limited to royalty payments and this Letter does not change what has been paid under third-party agreements. The Letter does not deal with the entitlement of each of the Member Nations to royalty payments received by AC Forestry.

[22] Big River, meanwhile, says the evidence is relevant because it is the principal source of revenue for AC Forestry and it is coming to an end.

[23] I agree with Big River. The letter is relevant to the question of whether or not Big River will be able to collect on any judgment if it succeeds at trial. If AC Forestry spends the cash on hand and disposes of its equipment because it no longer has an allocation for which the equipment is needed, Big River may be unable to enforce on any judgment. The Letter also goes to the ongoing business costs of AC Forestry. If AC Forestry has no allocations, it will not incur costs associated with the harvesting of such allocations. These are questions squarely raised by the *EMJA* and, in particular, s. 5(b) of the legislation. The evidence, while it amounts to hearsay, is being tendered in the context of an interlocutory application. Hearsay is permissible in such an application. Rule 13-30 of *The King's Bench Rules* states, in part:

13-30(1) Subject to subrule (2), an affidavit must be confined to facts

that are within the personal knowledge of the person swearing or affirming the affidavit.

(2) In an interlocutory application, the Court may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.

(3) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subrule (2), the source of the information must be disclosed in the affidavit.

...

[24] In this case, the Letter is, in the Court's view, inherently reliable. It is a government letter sent to each of the Member Nations. There was no suggestion that the Letter did not accurately reflect the government's position. This Letter, taken together with the other evidence and AC Forestry's history of non-payment of court orders, could be expected to affect the result. Accordingly, this evidence is permitted.

Continuation and Expansion of Existing Preservation Orders

[25] The powers of the Court in respect of an application for a preservation order are set out in s. 5(6) of the *EMJA* which provides:

5(6) A preservation order may do one or more of the following:

- (a) prohibit the disposition of property other than for a purpose mentioned in subclause (5)(b)(i), (ii) or (iii);
- (b) prohibit the damage to, dissipation of, destruction of or concealment of property;
- (c) require the defendant or transferee to pay money to the sheriff, whether as a single amount or through a series of payments;
- (d) require a person who is or who will become indebted to the defendant or transferee to discharge the debt by payment to the sheriff when the debt becomes payable;
- (e) prohibit the defendant or transferee from collecting an account;

- (f) appoint a receiver pursuant to Part VIII, with or without security, in which case Part VIII applies with any necessary modification;
- (g) allow the defendant or transferee to retain and use property affected by an order subject to conditions;
- (h) instruct the sheriff to seize property on such terms and conditions as the court considers appropriate;
- (i) instruct the sheriff, a receiver, the defendant, a transferee or another person to sell property pursuant to Part XI if:
 - (i) the property is likely to depreciate substantially in value before expiry of a preservation order; or
 - (ii) the costs of storage of the property are disproportionately large in relation to its value;
- (j) in the case of a sale mentioned in clause (i) by a person other than the sheriff or a receiver, instruct that person to pay the net proceeds of the sale to the sheriff;
- (k) direct the defendant or transferee to disclose to the court or to the sheriff the existence and location of property in the manner specified, which may include an examination of the defendant under oath or affirmation;
- (l) make any other provision that the court considers necessary for the effectiveness of the preservation order.

[26] In this case, \$1,956,416.54 now sits in court. Big River has brought an action which does plead a recognized cause of action, being breach of contract. It cannot be said that the action is groundless. It is also evident that given that AC Forestry has now lost its principal source of revenue, being the allocation of timber rights, there is the potential that the company will be unable to pay a judgment. However, as noted by the Court in *Arslan*, the language of the legislation is permissive and allows the Court to make any order it deems appropriate in the circumstances.

[27] In this case, there have been considerable delays in moving this case forward. Some of the delays are a result of the internal turmoil which AC Forestry finds itself in. It has lost many of its operating officers, and this has resulted in delays. Other

delays have been a result of the summary judgment application and the appeal of the decision on that application. However, there have been delays caused by a joinder application and the addition of new parties. Some of these delays must be laid at the feet of Big River. After three years, the parties have yet to go to questioning, though they have now produced their documents and attended mediation in 2021. It seems that most of Big River's efforts have been put into getting preservation orders and arguing contempt applications. This needs to stop, and the parties need to move forward with prosecution of the action. Preservation orders are not intended to be indefinite. In fact, the timeline set out in s. 7 provides discretion to the Court, but really shows the speed at which parties are expected to move. Section 7(1)(b) contemplates that preservation orders granted on notice expire after 60 days. It has now been more than 1,100 days since Big River's first application was brought. This matter needs to move more expeditiously.

[28] The Court is satisfied that the \$1,956,416.54 now held in court should remain and stay to the credit of the action, given the Letter and AC Forestry's delays and conduct to date.

[29] The 2023 financial statements for AC Forestry identify property, plant and equipment as having a value of \$159,911. The affidavit of Neil Sasakamoose indicates that AC Forestry maintains a logging enterprise and has equipment and labour of its own. There is some debate on the value of AC Forestry's equipment and the amount and level of claimed depreciation. It is not necessary for me to determine these issues. In accordance with the power set out in s. 5(6) of the *EMJA*, the Court is prohibiting AC Forestry from selling any more than 10% of any equipment it holds without first obtaining a further court order. This creates another pool of assets from which Big River may satisfy any judgment, if it obtains judgment.

[30] The Court is not, at this time, prepared to order further funds be paid into court. Frankly, the parties need to focus on moving the lawsuit to trial rather than coming back every few months to argue about preservation orders. By preserving more than \$2 million in cash and equipment, the Court is adequately protecting Big River while, at the same time, giving AC Forestry some flexibility in regard to its own cash reserves.

[31] Accordingly, in terms of existing and ongoing preservation orders, the Court orders that:

- a. \$1,956,416.54 shall remain in court to the credit of the action; and
- b. AC Forestry is prohibited from disposing any more than 10% of its equipment absent further order of the Court.

Security Payable by Big River

[32] As noted by the Court of Appeal in *Zhao*, where a party is granted a preservation order, they must put up security of their own to protect a defendant from the loss of access to their capital in accordance with s. 5(7) of the *EMJA*. The parties are on common ground that 6.25% per annum is the appropriate interest rate to be applied. This reflects the annual borrowing cost that AC Forestry might reasonably incur to raise capital. On August 12, 2021, Big River was ordered to pay \$46,013.23 in relation to the preservation of \$736,211.74. This amount covered the period to August 12, 2022. This equates to \$3,834.44 per month. What this means is that a further interest amount is payable for the months since August 12, 2022, equal to this amount multiplied by the months since.

[33] In relation to the \$180,206.96 paid in December 2022, the monthly amount of interest payable on this amount at a rate of 6.25% is \$938.58.

[34] Finally, in relation to the \$1,039,997.84, the monthly payment at a rate of 6.25% commencing from the date these funds were paid into Court would amount to \$5,416.66 per month.

[35] Within thirty days of this fiat, Big River shall calculate the amounts payable as security under s. 5(7) and pay such amounts into court. Thereafter, on a monthly basis, Big River shall pay into court the sum of:

\$ 3,834.44
938.58
<u>5,416.66</u>
<u>\$10,189.68</u> (monthly total)

[36] This amount, being \$10,189.68, shall be paid by Big River into court on a monthly basis on the first of each month for as long as this preservation order remains in place.

[37] In terms of the equipment being preserved, I make no order for security as, while AC Forestry is prohibited from disposing of such property, they will continue to have the use of such property.

Contempt of AC Forestry

[38] The legal test for contempt is not in dispute. It is set out at paragraph 52 of the fiat of December 22, 2022 (*Big River First Nation v A.C. Forestry Ltd.* (22 December 2022) Saskatoon, QBG-SA-00350-2021, QBG-SA-00463-2022 and QBG-RG-01534-2022 [now KBG-SA-00057-2023] (Sask KB)):

[52] The power to find a party in civil contempt is a discretionary power which should be used with caution. It is an enforcement power of last resort as noted by the Supreme Court of Canada in *Carey v Laiken*, 2015 SCC 17 at para 36, [2015] 2SCR 79 [*Laiken*]. It is for this reason that the threshold for a contempt finding is so high. It requires proof beyond a reasonable doubt (the criminal standard) as opposed to the civil standard. The applicant, Big River, must establish

three things beyond a reasonable doubt:

1. The order must state clearly and unequivocally what should and should not be done;
2. The alleged contemnor must have actual notice of the order; and
3. The alleged contemnor must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. In this sense, intent requires that the alleged contemnor intended to do what the order forbade. Subjective belief is therefore no defence unless it was objectively reasonable.

See: *Consumers' Co-operative Refineries Ltd. v Unifor Canada, Local 594*, 2020 SKQB 38; and *Laiken* at paras 32-35

[39] In this case, it is not in dispute that AC Forestry did not pay the amounts it was ordered to pay or anywhere near such amounts. AC Forestry argues that it could not pay due to its ongoing expenses, which expenses have only been set out in the recent affidavit of Ms. Karen Sasakamoose, filed February 29, 2024. The Court has frankly been waiting for years for this level of detail and disclosure from AC Forestry. That said, there are several problems with the argument of AC Forestry.

[40] First, AC Forestry has had no problem paying its creditors. It has paid creditors in preference to what has been owing and ordered paid into court.

[41] Second, even when AC Forestry had the money sitting in its bank account, it made no effort to pay. This resulted in the fiat of April 1, 2024 (*Big River First Nation v A.C. Forestry Ltd.* (1 April 2024) Saskatoon, QBG-SA-00350-2021 (Sask KB)), which states:

This Matter is taken under Reserve. However, pending the decision, the Court Orders that \$1,039,997.84 be paid into Court by AC Forestry within 14 days. The parties are on common ground that this is the amount that would be payable pursuant to preservation Orders already made but which have not, at this stage, been paid into Court. Accordingly, this is not a new order. Counsel for AC Forestry confirms that these funds are available and can be paid within the 14 days.

The best evidence before the Court at this time is that AC Forestry has \$2,333,536.21 in the bank and that accounts payable stand at \$204,000 or thereabouts. Accordingly, the Court is satisfied that AC Forestry has the means to pay these funds into Court immediately. Whether these funds stay in Court will be addressed in the decision now on reserve.

In the event there are any issues with the payment, the parties have leave to request a call with me. [Emphasis in original]

[42] These moneys could have been paid but were not paid without any satisfactory explanation. Therefore, even if it could be said that AC Forestry was unable to comply in 2022 and 2023 and should be excused for its non-compliance by virtue of the language of s. 5(b)(ii) of the *EMJA*, that argument simply cannot stand given what AC Forestry has in the bank now and given its reported liabilities.

[43] Third, on June 14, 2023, AC Forestry was told exactly what it needed to do in the event it was unable to comply with an order of the Court. (*Big River First Nation v A.C. Forestry Ltd.* (14 June 2023) Saskatoon, QBG-SA-00350-2021 (Sask KB).) An order from the Court is not an *a la carte* menu where parties can pick and choose what they will follow. They must comply, and they must comply fully. An order is just that. It is not a suggestion, a recommendation or something to be negotiated. This is not the first time AC Forestry is in this position. They were told explicitly at paragraph 16 of the fiat of June 14, 2023, what they needed to do:

[16] What AC Forestry should have done is clear. They should have been proactive. The second they knew they would not be in a position to comply, they should have applied to the Court on their own initiative to vary the order. At a minimum, they should have alerted their counsel and requested a call with the Court. They failed to do so, failed to instruct counsel, failed to show any remorse prior to the most recent attendances and took minimal steps to respond to what were fair inquiries from the applicant. They should have sought to vary the order. Had they done so, appearances on March 8, 2023, April 18, 2023, May 15, 2023 and June 6, 2023 may have been avoided. Big River would not have had to file extensive material seeking contempt, and considerable time and money would have been saved. Big River should not have to pay costs it incurred to get AC Forestry to do what it was ordered to do in the first place.

[44] Once again, AC Forestry has been less than proactive. AC Forestry has been the subject of clear and explicit orders of the Court. AC Forestry received notice of these orders and they have intentionally failed to comply with such orders. I find them in contempt and order that they pay Big River's solicitor-and-client costs of the present application to be taxed, forthwith upon completion of the taxation or reaching agreement as to Big River's fees.

Summary

[45] In summary, the Court orders:

1. The Court makes a preservation order pursuant to s. 5 of the *EMJA* that:
 - a. \$1,956,416.54 shall remain in court to the credit of the action; and
 - b. AC Forestry is prohibited from disposing any more than 10% of its equipment absent further order of the Court.
2. Big River shall pay into court, as security required by s. 5(7) of the *EMJA*, the following:
 - a. \$3,834.44 per month for each month from August 12, 2021, to present, less any amounts paid to date;
 - b. \$938.58 per month for each month from December 22, 2022, to present less any amounts paid to date; and
 - c. \$5,416.66 per month for each month from April 1, 2024, to present.

These amounts in arrears shall be paid within 30 days of this order by Big River, and if there is any issue as to the accounting of such amounts, the parties have leave to request a call with the Court.

3. After the arrears of interest are brought up to date, Big River shall pay \$10,189.68 monthly on the first day of each and every month for so long as the preservation order remains in place.
4. AC Forestry is once again found in contempt of court and is ordered to pay Big River's costs of the present applications on a solicitor-and-client basis to be taxed, forthwith upon taxation.
5. This preservation order shall remain in place until further order of the Court. If this matter is not set down for trial within 12 months, either party may apply to vary this order in accordance with ss. 7 and 8 of the *EMJA*.

“N. Bardai”

J.

N. BARDAI