Court File No. CV-12-9566-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TERRACE BAY PULP INC.

Applicant

FACTUM OF TERRACE BAY PULP INC.
(Stay of OHSA Proceedings)

May 1, 2013

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PART I -OVERVIEW

1. Terrace Bay Pulp Inc. ("**Terrace Bay**" or the "**Company**") obtained protection from its creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to the order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), made on January 25, 2012, as amended and restated (the "**Initial Order**") (the "**Current CCAA Proceeding**"). Pursuant to the Initial Order, Ernst & Young Inc. was appointed as Monitor of the Company.

2. By Order dated March 11, 2009, Terrace Bay filed for and obtained protection from its creditors under the CCAA, to enable the Company to pursue a restructuring of its business for the benefit of its stakeholders (the "**First CCAA Proceeding**").

3. On September 15, 2010, Terrace Bay implemented a plan of compromise or arrangement in the First CCAA Proceeding (the "**Plan**"). The Plan contemplated the issuance of a promissory note (the "**Plan Note**") for the benefit of all holders of proven unsecured claims in the First CCAA Proceeding (collectively, the "**Plan Note Beneficiaries**").

4. The Plan Note Beneficiaries share *pari passu* in the Plan Note, which is secured against all assets, property and undertakings, real and personal, of Terrace Bay (the "**Property**"). The Plan Note has a first priority charge over the Property.

5. The Plan Note creditors will be the most directly impacted in the event Terrace Bay is required to incur financial obligations to respond to the OHSA Proceedings.

6. On January 10, 2012, the Ontario Ministry of Labour, Legal Services Branch (the "**Crown**") commenced a proceeding known as *R. v. Terrace Bay Pulp Inc. & Gino Leblanc* against Terrace Bay and, among others, Gino LeBlanc, in the Ontario Provincial Offences Court (Thunder Bay) (the "**First OHSA Proceeding**"), in connection with alleged violations under the *Occupational Health and Safety Act* (Ontario) (the "**OHSA**"). The proceeding has been discontinued as against all defendants other than Terrace Bay and Gino LeBlanc.

7. On October 15, 2012, the Crown commenced a proceeding known as *R. v. Terrace Bay Pulp Inc., Venshore Mechanical Ltd., Joseph Mykietyn, Arthur Szczepaniak & Alain Zborowski* against Terrace Bay and various other corporate and individual defendants, in the Ontario Provincial Offences Court (Thunder

Bay) (the "**Second OHSA Proceeding**", together with the First OHSA Proceeding, the "**OHSA Proceedings**"), in connection with further alleged violations of the OHSA. The Second OHSA Proceeding was subsequently transferred to Ontario Provincial Court (Thunder Bay).

8. Terrace Bay is insolvent. It commenced the Current CCAA Proceeding in order to conduct a marketing and sale process for its business and non-business assets. In July, 2012, Terrace Bay sold its operating assets relating to its pulp mill, located at 21 Mill Road in the Township of Terrace Bay, Ontario (the "**Mill**"), to a third party. As a result of the sale, Terrace Bay no longer operates the Mill or any other business and all of its former employees, to the extent not assumed by the purchaser on the sale, have been terminated.

9. The Company, in consultation with the Monitor, is currently evaluating letters of intent received with respect to its non-business assets. It has sought and obtained an extension of the stay of proceedings granted under the Initial Order until October 31, 2013 in order, among other things, to complete the sale of its non-business assets and distribute proceeds of sale to its creditors.

10. The OHSA Proceedings are very complex, involve numerous questions of fact and law and would require Terrace Bay to retain special counsel to represent them. The incidents giving rise to the OHSA Proceedings resulted in serious injury and, in the case of the Second OHSA Proceeding, loss of life. Both of the OHSA Proceedings involve multiple defendants.

11. The incidents giving rise to the OHSA Proceedings occurred prior to the commencement of the Current CCAA Proceeding. The resulting damage from such incidents is ascertainable and is not contingent on any future events.

12. The only remedy available to the Crown in the event of a conviction of Terrace Bay in both of the OHSA Proceedings is monetary. Section 66(2) of the OHSA provides that the maximum fine that may be imposed upon a corporation is $500,000 (plus any applicable victim fine surcharge). Any fine ordered upon a conviction of Terrace Bay in either of the OHSA Proceedings is a financial obligation of Terrace Bay. The Crown would be an unsecured creditor in respect of such amounts, and its claim would be subject to the payment of prior claims.

13. The costs and expenses, including legal expenses, that would be incurred by Terrace Bay in defending the OHSA Proceedings are significant and would be borne wholly by Terrace Bay's creditors, in the form of diminished proceeds available for distribution by Terrace Bay. In light of its insolvency and the ongoing Current CCAA Proceeding, Terrace Bay must consider the interests of these stakeholders in determining whether to defend the OHSA Proceedings.

14. A pre-trial is scheduled in the Second OHSA Proceeding for May 29, 2013. If a stay of proceedings or an interim stay is not granted, Terrace Bay will be required to attend the pre-trial. In order to attend and participate at the pre-trial, Terrace Bay would be required to retain special counsel. Potential counsel has indicated that significant preparation will be necessary in order to attend the pre-trial.

15. The Crown is not agreeable to adjourning the pre-trial in order for this motion to be determined. For this reason, Terrace Bay seeks an interim stay pending the Court's final disposition of the matter to preserve funds and so that it is not prejudiced in the interim.

16. This Factum is filed in support of the Company's motion for an Order, among other things, declaring that the OHSA Proceedings are stayed, and, if required, granting an interim stay of the OHSA Proceedings until the Court's final determination of the within motion.

17. Terrace Bay does not take the position that the OHSA Proceedings should be stayed against all other defendants.

PART II – FACTS

OHSA Proceedings

First OHSA Proceeding

18. The First OHSA Proceeding was commenced in response to an incident which occurred on January 13, 2011. A Terrace Bay employee was injured while working in the wood handling department of the Mill as a drum feed operator on a conveyor belt where logs enter the drum to be debarked (the "**January 13 Incident**"). Terrace Bay was charged with various offences under the OHSA

including the offence of failing, as an employer, to ensure that the prescribed measures and procedures were carried out in the Mill.

> Information of Douglas Cettina sworn January 10, 2012, Ontario Court of Justice.

Second OHSA Proceeding

19. The Second OHSA Proceeding is in response to a blow tank explosion which blew part of the roof off the Mill, on October 31, 2011 (the "**October 31 Incident**"). The October 31 Incident resulted in the death of a Mill employee. Two other individuals employed by a contractor sustained injuries as a result of the October 31 Incident. Charges were laid against Terrace Bay, Venshore Mechanical Ltd. (a contractor engaged by Terrace Bay) and three supervisors employed by Terrace Bay. Terrace Bay was charged with, among other things, failure to provide adequate instructions to employees.

> Affidavit of Wolfgang Gericke sworn January 24, 2012, at para. 6;
> Information of Robert Gerity sworn October 15, 2012, Ontario Court of Justice.

20. The January 13 Incident and the October 31 Incident were unusual occurrences at the Mill.

Approved Expenses

21. Terrace Bay's limited operating expenses are funded from cash on hand in connection with cash flow projections which have been approved by the Court (the "**Approved Expenses**").

22. Expenses related to the defence of OHSA Proceedings are not included in the Approved Expenses. The balance of Terrace Bay's assets, after payment of operating expenses, is held for the benefit of Terrace Bay's creditors and is subject to distribution only upon further order of the Court.

Crown is a Creditor of Terrace Bay

23. As Terrace Bay no longer operates the Mill or any business, there is no regulatory order that could have any effect in relation to Terrace Bay. In the event a conviction is entered against Terrace Bay in the OHSA Proceedings, the only remedy available is an order to pay a monetary fine. The predominant purpose of the OHSA Proceedings is to quantify the amount of the Crown's claim against Terrace Bay. Enforcement of any such order would be subject to the stay of proceedings provided for at paragraphs 10 and 11 of the Initial Order and to the satisfaction of prior creditor claims.

Status of OHSA Proceedings

24. The First OHSA Proceeding and the Second OHSA Proceeding have been adjourned to June 21, 2013 and May 29, 2013, respectively.

25. On June 21, 2013, the parties in the First OHSA Proceeding are required to appear before the Ontario Provincial Offences Court.

26. On May 29, 2013, a procedural pre-trial is scheduled in connection with the Second OHSA Proceeding. The pre-trial would require Terrace Bay to retain counsel and for counsel to conduct considerable preparation, including the review

of all Crown disclosure documents and the preparation of a brief to be submitted to the Ontario Provincial Court (Thunder Bay).

27. The above expenses will diminish the proceeds available for distribution to the creditors of Terrace Bay.

PART III – ISSUES

28. The issues on this motion are as follows:

(a) Are the OHSA Proceedings stayed by the Initial Order?

(b) In light of the position of the Crown that the OHSA Proceedings are not stayed pursuant to the Initial Order, should the OHSA Proceedings be stayed pursuant to section 11.1(4) of the CCAA?

(c) If applicable, pending a final determination of whether the OHSA Proceedings are stayed, should the Court grant an interim stay of the OHSA Proceedings?

(d) Is there a conflict between the CCAA and the statutory requirements to which the Company is subject pursuant to the OHSA?

PART IV -- THE LAW AND ARGUMENT

A. THE OHSA PROCEEEDINGS ARE STAYED

The Stay

29. Section 11.02 (2) of the CCAA provides as follows:

> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under [the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*]…;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36 (the "**CCAA**"), 11.02.

30. Pursuant to section 11.02 (2) of the CCAA, the Court granted a broad stay of proceedings in paragraphs 10 and 11 of the Initial Order.

B. THE OHSA PROCEEDINGS SHOULD BE STAYED PURSUANT TO 11.1(4) OF THE CCAA

31. Section 11.1(1) of the CCAA defines a regulatory body as "a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act."

CCAA, 11.1(1).

32. The Crown is a "regulatory body" for the purposes of section 11.1 as it is responsible for administering the OHSA. In administering the OHSA, the Crown has a responsibility to, among other things, promote occupational health and safety among employees in Ontario and prevent workplace injuries and occupational diseases.

Occupational Health and Safety Act, (Ontario) (the "**OHSA**"), R.S.O. 1990, C. O.1, s.4.1(2).

33. Section 11.1(2) of the CCAA provides that subject to various exceptions which are not applicable to the case at hand, no order made under the stay provisions of the CCAA affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

CCAA, 11.1(2).

The *Abitibi* Test

34. In *Newfoundland and Labrador v. AbitibiBowater Inc.* ("***Abitibi***"), the Province of Newfoundland and Labrador (the "**Province**") issued various orders against a CCAA debtor pursuant to provincial environmental legislation. The Province then brought a motion for an order that it was not barred from enforcing its orders against the debtor.

Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67 ("**Abitibi**").

35. In *Abitibi,* the Supreme Court of Canada (the "**SCC**") set out the following three requirements as being relevant to the determination of whether a claim is one which is subject to the CCAA process:

(a) There must be a debt, liability or obligation to a creditor;

(b) The debt, liability or obligation must be incurred before the debtor becomes bankrupt; and

(c) It must be possible to attach a monetary value to the debt, liability or obligation.

Abitibi, at para. 26.

36. The SCC found that actions of a regulatory body made pursuant to provincial legislation that may result in orders that in substance require a debtor to make a payment can be treated as monetary claims under the CCAA.

37. The three requirements set out in *Abitibi* are satisfied in the case at hand. It is therefore submitted that the OHSA Proceedings should be subject to the Current CCAA Proceeding and therefore, as a result, should be stayed.

38. With respect to the first requirement, the SCC in *Abitibi* held that the only relevant determination is whether the regulatory body has exercised its enforcement power against a debtor.

Abitibi, at para. 27.

39. The Crown has exercised its enforcement power against Terrace Bay by commencing the OHSA Proceedings, requiring Terrace Bay to incur a financial obligation in order to defend itself in the OHSA Proceedings. The only remedy available to the Crown against Terrace Bay, should it be successful in prosecuting Terrace Bay, is a monetary fine. As such, in the OHSA Proceedings against Terrace Bay, the Crown is enforcing its rights as a creditor of Terrace Bay. Such a claim falls to be administered as a claim against Terrace Bay in the Current CCAA Proceeding and should be stayed. Terrace Bay maintains that the stay of proceedings provided for at paragraphs 10 and 11 of the Initial Order should be effective to impose such stay. Alternatively, Terrace Bay seeks a declaration pursuant to section 11.1(4) of the CCAA that the Crown is seeking to enforce its rights as a creditor and that the enforcement of such rights be stayed.

Nortel Networks Corp., Re, 2012 ONSC 1213 *("**Nortel**"),* at para. 122, relying on *Abitibi.*

40. With respect to the second requirement, a claim will be exempt from the CCAA process where the debtor's obligation has not arisen at the time of commencement of the CCAA proceeding.

> *Abitibi,* at para. 29.

41. This requirement is satisfied in the case of Terrace Bay, as the January 13 Incident and the October 31 Incident both occurred prior to the Current CCAA Proceeding.

42. With respect to the third requirement of the test, the question is whether regulatory orders which are not expressed in monetary terms can be translated into such terms.

> *Abitibi,* at para. 30.

43. A contingent claim may be subject to the insolvency process provided the future event that must occur for the claim to crystalize is not too remote or speculative.

> *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, at para. 4; cited in *Abitibi* at para. 36.

44. The OHSA Proceedings relate to two separate incidents which took place in 2011 at the Mill, which is no longer owned by Terrace Bay. The resulting damage is ascertainable and is not contingent on any future event(s).

45. The reason the CCAA includes a broad range of claims is to ensure fairness to creditors and finality in the debtor's insolvency proceedings, as it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds.

Abitibi, at para. 35.

46. In considering whether the third requirement is satisfied, a CCAA court may consider the effect that requiring the debtor to comply with the order would have on the insolvency process.

Abitibi, at para. 38.

47. One of the central features of the CCAA scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum.

Abitibi, at para. 21.

48. An insolvency proceeding is a collective proceeding that supersedes the process otherwise available to creditor to enforce claims. This single proceeding model avoids inefficiencies and chaos attendant to individual creditors initiating different proceedings in different forums. It also places creditors on an equal footing in relation to the claims they assert.

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 ("***Century Services***"), at para. 22.

49. Permitting the OHSA Proceedings to continue in relation to Terrace Bay effectively prefers or advantages the interests of the Crown, as a potential unsecured creditor of Terrace Bay, over those of Terrace Bay's creditors, in contravention of the "single proceeding model" of the CCAA.

Century Services, at para. 22.

<u>The Crown is Acting as Creditor</u>

50. In *Nortel Networks Corp., Re* ("***Nortel***"), the Court, in considering whether certain orders issued by the Ontario Ministry of the Environment (the "**MOE**") were stayed as a result of Nortel's filing under the CCAA, reasoned

> …when the entity that is the subject of the MOE's attention is insolvent and not carrying on operations at the property in question, it is necessary to consider the substance of the MOE's actions. If the result of the issuance of the MOE Orders is that Nortel is required to react in a certain way, it follows, in the present circumstances, that Nortel will be required to incur a financial obligation to comply. *<u>It is not a question of altering its operational activities in order to comply with the EPA on a going forward basis. There is no going forward business.</u>* Nortel is in a position where it has no real option but to pay money to comply with any environmental issue….(emphasis added)

Nortel, at paras. 105-6 and 122.

49. In *Nortel,* Justice Morawetz found the critical point to be determined was whether the actions of the MOE required Nortel to respond in a way that caused Nortel to incur a financial obligation. This same reasoning applies to the OHSA Proceedings, as Terrace Bay will be required to incur financial obligations in relation to its defence should the OHSA Proceedings not be stayed.

Nortel, at para. 106.

51. Terrace Bay is insolvent. Its operating assets have been sold. The Company is no longer carrying on business or generating operating income. Terrace Bay has no employees.

52. As was the case in *Nortel,* Terrace Bay cannot alter its operational activities to comply with the OHSA as it has ceased operations. Terrace Bay has no "going forward" business.

53. The only remedy available to the Crown upon conviction is to seek enforcement of a fine against Terrace Bay. Therefore, the OHSA Proceedings are in substance and effect requirements for Terrace Bay to incur significant financial obligations.

54. The OHSA seeks to promote the occupational health and safety of employees in the Province of Ontario. Its objectives may include, among other things, to incentivize employers to keep healthy and safe workplaces, and to deter unsafe conditions. As Terrace Bay no longer has any employees, and does not conduct an occupation or a business, the prosecution of Terrace Bay under the OHSA does not further these objectives.

55. In *Nortel,* the Court held "once steps are taken by the MOE to require Nortel to take actions in respect of a factual matrix that arose prior to the filing date, if those actions require a monetary expenditure they must, for the purposes of the CCAA, be considered to be part of a claims process and must also, by necessity, be stayed."

> *Nortel,* at para. 122.

56. The events that gave rise to the OHSA Proceedings are in the past. The only remaining step is the quantification of the Crown's claim against Terrace Bay. Accordingly, the OHSA Proceedings should be subject to the CCAA proceeding and therefore subject to the stay.

57. To the extent that the Crown seeks to act as a regulator, it must be recognized that it is not in a position to regulate any continuing conduct or activity of Terrace Bay. It is submitted that any efforts to regulate Terrace Bay are unnecessary and theoretical and, in the circumstances of its insolvency, must be weighed against the prejudice occasioned to the creditors of Terrace Bay by reason of the diminishment in the property available for distribution if Terrace Bay is required to expend costs in relation to the OHSA Proceedings. To require Terrace Bay to actively defend the OHSA Proceedings in this context would be contrary to public policy.

58. In *Lemare Holdings Ltd., Re* ("***Lemare***"), the Province of British Columbia ("**BC**") provided various proposal letters to the debtor respecting stumpage and penalties owing pursuant to the *Forestry Act* (British Columbia) (the "**FA**"), but had not yet issued an assessment against the debtor at the time it entered CCAA protection.

Lemare Holdings Ltd., Re, 2012 CarswellBC 3294 (S.C.) ("***Lemare***"), at para. 27.

59. BC argued that since its proposals dealt with the harvesting of a public resource, it would be contrary to the public interest to stay its right to proceed. The court held that the public interest cuts both ways, and while the public has an interest in the

Crown recovering stumpage and penalties owing to it, the public also has an interest in seeing corporations continue in business.

Lemare, at paras. 68 & 77.

60. This rationale applies equally in relation to Terrace Bay where the interests of the public, being its creditors, are in the maximization of the assets available for distribution.

61. The court in *Lemare* concluded that the FA scheme of issuing an assessment constituted a step in the enforcement of a payment ordered by a regulatory body within the meaning of section 11.1(2) of the CCAA. Accordingly, the matters at issue related to the financial consequences of the past actions of Lemare and not the regulation of ongoing conduct.

Lemare, at para. 78.

62. As Terrace Bay is no longer operating any business and has no employees, the OHSA Proceedings in substance concern the financial consequences of past conduct, as opposed to actions to regulate ongoing activities, with the result that it is appropriate that the OHSA Proceedings be stayed.

63. In *Timminco Ltd., Re,* the plaintiff sought to lift the stay in the debtor's CCAA proceeding in order to continue its class action proceeding against the debtor. The Court noted "the reality of the situation is that the operating side of Timminco is but a shadow of its former self."

Timminco Ltd., Re, 2012 CarswellOnt 5390 (S.C.J. [Commercial List]), at para. 19.

64. The Court held that if the debtor's key employees were required to spend significant amounts of time dealing with the class proceeding, this would be detrimental to other stakeholders. The Court denied the plaintiff's request to lift the stay.

65. If the OHSA Proceedings are not stayed as against Terrace Bay, the company will be required to deplete its limited resources in defending itself, instead of distributing these funds to its creditors.

Competing Policy Considerations

66. In *Abitibi,* the Province argued that treating its orders as claims in the CCAA process undermined the "polluter-pay principle" developed by the SCC in the 2003 case of *Imperial Oil Ltd. v. Quebec (Ministry of the Environment).* The court disagreed, finding that full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors, resulting in the acceptance of a "third party-pay" principle in place of the "polluter-pay principle."

67. Further, the SCC rejected the Province's argument that subjecting the orders to the CCAA process amounted to issuing a "license to pollute", since insolvency proceedings do not concern a debtor's future conduct.

> *Imperial Oil Ltd. v. Quebec (Ministry of the Environment).* 2003 SCC 58 at para. 24; *Abitibi*, at paras. 40-1.

68. As Terrace Bay is no longer operating a business, the stay of the OHSA Proceedings could by no means constitute a license for Terrace Bay to operate

without regard to OHSA standards. Further, in the event the OHSA Proceedings are permitted to continue against Terrace Bay, the costs of Terrace Bay's participation will be borne not by Terrace Bay, but by its third party creditors.

C. INTERIM RELIEF SHOULD BE GRANTED

69. The SCC has established a three part test for injunctive relief, which applies where a party seeks an interim stay. The party requesting an interim stay must show:

(a) That there is a serious question to be tried;

(b) That irreparable harm will be suffered by the party if the stay is not granted; and

(c) That the balance of convenience favours the granting of a stay.

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 ("***RJR-MacDonald***") at paras. 77-80.

70. The first element of the test should be determined on the basis of common sense and an extremely limited review of the case on the merits. The court should satisfy itself that the application is neither vexatious nor frivolous.

RJR-MacDonald, at para. 50.

71. The issue of whether or not the OHSA Proceedings should be stayed arises by reason of the collision between the underlying objectives of the OHSA to, among other things, promote occupational health and safety among employees in Ontario, and the objective and purpose of the CCAA, which is remedial

legislation meant to facilitate compromises and arrangements between companies and their creditors, and to provide an effective facilitative process.

OHSA s. 4.1; CCAA.

72. The resulting practical issue is whether the limited resources of an insolvent debtor should be diminished by defending itself in proceedings which can only result in the imposition of a monetary fine. All of this is meant to occur at the expense of existing creditors of the debtor company, including secured creditors having priority over the claims that would result if the debtor is successfully prosecuted. The jurisprudence regarding the stay of regulatory proceedings, such as the OHSA Proceedings, favours Terrace Bay and in any event, this motion and the relief sought is not is not frivolous or vexatious. Therefore, the first branch of the test, whether there is a serious issue to be tried, is satisfied.

73. With regard to the second element of the test, it is clear that Terrace Bay and its creditors will suffer irreparable financial harm if an interim stay is not granted pending final disposition of the issue. This is because of the considerable expense associated with participation in the OHSA Proceedings including the upcoming pre-trial.

74. If an interim stay is not granted, in order to defend itself, Terrace Bay must begin preparation for the pre-trial imminently. In order to adequately prepare for the pre-trial, Terrace Bay will be required to retain legal counsel and that counsel will be required to review voluminous Crown disclosure documents and prepare a pre-trial brief. All of these costs are unrecoverable, and, as such, only serve to

diminish the value of the estate of Terrace Bay, thereby affecting other creditors. Further, all of these efforts and costs will be rendered moot if Terrace Bay is successful on the motion seeking a stay.

75. The defence of the OHSA Proceedings will divert time and resources which could be spent attending to the sale of Terrace Bay's remaining assets and other steps leading to the conclusion of the Current CCAA Proceeding, which would better serve the interests of Terrace Bay and its creditors. This harm is irreparable and incapable of being remedied in the context of the OHSA Proceedings, and any decision rendered in favour of Terrace Bay.

76. While Terrace Bay will suffer irreparable financial harm in the event an interim stay is not granted, the Crown is not prejudiced as it has the ability to continue the OHSA Proceedings against the other defendants.

It is not fair, appropriate or just to permit the OHSA Proceedings to continue in these circumstances.

D. THERE IS A CONFLICT BETWEEN THE OHSA AND THE CCAA

77. The doctrine of paramountcy has generally been interpreted to mean that where there are two validly enacted federal and provincial statutes and there is a conflict, the provincial law is rendered inoperative only to the extent of the inconsistency.

> Janis P. Sarra, Editor, *Annual Review of Insolvency Law,* 2012. (Toronto: Carswell, a Division of Thomson Reuters Canada Limited, 2012) at 454.

78. A party wishing to invoke the doctrine of paramountcy must demonstrate the existence of valid federal and provincial laws and the impossibility of their simultaneous application by reason of, among others, an operational conflict.

> *British Columbia (Attorney General) v. Lafarge Canada Inc.,* 2007 SCC 23, at para.77; Hogg, at page 454.

79. In *Sun Indalex Finance, LLC v. United Steelworkers* (“***Indalex***”), the SCC considered whether the provincial deemed trust under the *Pension Benefits Act* (Ontario) (the “**PBA**”) superseded the first priority charge granted to a debtor-in-possession (“**DIP**”) lender pursuant to the CCAA. The SCC stated that the PBA continues to apply in CCAA proceedings, subject to the doctrine of federal paramountcy.

> *Sun Indalex Finance, LLC v. United Steelworkers,* [2013] S.C.J. No. 6 (“***Indalex***”).

80. The SCC found that compliance with the PBA necessarily entailed defiance of the DIP order. On the one hand, provincial personal property security legislation required a part of the proceeds from the sale of the debtor’s assets to be paid to the pension plan administrator before other secured creditors were paid. On the other hand, the order authorizing the DIP loan provided that the DIP charge ranked in priority to all other security interests, statutory or otherwise.

> *Indalex*, at para. 60.

81. The court concluded that the federal and provincial laws were inconsistent, and found that as a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

Indalex, at para. 60.

82. The CCAA and the OHSA are validly enacted federal and provincial laws.

83. In a CCAA proceeding, creditors receive distributions from the debtor's estate in accordance with their relative priority over the real and personal assets of the debtor. Secured creditors rank ahead of unsecured creditors. The Crown is not now nor will it become a secured creditor of Terrace Bay. In the event of successful prosecution of the OHSA Proceedings, and, in that context, should a fine be imposed against Terrace Bay, the Crown will be an unsecured creditor of Terrace Bay.

84. In *Abitibi,* the SCC held that "processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament."

Abitibi, at para. 18.

85. Currently, it is not anticipated that the aggregate proceeds of sale of the property and assets of Terrace Bay will be sufficient to pay all secured creditors in full. Permitting the OHSA Proceedings to continue, at best, would help quantify unsecured claims of the Crown. At the same time, permitting the OHSA Proceedings to proceed will impair the ability of Terrace Bay to process claims of all creditors in an equitable and orderly manner, as a material portion of the estate

would be spent for the benefit of the Crown in defending the OHSA Proceedings. This does not achieve the objectives of a fair and equitable process as between creditors of an insolvent company.

86. Requiring Terrace Bay to participate in the OHSA Proceedings prejudices the recoveries available to other creditors of Terrace Bay, does not financially benefit the Crown, does not regulate the future activities of Terrace Bay and serves no broader public purpose in relation to Terrace Bay. To the extent it can be argued that the continued prosecution of the OHSA Proceedings fulfills the purposes of the OHSA, the Crown is not prevented from continuing the OHSA Proceedings against the other defendants, which actions are not affected by the stay.

87. The OHSA Proceedings should be stayed in order to preserve the priority scheme in the CCAA and allow for the orderly and equitable processing of creditor claims in Terrace Bay's CCAA proceeding.

88. The prosecution of the OHSA Proceedings against Terrace Bay in these circumstances presents a clear conflict with the stay of proceedings imposed by this Court in the Initial Order and the single proceeding model in relation to claims subject to the CCAA process that is one of the central features of the CCAA. The continued prosecution of the OHSA Proceedings in relation to Terrace Bay defeats the purpose and objectives of the CCAA.

> *Abitibi*, at para. 21; *Indalex*, at paras. 58 & 60.

PART V -- RELIEF REQUESTED

89. For the foregoing reasons, the Company respectfully requests that this Court grant an order, among other things, declaring that the OHSA Proceedings are stayed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Michael McGraw / Marc Flynn / Kristina Desimini,
Lawyers for the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

	Cases
1.	*Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67; [2012] S.C.J. No. 67
2.	*Nortel Networks Corp., Re,* 2012 ONSC 1213; 2012 CarswellOnt 3153 [Commercial List]
3.	*Confederation Treasury Services Ltd. (Bankrupt), Re,* 96 O.A.C. 75; 1997 CarswellOnt 31 (C.A.)
4.	*Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60; [2010] 3 S.C.R. 379
5.	*Lemare Holdings Ltd., Re,* 2012 BCSC 1591; 2012 CarswellBC 3294
6.	*Timminco Ltd., Re,* 2012 ONSC 2515; 2012 CarswellOnt 5390 [Commercial List]
7.	*Imperial Oil Ltd. v. Quebec (Ministry of the Environment),* 2003 SCC 58; 2003 CarswellQue 2315
8.	*RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311; 1994 CarswellQue 120
9.	*British Columbia (Attorney General) v. Lafarge Canada Inc.,* 2007 SCC 23; 2007 CarswellBC 1194
10.	*Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6; [2013] S.C.J. No. 6
	Other Authorities
11.	Janis P. Sarra, Editor, *Annual Review of Insolvency Law*, 2012. (Toronto: Carswell, a Division of Thomson Reuters Canada Limited, 2012)

SCHEDULE "B"

RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended:

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

11.02 (3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Meaning of "regulatory body"

11.1 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

11.1(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

11.1(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(*a*) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(*b*) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

11.1(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

<u>Occupational Health and Safety Act, R.S.O. 1990, C. O.1, as amended:</u>

Administration of Act

4.1 (1) The Minister is responsible for the administration of this Act. 2011, c. 11, s. 2.

Powers of Minister

4.1 (2) In administering this Act, the Minister's powers and duties include the following:

1. To promote occupational health and safety and to promote the prevention of workplace injuries and occupational diseases.
2. To promote public awareness of occupational health and safety.

3. To educate employers, workers and other persons about occupational health and safety.
4. To foster a commitment to occupational health and safety among employers, workers and others.
5. To make grants, in such amounts and on such terms as the Minister considers advisable, to support occupational health and safety. 2011, c. 11, s. 2.

Penalties

66. (1) Every person who contravenes or fails to comply with,

(a) a provision of this Act or the regulations;

(b) an order or requirement of an inspector or a Director; or

(c) an order of the Minister,

is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than twelve months, or to both.

Idem

66. (2)If a corporation is convicted of an offence under subsection (1), the maximum fine that may be imposed upon the corporation is $500,000 and not as provided therein.

Accused liable for acts or neglect of managers, agents, etc.

66. (4) In a prosecution of an offence under any provision of this Act, any act or neglect on the part of any manager, agent, representative, officer, director or supervisor of the accused, whether a corporation or not, shall be the act or neglect of the accused. R.S.O. 1990, c. O.1, s. 66.

Court File No. CV-12-9566-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985 c. C-36 AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TERRACE BAY PULP INC.

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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