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.

FACTUM OF THE RESPONDING PARTY,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTRY OF LABOUR
(Motion for Interim and Permanent Stay)
Motion to be heard: May 15, 2013

May 8, 2013

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office –Civil
720 Bay Street, 8th Floor
Toronto, Ontario M5G 2K1

Ronald Carr (LSUC# 13341F)
Tel: (416) 326-2704
Email: ronald.carr@ontario.ca

Lisa Brost (LSUC# 49279G)
Tel: (416) 325-9806
Email: lisa.brost@ontario.ca

Michael Dunn, LSUC #51512F
Tel: (416) 326-3867
Email : michael.dunn@ontario.ca

Fax: (416) 326-4181

Counsel for the Her Majesty the Queen in right of Ontario as represented by the Ministry of Labour

TO: Service List

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.

FACTUM OF THE RESPONDING PARTY HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTRY OF LABOUR
(returnable May 15, 2013)

PART I — OVERVIEW

1. Pursuant to its mandate to protect Ontario workers the Ministry of Labour (the "Ministry") commenced prosecutions under the *Provincial Offences Act* ("POA") in January 2012 and October 2012 against Terrace Bay Pulp Inc. ("Terrace Bay") and a number of individuals for violations of the *Occupational Health and Safety Act* ("OHSA"). These prosecutions relate to two separate incidents (i) an injury sustained by a Terrace Bay employee in 2011 while working in the wood handling department of the Mill; and (ii) the death of a worker in 2011 which resulted from a tank explosion. These prosecutions are collectively referred to as the "OHSA Proceedings".

2. On this motion, Terrace Bay seeks:

(i) a permanent stay of the OHSA Proceedings under subsection 11.1(4) of the *Companies' Creditors Arrangement Act* (the "CCAA"); and

(ii) an interim stay of the OHSA Proceedings, pending determination of the motion above.

3. Terrace Bay is not entitled to any of the relief sought. Section 11.1(2) of the CCAA specifically permits the continuation of these prosecutions.

4. Terrace Bay has fundamentally misunderstood the purpose of a regulatory prosecution. Prosecutions are not brought to collect money; they are commenced where there is sufficient evidence of a contravention and where it is in the public interest to proceed. Regulatory prosecutions serve important public purposes. General deterrence is particularly applicable to public welfare offences. It is essential for the proper functioning of society for citizens to expect that basic rules are enforced to protect the physical, economic and social welfare of the public.

5. Terrace Bay has also not moved for an order under s. 11.1(3) of the CCAA, presumably because it could not meet the test. This section permits a regulatory proceeding to be stayed where the debtor company can prove that a viable compromise or arrangement could not be made and it is not contrary to the public interest.

6. Instead, it purports to rely on subsection 11.1(4) of the CCAA which allows a court to stay regulatory proceedings only where the regulatory body is found to be seeking to enforce its rights as a creditor. In doing so, Terrace Bay has improperly applied the Supreme Court's recent decision in *Newfoundland and Labrador v AbitibiBowater Inc.*, ("*Abitibi*"), where the Court established a three part test for determining when an order of a regulator should be seen as a "claim" within the meaning of the CCAA.

7. Terrace Bay cannot meet any of the elements of the *Abitibi* test :

(i) There must be a liability or obligation owed to a creditor:

Section 11.1(2) of the CCAA provides that regulatory proceedings, except steps taken by a regulator to enforce a payment, are exempt from the scope of the general stay of proceedings. The OHSA Proceedings are quasi-criminal and regulatory in nature. The Ministry is carrying out its statutory mandate to prosecute those believed to be responsible for injury and death, not enforcing any rights as a creditor of Terrace Bay.

(ii) The liability or obligation must be a pre-filing claim incurred before the debtor becomes insolvent:

Any monetary "liability" or "obligation" to the Ministry on the part of Terrace Bay would arise only if, and when, a court makes a finding of guilt, enters a conviction and imposes a fine as a sentence in the OHSA proceeding. Thus, the earliest that any obligation or liability could arise would be well after the date CCAA proceedings were commenced and therefore any "claim" could only be a post-filing claim.

(iii) It must be possible to attach a monetary value to the liability or obligation:

It is not possible to attach a monetary value to Terrace Bay's liability. In order to crystallize this obligation a number of steps must be taken. A court must make a finding of guilt, enter a conviction and impose a fine. Further, in a regulatory prosecution under the POA, it is open to a court to impose a non-monetary penalty i.e. the court may suspend the passing of sentence and require the defendant to comply with terms of a probation order. On the record before this Court, it is not sufficiently certain that a monetary penalty will ultimately be imposed against Terrace Bay.

8. It is also clear that Terrace Bay is not entitled to the interim relief sought in that:

(i) interim relief is not warranted given that, as noted above, it is apparent that Terrace Bay's claim to the ultimate relief sought, a permanent stay of the OHSA Proceedings under subsection 11.1(4) of CCAA, cannot succeed;

(ii) Terrace Bay will not suffer and, in fact does not allege that it will suffer, any irreparable harm if interim relief is not granted; and

(iii) the balance of convenience does not favour granting an interim stay of proceedings.

9. Terrace Bay has also served a Notice of Constitutional Question ("NCQ"), in which it argues that the OHSA proceedings are barred by virtue of the doctrine of federal paramountcy. There is no merit to this argument. Interpreting s. 11.1(4) as urged by Terrace Bay would usurp the provinces' constitutional authority over property and civil rights, and would likely take the CCAA beyond Parliament's legislative competence over bankruptcy and insolvency.[1]

10. Terrace Bay has also not shown any conflict between the CCAA and the OHSA. Section 11.1(3) provides a mechanism for ensuring the harmonious co-existence of regulatory and CCAA proceedings, by permitting a stay where the company can show that the continued regulatory proceeding would interfere with an arrangement, and that staying the regulatory proceeding is in the public interest. This section, which Terrace Bay has not relied on, ensures that no conflict will arise. The doctrine of paramountcy is not engaged.

11. The Ministry is not seeking to take priority over other creditors of Terrace Bay. The continued performance of the Ministry's mandate will not impede any restructuring efforts, as Terrace Bay is not undertaking such efforts. Continuation of the OHSA Proceedings will simply allow the Ministry to fulfill its mandate and obligation to the public to enforce the laws of Ontario. Staying the OHSA Proceedings will impede the Ministry from carrying out its public interest mandate, risk infringing *Charter* rights of the individual defendants involved and serve no purpose other than sparing the Applicant corporation the potential inconvenience and expense of having to respond to the serious charges against it.

---

[1] Ontario served a Notice of Constitutional Question on [xx] that addresses this argument.

PART II — THE FACTS

A. The Incidents Giving Rise to the OHSA Proceedings

12. On January 13, 2011, an employee of Terrace Bay suffered two broken knees when he was caught in debarking equipment that he was cleaning (the "Incident Causing Injury"). The incident occurred at Terrace Bay's workplace on Mill Road in Terrace Bay, Ontario.

> Affidavit of Line Forestier sworn May 8, 2013 ("Forestier Affidavit"), Motion Record of Her Majesty the Queen in Right of Ontario as represented by the Ministry of Labour (the "Crown Motion Record"), Tab 1, para. 3.

13. On October 31, 2011, another worker employed by Terrace Bay was killed when a tank on the premises exploded (the "Incident Causing Death"). This explosion occurred while workers employed by another company were at Terrace Bay's facilities performing welding repairs to the tank.

> Forestier Affidavit, Crown Motion Record, Tab 1, para. 11.

14. The Ministry is responsible for enforcing the OHSA, which is a remedial public welfare statute establishing minimum occupational health and safety standards for the protection of workers. It is the main vehicle by which the enforcement of health and safety occurs at the workplace.

> Forestier Affidavit, Crown Motion Record, Tab 1, para. 4.

15. In both cases, a health and safety inspector employed by the Ministry investigated the incident and concluded that provisions of the OHSA had been contravened.

> Forestier Affidavit, Crown Motion Record, Tab 1, paras. 5 and 12.

B. The Charges and the Proceedings to Date

(i) The Proceedings Arising From the Incident Causing Injury

16. On January 10, 2012, a prosecution under the POA was commenced against Terrace Bay and a supervisor at Terrace Bay for violations of the OHSA with respect to the Incident Causing Injury (the "First OHSA Proceeding"). The two defendants were charged on a single Information. Terrace Bay was charged with five health and safety violations and the individual defendant was charged with four health and safety violations.

Forestier Affidavit, Crown Motion Record, Tab 1, para. 6.

17. On January 11, 2012, Terrace Bay was served with a Summons requiring attendance on February 24, 2012 before the Ontario Court of Justice in Thunder Bay.

Forestier Affidavit, Crown Motion Record, Tab 1, para. 7.

18. Terrace Bay's legal counsel sought and obtained Crown disclosure. Terrace Bay's legal counsel has attended all scheduled court appearances since the first appearance, including a pretrial.

Forestier Affidavit, Crown Motion Record, Tab 1, paras. 8 and 10.

C. The Proceedings Arising From the Incident Causing Death

19. On October 15, 2012, a second prosecution under the POA was commenced against five defendants for violations of the OHSA with respect to the Incident Causing Death (the "Second OHSA Proceeding"). Terrace Bay, another corporate employer and three Terrace Bay supervisors were charged on a single Information. Terrace Bay was charged with three health and safety violations. Three individuals employed by Terrace Bay were also each charged with two health and safety violations.

Forestier Affidavit, Crown Motion Record, Tab 1, paras. 13 to 15.

20. Each defendant was served with a Summons requiring attendance on November 23, 2012 before the Ontario Court of Justice in Thunder Bay.

Forestier Affidavit, Crown Motion Record, Tab 1, para. 16.

21. Terrace Bay's Insolvency Counsel sent the Ministry a letter dated November 16, 2012 requesting that both of the prosecutions under the OHSA be adjourned for five months, to the end of April 2013, to allow Terrace Bay to bring a motion under the CCAA to stay the prosecutions. This motion to stay the prosecution was to be brought at the same time as the motion to extend the stay of proceedings. The Ministry responded that it would oppose this adjournment request as the OHSA Proceedings must proceed in a timely manner and that there are four other defendants to the proceedings, including three individuals whose Charter rights to a timely trial could be negatively affected by such a long adjournment.

Forestier Affidavit, Crown Motion Record, Tab 1, paras. 17 and 18.

22. From November 23, 2012 to date, there have been a total of four court appearances in the Second OHSA Proceeding. Terrace Bay was represented at each of these appearances.

Forestier Affidavit, Crown Motion Record, Tab 1, paras. 20 to 25.

23. At the last attendance in the Second OHSA Proceeding, on February 11, 2013, Terrace Bay's legal counsel advised the Ministry's counsel that Terrace Bay may wish to be present at the next appearance, a pre-trial conference scheduled for May 29, 2013, and, if in attendance, would observe, but would not participate or contribute to the pre-trial conference.

Forestier Affidavit, Crown Motion Record, Tab 1, para. 25.

C. The Impact of an Interim Stay of the OHSA Proceedings

24. The granting of an interim stay will necessarily delay the prosecutions of Terrace Bay and its co-defendants. A delayed prosecution is not in the public interest.

(i) The Crown's ability to establish its case may be significantly prejudiced as witnesses become unavailable or their memories fail.

(ii) The individual defendants' right to a trial within a reasonable time may be compromised and the public, including the families of the deceased worker and the injured worker, will be denied a timely resolution of the matter.

(iii) Timely prosecutions benefit general worker health and safety as they may advance both specific and general deterrence.

Forestier Affidavit, Crown Motion Record, Tab 1, para. 26.

25. In addition to the general public interest concerns arising from a stay of the prosecutions, other third party rights will be impacted by a stay. As noted above, the rights of the individual defendants in the OHSA Proceedings to a trial within a reasonable period of time may be negatively affected if Terrace Bay is granted an interim stay. The Crown is prepared to set trial dates in the Second OHSA Proceeding but, given the uncertainty as to whether the matter is proceeding against all defendants, the judge presiding at the pre-trial may be reluctant to schedule trial dates for the co-defendants.

Forestier Affidavit, Crown Motion Record, Tab 1, para. 27.

26. The Initial Order made in these proceedings, dated January 25, 2012, specifically provides that nothing in the Order shall "affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA."

Initial Order dated January 25, 2012, para. 11.

PART III – ISSUES

27. The issue raised on Terrace Bay's motion for permanent relief is whether the Ministry in prosecuting Terrace Bay under the OHSA is seeking to enforce its rights as a creditor, such that a court may stay the OHSA Proceedings under subsection 11.1(4) of the CCAA.

28. Terrace Bay's motion for interim relief raises the following issues:

(i) whether there is a serious issue as to whether the OHSA Proceedings should be permanently stayed pursuant to section 11.1(4) of the CCAA;

(ii) whether Terrace Bay will suffer irreparable harm of a nature that cannot be quantified in monetary damages if the OHSA Proceedings are not stayed pending hearing of its motion for a permanent stay; and

(iii) whether the balance of convenience, taking into account the public interest, favours staying the OHSA Proceedings or allowing the prosecutions to continue.

PART IV – THE LAW

A. The OHSA Proceedings Do Not Involve the Enforcement of Creditor Rights

(a) Applicable statutory provisions

29. "Claim," as defined by s. 2(1) of the CCAA means any indebtedness, liability or obligation of any kind that, if unsecured, would be a claim provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* ("BIA").

> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), supra., s. 2(1).

30. Section 2 of the BIA, defines a "claim provable" as follows:

> "claim provable in bankruptcy", "provable claim" and "claim provable" include any claim or liability provable in proceedings under the this Act *by a creditor* [emphasis added].

> *Bankruptcy and Insolvency Act*, R.S.C., c. B-3, s. 2.

31. Section 121(1) of the BIA completes the definition of "claims provable":

> 121.(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred *before the day on which the bankrupt becomes bankrupt* shall be deemed to be claims provable in proceedings under this Act. [emphasis added]
>
> *Bankruptcy and Insolvency Act,* R.S.C., c. B-3, s. 121.

32. Section 11.1(2) of the CCAA specifically contemplates that notwithstanding the granting of a general stay of proceedings pursuant to s.11.02 of the CCAA, a regulator may continue to operate outside of the CCAA regime. It provides as follows:

> 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.
>
> *CCAA*, supra. s. 11.1(2).

33. Section 11.1(3) of the CCAA permits the court to order that a purely regulatory prosecution can be stayed, provided that the debtor must satisfy a two-part test. It provides as follows:

> (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.
>
> *CCAA,* supra. s. 11.1(3).

34. Section 11.1(4) of the CCAA provides:

> 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.
>
> *CCAA*, supra. s. 11.1(4).

35. A stay under subsection 11.1(4) can only be granted if there is a determination that the regulatory body at issue is seeking to enforce its rights *as a creditor*. In this case, the Ministry is not acting as a creditor with a claim to enforce. Rather, it is acting solely in its capacity *as regulator*.

36. The OHSA Proceedings fall directly within the scope of s.11.1(2). Terrace Bay asks this Court to stay a purely regulatory prosecution without meeting (or even relying on) the statutory test required by s.11.1(3). Instead of satisfying that test, Terrace Bay asks this Court to endorse a less onerous test not found in s.11.1, namely whether the remaining assets of the debtor will be depleted to the detriment of the creditors.

(b) Terrace Bay's reliance on *Nortel Networks Corporation (Re)* is misplaced

37. Terrace Bay has relied on *Nortel,* a case which was decided before *Abitibi*. Leave to appeal *Nortel* has been granted and the appeal is to be heard by the Court of Appeal on June 19, 2013 along with a companion appeal in *Northstar Aerospace (Re)*. There is good reason to doubt that either of these decisions would be decided as they were today in light of the Supreme Court of Canada's decision in *Abitibi*. The Supreme Court established a very different threshold than that used in *Nortel* for determining whether a regulatory order is properly stayed as a monetary "claim."

> *Nortel Networks Corporation (Re)*, 2012 ONSC 1213 (CanLII) at paras. 106, 107 and 122, leave to appeal granted by the Court of Appeal June 22, 2012, Crown Brief of Authorities, Tab 1.
> *Northstar Aerospace (Re),* 2012 ONSC 4423 (CanLII) at paras. 55 and 60, leave to appeal granted December 24, 2012, Crown Brief of Authorities, Tab 2.

38. The focus of the Supreme Court's analysis is not on whether the order requires the *debtor* to spend money to comply but rather on whether there is "sufficient certainty" that the *regulator* will make a claim. It is a significantly narrower test. Importantly, the Court in *Nortel* specifically found that it was not relevant to determine whether it was sufficiently certain that the

regulatory body could carry out the remediation itself, thus resulting in a debt owed to the regulatory body. This issue was held by the Supreme Court to be crucial to the proper determination of this issue.

> *Newfoundland and Labrador v AbitibiBowater Inc.*, [2012] S.C.J. No.67, at paras. 34, 36 and 61, Crown Brief of Authorities, Tab 3.

39. Further, even if *Nortel* can be reconciled with the *Abitibi* decision, it is clearly distinguishable from the matter at hand. In bringing the OHSA Proceedings, the Ministry is not forcing Terrace Bay to expend any funds or resources. Terrace Bay is not being asked to respond to any orders issued by the Ministry, as in *Nortel* and *Abitibi*, or even to a statutory obligation *per se*. The only potential expenditures with which Terrace Bay takes issue are costs arising from its response to the prosecutorial proceedings. Any time and resources that Terrace Bay expends in relation to the OHSA Proceedings will be at its sole discretion and for its sole benefit. In such circumstances, it is inconceivable that the Ministry could be considered to be acting as a creditor with respect to the OHSA Proceedings. Its activities are solely regulatory or prosecutorial in nature.

(c) The test established by the Supreme Court of Canada in *Abitibi* is not met

40. In *Abitibi,* the Supreme Court recognized that sometimes a regulator may act as creditor with the result that it is subject to the insolvency process. The majority of the Court enunciated a three-part test for determining when a regulator seeks to enforce its rights as a creditor:

(a) there must be a debt, a liability or an obligation to a <u>creditor</u>;

(b) the debt, liability or obligation must be incurred <u>before the debtor became insolvent</u>; and

(c) it must be possible to attach a <u>monetary value</u> to the debt, liability or obligation. In this regard, where the liability is contingent, the issue is whether it is "sufficiently certain" that the obligation will ripen into a financial liability owed to the regulatory body that issued the order.

Newfoundland and Labrador v AbitibiBowater Inc., supra. at para. 26-36, Crown Brief of Authorities, Tab 3.

41. It is apparent from this test that the Ministry does not have a claim that is subject to the CCAA insolvency process. None of the three requirements set out above is met in this case.

i. Terrace Bay has no liability or obligation to the Crown within the meaning of the CCAA

42. Under the first requirement of the test, the only determination that needs to be made is whether the regulatory authority has exercised its enforcement power through the issuance of an order, thereby identifying itself as a creditor, or potential creditor. No enforcement power within the meaning of the *Abitibi* test has been exercised in the present case.

Newfoundland and Labrador v AbitibiBowater Inc., supra. at para. 27, Crown Brief of Authorities, Tab 3.

43. First, the CCAA recognizes a distinction between debts, liabilities or obligations owed to creditors on the one hand and regulatory proceedings on the other. The Initial Order in these proceedings specifically provides that nothing in the Order shall "affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA." The intention in adding s.11.1 was to ensure that regulatory bodies, exercising powers for the benefit and well-being of all Canadians, would not be restricted by insolvencies from properly carrying out regulatory duties. It was intended that s.11.1 permit regulatory bodies to continue to prosecute debtor companies for failings under the relevant legislation.

CCAA, supra., s. 11.1(1).
Industry Canada, Corporate and Insolvency Law Policy Directorate, "Bill C-55: Clause by Clause Analysis", Crown Brief of Authorities, Tab 4.
Industry Canada, Corporate and Insolvency Law Policy Directorate, "Bill C-12: Clause by Clause Analysis", Crown Brief of Authorities, Tab 5.

44. To grant a stay of the prosecution against Terrace Bay would be contrary to the plain meaning of section 11.1 and would defeat the purposes for which the section was enacted.

45. Moreover, the exception recognized in section 11.1(2) is intended to permit the staying only of the "enforcement of a payment ordered by the regulatory body". The OHSA Proceedings themselves are not measures to enforce payment, but quasi-criminal proceedings aimed at prosecuting those believed to have committed unlawful acts that resulted in injury and death. The Ministry's interests with respect to the proceedings are not monetary in nature, but rather relate to intangible, non-monetary public interests, including the public interest in advancing worker health and safety and in the administration of justice.

46. It is also important to recognize that regulatory prosecutions against corporate defendants are not about recovering money. They are brought to advance the public interest, primarily through general deterrence. The purpose of an OHSA prosecution is to have a court determine whether a defendant has violated the OHSA and, if so,impose a sentence which will help to protect workers and respect the integrity of the legislative scheme.

> *R. v. Meridian Construction Inc.,* 2005 NSPC 40 at paras. 13-14, Crown Brief of Authorities, Tab 6.

47. The Ontario Court of Appeal has indicated that deterrence is particularly applicable to public welfare offences where it is essential for the proper functioning of our society for citizens to expect that basic rules are enforced to protect the physical, economic and social welfare of the public. The imposition of a financial penalty serves as an example to industry. Notably, s. 68.1 of the OHSA permits the Ministry to publish information about convictions.

> *R. v. Cotton Felts Ltd.,*[1982] O.J. No. 178 at para. 23 (C.A.), Crown Brief of Authorities, Tab 7.
> *R. v. Inco,* [2000] O.J. No. 1868 at para. 4 (C.A.). Crown Brief of Authorities, Tab 8.
> *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s.68.1.

48. This function can be achieved despite a corporate insolvency. Even where there is no real prospect that a fine could be enforced, the fact of the conviction itself and the assessment of a fine discharges the general deterrence objective. In *R. v. A-1 Mushroom Substratum Ltd.*, even though the company was bankrupt at the time of sentencing, the court imposed a fine of $200,000.

> *R. v. A-1 Mushroom Substratum Ltd.,* 2011 BCPC 458, at paras. 14, 67, Crown Brief of Authorities, Tab 9.

49. The caselaw interpreting insolvency stay provisions has also recognized a distinction between prosecuting the offence and enforcing monetary penalties that might be imposed. The Supreme Court of Canada, in interpreting the former stay provision of the *Bankruptcy Act*, held that this provision did not prohibit the making of a compensation order under the *Criminal Code*. The Court held that it is only when steps are taken to actually enforce the monetary order that the stay applies because enforcement would result in the granting of the very priorities which the *Bankruptcy Act* seeks to avoid. The Court also recognized the important public purpose that sentencing serves:

> None the less, it is worth making such a fine distinction in order to retain the integrity of the sentencing process, to preserve the rehabilitative and deterrent effect of properly made compensation orders, and to maintain the distinction between civil and criminal procedures. To require the leave of the bankruptcy courts before such an order could be made would severely limit the role of the sentencing judge which is so vital to the administration of criminal law.

> *R. v. Fitzgibbon,* [1990] 1 S.C.R. 1005 at paras. 22-24, 27, Crown Brief of Authorities, Tab 10.

50. In a Saskatchewan decision that also involved a health and safety prosecution, the Court applied the *Fitzgibbon* decision in holding that the prosecution was not barred, and ought not to be barred, by a stay of proceedings ordered under the CCAA. In so holding, the Court specifically referenced the potential impact of staying proceedings of a criminal or quasi-criminal nature in light of commercial interests, as well as the impact of such a stay on individual

co-accused. The Court also noted that the Crown was not attempting to make money through the prosecution, but rather to obtain sanctions against alleged wrongdoers.

> *Milner Greenhouses Ltd. v. Saskatchewan*, [2004] S.J. No. 264 (Q.B.) at paras. 26 and 29, Crown Brief of Authorities, Tab 11.

51. In *Re Air Canada*, an Ontario court cited *Milner Greenhouses* in holding that a stay of proceedings under the CCAA does not stay the prosecution of a quasi-criminal regulatory offence, but merely stays the enforcement of any orders arising from successful prosecutions.

> *Air Canada (Re)*, [2006] O.J. No. 5070 (S.C.J.) at para. 22, Crown Brief of Authorities, Tab 12.

52. The "enforcement of a payment" within the meaning of s.11.1 is only triggered when steps are taken to enforce a monetary penalty that has been imposed. In caselaw decided prior to the enactment of s.11.1 it was held that no obligation on the part of the entity charged arises unless and until a finding of guilt is made in the proceedings, a monetary penalty is imposed against the insolvent entity as a result and the regulator takes steps to enforce payment. Such a result is consistent with s.11.1.

> *Thow (Re)*, [2009] B.C.J. No. 1729 (S.C.) at paras. 18, 38, 41, 42 and 45, Crown Brief of Authorities, Tab 13.
> *Air Canada (Re)*, supra. at para. 32, Crown Brief of Authorities, Tab 12.
> *XI Biofuels Inc. (Re)* (2010), 33 OSCB 10963 at para. 25 (O.S.C.), Crown Brief of Authorities, Tab 14.
> *Contra Greely (Syndic de)*, [2012] J.Q. No. 5860 (S.C.), Crown Brief of Authorities, Tab 15.

ii. Terrace Bay has no "pre-filing obligation" that is subject to a stay of proceedings

53. With regard to the second branch of the *Abitibi* test, claims must be founded on monetary obligations that are incurred "before the day on which the bankrupt becomes bankrupt." Any possible liability or obligation on the part of Terrace Bay in relation to the OHSA Proceedings is not a pre-filing claim that is subject to a stay.

54. Terrace Bay wrongly contends that the trigger date is the date that the incidents occurred. The key to determining whether a pre-filing obligation exists in relation to a regulatory prosecution is the date when a monetary penalty is imposed and enforced. If that date occurs after CCAA proceedings are commenced, the liability is a post-filing claim. Monetary obligations arising in an OHSA prosecution are different from monetary obligations arising from remedial environmental orders. As the Supreme Court observed in *Abitibi*, because the date of environmental damage is difficult to pinpoint, s.11.8(9) of the CCAA provides temporal flexibility. Notably, that section presumes that the regulator has a monetary claim as it refers specifically to the costs of remedying environmental conditions.

> *Newfoundland and Labrador v AbitibiBowater Inc.*, supra. at para, 28 Crown Brief of Authorities, Tab 3.

55. That the trigger date for monetary obligations in an OHSA prosecution is not the date of the underlying incident is illustrated by the differing results in two similar decisions. In *Thow* the monetary filing was found to be a post-filing claim because the securities regulator did not make a finding and assess a fine against the bankrupt until *after* the date of bankruptcy. Conversely, in *Air Canada (Re),* the obligation owed by Air Canada to the regulator was a pre-filing claim because the regulatory body made a finding against the debtor corporation and imposed a monetary penalty *prior* to the company's commencement of CCAA proceedings.

56. Even Terrace Bay's own authorities support the Ministry's position. In *Lemare Holding Ltd.* the court endorsed the approach taken in the *Thow* case. The debtor had been issued an audit proposal letter in advance of the issuance of a formal stumpage assessment and assessment of a penalty under the British Columbia *Forest Act*. The court held that the proposed audit letter constituted a contingent claim. The court distinguished *Thow* on the basis that in *Thow* the commission had still to conduct an investigation, hold a hearing, make findings and reach a

decision. In *Lemare Holdings*, there had been a lengthy investigation, findings had been made and conclusions drawn. In the circumstances of that case, the issuance of the audit proposal letter constituted the first step in the enforcement of a payment within the meaning of s.11.1(2) of the CCAA.

> *Lemare Holdings Ltd. (Re),* [2012] B.C.J. 2218 at para. 53and 78 (S.C.), Crown Brief of Authorities, Tab 16.

57. In the present case, while the First OHSA Proceeding against Terrace Bay was commenced prior to the date of the Initial Order, no hearing has taken place, no findings have been made or conclusions drawn. That is the function of the court that tries the offences. The Second OHSA Proceeding was not even commenced until nearly eleven months after the Initial Order was made. Any fine that might be imposed in the OHSA Proceedings could at best be a post-filing claim like that in *Thow* and which is not subject to a stay of proceedings.

> *Thow (Re),* supra, at paras. 42 and 46, Crown Brief of Authorities, Tab 13.
> *Air Canada (Re),* supra. at paras. 3, 4, 31, 32 and 33, Crown Brief of Authorities, Tab 12.
> *Ross v. Ross Mining Ltd.*, 2012 YKSC 102, Crown Brief of Authorities, Tab 17.

iii. <u>It is not sufficiently certain that the prosecution of Terrace Bay will ripen into a financial obligation</u>

58. Finally, the third branch of the *Abitibi* test requires a consideration of whether it is sufficiently certain that a non-monetary regulatory order will ripen into a financial obligation owed to the regulatory body that issued the order. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative.

> *Newfoundland and Labrador v AbitibiBowater Inc.*, supra. at paras. 36 and 46 Crown Brief of Authorities, Tab 3.

59. In this case, any "claim" by the Ministry which might arise is contingent on a finding of guilt and entering of a conviction by the Ontario Court of Justice and the imposition of a fine

against Terrace Bay. Accordingly, at this time there is no "claim" to stay. These contingencies are too remote and speculative to amount to a claim.

> *Thow (Re),supra,* at paras. 18, 38, 41, 42, 45 and 46, Crown Brief of Authorities, Tab 13.
> *Air Canada (Re), supra,* at paras. 36 and 46, Crown Brief of Authorities, Tab 12.

60. Finally, Terrace Bay's claim that the Ministry is acting in a role as a creditor rather than that of a regulator or prosecutor is based in part on its mistaken understanding of the potential outcome of the prosecution. In the event that the Ministry is successful in its prosecution of Terrace Bay in the OHSA Proceedings, the court may, but not necessarily will, impose a monetary penalty against Terrace Bay. Further, should a fine be imposed under the *OHSA* against Terrace Bay, it would not be payable to the Ministry or to the Crown, but rather be collected by and payable to the Municipality of Thunder Bay. This makes it even more obvious that the Ministry is not acting as a creditor with respect to the OHSA Proceedings. The Ministry's sole role in these proceedings is that of investigator and prosecuting agent. It does not have, and cannot ultimately have, rights as a creditor to enforce with respect to any fine imposed under the OHSA.

> *Occupational Health and Safety Act*, R.S.O 1990, c. O.1, s. 66.
> *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 165.
> Memorandum of Understanding and Local Side Agreement dated August 10, 2000, Exhibit "I" to the Forestier Affidavit, Crown's Motion Record, Tab 2(I).

B. Terrace Bay is Not Entitled to Interim Relief

61. The test to be applied in determining whether an interim stay should be issued is well established: 1) are there serious issues to be determined; 2) will irreparable harm be suffered if a stay is not issued; and 3) does the balance of convenience, taking into account the public interest, favour retaining the status quo until the court has disposed of the legal issues.

> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 at para. 43, Commercial List Authorities Book.

Northstar Aerospace, Inc. (Re), 2012 ONSC 6362 (CanLII) at paras. 1 and 28, Crown Brief of Authorities, Tab 19.
Crystallex International Corporation (Re), 2012 ONSC 2125 (CanLII) at para. 96, Crown Brief of Authorities, Tab 20.

(a) Terrace Bay's Motion for a Permanent Stay Cannot Succeed

62. In determining whether to grant an interim stay, a preliminary assessment must be made of the merits of the moving party's position on the ultimate issue to be determined in order to ensure that there are interests that require interim protection.

RJR MacDonald Inc. v. Canada (Attorney General), supra., at para. 44.

63. As set out above, it is clear that Terrace Bay does not have rights that warrant interim protection. The Ministry does not have a "claim", within the meaning of the CCAA, to enforce against Terrace Bay. Further, it is plain and obvious that the OHSA Proceedings do not involve the enforcement of a creditor's rights, but rather are quasi-criminal proceedings whose aim is to advance worker health and safety and the administration of justice.

64. As Terrace Bay's motion for permanent relief cannot succeed, its motion for interim relief must also fail.

(b) Continuation of the OHSA Proceedings Poses no Harm to Terrace Bay

65. Terrace Bay will not suffer irreparable harm if the OHSA Proceedings are not stayed. In fact, Terrace Bay makes no such claim. Rather, the Company only asserts that continuation of the prosecution will cause inconvenience and require the investment of time and resources.

Affidavit of Wolfgang Gericke sworn April 18, 2013 (the "Gericke Affidavit"), Motion Record of Terrace Bay, Tab 2, at para. 96.

66. There have been numerous attendances in the OHSA Proceedings to date, including a pretrial in the First OHSA Proceedings . A representative of Terrace Bay has been present at all of these attendances. Terrace Bay has not been irreparably harmed as a result of such

appearances and will not be irreparably harmed if required to appear at the May 29, 2013 pre-trial in the Second OHSA Proceedings.

Forestier Affidavit, Crown Motion Record, Tab 1, 9 and 20 to 25.

67. Further, the OHSA Proceedings pose no risk of harm to any restructuring, as Terrace Bay is not undertaking any restructuring. Terrace Bay is not restructuring its affairs to carry on as a going concern in the future, but is rather utilizing the CCAA process to liquidate its assets, for the benefit of its creditors. As a result, the OHSA Proceedings pose no risk of disruption to a CCAA restructuring.

68. Rather, any risk of irreparable harm relates to the *granting of* the interim stay sought by Terrace Bay. As noted by the Federal Court of Canada:

> When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is guardian, suffers irreparable harm.

Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791 at p. 795. Crown Brief of Authorities, Tab 21.

(c) The Balance of Convenience and the Public Interest Militate Against Staying the OHSA Proceedings

69. The balance of convenience heavily favours denying Terrace Bay's motion for an interim stay of the OHSA Proceedings.

70. In determining the balance of convenience in a given case, a court must undertake an assessment as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

RJR MacDonald Inc. v. Canada (Attorney General), supra., at paras. 62 and 66.

71. In cases where a public authority is a party to a motion for a stay, the issue of the public interest is considered at the balancing stage of the test.

RJR MacDonald Inc. v. Canada (Attorney General), supra., at para. 81.

72. As noted, Terrace Bay's primary, if not sole, objection to the continuation of the OHSA Proceedings is that it may be forced to expend time and resources in participating in the OHSA Proceedings, to its inconvenience and at the potential expense of creditors.

Gericke Affidavit, Motion Record of Terrace Bay, Tab 2, para. 96.

73. This potential prejudice was addressed by a Saskatchewan court in determining whether occupational health and safety prosecutions should be stayed in the context of CCAA proceedings initiated by the alleged corporate wrongdoer. The company contended that unless the regulatory proceedings were stayed, it would have to divert money and manpower from its focus of creating a business plan and restructuring its affairs. The Court held that such an argument only has merit if one concludes that criminal and quasi-criminal proceedings fall within the intent and application of the CCAA. While determining that such proceedings did not fall within the intent and application of the CCAA, the Court noted that even if such proceedings were stayed by the CCAA Initial Order, it would exercise its jurisdiction to lift the stay. In this regard, it noted:

i. that the effect of lifting a stay to permit the prosecution of the regulatory charges to proceed would be minimal;
ii. that the trial dealing with the charges was months away; and
iii. the importance of having the charges dealt with expeditiously, particularly where there are individual co-accuseds.

Milner Greenhouses Ltd. v. Saskatchewan, supra., at paras. 28 and 30, Crown Brief of Authorities, Tab 11.

74. All of these considerations apply to the matter at hand and are central to the consideration of whether the balance of convenience favours granting a stay or allowing the regulatory prosecutions to proceed.

i. The sole attendance in the OHSA Proceedings with respect to which an interim stay is sought is a May 29, 2013 pre-trial attendance. As Terrace Bay's legal representative in the proceedings has advised the Ministry that Terrace Bay may only participate in this attendance as an observer, any investment of time and resources by Terrace Bay in relation to such attendance will likely be relatively insignificant.

ii. A trial date in the OHSA Proceedings has yet to be set and may well be some time away.

iii. There are defendants to the OHSA Proceedings other than Terrace Bay. Certain of Terrace Bay's co-defendants are individuals whose Charter rights may be infringed by delay in the OHSA Proceedings.

75. The detrimental impact of an interim stay on the public interest and the Charter rights of individuals tilts the balance strongly in favour of denying the interim relief sought. Such considerations must trump the concerns raised by Terrace Bay on this motion, which relate solely to the time and cost that may be associated with attending a pre-trial in the OHSA Proceedings. The balance of convenience strongly favours allowing the OHSA Proceedings to continue.

C. Constitutional principles dictate that the OHSA Proceedings ought not to be characterized as "claims" that are subject to the stay

76. The above interpretation of s. 11.1 of the CCAA is supported by the fact that the contrary interpretation would usurp the province's regulatory powers and likely take the CCAA beyond the scope of Parliament's power over "Bankruptcy and Insolvency." When faced with two plausible characterizations of a law, courts should normally choose the one which supports the law's constitutional validity. As the Supreme Court has recently held:

> ... the courts must never lose sight of the fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which

would bring about a conflict between the two statutes" (Attorney General of Canada v. Law Society of British Columbia, at p. 356). [Emphasis added].

Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, para. 75, Crown Brief of Authorities, Tab 22.
Siemens v. Manitoba (A.G.), [2003] 1 S.C.R. 6, para. 33, Crown Brief of Authorities, Tab 23.

77. The Supreme Court and Privy Council cases which have considered the meaning of the words "Bankruptcy and Insolvency" in subsection 91(21) of the *Constitution Act, 1867* have consistently interpreted the term "insolvency" as involving relations between an insolvent debtor and its creditors (including provincial Crowns in their capacity as creditors). The federal power over insolvency does not give Parliament the general power to immunize insolvent debtors from their obligations under provincial regulation.

Constitution Act, 1867 (U.K.), 29&30 Vict., c. 3, s. 91(21).
Ontario (A.G.) v. Canada (A.G.), [1894] A.C. 189, [1894] J.C.J. No. 1 (P.C.), para. 26, Crown Brief of Authorities, Tab 24.
Reference re Companies' Creditors Arrangement Act, [1934] S.C.R. 659, p. 662, 665, Crown Brief of Authorities, Tab 25.
British Columbia (A.G.) v. Canada (A.G.), [1937] A.C. 391, [1937] J.C.J. No. 9 (P.C.), para. 9, Crown Brief of Authorities, Tab 26.
Ladore v. Bennett, [1939], J.C.J. No. 1, [1939] A.C. 468 (P.C.), para. 5, Crown Brief of Authorities, Tab 27.
Alberta (A.G.) v. Canada (A.G.), [1943] J.C.J. No. 2, [1943] A.C. 356 (P.C.), para. 4, Crown Brief of Authorities, Tab 28.
Canadian Bankers Assn. v. Saskatchewan (A.G.), [1956] S.C.R. 31, p. 46, Crown Brief of Authorities, Tab 29.
Century Services Inc. v. Canada (A.G.), [2010] SCC 60, para. 12, Crown Brief of Authorities, Tab 30.

78. The federal power over bankruptcy and insolvency gives Parliament jurisdiction over the relationship between insolvent debtors and their creditors. In all other respects, the provincial legislatures retain their exclusive jurisdiction over property and civil rights. Determining whether a company must comply with provincial regulatory laws is a matter of provincial jurisdiction, unless the province has become a creditor of the insolvent debtor and thus brought itself within the scope of the federal power.[2] The CCAA, if interpreted to grant a CCAA court the power to

[2] Even then, the provincial regulatory laws continue to operate, subject only to any conflicting requirements of federal insolvency law.

release an insolvent company from its obligations to comply with provincial regulatory laws, even if the province had not become a creditor of the company, would be *ultra vires*. Such an interpretation of the CCAA is not to be preferred.

> *Constitution Act, 1867*, s. 92(13).

79. Under such an interpretation, the CCAA would not be saved by use of the incidental effects doctrine. Granting a CCAA court the ability to completely release an insolvent company from its obligation to comply with otherwise valid provincial laws would not be "a merely incidental effect," but a usurpation of provincial legislative authority. Nor would such a power be sufficiently connected to the purposes of the CCAA to be saved by the ancillary powers doctrine.

> *Canadian* Western *Bank*, supra., paras. 28, 31, Crown Brief of Authorities, Tab 22.
> *General Motors v. City National Leasing,* [1989] 1 S.C.R. 641, p. 668-69 and 683, Crown Brief of Authorities, Tab 31.
> *Québec (A.G.) v. Lacombe,* [2010] 2 S.C.R. 453, paras. 42 and 45, Crown Brief of Authorities, Tab 32.
> *Century Services Inc.*, supra., paras. 15 and 59-60, Crown Brief of Authorities, Tab 30.
> *Re Air Canada,* [2003] O.J. No. 6254 (Sup. Ct.), para. 18, Crown Brief of Authorities, Tab 33.

(a) The doctrine of paramountcy is not engaged

80. The doctrine of paramountcy arises only where there is a conflict between valid federal and provincial legislation, either because compliance with both laws is impossible (impossibility of dual compliance) or because compliance with the provincial law would frustrate the purposes of the federal law.

> *Québec (A.G.) v. Canadian Owners and Pilots Association,* [2010] 2 S.C.R. 536 ("COPA") Crown Brief of Authorities, Tab 34.

81. A proper application of s. 11.1(4), as discussed above, leads to the conclusion that the Crown is not seeking to enforce its rights as a creditor through the OHSA proceedings. There is therefore no conflict between s. 11.1(4) and the OHSA proceeding.

82. The Applicant has similarly failed to show that there could be any conflict between the CCAA and the OHSA prosecutions. As noted above, the CCAA itself provides a mechanism by which a company can establish that continued proceedings by a regulatory body should be subject to the statutory stay, notwithstanding the fact that the proceeding is not a proceeding for the enforcement of a debt (and thus not caught by s. 11.1(4)). Put differently, s. 11.1 of the CCAA contemplates the harmonious operation of both continued provincial regulation of an insolvent debtor and the application of the CCAA. Section 11.1(3) sets out the procedure for resolving provincial regulatory efforts with the proper operation of the CCAA.

83. Section 11.1(3) of the CCAA permits the court to stay a proceeding brought by a regulatory body if the company can establish that (a) a viable compromise or arrangement could not be made in respect of the company if the proceeding were to continue; and (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

84. The Applicant has made no submissions that could meet its burden under s. 11.1(3). First, there is no evidence that the continued prosecution would affect any compromise or arrangement. Second, the public interest in this case strongly favours the continued prosecution of offences under provincial health and safety statutes, for the reasons described above at paras. 46-49.

85. This is a complete answer to the Applicant's assertion at para. 85 of its factum that the OHSA proceedings will somehow impact its ability to process the claims of all creditors in an equitable manner. If this were the case, the Applicant could seek an order under s. 11.1(3). Having failed to use the process established by Parliament to ensure that provincial regulatory

proceedings do not interfere with a CCAA process, it is not open to the Applicant to argue that a conflict exists.

86. The Applicant's reliance on *Indalex* is similarly misplaced. In that case, a provincial statute sought to displace the order of priorities established by a CCAA order. No such conflict arises in this case. The continued prosecution under OHSA has no impact on any court-ordered priorities. Should the prosecution eventually result in a conviction, and should the court decide to impose a fine, the Crown accepts that the enforcement of this fine by the municipality would only be entitled to the priority of an unsecured debt.

> *Sun Indalex Finance LLC v. United Steelworkers*, 2013 SCC 6 at paras. 56-57, 60, Crown Brief of Authorities, Tab 35.

PART IV — RELIEF SOUGHT

87. The Ministry respectfully requests that this Court dismiss Terrace Bay's motions with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

May 8, 2013

Ronald Carr, Lisa Brost and Michael Dunn
Counsel for Her Majesty in Right of Ontario, As Represented by the Ministry of Labour

Schedule A – List of Authorities

1. *Nortel Networks Corporation (Re)*, 2012 ONSC 1213 (CanLII)
2. *Northstar Aerospace (Re),* 2012 ONSC 4423(CanLII)
3. *Newfoundland and Labrador v AbitibiBowater Inc.,* [2012] S.C.J. No.67
4. Industry Canada, Corporate and Insolvency Law Policy Directorate, "Bill C-55: Clause by Clause Analysis"
5. Industry Canada, Corporate and Insolvency Law Policy Directorate, "Bill C-12: Clause by Clause Analysis"
6. *R. v. Meridian Construction Inc.,* 2005 NSPC 40
7. *R. v. Cotton Felts Ltd.,* [1982] O.J. No. 178 (C.A.)
8. *R. v. Inco*, [2000] O.J. No. 1868 (C.A.)
9. *R. v. A-1 Mushroom Substratum Ltd.,* 2011 BCPC 458
10. *R. v. Fitzgibbon,* [1990] 1 S.C.R. 1005 (S.C.C.)
11. *Milner Greenhouses Ltd. v. Saskatchewan*, [2004] S.J. No. 264 (Q.B.)
12. *Air Canada (Re),* [2006] O.J. No. 5070 (S.C.J.)
13. *Thow (Re),* [2009] B.C.J. No. 1729 (S.C.)
14. *XI Biofuels Inc. (Re)* (2010), 33 OSCB 10963
15. *Greely (Syndic de),* [2012] J.Q. No. 5860 (S.C.)
16. *Lemare Holdings Ltd. (Re),* 2012 B.C.J. 2218 (S.C.)
17. *Ross v. Ross Mining Ltd.,* 2012 YKSC 102 (S.C.)
18. *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (Commercial List Authorities Book)
19. *Northstar Aerospace, Inc. (Re),* 2012 ONSC 6362 (CanLII)
20. *Crystallex International Corporation (Re),* 2012 ONSC 2125 (CanLII)
21. *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791
22. *Canadian Western Bank v. Alberta,* [2007] 2 S.C.R. 3

23. *Siemens v. Manitoba (A.G.),* [2003] 1 S.C.R. 6

24. *Ontario (A.G.) v. Canada (A.G.),* [1894] A.C. 189, [1894] J.C.J. No. 1 (P.C.)

25. *Reference re Companies' Creditors Arrangement Act,* [1934] S.C.R. 659

26. *British Columbia (A.G.) v. Canada (A.G.),* [1937] A.C. 391, [1937] J.C.J. No. 9 (P.C.)

27. *Ladore v. Bennett,* [1939], J.C.J. No. 1, [1939] A.C. 468 (P.C.)

28. *Alberta (A.G.) v. Canada (A.G.),* [1943] J.C.J. No. 2, [1943] A.C. 356 (P.C.)

29. *Canadian Bankers Assn. v. Saskatchewan (A.G.),* [1956] S.C.R. 31

30. *Century Services Inc. v. Canada (A.G.),* [2010] SCC 60

31. *General Motors v. City National Leasing,* [1989] 1 S.C.R. 641

32. *Québec (A.G.) v. Lacombe,* [2010] 2 S.C.R. 453

33. *Re Air Canada,* [2003] O.J. No. 6254 (Sup. Ct.)

34. *Québec (A.G.) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536

35. *Sun Indalex Finance LLC v. United Steelworkers*, 2013 SCC 6

Schedule B – Statutes Cited

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 2.1, 11.1(1-4)

INTERPRETATION

2. (1) In this Act,…. "claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

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.

(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.

(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.

(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.

2. *Bankruptcy and Insolvency Act*, R.S.C., c. B-3, s. 2, 121(1)

INTERPRETATION

2. In this Act,…"claim provable in bankruptcy", "provable claim" and "claim provable" include any claim or liability provable in proceedings under the this Act by a creditor;

121.(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred *before the day on which the bankrupt becomes bankrupt* shall be deemed to be claims provable in proceedings under this Act.

3. *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s.66 and 68.1

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.

(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.

68.1 (1) If a person, including an individual, is convicted of an offence under this Act, a Director may publish or otherwise make available to the general public the name of the person, a description of the offence, the date of the conviction and the person's sentence.

(2) Authority to publish under subsection (1) includes authority to publish on the Internet.

(3) Any disclosure made under subsection (1) shall be deemed to be in compliance with clause 42 (1) (e) of the *Freedom of Information and Protection of Privacy Act.*

4. *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 165

165. (1) When a transfer agreement is in force, the municipality has power to collect fines levied in respect of proceedings under Parts I, II and III, including costs under section 60, surcharges under section 60.1 and fees referred to in section 66.2, and to enforce their payment; collection and enforcement shall be carried out in the manner specified in the agreement.

(2) Subsection (1) also applies to fines and fees imposed under the *Contraventions Act* (Canada).

(3) Subsections 69 (6) to (21) do not apply to fines that are governed by the agreement.

(4) Fines that are governed by the agreement are payable to the municipality and not to the Minister of Finance.

5. Constitution Act *1867* (U.K.), 29&30 Vict., c. 3, s. 91(21) and 92(13)

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

21. Bankruptcy and Insolvency.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

13. Property and Civil Rights in the Province.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

FACTUM

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office –Civil
720 Bay Street, 8th Floor
Toronto, Ontario M5G 2K1

Ronald Carr (LSUC# 13341F)
Tel: (416) 326-2704
Email: Ronald.carr@ontario.ca

Lisa Brost (LSUC# 49279G)
Tel: (416) 325-9806
Email: lisa.brost@ontario.ca

Michael Dunn, LSUC #51512F
Tel: (416) 326-3867
Email : michael.dunn@ontario.ca

Fax: (416) 326-4181

Counsel for the Her Majesty the Queen in right of Ontario as represented by the Ministry of Labour