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.

NOTICE OF CONSTITUTIONAL QUESTION

(MOTION RETURNABLE MAY 15, 2013)

Her Majesty the Queen in Right of Ontario, as represented by the Minister of Labour ("Ontario") intends to question the constitutional validity of the definition of "claim" in section 2 and of sections 6, 11, 11.02, 11.1, 11.8(8)-(9), and 36 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA") and the constitutional validity of the definitions of "claim provable in bankruptcy" and "creditor" in section 2 and of section 121 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), if these sections are interpreted as urged by the Applicant.

The question is to be argued on May 15, 2013, at 10 a.m., at 330 University Avenue, Toronto ON M5G 1R7.

The following are the material facts giving rise to the constitutional question:

1. On January 13, 2011, a non-fatal injury occurred to a worker employed by Terrace Bay Pulp Inc. ("Terrace Bay"). A prosecution under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("OHSA") was commenced against Terrace Bay by an Information sworn on January 10, 2012.

2. On October 31, 2011, a worker employed by Terrace Bay was killed when a tank measuring about 90 feet high exploded. A prosecution of Terrace Bay under OHSA was commenced by an Information sworn on October 15, 2012.

3. On January 25, 2012, Terrace Bay sought protection from its creditors pursuant to the Initial Order made under the CCAA. The Initial Order provided 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".

4. On April 30, 2013, Terrace Bay served a Notice of Constitutional Question which questioned the applicability of the OHSA because of an alleged conflict between the CCAA and OHSA.

5. Section 11.1 of the CCAA provides that:

> 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.
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> (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.

6. Terrace Bay has relied only on ss. 11.1(4), and seeks a declaration that Ontario is seeking to enforce its rights as a creditor.

The following is the legal basis for the constitutional question:

7. If the CCAA is interpreted in a way that would subject the OHSA prosecutions to a stay of proceedings without an order properly made under subsection 11.1(3) or that would allow a prosecution under the OHSA to be treated as a "claim" for purposes of the CCAA, the CCAA (and the sections of the BIA it incorporates by reference) would be *ultra vires* the federal power over bankruptcy and insolvency.

8. The federal power over bankruptcy and insolvency is concerned with liquidating bankrupt companies and allowing insolvent companies to avoid bankruptcy by coming to an arrangement with their creditors (including provinces acting as creditors). If every act taken by a regulatory body that could require a company to pay money is a "claim," irrespective of whether the province has become a creditor of the insolvent company, the CCAA would be *ultra vires* Parliament and would be such an intrusion into provincial legislative jurisdiction that it could not be saved by the ancillary powers doctrine.

9. Similarly, if section 11.1, contrary to its literal wording, allows a stay issued under the CCAA to apply to every action taken by a regulatory body that could require a company to pay money, irrespective of whether the province has become a creditor of the insolvent company, without the need to meet the test set out in subsection 11.1(3), the CCAA would be *ultra vires* Parliament and would be such an intrusion into provincial legislative jurisdiction that it could not be saved by the ancillary powers doctrine.

May 7, 2013

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