

**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

NOTICE OF CONSTITUTIONAL QUESTION

THE APPLICANT, Terrace Bay Pulp Inc., intends to question the constitutional applicability of the *Occupational Health and Safety Act*, R.S.O. 1990, C. O.1, as amended (the "**Act**") and specifically the OHSA Proceedings (as defined below), to the proceeding commenced by the Applicant under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (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**"). In particular, the Applicant wishes to pose the following question:

- (i) Is there a conflict between the CCAA and the statutory requirements to which the Applicant is subject pursuant to the Act?

The question is to be argued on Wednesday, May 15, 2013, at 10:00 a.m., at 330 University Avenue, 8th Floor, Toronto, Ontario.

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

1. 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 the Applicant and, among others, Gino LeBlanc, in the Ontario Provincial Offences Court (Thunder Bay) (the “**First OHSA Proceeding**”), in connection with alleged violations under the Act.

2. 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 the Applicant 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 Act. The Second OHSA Proceeding was subsequently transferred to Ontario Provincial Court (Thunder Bay).

3. The Applicant is insolvent. It commenced proceedings under the CCAA in order to find a purchaser for its business and other assets. The business assets have now been sold. All of the Applicant’s former employees, to the extent not assumed by the purchaser on the sale, have been terminated.

4. The Applicant continues under CCAA protection in order to complete a process to sell its remaining non-business assets, principally real estate holdings.

5. The OHSA Proceedings are very complex. The incidents giving rise to the OHSA Proceedings resulted in serious injury and, in the case of the Second OHSA Proceeding, loss of life. Each of the OHSA Proceedings involves multiple defendants.

6. In the event that the Crown secures a conviction against the Applicant in either of the OHSA Proceedings, a fine would be levied against the Applicant. Section 66(2) of the Act

provides that the maximum fine that may be imposed upon a corporation is \$500,000. This excludes any applicable victim fine surcharges. Any fine would constitute an unsecured debt in the estate of the Applicant, which would be subject to prior creditor claims including the claims of creditors under a promissory note secured against all assets, property and undertakings, real and personal, of the Applicant, for the benefit of the Applicant's unsecured creditors in a separate CCAA proceeding commenced by the Applicant on March 11, 2009 (the "**Plan Note**"). Any resulting fine would likely remain unpaid.

7. Any amounts spent by the Applicant in defending the OHSA Proceedings will reduce the funds available for distribution to the Applicant's creditors, including the Plan Note creditors. If the OHSA Proceedings are not stayed, the costs of the Applicant's defence will be borne not by the Applicant but by its third party creditors, who will suffer a diminishment of the proceeds ultimately available for distribution by the Applicant by reason of the costs and expenses that the Applicant will be required to incur to defend the OHSA Proceedings.

8. The court-appointed Monitor, Ernst & Young Inc., (the "**Monitor**") supports the Applicant's request for an Order from the Court staying the OHSA Proceedings as against the Applicant only, as well as an interim order pending the final disposition of this matter.

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

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

11. On May 29, 2013, a procedural pre-trial is scheduled in connection with the Second OHSA Proceeding. The pre-trial requires 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).

12. If the Applicant is required to participate in the OHSA Proceedings, it will need to retain counsel, who will be required to expend a material amount of time in reviewing documents, preparing a pre-trial brief and otherwise take steps in relation to the defence of the OHSA Proceedings, all of which will burden the Applicant with more expenses and diminish the proceeds available for distribution to its creditors.

The following is the legal basis for the constitutional question:

13. The doctrine of paramountcy has generally been interpreted to mean that where there are two validly enacted 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.

14. In *Sun Indalex Finance, LLC v. United Steelworkers* (“*Indalex*”), the Supreme Court of Canada (the “SCC”) considered whether the provincial deemed trust under the *Pension Benefits Act*, R.S.O. 1990, C. P.8 (the “PBA”) superseded the first priority charge granted to a

debtor-in-possession (“**DIP**”) lender by the court under the authority of the CCAA. The court held 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*”).

15. The SCC found that compliance with the PBA necessarily entailed defiance of the DIP order made under federal law. According to the SCC, 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.

16. The SCC 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.

17. The CCAA and the Act are validly enacted federal and provincial laws.

18. 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 a secured creditor of the Applicant. In the event of successful prosecution of the OHSA Proceedings, and, in that context, should a monetary award be made against the Applicant, the Crown will be an unsecured creditor of the Applicant.

19. In *Newfoundland and Labrador v. AbitibiBowater Inc.* (“**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.”

Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67 (“**Abitibi**”),
at para. 18.

20. At the current time, it is not contemplated that the aggregate proceeds of sale of the property and assets of the Applicant 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. On the other hand, permitting the OHSA Proceedings to proceed will impair the ability of the Applicant 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.

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

22. The prosecution of the OHSA Proceedings against the Applicant 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 the Applicant defeats the purpose and objectives of the CCAA.

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

Date: April 30, 2013

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Proceeding commenced at Toronto

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