

CITATION: Terrace Bay Pulp Inc. (Re), 2013 ONSC 5111
COURT FILE NO.: CV-12-9566-00CL
DATE: 20130809

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

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

**RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TERRACE BAY PULP INC., Applicant**

BEFORE: MORAWETZ J.

COUNSEL: Kristina Desimini and Michael McGraw, for Terrace Bay Pulp Inc.

Sheryl Seigel, for Ernst & Young Inc., Monitor

**Ronald Carr, Lisa Brost and Michael Dunn for Her Majesty The Queen in
Right of Ontario as Represented by the Ministry of Labour**

Jonathan Edge (student-at-law), for the Township of Terrace Bay

HEARD: MAY 15 AND JUNE 5, 2013

ENDORSEMENT

[1] Terrace Bay Pulp Inc. (“Terrace Bay” or the “Applicant”) brought this motion for an order declaring that the proceeding known as *R. v. Terrace Bay Pulp Inc. and Gino LeBlanc*, brought by the Ministry of Labour (the “Ministry”) against the Applicant, (the “First OHS Proceeding”), and the proceeding known as *R. v. Terrace Bay Pulp Inc., Venschore Mechanical Ltd., Joseph Mykietyn, Arthur Szczepaniak and Alain Zborowski*, brought by the Ministry against the Applicant, (the “Second OHS Proceeding”, and together with the First OHS Proceeding, the “OHS Proceedings”), in connection with alleged violations under the *Occupational Health and Safety Act (Ontario)* (the “OHS”), are stayed.

[2] Terrace Bay obtained protection from its creditors under the *Companies' Creditors Arrangement Act* (“CCAA”) on January 25, 2012. On that date, an order (the “Initial Order”) was granted and Ernst & Young Inc. was appointed as Monitor.

- [3] These CCAA proceedings are hereinafter referred to as the “Current CCAA Proceeding”.
- [4] Previously, by order granted March 11, 2009, Terrace Bay filed for and obtained protection under the CCAA, (the “First CCAA Proceeding”).
- [5] On September 15, 2010, Terrace Bay implemented a Plan of Compromise in the First CCAA Proceeding (the “Plan”). The Plan contemplated the issuance of a promissory note (the “Plan Note”) for the benefit of holders of proven unsecured claims in the First CCAA Proceeding (collectively, the “Plan Note Beneficiaries”).
- [6] The Plan Note Beneficiaries shared *pari passu* in the Plan Note, which is secured against all assets and property of Terrace Bay (the “Property”).
- [7] On January 10, 2012, the First OHSA Proceeding was commenced, in connection with alleged violations under the OHSA. The First OHSA Proceeding has been discontinued as against all defendants other than Terrace Bay and Gino LeBlanc.
- [8] On October 15, 2012, the Second OHSA Proceeding was commenced, in connection with further alleged violations of the OHSA.
- [9] Terrace Bay is insolvent. It commenced the Current CCAA Proceeding in order to conduct a marketing and sales process for its business and non-business assets. In July 2012, Terrace Bay sold its operating assets relating to its pulp mill (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, have been terminated.
- [10] Terrace Bay is currently evaluating Letters of Intent received with respect to its non-business assets. It has obtained a stay of proceedings in the Current CCAA Proceeding until October 31, 2013.
- [11] The incidents giving rise to the OHSA Proceedings occurred prior to the commencement of the Current CCAA Proceeding.
- [12] 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. 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.
- [13] The Second OHSA Proceeding was commenced 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. Charges were laid against Terrace Bay, Venschore 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.

[14] 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").

[15] Expenses related to the defence of OHS 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 are subject to distribution only upon further order of the court.

[16] The issues on this motion are as follows:

- (a) Are the OHS Proceedings stayed by the Initial Order?
- (b) In light of the position of the Ministry that the OHS Proceedings are not stayed pursuant to the Initial Order, should the OHS Proceedings be stayed pursuant to section 11.1(4) of the CCAA?
- (c) Is there a conflict between the CCAA and the statutory requirements to which Terrace Bay is subject pursuant to the OHS.

[17] Pursuant to Section 11.02(2) of the CCAA, a broad stay of proceedings was granted, which is reflected at paragraphs 10 and 11 of the Initial Order.

[18] Section 11.1(1) of the CCAA defines a "regulatory body". It is acknowledged that the Ministry, in this case, is a "regulatory body" for the purposes of Section 11.1, as it is responsible for administering the OHS.

[19] Section 11.1(2), (3) and (4) of the CCAA read:

(2) Regulatory bodies – order under section 11.02 - 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) Exception – 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 of the regulatory body be affected by the order made under section 11.02.

(4) Declaration – enforcement of a payment – 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 that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

[20] The Applicant takes the position that the only remedy available to the Ministry 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). Terrace Bay takes the position that any fine ordered upon a conviction of Terrace Bay in either of the OHSA Proceedings would be a financial obligation of Terrace Bay and the Ministry would be an unsecured creditor in respect of such amounts, and its claim would be subject to the payment of prior claims.

[21] Further, the costs and expenses, including legal expenses, that would be incurred by Terrace Bay in defending the OHSA Proceedings would be significant and would be borne wholly by Terrace Bay's creditors, in the form of diminished proceeds available for distribution by Terrace Bay. Terrace Bay takes the position that in light of its insolvency in the Current CCAA Proceeding, it must consider the interests of these stakeholders in determining whether to defend the OHSA Proceedings.

[22] Terrace Bay further submits that the Ministry has exercised its enforcement power 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, counsel submits, available to the Ministry against Terrace Bay, should it be successful in prosecuting Terrace Bay, is a monetary fine. As such, the Ministry is enforcing its right to the creditor Terrace of Bay. Counsel submits that such a claim falls to be administered as a claim against Terrace Bay in the Current CCAA Proceeding and should be stayed.

[23] Terrace Bay submits that the stay of proceedings provided for in 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 Ministry is seeking to enforce its rights as a creditor and that the enforcement of such right be stayed.

[24] In response, the Ministry submits that Terrace Bay has fundamentally misunderstood the purpose of a regulatory prosecution in that 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.

[25] Further, the Ministry points out that Terrace Bay has not moved for an order under Section 11.1(3) of the CCAA, submitting that Terrace Bay could not meet the test. Section 11.1(3) permits a regulatory proceeding to be stayed where the debtor company can prove that a viable compromise or arrangement could not be made and is not contrary to the public interest.

[26] Instead, counsel to the Ministry submits that Terrace Bay purports to rely on section 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, the Ministry submits that Terrace Bay has improperly applied the Supreme Court's recent decision in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 ("Abitibi").

[27] The Ministry takes the position that the OHS Proceedings do not involve the enforcement of creditor rights, stating that 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.

[28] The Ministry takes the position that the OHS Proceedings fall directly within the scope of 11.1(2).

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

[30] The Supreme Court of Canada set out the following three requirements for determining when an order of a regulator should be seen as a "claim" within the meaning of the CCAA:

- (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.

[31] The Applicant takes the position that the three requirements set out in Abitibi are satisfied. With respect to the first requirement, counsel to the Applicant submits that the Supreme Court of Canada in Abitibi held that the only relevant determination is whether the regulatory body has exercised its enforcement power against the debtor.

[32] In this case, counsel submits that the Ministry has exercised its enforcement power against Terrace Bay by commencing the OHS Proceedings, requiring Terrace Bay to incur a financial obligation in order to defend itself in the OHS Proceedings.

[33] In response, the Ministry takes the position that a monetary liability or obligation would arise only if, and when, a court makes a finding of guilt, and enters a conviction and imposes a fine as a sentence in the OHS Proceeding. Further, counsel submits that it is not possible to attach a monetary value to Terrace Bay's liability. In order to crystalize the 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 *Provincial Offences Act*, 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. Counsel submits that on the record, it is not sufficiently certain that a monetary penalty will ultimately be imposed against Terrace Bay.

[34] In support of its position, the Applicant relies upon Nortel Networks Corporation (Re), 2012 ONSC 1213 and Northstar Aerospace (Re), 2012 ONSC 4423. Appeals of both decisions were argued concurrently at the Court of Appeal for Ontario and the decision is currently under reserve.

[35] In Nortel, one of the points considered was whether the actions of the Ministry of the Environment (“MOE”) required Nortel to respond in a way that caused Nortel to incur a financial obligation. A similar issue arose in Northstar. I held in both cases, that the actions of the MOE would require the debtor to incur a financial obligation.

[36] In my view, the issue in this case is different. It seems to me that, the OHSa Proceedings do not, at this stage, require Terrace Bay to respond in a way that causes it to incur a financial obligation.

[37] There are two potential financial obligations that have to be considered. The first is whether OHSa Proceedings could result in a financial penalty being imposed as against Terrace Bay. This has not yet been determined. This situation is to be contrasted with Nortel and Northstar, where, in response to actions taken by the MOE, the debtors, both Nortel and Northstar, would be required to expend resources in response to the actions taken by the MOE. In this case, there is another step to be taken, i.e., there would have to be a finding of guilt before any penalty could be imposed.

[38] The second type of financial obligation is the expenditure of resources to defend its actions. I do not doubt that if Terrace Bay makes a decision to defend the action, it will incur a financial obligation. However, it does, in this case, have a choice. It can choose to either defend or not to defend the OHSa Proceedings. That is not to suggest that the choice is an enviable one. Clearly it is not. However, the fact remains that Terrace Bay can either choose to incur a financial obligation, by defending, or not to incur a financial obligation, by not defending. In this respect, the Nortel and Northstar decisions are distinguishable.

[39] At this stage, the OHSa Proceedings do not force or require Terrace Bay to expend any funds or resources. Terrace Bay is not being asked to respond to any orders issued by the Ministry. Further, any time and resources that Terrace Bay expends in relation to the OHSa Proceedings, are at its sole discretion.

[40] At this stage, it seems to me that the Ministry cannot be considered to be acting as a creditor with respect to the OHSa Proceedings. Its activities, at this stage, are regulatory or prosecutorial in nature.

[41] As a result, I have concluded that the first part of the Abitibi test has not been met.

[42] Having reached this conclusion, it is unnecessary to address the second and third part of the Abitibi test.

[43] Terrace Bay also served a notice of constitutional question, in which it argues that the OHSa Proceedings are barred by virtue of the doctrine of federal paramourcy.

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

[45] I have concluded that the Crown is not, at this stage, seeking to enforce its rights as a creditor, through the OHS Proceedings. Thus, it seems to me that there is no conflict between 11.1(4) of the CCAA and the OHS Proceeding and there is no merit to the submissions put forth by Terrace Bay on this issue.

[46] In the result, the motion of Terrace Bay for an order declaring that the OHS Proceedings are stayed is dismissed.

[47] The parties are encouraged to resolve the issue of costs, but failing such agreement, brief written submissions to a maximum of 3 pages, may be filed within 30 days.

MORAWETZ J.

Date: August 9, 2013