

# Can Government Bring OHS Enforcement Action Against Bankrupt Employer?



## SITUATION

An employer operating a mill has two safety incidents within 10 months, one of which involved a worker fatality. The government brings two separate OHS proceedings against the employer. The employer argues that the government can't bring these enforcement actions because it's in the midst of a bankruptcy proceeding. It says the government's only remedy if it's convicted of the OHS offences will be a fine, which it won't be able to pay because it's insolvent. Additionally, the employer says it has already sold all its business assets, no longer operates the mill, and its cash and non-business assets must first be used to pay secured creditors. And those creditors will be harmed if it has to spend money defending itself against the OHS charges. So the employer asks the court to dismiss these charges.

## QUESTION

**Should the court dismiss the OHS charges'**

- A. No, because at this stage, the employer isn't being forced to spend any money.
- B. No, because the government, as a creditor, would be entitled to collect any fine from the employer's assets.
- C. Yes, because the employer can't afford to defend itself.
- D. Yes, because the employer wouldn't be able to pay any fine imposed if it's convicted.

ANSWER:

**A. The OHS charges shouldn't be dismissed because, at this stage of the proceedings, the employer isn't required to spend any money.**

## EXPLANATION

This hypothetical is based on an Ontario Superior Court of Justice decision in which the court refused to dismiss two OHS proceedings against a mill operator despite a pre-existing bankruptcy filing. The court said the proceedings, at their current stage, didn't require the employer to spend any money or resources. For example, the court hadn't issued any orders against it yet and the employer had the discretion to decide whether to spend any money to defend itself in the OHS proceedings'such expenditure wasn't mandatory. The court also added that the proceedings were regulatory or prosecutorial and were brought in the public interest'not to collect any payment from the employer. Bankruptcy law can't stop a regulatory body from investigating a bankrupt employer or prosecuting it for regulatory violations, the court explained. Thus, the court said the proceedings should continue.

## WHY THE WRONG ANSWERS ARE WRONG

**B is wrong** because the government isn't acting as a creditor. A creditor is an entity owed money by another party. A regulatory body seeking to investigate violations, such as the agency that enforces the OHS laws, isn't a creditor. Additionally, bankruptcy law governs how creditors get paid by bankrupt debtors. So even if the government was acting as a creditor, it would be subject to those rules and not guaranteed to collect a fine. In this case, a court hasn't imposed any fine on the employer yet or even determined if a fine paid to the government would be warranted. The government is just seeking to enforce the OHS regulations, which is in the public interest'especially after a workplace fatality. Thus, it's inaccurate to classify the government as a creditor at this time.

**C is wrong** because the employer doesn't need to pay to defend itself. OHS laws don't obligate an employer to spend any money or resources to defend itself against allegations it has violated the law. An employer has the discretion to decide whether to spend money in its defense'it can always plead guilty to the charges. So the employer here can't claim obligations under bankruptcy law are preventing it from responding to the OHS violations. Thus, the OHS proceedings can continue and the employer can choose whether to defend itself in the action.

**D is wrong** because whether the employer could pay a fine if it's convicted has no bearing on whether an OHS prosecution should proceed. The only question at this stage is whether the employer violated the OHS law. An employer can't escape examination of that question by claiming financial distress. In addition, if an employer is convicted, there are other penalties the court can impose besides a fine, such as requiring it to comply with the terms of a probation order. And in the sentencing stage, the court may consider the employer's ability to pay when setting a fine. Here, the government is seeking to enforce OHS law and needn't consider whether the employer is financially capable of satisfying any fines that may be imposed for its violations. Thus, the court shouldn't dismiss the proceedings.

## SHOW YOUR LAWYER

*Terrace Bay Pulp Inc. (Re)*, [2013] ONSC 5111 (CanLII), Aug. 9, 2013