NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREEK COAL CORP., NEW WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS

SUBMISSIONS OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST (THE "1974 PLAN")

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I. INTRODUCTION

1. The United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**") is a creditor of the Walter Canada Group (as defined below) by reason of a claim properly governed by U.S. law, specifically ERISA (the "**1974 Plan Claim**"). It is a basic principle of insolvency law that a foreigner with a proven foreign claim stands in the same position as a domestic creditor with a proven domestic claim.[1] Where facts exist such that U.S. law is the "proper law of the obligation", a Canadian entity is liable for withdrawal liability under ERISA.

2. The deficient evidentiary record militates against the Court disposing of the preliminary issues in favour of the Walter Canada Group and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 (the "**Steelworkers**"). However, the evidence that is properly before this Court favours the 1974 Plan on all three preliminary issues.

3. Addressing the first preliminary issue raised by the Walter Canada Group, the first step to determine whether U.S. or Canadian law applies to the 1974 Plan Claim is to characterize the claim. The objective of characterization is to find a rule that is fair to the parties. This requires an understanding of the facts and circumstances surrounding the claim.

4. The 1974 Plan's characterization of its claim rests on settled law. The cases on which the 1974 Plan relies are cases where the precise issue decided was characterization for choice of law purposes.

5. Those cases specifically address the situation where, as in this case, a statute confers a right of action against an entity that itself was not a party to the contract to which the claim relates. That unbroken line of authority establishes the following: where, as here, the "essential nature" of a claim authorized by statute "is to enforce the terms of [a] contract,"[2] then, for choice of law purposes, the correct characterization of the claim is

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[1] *Teleglobe (Re)*, [2005] O.J. No. 528 (S.C.J.) 1974 Plan's Book of Authorities ["1974 Plan BOA"], Tab 54 at para. 8; and *Halsbury's Laws of England, Conflict of Laws*, vol. 8(1), 4th ed. (Reissue) (London, UK: Butterworths, 1996) at 710, 1974 Plan BOA, Tab 109 at para. 980.

[2] *Through Transport Mutual Assurance Association (Eurasia) Ltd. v. New India Assurance Co Ltd.*, [2004] EWCA Civ 1598, 1974 Plan BOA, Tab 66 at para. 59 [*Through Transport*].

as a claim in contract. That is so notwithstanding that the defendant was not a party to the contract.

6. In contrast to the cases directly on point which support the 1974 Plan's characterization of the 1974 Plan Claim, neither the Walter Canada Group nor the Steelworkers is able to cite a single case which supports characterizing a claim seeking to impose civil liability on a corporation as one "implicating legal personality".[3]

7. In applying the choice of law rule for contract, courts look for the forum with the "closest and most real connection" to the underlying claim. Applying the law with the "closest and most real connection" to the underlying claim reflects a trend towards the use by courts of a principled approach to choice of law.

8. The 1974 Plan Claim is most closely connected with the law of the United States. The Walter Canada Group and the Steelworkers contend that there is no intersection between the Walter Canada entities and their American affiliates. Notwithstanding such protestations, the record – even in its incomplete state – indicates significant connections. The evidence filed by the Walter Canada Group shows that Walter Canada Group's controlling minds were located in the United States at all relevant times. Such evidence further shows that the Walter Canada Group operated the Canadian entities as part of an integrated global enterprise out of their head offices in Birmingham, Alabama. The acquisition of the Walter Canada Group by Walter Energy, Inc. leveraged U.S. assets to acquire assets held in Canadian subsidiaries, removing over US$2 billion in value from the United States to Canada.

9. On the second preliminary issue raised by the Walter Canada Group, application of ERISA to the 1974 Plan Claim is a domestic application of the statute. On the evidence before the Court on this application, the only available conclusion is that there is no problem of extraterritoriality.

10. The experts on both sides cite the 1997 opinion ("**PBGC Opinion 97-1**") of the Pension Benefit Guaranty Corporation (the "**PBGC**"), the United States federal agency

[3] Written submissions of Walter Canada Group, dated December 12, 2016 ["WCG Written Submissions"] at para. 57.

responsible for administering ERISA.[4] The PBGC's view, entitled to deference under U.S. law, is that circumstances such as those at issue in this case do "not implicate extraterritorial application of ERISA."[5] The 1974 Plan's expert reaches the same conclusion: "all of the events involved in the creation, computation and assertion of the withdrawal liability have taken place within the United States."[6]

11. The Walter Canada Group's expert(s) express no conclusion to the contrary.

12. The result is that the Walter Canada Group and the Steelworkers ask the court to reach a conclusion that:

    (a) none of the experts in U.S. law in this case reached,

    (b) is contrary to the opinion of the only expert in the case who has expressed a conclusion on the point, and

    (c) is contrary to the considered opinion on the very point of the United States federal agency responsible for ERISA, and whose opinion is entitled to deference under U.S. law.

13. In any circumstances a Canadian court should be slow to reject the considered opinion on the operation of ERISA of the U.S. "expert agency charged by Congress with interpreting" ERISA.[7] But it ceases even to be an option where, as in this case, there is no contrary opinion in evidence and indeed there is expert opinion evidence agreeing with it.

14. Moving to the third preliminary question raised by the Walter Canada Group, it is a high legal bar for the Walter Canada Group or the Steelworkers to prove that application of U.S. law to the 1974 Plan Claim is contrary to public policy. ERISA does not offend an essential public or moral interest, nor is it contrary to Canadian conceptions of essential justice and morality. The notion that a legislature may decide that others are to

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[4] Expert Report of Judith Mazo, served November 24, 2016 ["Mazo Report"], 1974 Plan's Book of Evidence ["1974 Plan BOE"], vol. 2, Tab 2 at 17, para. 51; and Expert Report of Marc Abrams, served November 14, 2016 ["Abrams Report"], Walter Canada Group's Book of Evidence ["WCG BOE"], vol. 6, Tab 20 at 10.

[5] PBGC Office of General Counsel, Opinion 97-1, dated May 5, 1997 ["PBGC Opinion"] 1974 Plan's Book of Authorities RE: Mazo Report served November 24, 2016 ["Mazo BOA"], Tab 35; and Mazo Report, *supra* note 4 at paras. 51-54; and *Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (2007), 1974 Plan BOA, Tab 68.

[6] Mazo Report, *supra* note 4 at para. 54.

[7] *Ibid* at para. 51.

participate in the liability of a limited company is not contrary to Canadian public policy. Canadian legislatures have done that in areas ranging from tax to labour and employment to environmental to corporate law. Further, in the course of the statutorily mandated review of Canadian insolvency legislation, Canadian legislators have been considering recommendations from insolvency professionals and industry stakeholders. These recommendations have included the adoption of legislation that would allow Canadian creditors to pursue the assets of corporate group members in foreign jurisdictions. In other words, Canadian insolvency professionals and legal experts have recommended similar legislation.[8] How then can such a law be contrary to public policy? Under the law as it currently stands, such claims are to be assessed on a case-by-case basis.

15. If the Court determines that it can make a determination on the merits given the evidentiary record, evidence in that record permits the Court to dispose of all three preliminary issues in this summary trial in favour of the 1974 Plan. Notwithstanding this, however, the 1974 Plan has been prevented from advancing its claim in the best light. The traditional order of trial sees the plaintiff lead its evidence first and then the defendants lead their responding evidence, if any. In this way a plaintiff is "able to present the evidence in support of [its] claim fully, in an orderly way, and in its best light, before it is challenged by the defendants".[9]

16. The Walter Canada Group's summary trial application – brought less than one and a half months after the close of the pleading period on October 5, 2016, and before any discovery – reverses the natural order of a trial. This has thrown the 1974 Plan onto the defensive at the outset, having to respond to "evidence" that it has had no opportunity to test and arguments that mischaracterize the ultimate issues that must be adjudicated by this Court.

17. The Walter Canada Group's refusal to grant the 1974 Plan any discovery leading up to this summary trial has impeded the 1974 Plan's ability to "prepare for [itself] the representations on the basis of which [the] dispute is to be resolved."[10] The 1974 Plan has pleaded facts that are relevant to the preliminary issues before this Court in this

[8] See Section IV.F.

[9] *Mayer v. Mayer*, 2012 BCCA 77, 1974 Plan BOA, Tab 36 at para. 85.

[10] *Ibid* at para. 78.

summary trial. To prove the truth of many of these facts requires evidence that can best come out of the mouths of the Walter Canada Group's key decision-makers and out of the Walter Canada Group's own documents. It has also curtailed the 1974 Plan's ability to test the "evidence" the Walter Canada Group and the Steelworkers contend is dispositive.

18. The result is an application for summary determination of threshold issues that cannot be decided in this summary trial against the 1974 Plan. There are three key reasons for this conclusion, all of which will be developed below.

19. First, the deficient evidentiary record has left the Court in a position where it cannot find the facts necessary to determine the preliminary issues in favour of the Walter Canada Group and the Steelworkers in this summary trial application.

20. The Walter Canada Group and the Steelworkers rely largely on inadmissible evidence such as the First Affidavit of William Harvey, dated December 4, 2015 (the "**Harvey Affidavit**").[11] Certain statements in the Harvey Affidavit and its exhibits are admissible at the instance of the 1974 Plan as admissions against interest, but the affidavit is not admissible for the Walter Canada Group or the Steelworkers. As a result, the Court will only be in a position to find in favour of the Walter Canada Group and the Steelworkers after the 1974 Plan has had a meaningful opportunity through discovery to obtain evidence of the facts it says are relevant to its claim.

21. Second, it would be unjust for the Court to find against the 1974 Plan Claim on this deficient evidentiary record in the face of the Walter Canada Group's refusal to grant the 1974 Plan any discovery.

22. Third, a consideration of the relevant factors for proceeding summarily on an issue militates against this Court proceeding with this application. The significant amount involved, the complexity of the case, the substantial risk of wasting time and effort, and the undesirability of producing premature appeals on hypothetical facts and issues all point directly against summary disposition based on the present record.

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[11] 1st Affidavit of William Harvey, dated December 4, 2015 ["Harvey Affidavit"], WCG BOE, vol. 2, Tab 9; and Exhibit "B" to Harvey Affidavit, ["Harvey Affidavit, Exhibit "B""], 1974 Plan BOE, vol. 4, Tab 7. As set out more fully in Section IV.B below, certain statements in the Harvey Affidavit are admissible as admissions against interest (as particularized in Schedule "A"). However, the Harvey Affidavit as a whole is not admissible and the Walter Canada Group and the Steelworkers are not entitled to rely on it to seek dismissal of the 1974 Plan Claim.

23. The Court of Appeal has cautioned that the orderly development of the common law is not enhanced by the Court of Appeal being required to address important issues of law unless the case at hand, in all its aspects, requires it to do so.[12] All three parties in this summary trial agree that the 1974 Plan Claim raises important issues of law. The 1974 Plan submits that this Court should not proceed summarily in this case until the evidentiary record permits it to adjudicate the entirety of the 1974 Plan Claim, and not certain preliminary issues. This will ensure the Court of Appeal is not asked to rule on important issues of law until the entire matter is before it, and not just certain slices.

II. FACTS

24. The 1974 Plan is a multiemployer defined-benefit pension plan that administers retirement benefits for thousands of coal miners and their families.[13]

25. One of the employers that promised to contribute to the 1974 Plan is Jim Walter Resources Inc., now known as New WEI 13, Inc. ("**Walter Resources**").[14] Walter Resources is an American company and wholly owned subsidiary of Walter Energy, Inc., now known as New WEI, Inc. ("**Walter Energy**"), another American company.[15] Walter Energy also wholly owns, either directly or indirectly, Canada Holdings.[16] On December 28, 2015, Walter Resources withdrew from the 1974 Plan, incurring approximately US$900 million in withdrawal liability.[17]

26. The 1974 Plan Claim against the Walter Canada Group arises under:

    (a) the United Mine Workers of America 1974 Pension Plan Document (the "**Pension Plan Document**"), effective December 6, 1974, and amended from time to time thereafter,

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[12] *Bacchus Agents (1981) Ltd. v. Phillippe Dandurand Wines Ltd.*, 2002 BCCA 138, 1974 Plan BOA, Tab 3 para. 25 [*Bacchus Agents*].

[13] 1st Affidavit of Dale R. Stover, dated November 29, 2016 ["Stover Affidavit"], 1974 Plan BOE, vol. 1, Tab 1 at paras. 11 and 25.

[14] *Ibid* at paras. 18, 27, 34 and 41.

[15] Amended Notice of Civil Claim of the 1974 Plan, filed November 9, 2016 ["Amended NOCC"] WCG BOE, vol. 1, Tab 2 at para. 25. Ownership of Canada Holdings is admitted by all three parties, see Statement of Uncontested Facts, WCG BOE, vol. 1, Tab 1 para 20.

[16] *Ibid* at para. 41.

[17] Stover Affidavit, *supra* note 13 at paras. 74, 83 and 84.

(b) the United Mine Workers of America 1974 Pension Trust Documents (the "**Trust Document**"), effective December 6, 1974, and amended from time to time thereafter,

(c) a collective bargaining agreement (CBA) defined more fully below under which Walter Resources assumed pension funding obligations towards the 1974 Plan, and

(d) the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"), 29 U.S.C. §§ 1001 et seq.[18]

27. Walter Resources was a contributing employer to the 1974 Plan under the terms of the collective bargaining agreement (CBA) defined more fully below.[19] As a participating employer, Walter Resources was obligated to pay:

(a) monthly pension contributions for as long as Walter Resources had operations covered by the 1974 Plan; and

(b) "withdrawal liability" accruing upon a partial or complete withdrawal by Walter Resources from participation in the 1974 Plan.[20]

28. Under ERISA, all entities that share at least 80% common ownership with Walter Resources are jointly and severally liable for Walter Resources' withdrawal liability.[21] The Walter Canada group are among those entities.[22]

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[18] *United Mine Workers of America 1974 Pension Plan (July 1, 2011),* effective December 6, 1974 ["Pension Plan Document"], 1974 Plan BOE, Tab 1 (Stover Affidavit), Exhibit "B" at 181 (see: Article XII B(14)) and 185 (see: Article XIV(A); United Mine Workers of America 1974 Pension Trust Documents, effective December 6, 1974 ["Trust Document"] 1974 Plan BOE, Tab1 (Stover Affidavit), Exhibit C at 200 (see: Article VI (12)) and 205 (see: Article XIII); National Bituminous Coal Wage Agreements of 2011, effective July 1, 2011 ["CBA"] 1974 Plan BOE, Tab 1 (Stover Affidavit), Exhibit "A" at 29 (see: Article XX (g)(4)(b)); and Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 et seq.

[19] Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 77.

[20] *Ibid* at para. 80.

[21] Mazo Report, *supra* note 4 at paras. 39, 43, 53-54.

[22] Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 47 and Exhibit "B".

A. Formation and Connections of the 1974 Plan

1. How the 1974 Plan Came into Existence

29. The 1974 Plan is a pension plan that provides defined benefits to its beneficiaries.[23] The 1974 Plan provides pension and death benefits to approximately 88,000 eligible beneficiaries who are retired or disabled coal miners and their eligible surviving spouses and dependents.[24] The participants and beneficiaries in the 1974 Plan are retired or disabled former hourly coal production employees and their eligible surviving spouses.[25] Multiple companies in the coal industry contribute to the 1974 Plan.[26] Although the 1974 Plan's aggregate benefit payments are large, the individual pensions are modest:

(a) almost 80% of beneficiaries receive a monthly pension of less than US$800 a month;

(b) the average monthly pension for a regular retiree is US$674;

(c) the average monthly pension for a disabled retiree is US$568; and

(d) the average monthly pension for a surviving spouse is US$340.[27]

30. The 1974 Plan was established pursuant to the collectively bargained National Bituminous Coal Wage Agreements of 1974 (the "**1974 NBWCA**", and each such agreement as approved from time to time an "**NBCWA**").[28] The 1974 NBWCA was negotiated between the United Mine Workers of America (the "**UMWA**") and the Bituminous Coal Operators' Association, Inc. (the "**BCOA**").[29] The BCOA is a multiemployer bargaining association.[30]

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[23] Stover Affidavit, *supra* note 13 at para. 11.
[24] *Ibid* at paras. 28-29.
[25] *Ibid* at para. 28.
[26] *Ibid* at para. 1.
[27] *Ibid* at paras. 30-33.
[28] *Ibid* at para. 14.
[29] *Ibid.*
[30] *Ibid.*

31. Until its withdrawal, Walter Resources (or a predecessor entity) had been a participating employer in the 1974 Plan since 1978.[31]

2. The Financial Health of the 1974 Plan Is Declining

32. The 1974 Plan has been in serious and increasing financial trouble since 2010, and is expected to become insolvent in six to seven years.[32] The 1974 Plan is unlikely to have sufficient time to recoup its losses from the 2008/09 financial crisis through prudent investment and cannot recover its funding status through increased contributions.[33]

33. The inability of Walter Resources and certain of its U.S. affiliates (the "**U.S. Debtors**") to satisfy their withdrawal liability obligation results in a significant loss of funding to the 1974 Plan.[34] The loss of funding to the 1974 Plan due to the U.S. Debtors' inability to satisfy their obligations has exacerbated the impaired financial status and projected insolvency.[35] That in turn will affect the benefit levels of current and future retirees.[36] If the loss of funding causes the 1974 Plan to become insolvent, such insolvency would reduce (or render the 1974 Plan unable to pay) the pension benefits provided to the 1974 Plan's approximately 88,000 eligible beneficiaries.[37]

34. As a result of the loss of funding caused by Walter Resources' withdrawal and failure to pay the withdrawal liability, the share of the 1974 Plan's unfunded liabilities attributable to each of the remaining employers that contribute to the 1974 Plan will increase proportionally.[38] The remaining employers are not expected to be able to make up the difference.[39]

35. The PBGC guarantees payment of a portion of the 1974 Plan's benefits, but at a reduced level.[40] Under the PBGC's guarantee, the monthly benefits of an estimated 85%

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[31] *Ibid* at para. 37.
[32] *Ibid* at para. 50.
[33] *Ibid* at para. 72.
[34] *Ibid* at paras. 95-96.
[35] *Ibid* at para. 96.
[36] *Ibid* at para. 96.
[37] *Ibid* at paras. 29 & 97.
[38] *Ibid* at para. 95.
[39] *Ibid* at para. 95.
[40] *Ibid* at para. 98.

of the 1974 Plan's beneficiaries would be reduced.[41] Even with financial assistance from the PBGC, the 1974 Plan will have to reduce the already modest pensions of the vast majority of beneficiaries.[42] The PBGC's multiemployer insurance program is also currently in financial difficulty and is projected to be insolvent within the next ten years.[43]

3. The 1974 Plan Is Connected to the United States

36. The 1974 Plan is resident in Washington, DC.[44]

37. The trustees of the 1974 Plan are resident in the United States.[45]

38. All participating employers in the 1974 Plan are resident in the United States.[46]

39. The Pension Plan Document was signed by the President of the BCOA and the International President of the UMWA in Washington, DC, on September 27, 2011.[47]

40. The Pension Plan Document provides that it is to be interpreted in accordance with ERISA and that withdrawal liability is to be calculated in accordance with ERISA.[48]

41. The 2011 NBCWA provides that trusts and plans connected with the CBA must conform to the requirements of ERISA and other federal laws.[49] Walter Resources signed a collective bargaining agreement (the "**CBA**") with the UMWA that adopted each and every term of the 2011 NBCWA that affected the 1974 Plan.[50]

42. The Trust Document was signed by the President of the BCOA and the International President of the UMWA in Washington, DC on January 13, 1975.[51] The Trust Document was amended and restated as of July 1, 2011.[52]

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[41] *Ibid* at para. 99.
[42] *Ibid* at para. 100.
[43] *Ibid* at para. 101.
[44] *Ibid* at para. 12.
[45] *Ibid* at para. 13.
[46] *Ibid* at para. 39.
[47] Pension Plan Document, *supra* note 18 at 193.
[48] *Ibid* at 181 (see: Article XII B(14)); at 185 et seq. (see: Article XIV (A)-(N)).
[49] CBA, *supra* note 18 at 29 (see: Article XX (g)(4)(b)).
[50] Stover Affidavit, *supra* note 13 at paras. 17-18.
[51] Trust Document , *supra* note 18 at 200 (see: Article VI (12)) and 205 (see: Article XIII).
[52] *Ibid* at 205.

43. The Trust Document provides that:

(a) the 1974 Plan is to be construed, regulated and administered under the laws of the District of Columbia;

(b) the 1974 Plan will have its principal place of business in Washington, DC; and

(c) the trustees are authorized to do all acts necessary to comply with ERISA or other federal laws.[53]

B. Walter Energy Expanded its Business into Canada

44. The facts alleged by the 1974 Plan point to significant funds being transferred to Canada Holdings from Walter Energy.[54] Because this summary trial application has been brought prior to any discovery being provided to the 1974 Plan, the 1974 Plan has been deprived of evidence from the Walter Canada Group that would enable the 1974 Plan to prove those facts. These facts include:

(a) in the spring of 2011, Walter Energy purchased a group of companies, Western Coal Corp. ("**Western**") and its subsidiaries, which had mines in British Columbia;[55]

(b) this purchase expanded Walter Energy's business into Canada;[56]

(c) on March 9, 2011, Walter Energy incorporated Canada Holdings;[57]

(d) Canada Holdings was incorporated specifically to hold the shares of Western and its subsidiaries;[58]

(e) Western and its subsidiaries operated coal mines in British Columbia, the United Kingdom and the United States;[59]

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[53] *Ibid* at 205 (see: Article XIII); at 197 (see: Article II); and at 198--200 (see: Articles V and VI(12)).
[54] Amended NOCC, *supra* note 15 at paras. 46, 52-53.
[55] *Ibid* at paras. 40-45.
[56] *Ibid* at para. 47.
[57] *Ibid* at para. 40.
[58] *Ibid* at para. 42.
[59] *Ibid* at para. 43.

(f) on April 1, 2011, Canada Holdings acquired all outstanding common shares of Western (the "**Western Acquisition**");[60]

(g) before 2011, Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom;[61]

(h) total consideration paid by Walter Energy in respect of the Western Acquisition was approximately US$3.7 billion;[62]

(i) concurrently, and in connection with entering into the arrangement agreement with Western, Walter Energy, Western, and Canada Holdings entered into a credit facility (the "**Credit Facility**");[63]

(j) the lenders under the Credit Facility were Morgan Stanley Senior Funding, Inc., the Bank of Nova Scotia and others (the "**Bank Lenders**");[64]

(k) pursuant to the Credit Facility, the Bank Lenders committed to providing Walter Energy, Western and Canada Holdings with US$2.725 billion of senior secured credit facilities;[65]

(l) Walter Energy transferred the proceeds of the Credit Facility to Canada Holdings to fund the cash consideration, fees and expenses in connection with the Western Acquisition;[66]

(m) the majority of the funding Canada Holdings paid for the Western Acquisition was obtained under a hybrid debt transaction (the "**Hybrid Financing**");[67]

(n) as part of the Hybrid Financing, Walter Energy in substance advanced approximately US$2 billion in cash to Canada Holdings to enable Canada Holdings to purchase the Western Coal entities;[68] and

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[60] *Ibid* at para. 44.
[61] *Ibid* at para. 47.
[62] *Ibid* at para.46.
[63] *Ibid* at para. 48.
[64] *Ibid.*
[65] *Ibid* at para. 49.
[66] *Ibid* at para. 50.
[67] *Ibid* at para. 51.

(o) Walter Energy incurred significant debt in relation to the Western Acquisition.[69]

C. Walter Energy and Its Affiliates Operated under Common Ownership and Centralized Management

45. The Walter Canada Group operated as an integrated global enterprise with its U.S. affiliates.

1. The Walter Canada Group and Walter Resources Share Common Ownership

46. The 1974 Plan alleges that the Walter Canada Group and Walter Resources are wholly owned by Walter Energy.[70] Again, because this summary trial application has been brought prior to any discovery being provided to the 1974 Plan, the 1974 Plan has been deprived of evidence from the Walter Canada Group that would enable the 1974 Plan to prove these facts. These facts include:

(a) Walter Resources is a wholly owned subsidiary of Walter Energy;[71]

(b) Walter Energy is a public company incorporated under the laws of Delaware;[72]

(c) Walter Energy has its headquarters in Birmingham, Alabama ("**Headquarters**"), and did business in West Virginia and Alabama;[73]

(d) Walter Resources is incorporated in Alabama and did business in Alabama;[74]

(e) until implementation of the joint proposal of the Walter Canada Group in December 2016, each of the entities comprising the Walter Canada Group was a wholly owned subsidiary of Walter Energy;[75] and

(f) The "Walter Canada Group" comprises:

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[68] *Ibid* at para. 52.
[69] *Ibid* at para. 59.
[70] *Ibid* at para. 15.
[71] *Ibid* at para. 25.
[72] *Ibid* at para. 24.
[73] *Ibid* at paras. 24 & 79.
[74] *Ibid* at para. 81.
[75] *Ibid* at para.75.

(i) Canada Holdings and 0541237 BC Ltd.;

(ii) Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Cambrian Energybuild Holdings ULC, and Willow Creek Coal ULC;

(iii) Pine Valley Coal Ltd.; and

(iv) Willow Creek Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership, and Brule Coal Partnership.[76]

(g) Walter Energy's board of directors and its management team operated out of Birmingham, Alabama;[77] and

(h) Walter Resources' management team operated out of Birmingham, Alabama.[78]

2. The Walter Canada Group and Walter Resources Share Common Management

47. The 1974 Plan alleges that the Walter Canada Group is controlled from Birmingham, Alabama.[79] The facts alleged point to common management, including:

(a) Mr. Harvey is the Executive Vice President and Chief Financial Officer of Canada Holdings and Executive Vice President and Chief Financial Officer of Walter Energy;[80]

(b) Walter Energy and its U.S., Canadian and UK affiliates, including the Walter Canada Group, comprise a single global enterprise with integrated businesses;[81]

(c) Walter Energy's legal team provided legal advice to the Walter Canada Group and the rest of the global enterprise;[82]

(d) Mr. Harvey was located in Birmingham, Alabama.[83]

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[76] *Ibid* at paras. 2-13 & 33.
[77] *Ibid.* at para. 80.
[78] *Ibid* at para. 82.
[79] *Ibid* at para. 34.
[80] *Ibid* at paras. 89-90.
[81] *Ibid* at para. 15.
[82] *Ibid* at para. 100.

(e) at all material times, Walter Energy directed and controlled the affairs of the Walter Canada Group centrally from Headquarters;[84]

(f) the management team and key decision makers of Canada Holdings and the other entities in the Walter Canada Group operated out of the U.S.;[85] and

(g) after the date of the Western Acquisition (as defined herein), the President of Canada Holdings and the rest of the Canadian operations resided in and worked out of Birmingham, Alabama.[86]

48. However, the Walter Canada Group proffered, and the Steelworkers rely upon, the Harvey Affidavit. In the Harvey Affidavit, Mr. Harvey makes a number of statements which align with the facts alleged by the 1974 Plan. For the reasons set out in Section IV.B, the 1974 Plan's position is that the Harvey Affidavit is inadmissible at the instance of the Walter Canada Group or the Steelworkers. However, certain statements in the Harvey Affidavit are admissible at the instance of the 1974 Plan as admissions against interest.[87] These statements include that:

(a) "Walter Energy manages its global operations centrally from its headquarters in Birmingham, Alabama."[88]

(b) until these proceedings, Headquarters provided numerous administrative services to Walter Energy and its affiliates, including the Walter Canada Group;[89] and

(c) services included finance, tax, treasury, human resources, payroll, benefits and communications, information technology, legal, operations and health, safety and environment, among others.[90]

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[83] *Ibid* at oath.
[84] *Ibid.* at para. 34.
[85] *Ibid* at paras. 88 and 91.
[86] *Ibid* at para. 88.
[87] See Schedule "A" hereto.
[88] Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 66.
[89] *Ibid* at paras. 66-69, 75, 128, 148-149, 151, 161.
[90] *Ibid* at paras. 66-69, 75.

49. In January 2016, the Chief Restructuring Officer in the Walter Canada Group's proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") reported that the directors and officers of the Walter Canada Group had resigned.[91] These directors and officers of the Walter Canada Group did so *after* the U.S. Bankruptcy Court had authorized the U.S. Debtors to withdraw from the 1974 Plan.[92]

D. The U.S. Debtors Commenced Chapter 11 Proceedings

50. On July 15, 2015, the U.S. Debtors commenced proceedings (the "**Chapter 11 Proceedings**") under Chapter 11 of Title 11 of the United States Code (the "**U.S. Bankruptcy Code**").[93] On October 8, 2015, the 1974 Plan filed a proof of claim in the Chapter 11 Proceedings against each of the 23 U.S. Debtors (the "**Proofs of Claim**").[94]

51. Each of the Proofs of Claim stated the contingent estimated withdrawal liability of Walter Resources and members of its "controlled group" (as determined by ERISA) of US$904,367,132, which assumed that Walter Resources would withdraw from participation in the 1974 Plan during that plan year beginning July 1, 2015.[95]

52. When employers withdraw from participation in the 1974 Plan, employees of the Plan calculate and assess the amount of withdrawal liability required under ERISA, using information provided by the 1974 Plan's enrolled actuary in the actuary's annual Valuation Report and other information from the 1974 Plan's financial records.[96]

53. The withdrawal liability calculation set out in the Proofs of Claim was based on estimates because the final figure for withdrawal liability could not be calculated until the date of withdrawal was known and until the enrolled actuary has completed the annual plan valuation with a final calculation of the 1974 Plan's unfunded vested benefits.[97]

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[91] 1st Affidavit of William E. Aziz dated March 22, 2016 ["*Aziz Affidavit*"], WCG BOE, vol. 2, Tab 9 at para. 21.

[92] *Walter Energy, Inc. (Re)*, Chapter 11, Case No 15-02741-TOM11, United States Bankruptcy Court for the Northern District of Alabama, 28 December 2015 ["Rejection Order"], WCG BOE, vol. 3, Tab 12C (1st Affidavit of Miriam Dominguez); Stover Affidavit, *supra* note 13 at para. 83.

[93] Amended NOCC, *supra* note 15 at para. 58.

[94] Stover Affidavit, *supra* note 13 at para. 76.

[95] *Ibid* at para 78.

[96] *Ibid* at para 48.

[97] *Ibid* at paras 46, 78-79.

54. During the U.S. Proceedings, the U.S. Debtors sought authority from the Bankruptcy Court to sell their U.S. assets and operations free and clear of all liabilities.[98] The U.S. Debtors also sought authority to reject the CBA, which would terminate the requirement to make monthly pension contributions, giving rise to withdrawal liability.[99]

55. The joint and several liability under ERISA of those entities who are not U.S. Debtors (as defined below) was never at issue in the U.S. Bankruptcy Proceedings (as defined below). The 1974 Plan could not have made, and therefore did not make, a claim against such non-debtors in the U.S. Bankruptcy Proceedings. Instead, the 1974 Plan is advancing its claim before this Court in these proceedings in a manner that respects this Court's jurisdiction to determine claims against the Walter Canada Group.

E. Walter Resources' Withdrawal from the 1974 Plan Led to Liability under ERISA for All Walter Entities

56. On December 28, 2015, the U.S. Debtors obtained a ruling from the U.S. Bankruptcy Court authorizing the U.S. Debtors to reject the CBA (the "**Rejection Order**").[100] In the Rejection Order, the U.S. Bankruptcy Court "ordered, adjudged and decreed" that the CBA was rejected.[101]

57. The Rejection Order had the effect of terminating Walter Resources' obligation to make monthly payments to the 1974 Plan.[102] Pursuant to section 4203 of ERISA, the termination of the obligation to make monthly pension plan payments constitutes a complete withdrawal from the 1974 Plan by Walter Resources.[103]

58. Under section 4201 of ERISA, upon its withdrawal from a multiemployer pension plan, a previously contributing employer is immediately liable for its proportionate share of the employer's unfunded vested pension liabilities or "withdrawal liability".[104]

59. Under section 4001(b)(1) of ERISA, all entities that are at least 80% owned by the common parent corporation, wherever incorporated, and all trades or businesses under

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[98] Rejection Order, *supra* note 92 at 22, para 1; Amended NOCC, *supra* note 15 at para 63.
[99] Rejection Order, *supra* note 92 at 22, para 1; and Amended NOCC, *supra* note 15 at para. 16, 64-65.
[100] Stover Affidavit, *supra* note 13 at para. 83 and Rejection Order, *supra* note 92 at 76.
[101] Stover Affidavit, *supra* note 13 at para. 83 and Rejection Order, *supra* note 92 at 76.
[102] Stover Affidavit, *supra* note 13 at paras. 40 and 87.
[103] Mazo Report, *supra* note 4 at para. 31.
[104] *Ibid* at paras. 31-33.

common control with them, constitute a single employer participating in a multiemployer pension plan (each, an "**Employer**").[105] Employers are legally subject to "withdrawal liability" accruing upon a partial or complete withdrawal from participation in the multiemployer pension plan by the participating employer.[106]

60. This withdrawal liability is a valid and enforceable debt as against the Employer, which includes each affiliate, wherever incorporated, which meets the test under ERISA for a member of the same "controlled group" (i.e., each entity that is at least 80% owned, either directly or indirectly, by the same parent).[107] The Walter Canada Group and the Steelworkers admit that Canada Holdings is wholly owned by Walter Energy.[108]

61. Withdrawal from the 1974 Plan occurred in the United States.[109] The liability created thereby occurred in the United States.[110]

F. The 1974 Plan Claim Is Joint and Several Against All Entities in the Walter Canada Group

62. As a result of Walter Resources' withdrawal from the 1974 Plan on December 28, 2015, the 1974 Plan has a claim for withdrawal liability against each Employer in the amount of US$904,367,132.00.[111]

63. By operation of ERISA, the 1974 Plan Claim is a valid and enforceable claim as against Walter Energy, and each U.S. or foreign affiliate which meets the test under ERISA for a member of the same "controlled group".[112] The 1974 Plan alleges that this includes each of the entities in the Walter Canada Group.[113]

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[105] *Ibid* at paras. 39 and 43; see: 26 U.S.C. § 414(b), (c), Walter Canada Group's Book of Authorities re: Expert Report of Marc Abrams ("Abrams BOA"), Tab 12; 26 C.F.R. § 1.414(c)-2(b), (c), Abrams BOA, Tab 3.

[106] *Ibid* at para. 33.

[107] *Ibid* at paras. 39, 46-47; Stover Affidavit, *supra* note 13 at para. 74.

[108] Admitted by all parties, see Statement of Uncontested Facts, WCG BOE, vol. 1, Tab. 1, para. 20.

[109] Stover Affidavit, *supra* note 13 at paras 83-84.

[110] *Ibid.*

[111] *Ibid* at paras. 79-82.

[112] Mazo Report, *supra* note 4 at paras. 39, 43, 47, 49-54; and Stover Affidavit, *supra* note 13 at para. 74.

[113] Amended NOCC, *supra* note 15 at para. 73.

G. Walter Canada Group Commenced CCAA Proceedings

64. On December 7, 2015, the Walter Canada Group obtained creditor protection under the *Companies' Creditors Arrangement Act*.[114] In these proceedings, the Walter Canada Group implemented a sales process for its mining assets and a claims process.[115]

65. The claims process approved by this Court provided for a separate process to adjudicate the 1974 Plan Claim.[116]

66. On November 16, 2016, the Walter Canada Group filed a notice of application returnable January 9, 2017 (the "**Summary Trial Application**"), seeking an order that:

(a) the 1974 Plan Claim is governed by Canadian substantive law;

(b) in the alternative, ERISA does not apply extraterritorially;

(c) in the further alternative, ERISA is unenforceable as a penal, revenue or public law; or

(d) in the further alternative, ERISA is unenforceable because it conflicts with Canadian public policy.

67. The Walter Canada Group has since abandoned the position that ERISA is unenforceable as a penal, revenue or public law.[117]

68. On December 2, 2016, the 1974 Plan filed an application returnable January 9, 2017, seeking an order that the Summary Trial Application is not suitable for summary determination.

69. On December 7, 2016, the Walter Canada Group obtained the Court's authorization to close a transaction that has had or will have the following effects, among others:

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[114] *Walter Energy Canada Holdings Inc. (Re),* (16 August 2016), Vancouver (S-1510120) (BCSC) ["Approval and Vesting Order"], 1974 Plan BOA, Tab 117.

[115] *Walter Energy Canada Holdings Inc. (Re),* (16 August 2016), Vancouver (S-1510120) (BCSC) ["Claims Process Order"], 1974 Plan BOA, Tab 118.

[116] *Ibid* at paras. 30-33.

[117] While the Walter Canada Group states in their submissions that the 1974 Plan Claim against the partnerships was not being advanced, that submission has been withdrawn and it is conceded that the 1974 Plan Claim is advanced against all entities within the Walter Canada Group.

(a) the Walter Canada Group has been declared bankrupt;

(b) the claims against the Walter Canada Group have been declared transferred to the "New Walter Canada Group", one of which is a claim by Walter Energy in respect of the Hybrid Financing; and

(c) if the Walter Canada Group can convince this Court that the 1974 Plan Claim can be summarily dismissed without discovery, nearly $40 million will be paid to Walter Energy in respect of the Hybrid Financing.[118]

70. By order of this Court, the New Walter Canada Group stands in the shoes of the Walter Canada Group with respect to the 1974 Plan Claim. In addition, the New Walter Canada Group is wholly owned, either director or indirectly by Walter Energy.[119]

H. 1974 Plan's Efforts to Obtain Discovery

71. The 1974 Plan has made repeated requests to obtain discovery from the Petitioners.

72. On October 3, 2016, the 1974 Plan prepared an initial list of discovery requests based on facts put in issue by the pleadings. The 1974 Plan requested that the Petitioners produce documents responsive to an itemized list of categories. The Petitioners did not respond to this request.[120]

73. On October 4, 2016, the 1974 Plan sent an email to the Petitioners outlining an option for a summary trial preceded by document discovery and examination for discovery. The 1974 Plan proposed that the summary trial be heard on either the week beginning January 9, 2017, or the week beginning February 20, 2017.[121]

74. On October 26, 2016, the parties appeared before this Court pursuant to a direction made on August 16, 2016 (the "**October Appearance**"). The purpose of the October

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[118] Walter Energy Canada Holdings Inc. (Re), (7 December 2016), Vancouver (S-1510120) ["New Walter Group Procedure Order"] 1974 Plan BOA, Tab 119.

[119] See: Joint Proposal of the Walter Energy Canada Group, filed December 19, 2016 ["Joint Proposal"], 1974 Plan BOE, vol. 2, Tab 4 (7th Affidavit of Miriam Dominguez), Exhibit "A"; and Monitor's Seventh Report, dated December 11, 2016, ["Monitor's Seventh Report"], 1974 Plan BOE, vol. 3, Tab 6.

The legal analysis below refers to the Walter Canada Group. To the extent the 1974 Plan Claim has been deemed to be against the New Walter Canada Group, all references to the Walter Canada Group apply equally to the New Walter Canada Group, as appropriate.

[120] 6th affidavit of Miriam Dominguez dated December 2, 2016 ["6th Dominguez Affidavit"], 1974 Plan BOE, vol. 2, Tab 3, Exhibit "D" at 15-16.

[121] *Ibid,* Exhibit "A" at 2-3.

Appearance was to determine the procedural vehicle that would be used to determine the issues raised by the 1974 Plan Claim.

75. At the October Appearance, the 1974 Plan reiterated its position that the 1974 Plan Claim should be determined by summary trial on the earliest hearing date that would accommodate necessary pre-trial discovery.[122] The Walter Canada Group submitted that discovery was not necessarily required for a threshold issue.[123]

76. The Court concluded that it was not in a position to determine whether discovery was required for the threshold issue proposed by the Walter Canada Group:

> Proceeding to a determination of the issues, as proposed by Walter Energy and without agreement, poses some risk. Even so, I am simply not in a position to say who is right and who is wrong in terms of what level of discovery is warranted for the purpose of deciding this "threshold" issue or even whether a summary trial on this issue is appropriate.[124]

77. The Court permitted the Walter Canada Group to proceed with a summary trial application.[125] However, the Court cautioned that this could ultimately result in further delays for distribution:

> At the return of the application, the 1974 Plan may still take the position that the application is not appropriate and advance arguments to that effect. If so, Walter Energy and the Union still run the risk that the Court may agree with the 1974 Plan that it cannot or will not decide the issue by summary trial without the sought after disclosure (or perhaps other issues). If that occurs, the parties are not one month, but three to four months behind, in delaying a determination of the issues and hence exacerbating the delay faced by the creditors in terms of a distribution.[126]

78. After receiving the Walter Canada Group's summary trial application, the 1974 Plan again requested that the Walter Canada Group disclose documents related to discovery

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[122] *Ibid,* Exhibit "C" at 15-16.

[123] *Ibid,* Exhibit "C" at 25 and 27.

[124] 8th Affidavit of Miriam Dominguez, dated December 30, 2016 ["8th Dominguez Affidavit"], Exhibit "C" at 15 at para. 7.

[125] *Ibid* at para. 8.

[126] *Ibid* at para. 9.

categories itemized by the 1974 Plan.[127] The 1974 Plan further requested to examine for discovery Mr. Harvey.[128]

79. The 1974 Plan subsequently brought an application seeking an order for document discovery to allow it to meet the preliminary issues raised by the Walter Canada Group in its summary trial application. The Court did not grant an order for document discovery, concluding that discoveries would remain in play if the Court concluded the preliminary issues were not suitable for summary trial. The Walter Canada Group has not disclosed any of the requested documents to the 1974 Plan or consented to allow the 1974 Plan to examine for discovery Mr. Harvey.

80. On December 23, 2016, the 1974 Plan provided the Walter Canada Group and the Steelworkers with its list of documents.[129] Neither the Walter Canada Group nor the Steelworkers have provided the 1974 Plan with a list of documents.[130]

I. Objections to Expert Evidence

81. The Walter Canada Group filed an expert report authored by Marc Abrams (the "**Abrams Report**"). It also filed an expert report of Alan L. Gropper as a purported reply to the Mazo Report (the "**Gropper Report**").

82. The 1974 Plan has given notice of its objections to the expert reports filed by the Walter Canada Group. The 1974 Plan objects to the entirety of the Gropper Report. The primary (but not only) basis of the objection is that the Gropper Report is not proper reply.

III. ISSUES

83. The issues before this Court are:

(a) What evidence proffered by the parties is admissible in a summary trial application?

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[127] 6th Dominguez Affidavit, *supra* note 120, Exhibit "E" at 48-49.

[128] *Ibid.*

[129] 8th Dominguez Affidavit, supra note 124, Exhibit "A" at 2-9.

[130] *Ibid* at para. 2.

(b) Are the issues raised by the Walter Canada Group's notice of application dated November 16, 2016, suitable for summary trial?

(c) Is the 1974 Plan Claim governed by U.S. or Canadian substantive law?

(d) If the 1974 Plan Claim is governed by U.S. substantive law as submitted by the 1974 Plan, does the Walter Canada Group avoid liability by virtue of being incorporated in Canada?

(e) Are the withdrawal liability provisions of ERISA unenforceable because they conflict with Canadian public policy?

84. The 1974 Plan submits that:

(a) Much of the evidence relied on by the Walter Canada Group is inadmissible in this summary trial (although as discussed below, certain statements in the Harvey Affidavit – specified in Schedule "A" to the 1974 Plan's written submissions – are admissible at the instance of the 1974 Plan as admissions against interest). The Harvey Affidavit fails to distinguish between evidence on personal knowledge and evidence on information and belief. Further, the Harvey Affidavit fails to identify, by name, the source for each individual statement on information and belief. Beyond that:

(i) The Walter Canada Group, and to a lesser extent the Steelworkers:

(A) impermissibly seeks to rely on prior interlocutory judgments of this Court to prove certain facts in this summary trial, several of which were not actually stated by the Court;

(B) relies on EDGAR filings of which the affiant attaching them to an affidavit has no personal knowledge; and

(C) seek to have the Court to proceed on assumed facts which have not been admitted by all parties in this proceeding.

(b) The evidentiary record is insufficient for the Court to find the facts necessary to rule in favour of the Walter Canada Group and the Steelworkers. This is so in respect of all the three preliminary issues in this summary trial application.

Further, it would be unjust to dismiss the 1974 Plan Claim summarily in the face of the Walter Canada Group's refusal to grant any discovery. A consideration of the principles for determining an issue summarily militate against proceeding summarily on the present record.

(c) The 1974 Plan Claim is governed by U.S. substantive law. The evidentiary record before the court is incomplete. But the evidence that is properly before the Court indicates that U.S. law has the closest and most real connection to the 1974 Plan Claim.

(d) The Walter Canada Group cannot avoid application of ERISA merely due to their being incorporated in Canada. On the facts of the case at bar, there is no issue of extraterritorial application of the statute. The only available conclusion on the evidence before the Court is that the liability in question represents the domestic application of U.S. law.

(e) The Walter Canada Group and the Steelworkers have not met the high legal bar to prove that application of U.S. law to the 1974 Plan Claim is contrary to public policy. The attribution of liability to others within a corporate group is not unknown to Canadian law. Moreover, Canadian legislators have not barred ERISA claims en masse. Instead, the CCAA allows for a case-by-case assessment, as advocated by the 1974 Plan.

IV. LEGAL ANALYSIS

A. Evidence in the Walter Canada Group's Book of Evidence is Largely Inadmissible

85. The Walter Canada Group seeks a final order dismissing the 1974 Plan Claim. This is not an interlocutory motion. As such, the Walter Canada Group's application must be "conducted in an orderly way with due regard to the rules of pleading and evidence."[131]

86. The Walter Canada Group has not adduced evidence with due regard to the rules of evidence.

87. For instance, the Walter Canada Group and the Steelworkers rely on affidavits that rely on information and belief. Evidence on information and belief is not admissible in an

[131] *Cotton v. Wellsby* (1991), 4 B.C.A.C. 171, 59 B.C.L.R. (2d) 366, 1974 Plan BOA, Tab 21 at para. 37.

application seeking a final order. Witnesses for a summary trial are permitted to say only what they would be able to say when testifying at a conventional trial. This applies to the evidence of former management of the Walter Canada Group. It also applies to legal assistants attaching EDGAR filings without having personal knowledge of the contents of those documents.

88. The Walter Canada Group also asks this Court to rely on statements in previous interlocutory judgments to prove facts in this summary trial application seeking a final order. It further asks this Court to accept certain facts set out in the 1974 Plan's pleadings as "uncontested" when those facts have not been admitted by either or both of the Steelworkers and the Walter Canada Group.

89. The cumulative effect of all of the deficiencies in the Walter Canada Group's evidence is that the Court is being asked to proceed on a summary trial application with very little admissible evidence from the applicants.

1. Evidence must be trial-quality

90. The Walter Canada Group seeks a final order dismissing the 1974 Plan Claim based on affidavit and expert evidence.[132] Accordingly, the rules and principles governing the admissibility of evidence adduced in summary trial applications apply to the Walter Canada Group's application.

91. A summary trial application is a trial. Only trial-quality evidence is admissible. This was explained by Mr. Justice K.J. Smith (then of this Court) in *Zurich Insurance Co. v. Reksons Holdings Ltd.*, 1994 CarswellBC 2925, at paragraph 5:

> Counsel should know that an application under Rule 18A, while summary, is nonetheless a trial. By initiating its application under Rule 18A, the plaintiff represented that it was ready to proceed with a summary trial. In my view it was not. The demand for trial time is such that we cannot waste it, and counsel who elect to go to trial should not routinely expect to be given a second chance if they do not have their cases in order. Careful thought should be given to the legal and factual issues and to the evidence necessary to either make out or defend the

[132] Although the Walter Canada Group appears to be trying to resile from the position that its application is brought under Rule 9-7, the application that the Walter Canada Group was authorized to bring at the October Appearance was a summary trial application. See: 6th Dominguez Affidavit, *supra* note 120, Exhibit "C", at 37-38.

> case, and the case should be presented with no less care and attention than if it were a trial in the usual way.[133]

92. The legal pre-conditions to admissibility are not discretionary. If a fact is not proven by admissible evidence, or admitted, there is no alternative path to the court relying on that fact in its decision. This was emphasized by Madam Justice Southin in *Cotton v. Wellsby* (1991), 4 B.C.A.C. 171, 59 B.C.L.R. (2d) 366 at para. 37:

> I cannot emphasize too strongly that R. 18A is a rule for trial. A trial, whether traditional or summary, must be conducted in an orderly way with due regard to the rules of pleading and evidence. Judges proceeding under R. 18A are not to think of themselves as cadis under palm trees.[134]

93. The requirement to produce admissible evidence is no less merely because the 1974 Plan Claim originated in CCAA proceedings. The CCAA is within the federal domain of bankruptcy and insolvency, and a component of the system of bankruptcy and insolvency law. In all bankruptcy matters, provincial laws of evidence apply to proceedings insofar as they are not inconsistent with, or contrary to, the rules of evidence contained in the *Canada Evidence Act*.[135]

94. The requirement that the Walter Canada Group adduce only trial-quality evidence in this summary trial is not inconsistent with or contrary to the rules of evidence contained in the *Canada Evidence Act*. It also is not inconsistent with purposes of the CCAA. Unlike many CCAA applications, which must be dispensed with quickly and efficiently to maximize the Court's ability to oversee a successful restructuring, the Walter Canada Group seeks adjudication of the Summary Trial Application to proceed with distribution to creditors. Notably, the purported largest of those creditors is the Walter Canada Group's U.S. parent company. Regardless of its ultimate outcome, the 1974 Plan Claim will not prejudice the restructuring of the Walter Canada Group or impede the remedial purpose of the CCAA.

95. There is thus no justification for relaxing the rules of evidence in this summary trial because it stemmed from a CCAA proceeding.

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[133] 1974 Plan BOA, Tab 61

[134] *Supra*, note 131.

[135] Houlden and Morawetz, *Bankruptcy and Insolvency Analysis,* I§12, p. 958 (2016-2017 edition), 1974 Plan BOA, Tab 110; *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 40, 1974 Plan BOA, Tab 88; *Down (In Bankruptcy)*, 2000 BCCA 218, 1974 Plan BOA, Tab 23; *Mullen (Re)*, 2016 NSSC 203, 1974 Plan BOA, Tab 3.

96. The Court directed that the 1974 Plan Claim proceed by way of Notice of Civil Claim and involve the exchange of pleadings. This direction recognizes that this claim could not be determined without greater process and formality than some determinations within a CCAA proceeding may require. This was highlighted at the October Appearance, where the Court emphasized that evidentiary issues could derail this summary trial. [136]

97. The Court's caution at the October Appearance has proven to be prescient. The Walter Canada Group's book of evidence on this summary application is replete with evidentiary issues. The Walter Canada Group's "Statement of Uncontested Facts" assembles 122 "facts" which, despite the name of the document they are embedded in, are largely contested and very few of them are capable of being accepted as true on the present record.

98. The "Statement of Uncontested Facts" relies on a myriad of sources, including: (a) the Harvey Affidavit; (b) previous decisions of this Court in these proceedings; (c) previous decisions in foreign proceedings; and (d) EDGAR filings attached to an affidavit of a legal assistant at the Walter Canada Group's counsel's law firm. The Statement of Uncontested Facts also includes many facts that either one or both of the Walter Canada Group and the Steelworkers are not prepared to admit generally.

99. Very few "facts" in the Walter Canada Group's "Statement of Uncontested Facts" are capable of being accepted as true on this summary trial application.

100. In addition to these issues, the Walter Canada Group has mischaracterized certain "facts" in their "Statement of Uncontested Facts". The Walter Canada Group also seeks to have the Court proceed on assumed facts which have not been admitted by all parties in this proceeding, and as such cannot be treated by the Court as "uncontested".

a. The Harvey Affidavit

101. The Walter Canada Group adduces the Harvey Affidavit as evidence in the Summary Trial Application. In his affidavit, Mr. Harvey describes himself as the Executive Vice

[136] 6th Dominguez Affidavit, Exhibit "C" at 37-38.

President and Chief Financial Officer of Canada Holdings and the Chief Financial Officer and Executive Vice President of Walter Energy.[137]

102. Many "facts" in the Walter Canada Group's Statement of Uncontested Facts are derived from this affidavit, including paragraphs 39, 43, 46, 57-67, 70, 73-78, 81-89, 94 and 122.

103. The Harvey Affidavit was previously filed in this proceeding in support of the Walter Canada Group's petition for relief under the CCAA on December 4, 2015. The Harvey Affidavit is based on a mixture of personal knowledge and information and belief.

104. The 1974 Plan submits that the Harvey Affidavit is inadmissible in this summary trial application for a final order because he fails to distinguish which of his evidence is based on personal knowledge and which is based on information and belief. The 1974 Plan further submits that the Harvey Affidavit would still be inadmissible even if this Court could accept evidence on information and belief because Mr. Harvey fails to identify, by name, the source for each individual statement on information and belief.[138]

(i) Evidentiary requirements for affidavit evidence

105. The requirements for affidavit evidence tendered in a summary trial application were summarized by Mr. Justice MacAulay in *Sermeno v. Trejo*, 2000 BCSC 846:

> [9] ... The ordinary rules of evidence and pleadings must prevail. Of particular import is the recognition that the rule against hearsay is very much alive in Rule 18A applications: *Adia*, at para. 38.
>
> [10] Hearsay evidence is only admissible on interlocutory applications or by leave of the court (under one of the exceptions to the hearsay rule). Double hearsay is never admissible. Where hearsay is permitted, the source of the information must be precisely set out. The name of the individual providing the information is to be included (*Meier v. Canadian Broadcasting Corp.* (1981), 28 B.C.L.R. 136 (B.C. S.C.)).
>
> [11] Evidence based on information and belief should not be tendered at a trial. Since an 18A application is a trial, the evidence presented in the affidavit material must be based on personal knowledge and not information and belief. If there are any circumstances in which Rules 51(10)(b) or 52(8)(e) permit the use of affidavit evidence based on

[137] Harvey Affidavit, *supra* note 10 at para. 1.

[138] Similar concerns arise with Keith Calder's affidavits which also are based on a mixture of personal knowledge and information and belief.

> information and belief, they must of necessity be few and exceptional: *American Pyramid Resources Inc. v. Royal Bank* (1986), 2 B.C.L.R. (2d) 99 (B.C. S.C.), following *Adia*, *supra*, in *F.E. McCracken Ltd. v. Provident Properties Inc.* (B.C. S.C.).[139]

106. *Sermeno* confirms that: (a) the rule against hearsay is applicable to a summary trial application; (b) evidence based on information and belief should not be tendered at a trial; (c) where hearsay is permitted pursuant to an exception to the hearsay rule, the source of the information, including the name of the individual providing the information, must be precisely set out; and (d) double hearsay is never admissible.

107. In *King v. Malakpour*, 2015 BCSC 2272, Mr. Justice Crawford reiterated that an affidavit containing statements on information and belief must identify the source. In addition, that such information cannot be used to obtain a final order:

> [16] ...If an affidavit contains statements on information or belief then the source of information and belief must be given, and such information cannot be used if a party is seeking a final order: R. 22-2(13).[140]

108. The rationale for requiring evidence in a summary trial to be based on personal knowledge and not information and belief is to exclude hearsay evidence. The rule excluding hearsay evidence is well established. The rationale for the presumptive rule was described by Madam Justice Charron in *R. v. Khelawon*, 2006 SCC 57 at paragraph 2:

> As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. ...[141]

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[139] 1974 Plan BOA, Tab 52.

[140] 1974 Plan BOA, Tab 33.

[141] 1974 Plan BOA, Tab 45.

109. The requirement to disclose the source of his or her information and belief is not met by the general statement at the beginning of an affidavit that it is wholly or partly based on information and belief. This was explained by Mr. Justice Bouck in *L.M.U. v. R.L.U.*, 2004 BCSC 95:

> [38] Frequently, deponents swear or affirm to the admissibility of hearsay evidence using these words:
>
> > I have personal knowledge of the facts and matters hereinafter deposed to, save where stated to be on information and belief, in which case I verily believe the same to be true.
>
> [39] This type of preamble does not make out-of-court oral or written statements admissible on an interlocutory application for proving the truth of the facts contained in the statements because it is inadequate for that purpose. Nor does it make out-of-court statements admissible for proving such things as the fact that the statement was made since it does not mention another relevant purpose for admitting the statement.[142]

110. The requirement to disclose the source of information and belief is also not met where the source is identified by a general class of people.[143] Rather, the word 'source' is equivalent to 'an identified person'.[144]

111. This was emphasized by Madam Justice Gropper in *Coast Building Supplies Ltd. v. Superior Plus LP*, a case involving an application by the plaintiff for disclosure of documents.[145] The plaintiff sought to rely on an affidavit on information and belief. The sources of information included "representatives of the defendant and certain other companies."[146] The defendant argued that this was impermissible and that the name of the source had to be provided. The plaintiff argued that it was sufficient in the affidavit to generally describe the source and it was not necessary to name the source.

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[142] 1974 Plan BOA, Tab 34.

[143] *Coast Building Supplies Ltd. v. Superior Plus LP*, 2016 BCSC 1867, 1974 Plan BOA, Tab 19 [*Coast*]; *B.C. Bottle Depot Assn. v. Encorp Pacific (Canada)*, 2009 BCSC 403, 1974 Plan BOA, Tab 6 at paras. 35-36.

[144] *Albert v. Politano*, 2013 BCCA 194, 1974 Plan BOA, Tab 2 at para. 21.

[145] *Coast*, *supra* note 143.

[146] *Ibid.*

112. Gropper J. disagreed with the plaintiff, concluding that the name of the source had to be identified:

> [9] Mr. Sangha's affidavit referring to his sources as certain representatives of the defendant and others must provide a name and the basis for the person's knowledge in order that it is reliable to be stated on information and belief.
>
> [10] The authorities were helpfully summarized by Mr. Justice Kelleher in *XY, LLC v. Canadian Topsires Selection Inc.*, 2015 BCSC 988, beginning at para. 33:
>
> > [33] Affidavit evidence based on information and belief is only admissible if the source is identified, in the sense of "an identified person": *Meier v. Canadian Broadcasting Corporation (*1981), 28 B.C.L.R. 136 at 137-8 [*Meier v. CBC*]. It is not enough to specify the source without naming the individual. If the source wishes to remain anonymous, the evidence in affidavit form is inadmissible: *Meier v. CBC*.
> >
> > [Paragraph 34 is quoted by Gropper J. but omitted here]
>
> [11] I consider that the authorities do not support the plaintiff's position that the name of the source does not have to be provided. Indeed, the authorities demonstrate that it does. Coast did not provide any authority that a confidential source, described generally, is sufficient in an affidavit.
>
> [12] Furthermore, not naming the source is inconsistent with the notion of reliability which is referred to specifically in [*Albert v. Politano,* 2013 BCCA 194].
>
> [Emphasis added.][147]

(ii) The Harvey Affidavit is inadmissible in this summary trial application

113. All of the problems identified by MacAulay J. in *Sermeno*, Crawford J. in *King* and Bouck J. in *L.M.U.* apply to the Harvey Affidavit. As set out in paragraph 1 of his affidavit, it is based on information and belief:

> I am the Executive Vice President and Chief Financial Officer of Walter Energy Canada Holdings, Inc. and the Chief Financial Officer and

[147] *Ibid.* at paras 10-12.

> Executive Vice President of Walter Energy, Inc. and as such have personal knowledge of the facts hereinafter deposed to, except where such facts are stated to be based upon information and belief and where so stated I do verily believe the same to be true.

114. This is not permitted in an application for a final order, where an affidavit "must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial."[148]

115. The Harvey Affidavit relies upon hearsay evidence imparted from several unidentified individuals.

116. This is evident from the express terms of the Harvey Affidavit. After describing at paragraph 1 that his affidavit is based on information and belief, at paragraph 3 Mr. Harvey describes that there are facts in his affidavit based on conversations with a number of unidentified individuals:

> I have spoken with certain officers, directors, employees and advisors of Walter Canada Group and the U.S. Petitioners (defined below), and where I have relied on information from such discussions, I believe such information to be true.

117. The Harvey Affidavit fails to distinguish between facts based on personal knowledge and facts based on information and belief based on conversations with officers, directors and employees. This is impermissible.

118. A similar situation arose in *Joshi v. Vien*, 2003 BCSC 1772. In that case, the defendants sought an order extending the time to file and deliver a jury notice on the basis that the notice inadvertently had been filed late. The defendants sought to rely on an affidavit of a paralegal at the defendants' counsel's law firm, which indicated that the affidavit was based on both personal knowledge and on information and belief. The body of the affidavit failed to identify which statements were based on personal knowledge and which statements were based on information and belief. The Court concluded that it could not rely on this affidavit, setting out its reasoning as follows:

> [18] I find that the evidence on behalf of the defendants in the case at bar is insufficient to support an extension of time to file the jury notice.

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[148] *Supreme Court Civil Rules* Rule 22-2(12), 1974 Plan BOA, Tab 97.

> [19] The evidence relied on is from a paralegal who deposes to personal knowledge of facts and matters, or fact and matters stated to be on information and belief. However, the body of the affidavit (#3) does not identify which statements are based on personal knowledge and which on information and belief. For example, paragraph 7 states: "The intention to proceed by way of jury trial never changed."
>
> [20] Did the paralegal have personal knowledge of that intention? If so, how did she come by that knowledge? If she was relying on information and belief, she should have said so. The source of the information is not identified. The statement is hearsay about a critical piece of evidence. It is evidence that goes to one of the tests that the applicants must meet, namely, was it their intention to proceed with a jury trial during the requisite period of time to file and deliver the jury notice? Where such a key piece of evidence is involved, the court should not rely on information from an unidentified source.[149]

119. A similar problem arose in *Royal Bank of Canada v. Campbell*, 1997 CanLII 617 (B.C.S.C.) [*Campbell*], where the plaintiff bank brought an application for summary judgment relying on an affidavit of an employee. The Court concluded that the affidavit was inadmissible, noting that it failed to distinguish between evidence on personal knowledge and evidence on and information and belief:

> [18] The order sought is a final order and therefore the affidavit in support should be on personal knowledge not information and belief.
>
> [19] These transactions took place in Fort St. John, British Columbia and Mr. Owen appears to reside in Vancouver, British Columbia. There is nothing in his affidavit to indicate what the basis of his personal knowledge is, nor is there any indication that the statements he makes are based on information and belief. In paragraph (1) he states that he has personal knowledge of the facts except where stated to be upon information and belief but nowhere does he say that any of his statements are on information and belief.[150]

120. Similar concerns arise in this case. The Court has no ability to determine which portions of the Harvey Affidavit may be admissible as evidence in this proceeding and which are hearsay, or even double hearsay.

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[149] 1974 Plan BOA, Tab 32.

[150] 1974 Plan BOA, Tab 49.

121. Despite Mr. Harvey stating in his affidavit that he relies on information and belief, the Walter Canada Group suggests, without foundation, that all but one of Mr. Harvey's statements in their Statement of Uncontested Facts are based on personal knowledge.[151]

122. Statements of counsel are not evidence on a summary trial application.[152] The evidence before the Court is the Harvey Affidavit, and that evidence indicates that Mr. Harvey's evidence contains and relies upon hearsay evidence imparted from several unidentified individuals.

123. As in *Joshi* and *Campbell*, it is clear on the face of the Harvey Affidavit that it includes hearsay. In his affidavit, Mr. Harvey describes events leading up to and following the Western Acquisition on April 1, 2011. This evidence cannot be based on personal knowledge, as Mr. Harvey only began working for the Walter Group on July 9, 2012, more than a year after the Western Acquisition.[153]

124. The Walter Canada Group relies on this hearsay evidence at various points in their written submissions, dated December 12, 2016 (the "**Walter Canada Written Submissions**") and Statement of Uncontested Facts.

125. For instance, at paragraph 15 of the Walter Canada Written Submissions, the Walter Canada Group relies on Mr. Harvey's hearsay evidence in asserting that "after completing the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Group into geographical business segments, the Walter U.S. Group, the Walter Canada Group and the Walter UK Group."

126. The Walter Canada Group further relies on this passage from the Harvey Affidavit as an "uncontested fact" of relevant conduct occurring outside of the United States. In particular, the Walter Canada Group relies on Mr. Harvey's hearsay evidence as proof that "[s]ubsidiaries or assets of Walter Canada were transferred to the U.S. entities in

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[151] WCG Written Submissions, *supra* note 3 at para. 41(b).

[152] *Strathloch Holdings Ltd. v. Christensen Bros. Foods Ltd.* (1997), 29 B.C.L.R. (3d) 341, 1974 Plan BOA, Tab 53 at para. 14 (C.A.).

[153] See: Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 1.

connection with the internal restructuring following the Western Acquisition, thereby providing additional resources for the U.S. pension liabilities."[154]

127. Mr. Harvey does not indicate the source of information regarding the events surrounding the Western Acquisition, of which he could not possibly have personal knowledge because, by his own admission, he was not there at the time. The Court can therefore have no confidence that it can accurately distinguish evidence that is based on Mr. Harvey's personal knowledge from evidence that is based on information and belief.

128. Nor is it the court's function to do so. Such a course of action would be inappropriate. As explained by Mr. Justice Warren in *Porchetta v. Santucci*, 1998 CarswellBC 457 at para. 12 (S.C. Chambers):

> ...it is the responsibility of counsel on an application under Rule 18A to present admissible evidence. It is not the duty of the court to act as censor going through an affidavit with a blue pencil and deleting those portions which the judge considers offends the rules of evidence.[155]

129. Except as set out in Schedule "A" hereto and as discussed in Section IV.B, the 1974 Plan submits that the Harvey Affidavit is inadmissible in this summary trial. No reliance can be placed on any statement in it. The result is that the Walter Canada Group has no admissible evidence of many "facts" it relies upon in the Walter Canada Written Submissions , including:

(a) The Walter Group operated its business in two distinct segments: (i) U.S. Operations, and (ii) Canadian and UK Operations;[156]

(b) After completing the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Group into geographical business segments, the Walter U.S. Group, the Walter Canada Group and the Walter UK Group;[157]

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[154] WCG Written Submissions, *supra* note 3 at para. 99(b).
[155] 1974 Plan BOA, Tab 41.
[156] WCG Written Submissions, *supra* note 3 at *para. 3.*
[157] *Ibid* at para. 15.

(c) The Walter Canada Group was required to pay approximately $1 million per month to the Walter U.S. Group for the essential management services provided by Walter Energy and its U.S. subsidiaries;[158]

(d) The Walter Canada Group does not have any assets or carry on any business in the U.S.;[159] and

(e) Subsidiaries or assets of Walter Canada were transferred to the U.S. entities in connection with the internal restructuring following the Western Acquisition, thereby providing additional resources for the U.S. pension liabilities.[160]

(iii) The 1974 Plan is entitled to challenge the Harvey Affidavit

130. The Walter Canada Group seeks to admit the Harvey Affidavit on the basis that, because it was previously filed in this proceeding, the Court can consider it without requiring further proof of that document.[161]

131. That the Harvey Affidavit was previously filed in this CCAA proceeding does not prevent the 1974 Plan from contesting the reliance that can be placed on it. A fact in an affidavit does not become "uncontested" merely by reason of the fact's inclusion in an affidavit. That is no different whether the affidavit is newly sworn for the pending application or is relied on for the pending application but was sworn at an earlier stage of the proceeding. The affidavit remains the sworn evidence of one witness only. It does not "bind" the Court.

132. The fact that the Harvey Affidavit was filed for an earlier application does not give it added solemnity as a "court record". Nor does it make the affidavit admissible in this summary trial when the affidavit does not comply with the evidentiary requirements for such an application.

133. The Walter Canada Group has cited no authority to the contrary. The authority the Walter Canada Group cites is *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA

[158] *Ibid* at para. 101.
[159] *Ibid* at para. 99(b).
[160] *Ibid* at para. 99(b).
[161] *Ibid* at paras. 40-41.

367.[162] *Petrelli* does not stand for the proposition that affidavit evidence found in the court record cannot be contested at a later application or at trial.

134. The 1974 Plan submits that the Harvey Affidavit is inadmissible in an application seeking a final order. Nothing said in *Petrelli* – or any other case – prevents the 1974 Plan from challenging the assertions set out in the Harvey Affidavit just because it was previously filed in the court record of this CCAA proceeding.

135. This does not change because the 1974 Plan previously listed the Harvey Affidavit as "Materials to be Relied On" in an Application Response to an interlocutory matter in these CCAA proceedings.

136. The application at issue was an application by the Walter Canada Group for a number of orders regarding the conduct of a potential restructuring. These orders included orders for the retention of several professionals, including a Financial Advisor and a Chief Restructuring Officer (CRO), to supervise a sale of the Walter Canada Group's assets. The Walter Canada Group also sought orders providing for payment of a success fee to the Financial Advisor and the CRO and an order for an intercompany charge.

137. The 1974 Plan, making its first appearance in this CCAA proceeding, opposed several of the orders sought. The position of the 1974 Plan was that the evidence filed by the Walter Canada Group, including the Harvey Affidavit, was insufficient to justify the granting of the orders it opposed.

138. It was for this reason that the 1974 Plan listed the Harvey Affidavit in its "Materials to be Relied On" in its Application Response. The 1974 Plan was arguing that the Walter Canada Group's evidence, including the Harvey Affidavit, did not justify the relief sought.

139. The 1974 Plan was not admitting any of the "facts" set out in the Harvey Affidavit such that it could now be precluded from challenging those "facts".

140. The 1974 Plan is not precluded from challenging Mr. Harvey's evidence tendered by the Walter Canada Group in this summary trial.

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[162] Book of Authorities of the Petitioners ("WCG BOA"), Tab 12.

b. Walter Canada Group and Steelworkers cannot rely on prior interlocutory decisions of this Court to prove facts in this summary trial

141. The Walter Canada Group also seeks to rely on two prior interlocutory decisions of this Court to prove facts in this summary trial. It submits that factual findings made in previous decisions, absent an appeal, must be accepted as found.[163]

142. The 1974 Plan submits that there are two barriers to the Walter Canada Group's attempt to rely on passages from this Court's previous decisions as "facts" for the purpose of this summary trial. First, the "facts" that the Walter Canada Group refers to in the Walter Canada Written Submissions as stemming from this Court's prior decisions are not supported by the passage it cites.[164]

143. Second, and more fundamentally, a "fact" stated in a prior judgment in this CCAA proceeding does not make it a fact for the purpose of this summary trial.

144. While a court is entitled to take judicial notice of prior decisions of the court, that does not determine what use properly may be made of them.[165]

145. Whether or not a prior decision is admissible in trials on the merits will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions.[166] The standard of proof of the previous judgment is relevant to the weight to be afforded to its findings.[167]

146. To be estopped from contesting a point at trial that arose in an earlier interlocutory decision, the decision in the interlocutory motion must have been rendered in a contentious matter between the parties or their privies.[168]

147. Further, there must be a reasonable expectation by both parties that the decision-maker would be making a final determination of the issue at the time of the proceeding.[169] In

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[163] WCG Written Submissions, *supra* note 3 at para. 41(a).

[164] *Ibid* at paras. 13, 15, 78-80; *Walter Energy Canada Holdings Inc. (Re)*, 2016 BCSC 107, WCG BOE, vol. 2, Tab 7; and *Walter Energy Canada Holdings Inc. (Re)*, 2016 BCSC 1746, WCG BOE, vol. 2, Tab 8.

[165] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, 1974 Plan BOA, Tab 10 at paras. 38-39.

[166] *Ibid* at para. 46.

[167] *Ibid* at para. 47.

[168] Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Toronto: LexisNexis, 2015), 1974 Plan BOA, Tab 106 at 311.

other words, the question of law or fact which is the subject of the later litigation must be identical with, or inextricably involved with, the question of law or fact previously decided.[170]

148. The 1974 Plan submits that in the circumstances, the Walter Canada Group cannot rely on the "facts" it cites in this Court's January 26, 2016 decision as "uncontested facts" for the purpose of this summary trial.

149. The Court's January 26, 2016 decision was an interlocutory application seeking several orders to set the Walter Canada Group "on a path to a potential restructuring".[171] The relief sought included the approval of a sale and solicitation process and the appointment of several professionals to manage that process and complete other necessary management functions. The Walter Canada Group also sought the approval of a key employee retention plan and a further extension of the initial stay to early April 2016.

150. The evidence on the motion largely consisted of the Harvey Affidavit, based on both personal knowledge and information and belief. Mr. Harvey was the only possible source who could provide the "facts" the Walter Canada Group alleges stem from the passage in this Court's decision quoted above.

151. While this Court may have been able to rely on evidence given on information and belief in this prior decision, it cannot rely on evidence on information and belief when making a final order in a summary trial. It would be getting in through the back door what cannot enter through the front door if a "fact" referred to in an earlier judgment, where the standard of admissibility was not personal knowledge, then is used as a fact in a hearing where only evidence on personal knowledge can be received.

152. Further, the passage quoted above was not in any way contentious on the motion. This Court was merely summarizing the nature of the 1974 Plan Claim. The nature of the 1974 Plan Claim – and the facts relevant to the 1974 Plan Claim – was not at issue or in any way interwoven with the issues before the Court on that application. It thus was not

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[169] *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1, 1974 Plan BOA, Tab 11 at 11 (C.A.).

[170] *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665, 1974 Plan BOA, Tab 14 at para. 17.

[171] *Walter Energy Canada Holdings, Inc (Re)*, 2016 BCSC 107 at para. 9, WCG BOE, Tab 7.

reasonable for either party to expect that the Court would be making a final factual determination on those matters which were in no way pertinent to the issues before the Court.

153. The 1974 Plan submits that the "facts" stated in this Court's previous decisions are entitled to no weight in this summary trial application for a final order.

c. EDGAR filings are inadmissible for the purpose intimated by the Walter Canada Group

154. The Walter Canada Group seeks to admit certain Form 8-K's with attached press releases it says were filed by Walter Energy with the SEC and retrieved through the SEC's EDGAR system (together, the "**Alleged Press Releases**").

155. The Walter Canada Group adduces these materials as the evidence to support the "uncontested fact" that the Western Acquisition was highly publicized.[172]

156. The Walter Canada Group has attached the Alleged Press Releases as schedules to the Second Affidavit of Linda Sherwood dated November 14, 2016 (the "**Sherwood Affidavit**").[173] The affiant, Linda Sherwood, is a legal assistant at the Walter Canada Group's counsel's law firm.[174]

157. The Walter Canada Group asserts that the admission of the Alleged Press Releases does not create any hearsay concerns because it is only relying on the statements in the Alleged Press Releases for "the fact that the statements were made".[175]

158. Despite the Walter Canada Group's protestations to the contrary, the Sherwood Affidavit is inadmissible in this summary trial for the purpose advocated by the Walter Canada Group.

159. The Sherwood Affidavit is hearsay. She is not the author of the Alleged Press Releases, nor does she have personal knowledge of the contents of these documents. The only

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[172] WCG Written Submissions, *supra* note 3 at paras. 99(a) and 103.
[173] 2nd Sherwood Affidavit, *supra* note 133, Schedules 'A'-'H'.
[174] 2nd Sherwood Affidavit, *supra* note 133 at para. 1.
[175] WCG Written Submissions, *supra* note 3 at para. 43.

non-hearsay evidence that Ms. Sherwood is able to provide is that on the date she accessed EDGAR (which she fails to specify), she found those documents.

160. The Walter Canada Group seeks to rely on the Sherwood Affidavit as proof that Walter Energy filed the Alleged Press Releases with the SEC on the dates listed on the Alleged Press Releases.[176] It further seeks to rely on the contents of the Alleged Press Releases as proof that the statements within those documents were made on those dates.[177]

161. For instance, at paragraph 10 of the Walter Canada Written Submissions, the Walter Canada Group relies on the Sherwood Affidavit as proof that:

> Walter Energy's Western Acquisition was publicly announced in November 2010, when Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly available EDGAR system.

162. This is hearsay. Ms. Sherwood has no personal knowledge that Walter Energy issued a press release or filed a Form 8-K with the SEC in November 2010. The Walter Canada Group is making an inference based on the date noted on the document, which date was generated by Walter Energy.

163. The same issue arises for the other seven EDGAR documents Ms. Sherwood attaches as schedules to the Sherwood Affidavit.[178] None of the statements in the Sherwood Affidavit or in the documents themselves are capable of proving that the documents were publicly available on EDGAR on the dates Ms. Sherwood says they were.

164. The Attached Press Releases are inadmissible as proof that the statements made in those documents were publicly available on EDGAR on the dates the Walter Canada Group states they were.

d. Walter Canada Group seeks to have Court proceed on facts they define as "admitted facts" which have not been admitted

165. Many of the "facts" in the "Statement of Uncontested Facts" are facts that the Walter Canada Group asks this Court to assume as true for the purpose of this summary trial

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[176] *Ibid* at paras. 10-11.
[177] *Ibid* at para. 43.
[178] *Ibid* at para. 11.

only. These are facts that are pleaded by the 1974 Plan, but are not admitted by either or both of the Walter Canada Group and the Steelworkers.

166. For these categories of "facts", the Walter Canada Group submits that should a subsequent proceeding be required, the Walter Canada or the Steelworkers will maintain the ability to lead contrary evidence.

167. This presents problems in a summary trial application, as it necessarily asks the Court to proceed on a hypothetical set of facts that are still subject to challenge.

168. A formal admission in civil proceedings made for the purpose of dispensing with proof at trial is conclusive as to the matters admitted.[179] In multi-party litigation, however, an admission is only admissible against the party who makes the admission.[180] Accordingly, where a fact necessary for success against two parties is only admitted by one of them, the plaintiff will still be required to prove that fact with admissible evidence.

169. As explained by Master Peppiatt in *Hill v. Church of Scientology of Toronto*, 1986 CarswellOnt 1869, in the context of whether an admission made in examination for discovery is conclusive as against a co-defendant:

> [11] ...Certainly any admissions made by one defendant will not be binding upon a co-defendant; what one defendant says will not eliminate or narrow any issues between the plaintiff and the co-defendant and what the defendant being examined says about his co-defendant's case will have little or no effect on enabling the examining party to know the case he has to meet in respect of the co-defendant or facilitating settlement, pre-trial procedure or the trial with respect to the co-defendant...

170. The 1974 Plan has tendered an affidavit of Dale Stover, the Director of Finance and General Services of the United Mine Workers of America Health & Retirement Funds. Mr. Stover provides direct evidence of several of the 1974 Plan's allegations in its pleadings that either one or both of the Walter Canada Group and the Steelworkers have not admitted in these proceedings. For instance, Mr. Stover provides direct evidence of

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[179] Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada* (Toronto: LexisNexis, 2014), 1974 Plan BOA, Tab 114 at 1313 ["Sopinka"].

[180] *Ibid* at 400.

the facts set out in paragraphs 7-12, 14, 99 and 113 of the Statement of Uncontested Facts.

171. For these facts, the Court can rely on Mr. Stover's direct evidence and make factual findings.

172. Many other facts pleaded by the 1974 Plan can only be proven through discovery of the Walter Canada Group or admissions by the Walter Canada Group and the Steelworkers. As the Walter Canada Group has not permitted any discovery, the Court is only able to find these facts in this summary trial if both the Walter Canada Group and the Steelworkers admit them. Absent an admission by both, the Court is unable to find these facts on the current record.[181]

173. The Walter Canada Group is essentially asking the Court to assume that these facts are true for the purpose of this summary trial only. That is improper. Proceeding on the basis of assumed facts is rarely appropriate in a summary trial. As explained by Mr. Justice Esson in *Bell Pole Co. v. Commonwealth Insurance Co.*, 1999 BCCA 262 [*Bell Pole*], proceeding with a summary trial on assumed facts "seems inconsistent with the principle that a summary trial is a trial".[182]

174. The Court of Appeal expanded upon this sentiment in *Jam's International v. Westbank Holdings et al.*, 2001 BCCA 121. Mr. Justice Lambert, after citing *Bell Pole*, made the following observations:

> [7] I would like to add this; the problem is particularly acute in those cases where the court has been asked to decide the 18A application on assumed facts which are not conceded by the applicant to be true. In most cases if the application is dismissed the applicant on assumed facts seeks to retain the right to prove the true facts which may or may not be the same as the assumed facts. As in the *Bell Pole* case I would not make a definitive ruling on this issue until the issue itself is argued and not simply raised by this Court.
>
> [8] I think it would be a rare case where the Court was asked to assume facts which were not also conceded to be true for all purposes of the litigation by all parties to the litigation and where it would be wise for the court to give a judgment on those assumed facts. Of course,

[181] See, for example, Amended NOCC, *supra* note 15 at paras. 25, 40, 42, 44-48, 51-52, 54, and 79-82.
[182] 1974 Plan BOA, Tab 7 at para. 15.

> when all parties are prepared to concede that the facts put forward on the application are true and should be treated as such by all parties to the litigation, for all purposes of the litigation and not simply for the 18A proceeding, and all parties agree that that is so, then no problem is likely to arise. But those facts are not assumed facts they are admitted facts.
>
> [Emphasis added.][183]

175. In *Christopher v. Westminster Savings Credit Union*, 2003 BCSC 362, Mr. Justice Halfyard reviewed previous authorities on the issue. Halfyard J. concluded that the Court cannot proceed to try an action summarily on the basis of assumed facts:

> [20] I understood Mr. Cuttler's position to be that, if I found this case to be unsuitable for disposition by summary trial, and dismissed the defendant's application, it would be open to the defendant at a later trial to contest the version of facts advanced by the plaintiffs. In my opinion, the weight of the authorities is that the court should not proceed to the summary trial of an action based on assumed facts, unless all parties agree to that procedure. There is also some authority for the proposition that, even if the parties agree that the court should decide an issue of law on facts that are to be assumed, the summary trial should not be proceeded with, unless all parties agree that the facts are to be admitted finally and conclusively for all purposes in the proceeding as a whole.
>
> ...
>
> [23] In my view, the law dictates that I cannot proceed to try this action summarily, based on the assumed facts proposed by defence counsel. ...
>
> [Emphasis added.][184]

176. The Walter Canada Group and the Steelworkers are not prepared to admit facts that the 1974 Plan cannot prove without discovery. As a result, except as set out in Schedule "A", the Court has no ability to find those facts in this summary trial. The Court should not be asked to decide this claim summarily based on assumed facts, particularly when the 1974 Plan has not consented to such a procedure.

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[183] 1974 Plan BOA, Tab 31.

[184] 1974 Plan BOA, Tab 16.

e. Implications of deficient evidentiary record for Statement of Uncontested Facts

177. The Walter Canada Group's "Statement of Uncontested Facts" is a compilation of "facts" from a variety of sources. It is not itself evidence of anything in this summary trial. Where the underlying source of a "fact" outlined in that document is not supported by admissible evidence, it is not open to the Court to find that fact in this summary trial.

178. As a result of the evidentiary deficiencies outlined above, there is no admissible evidence before the Court for many of the statements set out in the "Statement of Uncontested Facts". We have prepared for the Court's convenience a chart that sets out the 1974 Plan's position on each of the "facts" listed in the "Statement of Uncontested Facts", attached hereto as Schedule "B".

f. Implications of deficient evidentiary record for Walter Canada Group's Expert Report

179. The Walter Canada Group relies on the expert evidence of Mr. Abrams. Mr. Abrams opines that the ultimate determination of the extraterritoriality issue requires a determination of whether conduct relevant to ERISA's focus occurred inside the United States.[185] Mr. Abrams then lists a number of factors he says would likely be relevant to this inquiry. He also lists certain "facts" that he believes support a finding that the relevant conduct occurred both inside and outside the United States. Mr. Abrams does not express a conclusion on the issue.

180. An expert is not the source of facts. The expert is simply told what facts to assume. It is the function of an expert report to provide the trier of fact with a ready-made inference from facts to be proven at trial.[186] The weight to be given to an expert report depends on the extent to which those facts are actually proved.[187]

181. The majority of the "facts" that Mr. Abrams assumed to be true that he opines point to relevant conduct occurring outside the United States are not supported by admissible evidence. In particular, there is no admissible evidence to support the following factual assumptions because they are derived from the Harvey Affidavit:

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[185] Abrams Report, *supra* note 4 at 16-17.

[186] *Lozinski v. Maple Ridge (District)*, 2015 BCSC 2565, 1974 Plan BOA, Tab 35 at para. 21.

[187] *Ibid* at para. 21.

(a) In connection with the internal restructuring that followed the Western Acquisition, subsidiaries or assets of Walter Canada were transferred to the U.S. entities (thereby providing additional resources for the U.S. pension liabilities);

(b) The Walter Canada Group does not have any assets or carry on any business in the United States; and

(c) The Walter Canada Group was not responsible for making the decisions leading to Walter Resources' withdrawal from the 1974 Plan.[188]

182. In addition, there is no admissible evidence to support the assertion that the "Walter Canada Group did not employ any persons who were members of the 1974 Plan and were not contributing employers to the 1974 Plan." The source for this assertion is paragraph 13 of this Court's January 26, 2016 decision. As discussed, that paragraph does not make this finding. Moreover, even if the Court made that finding, the Walter Canada Group cannot rely on this Court's prior interlocutory decision as a source for that fact.[189]

183. Further, the Walter Canada Group has not pointed to an evidentiary source that supports the factual assumption that the Western Acquisition was "consummated in Canada".[190]

g. Conclusion on Walter Canada Group's evidence

184. The Walter Canada Group's position appears to be that the rules of procedure and standards governing the admissibility of evidence for this proceeding should be based, in any given moment, on what suits the Walter Canada Group, rather than on anything known to the *Supreme Court Civil Rules* or the law of evidence.

185. This is wrong. The Court can only rely upon evidence in the Walter Canada Group's book of evidence that would be admissible in a trial of this action. Very little of the evidence relied on by the Walter Canada Group is admissible by that standard.

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[188] Abrams Report, *supra* note 4 at 21-22.
[189] *Ibid* at 22.
[190] *Ibid* at 21.

186. As we set out below, these evidentiary deficiencies, coupled with the Walter Canada Group's refusal to grant the 1974 Plan any discovery, impair the Court's ability to find the facts necessary to adjudicate the preliminary issues raised in this summary trial.

B. The 1974 Plan Relies Upon Admissions Against Interest in Mr. Harvey's Affidavit

187. The 1974 Plan is entitled to rely on the Harvey Affidavit in this summary trial.

188. An admission is any statement made by a litigant and tendered as evidence at trial by the opposing party. Admissions are not subject to the rules for testimonial qualifications of personal knowledge.[191] Accordingly, statements by parties to a proceeding may be tendered as admissions by an opposing party regardless of whether the statement may or may not be hearsay. This was explained by Mr. Justice Sopinka in *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 24:

> The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in McCormick on Evidence, supra, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.
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> [Emphasis added.][192]

189. An admission may take many forms. A statement by a party while under oath or contained in an affidavit may be used as an admission in the course of subsequent civil

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[191] *R. v. Foreman*, [2002] 166 O.A.C. 60, 62 O.R. (3d) 204 at para. 37 (C.A.), 1974 Plan BOA, Tab 44; *R. v. Matte*, 2012 ONCA 504, 1974 Plan BOA, Tab 46 at paras. 19-20.

[192] 1974 Plan BOA, Tab 43.

litigation.[193] This was explained by Mr. Justice Melnick in *R.W. Anderson Contracting Ltd. V. Stambulic Bros. Construction Ltd.*, 1999 CarswellBC 1976 (S.C.):

> [14] I have an initial problem with the position taken by Anderson. Firstly, a letter of April 22, 1998 from Mr. Colgur to Mr. Collins, when read together with an affidavit of Mr. Anderson dated September 23, 1998 filed in the action *Stambulic Bros. Construction Ltd. v. Anderson*, Cranbrook 8138 (B.C. S.C.), is tantamount to an admission by Mr. Anderson of the correctness of the claims for the deficiencies advanced by Stambulic and Mocam. Although that affidavit was filed in another action, Phipson on Evidence, 13 ed., Sweet & Maxwell, (London: 1982), states at para. 20-42 as follows:
>
> > Affidavits and Depositions of Witnesses. So, generally, the depositions of viva voce testimony of a party's witnesses, even when printed in the appendix to a case on appeal to the House of Lords, are not receivable against such party in subsequent proceedings as admissions. But affidavits or documents which a party has expressly caused to be made or knowingly used as true, in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact, even on behalf of strangers; and it is immaterial, in such a case, whether the documents are originals or copies.
>
> [15] On the basis of that authority, I accept that I am able to refer to Mr. Anderson's affidavit in the other action for the purpose of receiving, in this action, his statement against interest.[194]

190. Accordingly, statements in the Harvey Affidavit are admissible at the instance of the 1974 Plan as admissions against interest for the Walter Canada Group.[195]

191. The reasoning behind this result is explained by Mr. Justice Pelletier (then of the trial court) in *Tajgardoon v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C.R. 591 (T.D.). At issue in *Tajgardoon* was the admissibility of certain notes (known as "CAIPS notes") taken by a visa officer in an application for judicial review of the visa

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[193] Sopinka, *supra* note 179 at 376; *Tipping v. Hornby* (1960), 32 W.W.R. 287 (B.C.S.C.), 1974 Plan BOA, Tab 55.

[194] 1974 Plan BOA, Tab 50.

[195] If the Steelworkers are prepared to admit the admissions set out in Schedule "A" to the 1974 Plan's Written Submissions, then any admission against the Walter Canada Group is similarly an admission against the Steelworkers. If the Steelworkers are not prepared to admit the admissions set out in Schedule "A" to the 1974 Plan's Written Submissions, then the admissions are solely operative against the Walter Canada Group.

officer's refusal to grant the applicant a visa. Pelletier J. concluded that the notes were admissible at the instance of the applicant as an admission against interest, but not at the instance of the respondent:

> [18] ... Admissibility is always a question of "For what purpose?" In the hands of the applicant, the contents of the CAIPS notes tend to be used to show that the visa officer has misconducted himself in some fashion. In the hands of the respondent, the same notes are used to bolster the respondent's submission that all relevant factors were considered. Using the traditional language of the law of evidence, one would say that the applicant relies upon admissions against interest found in the notes while the respondent seeks to use self-serving statements made in an out-of-court document whose author is not available for cross-examination. The conclusion flowing from a traditional analysis of the law is that the CAIPS notes would be admissible at the instance of the applicant as admissions against interest but would not be admissible in the hands of the respondent because they are self-serving hearsay statements.
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> [Emphasis added.][196]

192. Pelletier J.'s analysis – while addressing a different reason for excluding the evidence – is persuasive.

193. The Harvey Affidavit is inadmissible for the reasons stated above. Notwithstanding the Walter Canada Group having put the Harvey Affidavit before the Court for this summary trial, the 1974 Plan can rely for the truth on admissions against interest found within the document.

194. Mr. Harvey made the Harvey Declaration in his capacity as an officer of Walter Energy Mr. Harvey made his affidavit attaching the Harvey Declaration as an Exhibit in his capacity as an officer of Canada Holdings and of Walter Energy. Statements of Mr. Harvey, given in his capacity as a representative of the Walter Canada Group and Walter Energy and made in that capacity are binding as admissions against the Walter Canada Group.[197]

195. The admissions the 1974 Plan seeks to rely on in the Harvey Affidavit are admissible as evidence in this summary trial despite the hearsay concerns that render the Harvey

[196] 1974 Plan BOA, Tab 54.

[197] Sopinka, *supra* note 179 at 391-392.

Affidavit inadmissible in the hands of the Walter Canada Group and the Steelworkers. The Walter Canada Group cannot resile from what its representative previously stated in his affidavit. To repeat the words of Sopinka J., "what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements."

C. The Walter Canada Group's Application is Unsuitable for Summary Trial

196. The ultimate aim of any trial is to seek and to ascertain the truth. While the parallel objectives of proportionality and efficiency have become increasingly important in the civil procedure context, seeking the truth remains the cardinal principle in civil proceedings.[198]

197. This principle underlies and informs the *Supreme Court Civil Rules* in British Columbia. It manifests itself in Rule 9-7(15)(a), which prevents the Court from granting judgment on a summary trial application where "the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law".

198. The discovery stage of a proceeding is a key to the search for truth, as it facilitates the disclosure of evidence that might enable the parties to establish the truth of the facts they allege.[199] Where there is important evidence potentially relevant to an issue that is not before the Court because of a denial of an opportunity to obtain discovery, it is unjust to dismiss a claim summarily.[200]

199. The Walter Canada Group has staked the Summary Trial Application on the contention that the Court does not need to concern itself with the facts the 1974 Plan says matter to determine the preliminary issues in this summary trial.

200. The 1974 Plan submits that the Walter Canada Group's preliminary issues are currently unsuitable for determination in this summary trial. There are three key reasons for this conclusion, all of which will be developed below.

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[198] *Imperial Oil v. Jacques*, 2014 SCC 66, 1974 Plan BOA, Tab 30 at para. 24.

[199] *Ibid* at para. 26.

[200] *Supreme Court Civil Rules*, 1974 Plan BOA, Tab 97, Rule 9-7(15)(b); *Chouinard v. Army & Navy Dept. Store Ltd.*, 2008 BCCA 353, 1974 Plan BOA, Tab 15 at para. 19; *Bank of British Columbia v. Anglo-American Cedar Products Ltd.* (1984), 57 B.C.L.R. 350, 1974 Plan BOA, Tab 4 at 353 (S.C.).

201. First, the deficient evidentiary record has left the Court in a position where it cannot find the necessary facts to determine the preliminary issues in this summary trial application. The Court will only be in a position to do so after the 1974 Plan has had a meaningful opportunity through discovery to obtain evidence of the facts it says are relevant to its claim.

202. Second, it would be unjust for the Court to proceed on this deficient evidentiary record and find against the 1974 Plan in the face of the Walter Canada Group's refusal to grant the 1974 Plan any discovery.

203. Third, a consideration of the relevant factors for proceeding summarily on an issue militates against this Court proceeding with this application. The significant amount involved, the complexity of the case, the substantial risk of wasting time and effort, and the undesirability of producing premature appeals on hypothetical issues all point directly against summary disposition based on the present record.

1. Court is unable to find the facts necessary to dispose of preliminary issues in favour of the Walter Canada Group and the Steelworkers

204. The Court cannot decide the Summary Trial Application unless it is able to find the facts necessary to decide the issues of fact or law it raises.[201]

205. It is the nature of the evidence which must determine whether or not the Court is satisfied that the facts can be determined and the law applied.[202]

206. The 1974 Plan submits that the evidentiary record is insufficient for the Court to find the facts necessary to find against the 1974 Plan on any of the three preliminary issues before it on this summary trial application. As a result, if the Court does not resolve the preliminary issues in favour of the 1974 Plan based on the present record, the Walter Canada Group's summary trial application must be dismissed.

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[201] *Supreme Court Civil Rules*, *supra* note 200, Rule 9-7(15).

[202] *Doell v. Buck*, [1990] B.C.W.L.D. 038, 1999 CarswellBC 438, 1974 Plan BOA, Tab 22 at para. 6 (C.A.).

a. Choice of law issue is fact-dependent

207. The first threshold issue in the Walter Canada Group's summary trial application asks the Court to determine whether the 1974 Plan Claim is governed by U.S. or Canadian substantive law.

208. There is a key dispute between the parties as to the proper characterization of the 1974 Plan Claim. The Walter Canada Group characterizes the claim as an issue of legal personality, requiring the Court to apply the law of the place of incorporation.

209. The 1974 Plan submits that the Walter Canada Group is incorrect; the proper law of the claim requires a principled and contextual analysis that considers which law has the *closest and most real connection* with the claim.

210. If the Walter Canada Group were correct that the only fact which the law requires the Court to consider is the place of incorporation, then there would be an argument that the first threshold issue is suitable for determination on the present record.

211. But the Walter Canada Group is not correct. And the Walter Canada Group is not correct regardless of whether the Court ultimately agrees with the Walter Canada Group's characterization of the 1974 Plan Claim for choice of law purposes.

212. Even if the Court accepts the Walter Canada Group's characterization of the 1974 Plan Claim, the Court would still need more facts than merely the place of incorporation.[203] That is because characterization of a claim and the associated choice of law rule are not ends in themselves. They are a means to an end. The end is to enable the Court to identify the territory with the closest and most real connection with the claim. The Court cannot do so by putting on blinders and, as the Walter Canada Group asks it to do, shutting its eyes to the complex web of connections involved in this case.

213. Simply put, the court first must have a complete picture of the facts and connections before the Court can reach a conclusion on what the appropriate choice of law rule is. Otherwise, the Court is making a decision in a factual vacuum, never knowing whether the result fulfills the fundamental aim of a choice of law analysis.

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[203] See Section IV.D.

214. The 1974 Plan submits that relevant to this analysis is the degree to which the Walter Canada Group was managed out of the U.S. and an understanding of the Walter Group's global business. The 1974 Plan has pleaded facts relevant to this analysis that without discovery it is incapable of obtaining the evidence to prove. For example, the 1974 Plan sets out the following facts in its Amended Notice of Civil Claim that have not been admitted by the Walter Canada Group:

(a) Walter Energy and its various affiliates, including the Walter Canada Group, constitute a single global enterprise with integrated businesses;[204]

(b) The management team and key-decision makers of Canada Holdings and the other Walter Canada Group operated out of the United States;[205]

(c) U.S. law was the legal system with which the management team and key-decision makers were most familiar and they expected U.S. law to govern the business they directed;[206]

(d) Walter Energy's management team and key-decision makers were guided by U.S. law in their actions;[207]

(e) After the date of the Western Acquisition, the President of Canada Holdings and each of its Canadian subsidiaries resided in and worked out of Birmingham, Alabama, in the United States;[208]

(f) Additional members of the Walter Canada Group's management team resided in the U.S. and operated out of the Birmingham, Alabama office;[209]

(g) Until his resignation, Danny L. Stickel, sole director of Canada Holdings, 0541237 B.C. Ltd., Walter Canadian Coal ULC, Wolverine Coal ULC, Cambrian Energybuild Holdings ULC, Willow Creek Coal ULC, and Brule Coal ULC, and

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[204] Amended NOCC, *supra* note 15 at para. 15.
[205] *Ibid* at paras. 86-87.
[206] *Ibid* at para. 101.
[207] *Ibid* at paras. 86-87.
[208] *Ibid* at para. 88.
[209] *Ibid* at para. 91.

one of two directors of Pine Valley Coal Ltd., resided in and worked out of the United States and held positions with Walter Energy;[210]

(h) At least four of the five officers of Cambrian Energybuild Holdings ULC lived in and worked out of Birmingham, Alabama;[211]

(i) At least one of the two officers of Canada Holdings, 0541237 B.C. Ltd., Walter Canadian Coal ULC, Wolverine Coal ULC, Willow Creek Coal ULC, and Brule Coal ULC lived in and worked out of Birmingham, Alabama;[212]

(j) Withdrawal from the 1974 Plan occurred in the United States. The liability created thereby occurred in the United States;[213]

(k) The directors of the Canadian entities were familiar with U.S. law;[214]

(l) In relation to operations generally, and the withdrawal liability in particular, the laws and legal system of the United States informed and guided the perceptions and actions of the key players of all of the following: the 1974 Plan; Walter Energy; Walter Resources; Canada Holdings; Walter Canadian Coal ULC; Wolverine Coal ULC; Brule Coal ULC; Cambrian Energybuild Holdings ULC; Willow Creek Coal ULC; Pine Valley Coal, Ltd.; and 0541237 BC Ltd.;[215]

(m) As the legal system that guided the key players and directing minds of the entities listed in preceding subparagraph, and the legal system with which these individuals are the most familiar, U.S. law is the law that these individuals expected to govern their relationships and liabilities, including the 1974 Plan Claim for withdrawal liability;[216] and

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[210] *Ibid* at para. 92.
[211] *Ibid* at para. 93.
[212] *Ibid* at para. 94.
[213] *Ibid* at para. 96.
[214] *Ibid* at para. 98.
[215] *Ibid* at para. 99.
[216] *Ibid* at para. 100.

(n) The consolidated enterprise, which includes Walter Energy, Canada Holdings and their Canadian and U.S. operations, benefits from the Walter Canada Group's refusal to acknowledge the withdrawal liability.[217]

(collectively, the "**Unadmitted Facts**").

215. The 1974 Plan requires discovery to prove the Unadmitted Facts. The Walter Canada Group does not seem to disagree. Rather, it says that all of these Unadmitted Facts are irrelevant. The Walter Canada Group then lists several "uncontested facts" they suggest point to Canada as the forum with the closest and most real connection to the 1974 Plan Claim.

216. For example, the Walter Canada Group argues that the 1974 Plan will not be able to prove that the Walter Canada Group routinely conducted their affairs under U.S. law because of the following "uncontested facts":

(a) The Walter Canada Group's collective agreements with the Steelworkers and the Christian Labour Association of Canada were governed by the B.C. *Labour Relations Code*;[218]

(b) The Walter Canada Group's operations were subject to environmental assessment under the BC *Environmental Assessment Act* and its predecessor legislation, the *Mine Development Assessment Act*;[219]

(c) The Walter Canada Group experienced some issues meeting certain BC water quality guidelines at the Brule Mine;[220]

(d) Any significant changes to the Walter Canada Group's operations or further development of its properties in BC could have triggered a federal or provincial environmental assessment or both;[221]

(e) Each Walter Group mining site was inspected by the BC Ministry of Energy and Mines in September 2014;[222]

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[217] *Ibid* at para. 101.
[218] WCG Written Submissions, *supra* note 3 at para. 114(a).
[219] *Ibid* at para. 114(c).
[220] *Ibid* at para. 114(d).
[221] *Ibid* at para. 114(e).

(f) Pursuant to the BC *Mines Act*, the Walter Canada Group's operations required permits outlining the details of the work at each mine and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land and watercourses affected by the mine;[223]

(g) The Walter Canada Group filed mine plans and reclamation programs for each of its operations and accrued for reclamation costs to be incurred related to the operation and eventual closure of its mines under the *Mines Act* and the *Mine Code*;[224] and

(h) The Walter Canada Group submitted updated five-year mine plans for the Wolverine Mine and the Brule Mine in 2013.[225]

217. The Walter Canada Group further asserts it is an "uncontested fact" that the Walter Canada Group estimated (with the assistance of the then-Proposed Monitor) that obligations in respect of Walter Canada Group unpaid wages, unremitted source deductions, unpaid accrued vacation pay and certain taxes could amount to a total potential director liability of approximately $2.5 million.[226]

218. The relevance of these "facts" and legal conclusions, all drawn from the Harvey Affidavit, is unclear, as they are unrelated to the 1974 Plan Claim. They also say nothing about the degree of integration amongst the entities in the Walter Group or the location of the decision makers for the Walter Canada Group.

219. Even if these "facts" were relevant, there is no admissible evidence on the record to prove them because the assertions in the Harvey Affidavit cannot be relied upon in this summary trial. For example, and as submitted above, the "uncontested fact" regarding director liability is hearsay from an unidentified source and thus would not be admissible in any application, let alone an application for a final order of dismissal.

220. Importantly, however, all of these "facts", even if admissible, are nothing more than untested assertions. The Walter Canada Group's refusal to permit any discovery in this case has left the 1974 Plan unable to test the veracity of these assertions. Accordingly,

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[222] *Ibid* at para. 114(f).
[223] *Ibid* at para. 114(g).
[224] *Ibid* at para. 114(h).
[225] *Ibid* at 114(h).
[226] *Ibid* at para. 115.

even if these assertions were relevant and admissible, the 1974 Plan has been deprived of its opportunity to uncover and test the evidence, if any, underlying those assertions.

221. It is the 1974 Plan's position that the evidence on the record – even in its limited state – supports a conclusion that the United States is the forum with the closest and most real connection to the 1974 Plan Claim. The 1974 Plan anticipates that, with discovery, it will be able to adduce more evidence that will support that conclusion.

222. The Walter Canada Group and the Steelworkers, on the other hand, have tendered insufficient evidence for the Court to reach the conclusion that Canada is the forum with the closest and most real connection to the 1974 Plan Claim. The Court is accordingly unable to find the facts that would be necessary to dispose of the first preliminary issue in this summary trial in favour of the Walter Canada Group and the Steelworkers.

b. Extraterritoriality issue as framed by the Walter Canada Group is fact-dependent

223. The second issue raised in the Summary Trial Application whether the application of ERISA to the 1974 Plan Claim is an extraterritorial application of the statute. The 1974 Plan's position on this issue is that application of ERISA to the 1974 Plan Claim is a domestic application of the statute. On the evidence before the Court, the only available conclusion is that there is no problem of extraterritoriality.

224. The 1974 Plan further submits that the analysis prescribed by the Abrams Report cannot be performed on the present record.

225. Although Mr. Abrams reaches no conclusion on the point, the Walter Canada Group argues that based on the following "uncontested facts", the relevant conduct occurred in Canada for the purpose of the second prong of Mr. Abrams' analysis:

(a) Western Coal Corp. and its subsidiaries existed and operated in Canada before the Western Acquisition;

(b) The Western Acquisition was approved by the BC Supreme Court on March 10, 2011;

(c) The Western Acquisition was consummated in Canada;

(d) The 1974 Plan did not file any objection to the plan of arrangement at that time, despite the fact that the transaction was disclosed in Walter Energy's news releases and public filings numerous times starting in November 2010;

(e) Subsidiaries or assets of Walter Canada were transferred to the U.S. entities in connection with the internal restructuring following the Western Acquisition, thereby providing additional resources for the U.S. pension liabilities;

(f) No subsidiaries or assets of the U.S. entities were transferred to Walter Canada;

(g) The Walter Canada Group does not have any assets or carry on any business in the U.S;

(h) The Walter Canada Group did not employ any persons who were members of the 1974 Plan; and

(i) The Walter Canada Group were not contributing employers to the 1974 Plan.

226. The 1974 Plan refutes that these facts, even if proven, would be determinative of any of the preliminary issues raised in this summary trial. But even setting that aside, there are two critical problems with the Walter Canada Group's argument.

227. First, of these so-called "uncontested facts", only Item (b) is based on admissible evidence and is open to this Court to find as a fact in this summary trial. Item (a) is not admitted by the Steelworkers and thus cannot be accepted as a fact in this summary trial. There is no evidence on the record of Items (c) and (i). Items (e), (f) and (h) are based on inferences from the Harvey Affidavit, the entirety of which is inadmissible for the truth of its contents in this summary trial (except to the extent that it contains admissions against interest on which the 1974 Plan can rely). Item (g) is also inadmissible on this basis. As for Item (d), there is no admissible evidence that the Western Acquisition was disclosed in Walter Energy's news releases and public filings numerous times starting in November 2010.

228. Accordingly, even if these "facts" were relevant, the Court would be unable to find them on the present record.

229. Second, even if there were admissible evidence of these "facts", that would only make them admissible – it would not make them uncontested. The 1974 Plan has not admitted any of the facts set out in (c) through (i) above. To test the truth of these "facts", the 1974 Plan requires an opportunity to examine documents and a key representative of the Walter Canada Group's management team to uncover information about the Walter Canada Group's business.

230. The same problems plague the Walter Canada Group's attempt to diminish factors Mr. Abrams identified as pointing to relevant conduct occurring in the United States.

231. In his report, Mr. Abrams suggests that the existence of an unfunded liability at the time of the Western Acquisition points to relevant conduct occurring in the United States. Mr. Abrams also suggests that the provision of services by Walter Energy and its U.S. subsidiaries to the Walter Canada Group pursuant to management and intercompany agreements points to relevant conduct occurring in the United States.

232. The Walter Canada Group argues that the "highly publicized" nature of the Western Acquisition negates the significance of the fact that the 1974 Plan was underfunded at the time of the Western Acquisition. The Walter Canada Group suggests that the 1974 Plan, having notice of the transaction, ought not to be permitted to question it.

233. The 1974 Plan refutes that this is a relevant consideration in this case. The 1974 Plan's Claim does not challenge the Western Acquisition. However, even if it were relevant, the Walter Canada Group has adduced no admissible evidence that the 1974 Plan had notice of the Western Acquisition or that it was highly publicized. This is accordingly not a fact that the Court is able to find in this summary trial.

234. The Walter Canada Group also gives two reasons that the "shared services", described by Mr. Harvey in his affidavit as "essential",[227] do not overcome the factors pointing to the relevant conduct occurring in Canada:

(a) the Walter Canada Group was required to pay approximately $1 million per month to Walter Energy for these shared services; and

[227] Harvey Affidavit, *supra* note 10 at paras. 7(f), 30, 139, and 149.

(b) a previous U.S. case found that the provision of payroll services by a Canadian parent to a U.S. subsidiary was insufficient to justify the exercise of jurisdiction over the Canadian parent.[228]

235. On the first point, the assertion that the Walter Canada Group was required to pay approximately $1 million per month to Walter Energy for these shared services is not a fact that the Court can find in this summary trial. This "fact" comes from the Harvey Affidavit, which the Court cannot rely upon in this summary trial at the instance of the Walter Canada Group and the Steelworkers.

236. Even if this "fact" were admissible, all that the Harvey Affidavit states is that "as of December 2015, the Walter Canada Group paid approximately $1 million per month to the Walter U.S. group for the Shared Services." This statement does not say anything about whether the Walter Canada Group was making payments prior to December 2015 and, if so, the amount of any such payments.

237. Further, the payment of $1 million per month by a subsidiary to its parent is unlikely to be the arm's length transaction the Walter Canada Group makes it out to be. In the context of a centrally administered global enterprise, any "payments" for services may simply be bookkeeping exercises.

238. In any event, the 1974 Plan has been deprived discovery that would allow it to challenge this evidence.

239. With respect to the Walter Canada Group's second point regarding the shared services, the services provided to it by Walter Energy and its U.S. affiliates went well beyond the provision of "payroll services". This is evident from reviewing the Harvey Declaration, attached as Exhibit "B" to the Harvey Affidavit filed by the Petitioners on this summary trial application.

240. Mr. Harvey states in the Harvey Declaration that Walter Energy provided numerous administrative services to all entities in the Walter Group from its global headquarters in Birmingham, Alabama. In addition to payroll services, these services included finance, tax, treasury, human resources, benefits and communications, information technology,

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[228] WCG Written Submissions, *supra* note 3 at paras. 101-102.

legal, operations and health, safety and environment, among others. Mr. Harvey describes some of the essential services Walter Energy provided:

- **Finance**: Walter Energy's Finance Department was responsible for creating and maintaining company-wide accounting policies, performing accounting research for all of Walter Energy's subsidiaries. The Finance Department also was responsible for financial reporting, including SEC reporting and consolidations, forecasts, and budgets. The Finance Department was also involved in creating and monitoring company-wide internal controls.

- **Tax**: Walter Energy's Tax Department maintained all income tax items for the Walter Energy global operations, including financial reporting, regulatory filings and audit controversy settlement in the U.S. The Tax Department also was responsible for directing and concluding regulatory filings, audit and other tax controversy efforts for the Walter Canada Group, as well as restructuring and financial tax reporting activities associated with the Canadian entities. In addition, the Tax Department directed and managed all U.S., U.K., Canadian and state and provincial financial tax reporting to manage the accuracy and timeliness of tax disclosures and financial filings in addition to all regulatory filings required in these jurisdictions.

- **Treasury**: Walter Energy's Treasury Department was involved in the monitoring of bank accounts and cash needs daily; the borrowing and repayment of debt; funds transfers; intercompany payments; bank services management, administration and communications; and foreign exchange transactions for Walter Energy's global operations. Walter Energy also provided risk management activities, including risk identification and development of risk retention and transfer solutions (e.g., the design and management of various insurance programs). The Treasury Department also handled claims management, which included managing pollution legal liability, general liability, automobile liability and property damage claims, as well as managing loss control activities.

- **Human Resources** ("**HR**"): Walter Energy's HR Department provided various HR activities, including compensation, equity and benefits, payroll and other related services for the Walter U.S. Group and the Walter Canada Group.

- **Information Technology** ("**IT**"): Walter Energy's IT Department was responsible for the maintenance of Walter Energy's IT resources, which included servers, backups, software, contractor work and hardware maintenance.

- **Legal**: Walter Energy's Legal Department supported the Walter U.S. Group and their U.S. operations. Certain legal personnel were involved in activities that provided either a global benefit or a direct benefit to the Walter Canada Group or Walter UK Group.

- **Sourcing and Logistics**: Walter Energy's Sourcing Department provided assistance in the negotiation and implementation of global supply contracts for the Walter Group. Walter Energy's sourcing personnel assisted with supplier selection and development, contract negotiations, competitive bid events and asset relocations.

- **Sales and Marketing**: Walter Energy's Sales and Marketing Department managed sales of U.S. coal for the Walter U.S. Group and provided strategic marketing services for the Walter Canada Group and Walter UK Group. These activities included setting the global sales and marketing strategy for the Walter Group, the development of new sales and marketing procedures and similar activities.[229]

241. Mr. Harvey further describes that in the normal course of business, the Walter U.S. Group, Walter Canada Group, Walter UK Group and other affiliates engaged in various intercompany activities which gave rise to intercompany transactions (the "**Intercompany Transactions**"). Mr. Harvey states that the Intercompany Transactions gave rise in the ordinary course to payables and receivables between, among and on behalf of the Walter U.S. Group, Walter Canada Group, Walter UK Group and other affiliates.[230]

242. The Harvey Declaration suggests that Walter Energy controlled nearly every facet of its subsidiaries' businesses. The Walter Canada Group's comparison to a case involving the provision by a parent to its subsidiary of "payroll services" fails to do justice to the high degree of control and integration deposed to by Mr. Harvey.

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[229] Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 75.
[230] *Ibid* at para. 64.

243. Absent discovery, the Court will not be in a position to resolve the issue as framed by the Walter Canada Group of whether the relevant conduct occurred in Canada or the United States.

c. Public policy issue as framed by the Walter Canada Group and Steelworkers is fact-dependent

244. The Walter Canada Group and the Steelworkers submit that ERISA's withdrawal liability provisions should not be enforced as they violate Canadian public policy. This is a narrow exception to the applicability of a foreign law, and the essential justice and morality of Canadians must be at stake.[231]

245. It is the 1974 Plan's position that this preliminary issue does not require the Court to concern itself with the effects of ERISA in the particular circumstances of this case. The public policy exception to the applicability of a foreign law is solely concerned with the foreign law and whether that law is contrary to our view of basic morality.

246. This was emphasized in *Beals v. Saldanha*, 2003 SCC 72, a case cited by the Steelworkers. At issue in *Beals* was the enforceability of a Florida damages award in Ontario. The defendant argued enforcement of the judgment would be contrary to Canadian public policy because the damage award was excessive. Mr. Justice Major rejected the defendant's argument. In the course of his discussion of the public policy exception, Major J. emphasized that the focus is on the foreign law and not the specific facts of the case:

> [71] The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in *Castel and Walker*, supra, at p. 14-28:
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> > . . . the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts. . . .
>
> [Emphasis in original.][232]

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[231] *Block Brothers Realty Ltd. v. Mollard* (1981), 27 B.C.L.R. 17, 1974 Plan BOA, Tab 8 (C.A.).
[232] WCG BOA, Tab 2.

247. Both the Walter Canada Group and the Steelworkers incorrectly focus on the effect of enforcing the controlled group provisions of ERISA in the particular circumstances of this case.

248. The Walter Canada Group submits that the Court "should not now enforce ERISA to shift the burden of U.S. social policy to Walter Canada Group and its Canadian stakeholders."[233] The Walter Canada Group further submits that this Court "should refuse to enforce ERISA in the context of the 1974 Plan Claim because it allows individuals who never had a relationship with any Walter company to benefit at the expense of Walter Canada Group employees and creditors."[234]

249. The Steelworkers are more explicit. The Steelworkers argue that the controlled group liability provisions would offend the basic morality of Canadians where, as here, the "1974 Plan is asking that this Court to find that the labour legacy costs of Walter U.S. are to be born by the workers of Wolverine Mine by reducing their Severance and Termination Pay to almost nothing."[235]

250. The Steelworkers further submit that the 1974 Plan Claim would "have the result of undercutting the public policy objectives of *Employment Standards Act* and the *Labour Relations Code* and Collective Bargaining by diminishing the ability of former Wolverine employees to receive wages and benefits they should have earned by expropriate funds that are meant to satisfy these claims."[236]

251. The 1974 Plan submits that this focus on the effect of applying ERISA in this case is misplaced. But if the Walter Canada Group and the Steelworkers are correct that the effect on the Steelworkers and other creditors were relevant, the Court is not in a position to undertake the factual inquiry that would be required.

252. The Steelworkers suggest as much in their written submissions. The Steelworkers concede that they "do not suggest that Canadian courts should never consider claims against Canadian corporations for pension liabilities under ERISA from related American

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[233] WCG Written Submissions, *supra* note 3 at para. 121.
[234] *Ibid* at para. 125.
[235] Written submissions of United Steelworkers, dated December 19, 2016 ["USW Written Submissions"] at para. 84.
[236] *Ibid* at para. 86.

companies."[237] Accordingly, the Steelworkers do not argue that it is always contrary to Canadian public policy to apply ERISA's withdrawal liability provisions to Canadian companies. Rather, the Steelworkers argue that it would be contrary to Canadian public policy to apply ERISA's withdrawal liability provisions in the circumstances of this case.

253. The Steelworkers public policy argument appears to be premised on the assertion that the 1974 Plan is advocating an "automatic application of Controlled Group Liability." This underlies the Steelworkers' argument that the Court is unable to consider a number of relevant factors to the public policy analysis. The factors suggested by the Steelworkers are: (a) the circumstances leading to the debt and the calculation of the debt; (b) the connection between the Canadian company and the facts giving rise to the debt, including ; and (c) the impact of allowing the debt on other parties, particularly relevant in insolvency actions such as CCAA.

254. The 1974 Plan submits that the first two considerations are essentially what the 1974 Plan is submitting the Court must do to determine which forum has the law with the closest and most real connection to the 1974 Plan Claim. The 1974 Plan is not advocating an "automatic application" of ERISA to the Walter Canada Group. Instead, the 1974 Plan is arguing that U.S. law applies to the 1974 Plan Claim if, after a consideration of all of the relevant facts, the Court concludes that the United States has the closest and most real connection to the claim.

255. The 1974 Plan submits that there are insufficient facts for the Court to embark on the contextual and fact-driven analysis proposed by the Steelworkers – if such an analysis were necessary. Information uncovered in discovery is likely to furnish the Court with more facts to determine whether this is one of the cases alluded to by the Steelworkers where the Court can apply the withdrawal provisions of ERISA to Canadian corporations.

2. Proceeding in absence of discovery would be unjust to the 1974 Plan

256. The deficient evidentiary record supplied by the Walter Canada Group, coupled with the lack of any discovery, has impeded the 1974 Plan's ability to put its best foot forward in this summary trial.

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[237] *Ibid* at para. 75.

257. The Walter Canada Group's refusal to provide discovery constitutes an independent basis to dismiss this summary trial application.

a. Importance of discovery

258. The adversarial system is founded on the conception that the parties to an action will bring forward all relevant evidence available to support their case and will present their case in its best light.[238] In that way, "it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved."[239]

259. Pre-trial discovery is the mechanism available to a litigant to access this relevant evidence, providing the litigant with a means to establish the truth of the facts it alleges.

260. Document discovery allows parties to learn what relevant documents are or have been in the possession of other parties, and to inspect and get copies of documents that are not privileged. It is of central importance to the conduct of a case:

> The ability to obtain proper document discovery can be the single most important factor in the outcome of a case. The recollections of witnesses (even honest ones) can be faulty or coincident with their own interests in the matter. Contemporaneous documentary records are rarely fabricated and frequently provide the most reliable evidence on a particular point.[240]

261. Examination for discovery is similarly essential to the trial process. Affidavits are normally crafted by lawyers and tend to present facts in a light favourable to the party on whose behalf they were prepared.[241] The ability to examine a witness for discovery provides an opportunity to the opposing party to uncover facts that would otherwise not be disclosed:

> A critical step in any litigation, the examination can help counsel understand the nature of the other side's case, gain admissions for use at trial, commit an opposing witness to his or her testimony, and narrow the issues in the litigation. Conducted effectively, the examination for

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[238] *Mayer, supra* note 9 at para. 78.

[239] *Ibid.*

[240] Lyle G. Harris, Q.C., *Discovery Practice in British Columbia*, 2nd ed. (2016 Update) (Vancouver: The Continuing Legal Education Society of British Columbia, 2004), 1974 Plan BOA, Tab 113, § 2.1 ["Harris"].

[241] *Golden Capital Securities v. Holmes*, 2001 BCSC 1487.

> discovery lays the groundwork for successfully resolving a case out of court, or presenting the best case at trial.[242]

262. The importance of pre-trial discovery was highlighted in *Mayer v. Mayer*, 2012 BCCA 77. In *Mayer*, the Court of Appeal reversed the decision of the trial judge to dismiss a claim summarily without permitting the plaintiff an opportunity to develop its case fully through discovery and cross-examination. Mr. Justice Smith described the importance of document discovery and examination-for-discovery as follows:

> Litigants do not always have access to all of the relevant evidence bearing on the issues raised. Often, relevant documents are in the sole possession or control of their opponents. Documentary discovery requires the opponents to disclose such documents and enables the litigants to use them in support of their case. Also, oral discovery offers the opportunity to learn of relevant evidence otherwise not known to the examining party, to obtain helpful admissions, and to explore the strengths and weaknesses of the opponent's case: [citation omitted]. Moreover, when a party is unable to tender necessary evidence in any other way, the party may adduce such evidence from his opponent: [citations omitted]. Clearly, parties are not confined to reliance on their own evidence.[243]

263. Given the fundamental importance of discovery in the life of a lawsuit, the inability of a plaintiff to obtain discovery prior to a summary trial will frequently render it unsuitable for summary determination. Indeed, Rule 9-7(5) specifically contemplates the conduct of discoveries prior to a summary trial application.[244]

264. The plaintiff must not be deprived of an opportunity to uncover or develop all of the evidence that may be important regarding an issue on summary trial.[245] Where there is important evidence potentially relevant to an issue that is not before the Court, it will be unjust to dismiss a claim.[246] The plaintiff should be provided an opportunity to conduct oral and documentary discovery to obtain that relevant evidence.[247]

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[242] Harris, *supra* note 240, § 3.1.

[243] *Mayer, supra* note 9 at para. 79.

[244] *Roynat Inc. v. Dunwoody & Co.* (1993), 83 B.C.L.R. (2d) 385, 1974 Plan BOA, Tab 50 at para. 50 (S.C.).

[245] *Central Mountain Air Ltd. v. Corporation of the City of Prince George*, 2012 BCSC 1221, 1974 Plan BOA, Tab 13 at paras. 21-22; *656925 B.C. Ltd. v. Cullen Diesel Power Ltd.*, 2009 BCSC 260, 1974 Plan BOA, Tab 1 at para. 42.

[246] *Chouinard, supra* note 200 at para. 19; *Bank of British Columbia* note 200 at 353.

[247] *Chouinard supra* note 200 at para. 19.

265. This was explained by Mr. Justice Smith in *Chouinard v. Army & Navy Dept. Store Ltd.*:

> [19] In my view, the action was not suitable for summary disposition. The individual defendants, who are the allegedly tortious actors, had not yet been served with process and the pleadings had not been closed. It is reasonable to expect that evidence to be obtained from them by the appellant on oral and documentary discovery, and evidence to be obtained from the action brought by the other customer would shed light on the limitation issue, particularly as it affects the causes of action not considered by the trial judge. Thus, there was important evidence potentially relevant to the limitation question that was not before the court and, in the circumstances, it was unjust to the appellant to dismiss the action before affording him an opportunity to obtain that evidence.
>
> [Emphasis added.]

b. Important evidence not before the Court

266. The Walter Canada Group does not admit all of the allegations in the 1974 Plan's pleadings, choosing instead to stake an entire summary trial on the contention that discovery on these matters would be irrelevant.

267. The Walter Canada Group is not right in that contention. And based on the Walter Canada Group's own written submissions, it is clear that they are not right. After refusing the 1974 Plan discovery to obtain evidence of the organization and operations of the Walter Group on the basis that this would be irrelevant, the first "fact" in the Walter Canada Group's written submissions relates to that very issue:

> The Walter Group operates its business in two distinct segments: (i) U.S. Operations; and (ii) Canadian and UK Operations.[248]

268. This assertion, which the Walter Canada Group erroneously labels as an "uncontested fact", is at the heart of the factual inquiry the 1974 Plan has been saying all along will have to be undertaken. Absent document discovery and examinations for discovery, the 1974 Plan has no ability to test that fact and deconstruct the meaning of the Walter Group's alleged "distinct segments".

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[248] WCG Written Submissions, *supra* note 3 at para. 3.

269. The Walter Canada Group also relies on expert evidence that says the extraterritoriality issue must ultimately be resolved by considering where the "conduct or transactions" relevant to ERISA's focus or purpose primarily occurred.[249] The factors the Walter Canada Group's expert identifies as relevant to this inquiry are all factual.

270. Similarly, the Steelworkers argue that the Court – in determining the public policy issue – should consider the connection between the Canadian company and the facts giving rise to the claim against the Canadian company.

271. Without the opportunity for the 1974 Plan to obtain discovery of the Walter Canada Group, the Court is deprived of evidence that is important to these preliminary issues as framed by the Walter Canada Group and the Steelworkers.

272. This is clearly not a case, as the Walter Canada Group suggests, that the 1974 Plan's repeated requests for any discovery are blind hopes that "with the aid of the discovery processes something might turn up".[250] Discovery will furnish the 1974 Plan with – in the words of Smith J.A. – "important evidence potentially relevant" to the preliminary issues in this summary trial.

273. Central to the 1974 Plan's claim is its contention that Walter Energy and each of its American, Canadian and UK subsidiaries constitute a single global enterprise with management decisions for the Canadian entities being made in the U.S. To prove this contention, the 1974 Plan requires evidence of the myriad constituent elements it has pleaded that would allow the Court to draw that conclusion.

274. The 1974 Plan is able to rely on statements in the Harvey Affidavit as admissions against interest for several of the facts that have been pleaded but not admitted by both the Walter Canada Group and the Steelworkers. The Harvey Affidavit also contains admissions against interest that support the 1974 Plan's overall contention that the Walter Canada Group is part of Walter Energy's single global enterprise with integrated businesses and management out of the United States.

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[249] Abrams Report, *supra* note 4 at 16-17.

[250] WCG Written Submissions, *supra* note 3 at para. 135.

275. But simply relying on statements in the Harvey Affidavit as admissions against interest is constraining in this summary trial because it does not address every fact pleaded that is relevant in this summary trial.

276. Further, and more fundamentally, the refusal by the Walter Canada Group to grant any discovery in this case has deprived the 1974 Plan an opportunity to learn of relevant evidence not otherwise known to the 1974 Plan. This, in turn, has deprived the 1974 Plan of preparing for itself the "representations on the basis of which their dispute is to be resolved."

277. The 1974 Plan is deprived of the opportunity to prove all of the facts it has pleaded that it says are relevant to the preliminary issues. To prove the truth of these facts, including the Unadmitted Facts, requires evidence – evidence that can best come out of the mouths of the Walter Canada Group's management and out of the Walter Canada Group's own documents.

278. In these circumstances, where there is "important evidence potentially relevant" to the preliminary issues in this summary trial, it would be unjust for the Court to rule against the 1974 Plan before it has had an opportunity to develop its case through discovery.

279. The Walter Canada Group cites *Tassone v. Cardinal*, 2014 BCCA 149 as authority for the proposition that an application respondent cannot simply argue that "with the aid of the discovery processes something might turn up."[251]

280. *Tassone* is not an apt comparison to this case. *Tassone* concerned an appeal of a summary trial judgment by the defendant. The defendant argued it was an error for the trial judge to grant judgment when discovery had not taken place. Madam Justice Stromberg-Stein dismissed the appeal, noting that the defendant had years to obtain evidence to support her defence. Stromberg-Stein J.A. concluded that "any gaps in the record [were] the result of [the defendant's] <u>failure to take the proper procedural steps to obtain discovery</u>" (emphasis added).

281. A similar result to *Tassone* was reached in *Burg Properties Ltd. v. Economical Mutual Insurance Company*, 2013 BCSC 209, another suitability decision cited by the Walter Canada Group. In *Burg*, the plaintiff argued that a summary trial application brought by

[251] WCG BOA, Tab 17.

the defendant should not proceed until it had an opportunity to conduct a further examination for discovery of another representative of the defendant. Madam Justice Gerow rejected this argument, concluding the plaintiff had ample time to conduct all the examinations it required prior to the summary trial:

> [44] Burg submits the matter should not proceed until it conducts a further examination for discovery of a more informed representative of Economical Mutual. However, it has had plenty of time to take steps to conduct such a discovery. The hearing dates for the summary trial had been adjourned in the past. This matter has been outstanding since 2008. Burg has had ample time to do all the investigations and conduct all the examinations for discovery it deemed necessary to prosecute its claims. Burg cannot rely on its own inaction to deny the defendants the right to have this matter determined.
>
> [Emphasis added.][252]

282. *Tassone* and *Burg* suggest that courts are generally unwilling to entertain arguments by application respondents that they need discovery when they have taken insufficient steps to obtain it prior to the summary trial.

283. This is not the situation here. Unlike the defendant in *Tassone* and the plaintiff in *Burg*, the 1974 Plan has not had years to obtain evidence. Rather, it has been less than three months since the close of the pleading period. Further, the 1974 Plan has taken all the steps it can to obtain the evidence it needs to defend this summary trial application.

284. Unlike in *Tassone* and *Burg*, it is also not the case that the 1974 Plan has sat on its hands and took no steps to obtain discovery and is now seeking to "rely on its own inaction" to defeat this summary trial. The 1974 Plan has made repeated attempts to obtain discovery, including bringing a court application for document discovery. While the Steelworkers erroneously suggest that the 1974 Plan is seeking "additional disclosure from Walter Canada,"[253] the 1974 Plan has not been granted *any* discovery in this case.

285. The 1974 Plan submits that this case is more akin to *656925 B.C. Ltd. v. Cullen Diesel Power Ltd.*, a claim involving the enforceability of a contractual exclusion clause. While

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[252] WCG BOA, Tab 4.

[253] USW Written Submissions, *supra* note 235 at para. 10.

Madam Justice Dardi noted that the Court rarely finds exclusion clauses to be unenforceable, she concluded that the plaintiff was entitled to discovery prior to having to defend a summary trial application to dismiss its claim:

> [42] At this stage, there has not been full discovery of documents nor examinations for discovery. I am not satisfied that the plaintiff has had an opportunity to uncover or develop all of the evidence that may be important regarding this issue, nor am I persuaded that the plaintiff should be deprived of such an opportunity. While the plaintiff did not take steps prior to the delivery of the 18A application in April 2008, in the intervening months Cullen Diesel took the position that further document production and an examination for discovery were not necessary pending a determination of this 18A application.
>
> [43] Although the court rarely finds enforcement of an exclusion clause to be unfair, unreasonable, or unconscionable, the evidence on this application is insufficient to determine whether this is one of those rare cases. Therefore, it would be unjust to decide the issue on this Rule 18A application.
>
> [Emphasis added.][254]

286. The 1974 Plan has similarly been denied an opportunity to uncover or develop all of the evidence that may be important to the preliminary issues in this summary trial. It would be unjust for the Court to determine the preliminary issues in this summary trial against the 1974 Plan without providing it a chance to develop its case through discovery.

c. Conclusion on discovery issue

287. The Walter Canada Group has staked the Summary Trial Application on the contention that an understanding of the Walter Canada Group's business and relationships with the other Walter Group entities is irrelevant. It then filed an expert report suggesting the exact opposite – that the extraterritoriality issue could not be decided without an understanding of the Walter Canada Group's business and its relationship with its U.S. parent and affiliate companies.

288. The Walter Canada Group cannot have it both ways. It cannot say that no facts are required for this Court to adjudicate the preliminary issues in their application while simultaneously seeking to rely on an expert report that says facts matter.

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[254] *Supra*, note 245.

289. The Harvey Declaration demonstrates that the 1974 Plan is not blindly hoping that "with the aid of the discovery processes something might turn up." Instead, it shows that there is evidence in the possession or control of the Walter Canada Group and in the minds of its witnesses that is relevant to the preliminary issues on this summary trial application.

290. The 1974 Plan should be provided an opportunity to develop its case by conducting oral and documentary discovery to obtain the evidence it needs to meet those issues. To proceed without granting the 1974 Plan this opportunity would be unjust.

3. Other considerations militate against proceeding summarily on present record

291. The considerations that arise in a summary trial also militate against the Court proceeding summarily.

292. The Court of Appeal has articulated a number of factors for a trial judge to consider when deciding if a case is suitable for summary trial. These factors include:

(a) the amount involved;

(b) the complexity of the matter;

(c) its urgency:

(d) any prejudice likely to arise because of delay;

(e) the cost of taking the case forward to a conventional trial in relation to the amount involved;

(f) the course of the proceedings;

(g) the cost of the litigation and the time of the summary trial;

(h) whether credibility is a critical factor in determining the dispute;

(i) whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and

(j) whether the application would result in litigating in slices.[255]

293. Nearly all of these factors are engaged in this case and point directly against this application being suitable for summary disposition.

a. Amount involved

294. The amount involved is entitled to considerable weight.[256] The amount of the claim – over $1 billion – and the amount of funds available for distribution to creditors – approximately $70 million – are clearly significant. If proven, the 1974 Plan Claim will be the most significant claim in these CCAA proceedings by a large margin. While the amount involved is not determinative, a substantial claim is a warning that caution is required.[257]

b. Complexity of the matter

295. The preliminary issues raised by the Walter Canada Group are complex, requiring the Court to address important questions of law regarding the application of ERISA to a Canadian entity. As the Steelworkers acknowledge in their written submissions, this summary trial "is an important case for the parties and for the legal system which raises a significant legal issue of first instance."[258]

296. To resolve the legal questions in this case, the Court is presented with conflicting expert reports on the extraterritorial application of ERISA. Each party's expert will be required to attend the summary trial for cross-examination, further increasing the complexity of this case. To further complicate matters, the Court is being asked to proceed on an incomplete factual record which includes hypothetical facts and contentious evidence.

297. Given the significance of this case and the complicated issues that stem from it, the Court will be required to absorb a large body of evidence and legal argument. The pleadings, including the summary trial pleadings, come from ten documents and occupy approximately 80 pages. The Court will be required to consider 11 volumes of evidence

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[255] *Gichuru v. Pallai*, 2013 BCCA 60, 1974 Plan BOA, Tab 25 at para. 52.

[256] *W.I.B. Co. Construction Ltd. v. The Board of School Trustees of School District No. 23 (Central Okanagan)*, 1997 CarswellBC 896, 1974 Plan BOA, Tab 60 at para. 34 (S.C.) [*W.I.B.*].

[257] *Ibid.*

[258] USW Written Submissions, *supra* note 235 at para. 1.

totalling approximately 1700 pages. This evidence includes approximately 80 pages of expert opinion.

298. The written arguments prepared by the parties canvass a multitude of issues and, together, are likely to exceed 200 pages after the Walter Canada Group files its Reply Submissions. Accompanying the submissions are 6 volumes of authorities containing approximately 180 authorities totalling over 3,000 pages. There are three additional volumes of authorities for the expert witnesses, which collectively contain more than 80 U.S. authorities totalling over 1,000 pages.

299. The Walter Canada Group says that the complexity in this case is legal, not factual.[259] That statement does not square with the six volumes of evidentiary materials it has filed, which includes its "Statement of Uncontested Facts" listing 122 "facts" the Walter Canada Group says are relevant to this application (many of which are inadmissible and disputed). Many of those facts that are disputed largely relate to the degree of integration amongst the entities in the Walter Group – an enterprise of more than 30 corporate entities with operations in three countries selling to customers world-wide.

300. The volume of materials filed by the parties underscores the importance and complexity of the issues in this summary trial and suggests that this case currently is not suitable for summary determination.[260]

301. The 1974 Plan submits that much of the complexity in this summary trial falls away if it is granted discovery. Discovery will permit the parties to return to Court with a more robust evidentiary record. This in turn will allow the Court to address the legal issues in this case head on without the added complexity of having to address the myriad of evidentiary issues that have arisen in this summary trial application.

c. Urgency and costs of this litigation

302. Both the Walter Canada Group and the Steelworkers focus extensively on their desire to adjudicate the 1974 Plan Claim quickly.

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[259] WCG Written Submissions, *supra* note 3 at para. 138.

[260] *Coast Foundation v. Currie*, 2003 BCSC 1781, 1974 Plan BOA, Tab 20 at para. 12; *Chu v. Chen*, 2002 BCSC 906, 1974 Plan BOA, Tab 18 at paras. 64-75.

303. The desire of the Walter Canada Group and the Steelworkers to adjudicate this claim quickly cannot come at the expense of the 1974's Plan's ability to have its day in court and to be afforded an opportunity to fairly prosecute its substantial claim.

304. Trial judges can properly consider the objectives of proportionality and efficiency codified in Rule 1-3 of the *Supreme Court Civil Rules*. However, it is a misapplication of the rule to focus on speed in the completion of the proceedings at the expense of a determination of the proceedings on their merits.[261] The proper administration of justice requires that issues of importance be decided at the appropriate time through the appropriate procedures.[262]

305. Both the Walter Canada Group and the Steelworkers rely on *Hryniak v. Mauldin*, 2014 SCC 7. *Hryniak* dealt with the Ontario summary judgment rule. It does not change the law regarding summary trials in British Columbia.[263] Further, *Hryniak* does not advocate that trial judges proceed summarily to save time at the expense of fairness. As stated by Madam Justice Karakatsanis:

> [32] ... While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. ...
>
> [33] A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.[264]

306. The 1974 Plan has always recognized the importance of attempting to adjudicate its claim in an expeditious manner. As the creditor with the largest claim, the 1974 Plan stands to lose the most from lengthy delays. That is why, contrary to the assertion of both the Walter Canada Group's and the Steelworkers, the 1974 Plan has consistently advocated for an approach that would avoid a conventional trial.[265] Indeed, on October

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[261] *Houston v. Kine*, 2011 BCCA 358, 1974 Plan BOA, Tab 28 at para. 33.

[262] *Weldon v. Teck Metals Ltd.*, 2011 BCSC 489, 1974 Plan BOA, Tab 59 at para. 32, aff'd 2012 BCCA 53.

[263] *N.J. v. Aitken Estate*, 2014 BCSC 419 1974 Plan BOA, Tab 39 at para. 33.

[264] WCG BOA, Tab 8.

[265] WCG Written Submissions, *supra* note 3 at para. 141; and USW Written Submissions, *supra* note 235 at para. 97.

4, 2016, the 1974 Plan proposed a summary trial for the week of January 9-13 to be preceded by targeted document discovery and examinations for discovery.[266]

307. The 1974 Plan submits that in light of its substantial claim, this was a reasonable and proportionate proposal that would have expedited the adjudication of its claim while giving it an opportunity to put its best foot forward.

308. The Walter Canada Group rejected that proposal, electing instead to bring forward this summary trial application without the benefit of any pre-trial discovery. This impaired the 1974 Plan's ability to meet the preliminary issues raised in the Walter Canada Group's summary trial application.

309. The dispute between the parties is in relation to a distribution. The three parties who are seeking the largest shares are the 1974 Plan, the Steelworkers and Walter Energy. Regardless of its ultimate outcome, the 1974 Plan Claim will not prejudice the restructuring of the Walter Canada Group. There is no justification for the Walter Canada Group and the Steelworkers rushing to a summary trial on a deficient evidentiary record. That is particularly so where, as here, there is an alternative procedure available that will allow this claim to be resolved on its merits in an expedited fashion after necessary discovery.

d. Summary trial may create unnecessary complexity in the resolution of the dispute

310. The Walter Canada Group does not seek to finally adjudicate the 1974 Plan Claim. Instead, it raises several preliminary issues, the determination of which cannot result in a finding of liability against the Walter Canada Group. As a result, there is a risk that the findings reached on this summary trial will be irrelevant. If the 1974 Plan were to succeed on this Summary Trial Application but its claim were later to fail on the facts, the summary trial will have proved to be a waste of the parties' – and the Court's – time.[267]

311. Of further concern to the efficient resolution of this proceeding is the prospect of an appeal from the Walter Canada Group's summary trial application. Indeed, counsel for the Walter Canada Group submitted to this Court that given the 1974 Plan Claim raises

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[266] 6th Dominguez Affidavit, *supra* note 120, Exhibit "A" at 2-3.

[267] *Prevost v. Vetter*, 2002 BCCA 202, 1974 Plan BOA, Tab 42 at para. 25.

an important issue of law (i.e. the applicability of ERISA to Canadian entities) there is a high probability of appeal on either side.[268]

312. As the Summary Trial Application raises only certain preliminary issues, any result in the Court of Appeal in favour of the 1974 Plan would require further adjudication in this Court. This would unnecessarily prolong the litigation, add unnecessary complexity and dramatically increase the costs to the prejudice of all parties in the CCAA proceedings.

e. Litigating in slices

313. Because the Walter Canada Group seeks only to adjudicate certain preliminary issues, their application raises concerns about litigating in slices. This is underscored by the Walter Canada Group's characterization of the issues in this case as "preliminary issues". It is also highlighted by the Steelworkers, who intend to raise two additional issues in a subsequent proceeding to defeat the 1974 Plan Claim.[269]

314. The concern with litigating only slices of the 1974 Plan Claim is amplified in this case because the Court is being asked to decide matters of first impression in Canada based on hypothetical facts and without a complete record. Regardless of this Court's decision on the preliminary issues, there is likely to be an appeal. The Court of Appeal has cautioned that trial judges should not address important issues of law unless the case at hand actually requires them to do so. As stated by Madam Justice Southin:

> The orderly development of the common law is not enhanced by this Court addressing issues of law of the nature of these issues unless the case at hand, in all its aspects, requires it to do so.[270]

315. This consideration arises in this case because the Court is not being asked to finally adjudicate the 1974 Plan Claim. As a result, the determination of the preliminary issues will of necessity be hypothetical. The 1974 Plan submits that the Court of Appeal should not be asked to address the important issues of law raised in this case until this Court is asked to address all elements of the 1974 Plan Claim and not just certain preliminary issues.

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[268] 6th Dominguez Affidavit, *supra* note 120, Exhibit "C, at 27.

[269] USW Written Submissions, *supra* note 235 at para. 104.

[270] *Bacchus, supra* note 12 at para. 25.

316. The Walter Canada Group disputes this position. It says that determining the preliminary issues on this summary trial would not be hypothetical because if the Court agrees with the Walter Canada Group, the 1974 Plan Claim will be dismissed. The Walter Canada Group misses the mark because it is only considering the issue from the standpoint that it is successful in the Summary Trial Application. If this Court were to hold in favour of the 1974 Plan on all three preliminary issues, any appeal would of necessity require the Court of Appeal to address a hypothetical claim. As stated by Southin J.A., the Court of Appeal should not be asked to rule on "important issues of law in an action which may ultimately fail on its facts."[271]

317. Further complicating the matter here is that Court is being asked to assume facts are true for the purpose of the Summary Trial Application but either or both of the Walter Canada Group and the Steelworkers reserve the right to contest those facts at a later stage. For these "facts", the Court is of necessity being asked to proceed on hypothetical facts because it is not open to the Court to make a final factual determination in this trial.

318. The Steelworkers also seek to raise additional issues if the 1974 Plan is successful on all three preliminary issues in this summary trial. In particular, the Steelworkers intend to argue that "allowing the 1974 Plan Claim will effectively eliminate the Employee Claims for the Steelworkers and is therefore not a reasonable or equitable plan".[272] The Steelworkers also intend to alternatively argue that "if the 1974 Plan Claim is allowed, it must be in a separate class than the Employee Claims and only paid out after the Employee Claims are satisfied in full."[273]

319. These are essentially policy arguments. Indeed, the Steelworkers indicate these issues will "involve significant arguments and evidence of the role of CCAA proceedings and the different nature of the claims, including the significance of the Employee Claims as statutory claims and the policy reasons to grant these a higher priority than American pension plan unfunded liability."[274]

320. These additional issues, if decided in the Steelworkers' favour, would negate the argument that the application of the withdrawal liability provisions of ERISA in this case

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[271] *Ibid* at para. 29.

[272] USW Written Submissions, *supra* note 235 at para. 104.

[273] *Ibid* at para. 104.

[274] *Ibid* at para. 105.

would be contrary to Canadian public policy due to the effect it would have on the Steelworkers. As set out above, the Steelworkers argument on the third preliminary issue in this summary trial is that the Court's application of ERISA in this case is against Canadian public policy because it would reduce the Wolverine Mine employees' severance and termination pay to "almost nothing". If the Steelworkers are successful in the additional issues, however, their claims will be unaffected by the 1974 Plan Claim.

321. A Canadian court should be reluctant to pass judgment on the morality of a foreign law unless and until the court determines that the case inescapably requires the court to do so. The public policy issue, as the Walter Canada Group and Steelworkers have argued it, should not be decided in isolation from the additional issues the Steelworkers wish to raise.

322. The Walter Canada Group argues that concerns about "litigation in slices" do not arise in this case because the same judge is seized with all matters.[275] This argument was made – and rejected – in *Mayer*, *supra* note 9, where Mr. Justice Smith confirmed that a judge seized of a matter was required to weigh the same factors before litigating in slices as a judge not seized with the matter.

4. Conclusion on Suitability

323. The Walter Canada Group's application raises only preliminary issues that could only resolve the 1974 Plan Claim if one answer is given, but not if another answer is given. In these circumstances, the law imposes a special obligation on the Walter Canada Group to justify proceeding summarily. As described by Mr. Justice Lambert in *North Vancouver (District) v. Lunde* (1998), 162 D.L.R. (4th) 402 at para. 33 (B.C.C.A.) [*Lunde*]:

> If the answer to an issue sought to be tried under Rule 18A will only resolve the whole proceeding if one answer is given, but not if a different answer is given, then the applicant should be required to demonstrate, and the judge should be expected to decide, that the administration of justice, as it affects not just the parties to the motion, but also the orderly use of court time, will be enhanced by dealing with the issue as a separate issue.[276]

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[275] WCG Written Submissions, *supra* note 3 at para. 141.

[276] 1974 Plan BOA, Tab 38.

324. The Walter Canada Group cannot meet this obligation in this case. The deficient evidentiary record supplied by the Walter Canada Group, coupled with the 1974 Plan's inability to obtain any discovery, has left the Court in a position where it is proceeding on incomplete facts. Not only has this prevented the 1974 Plan from presenting its case in its strongest light, but it has also necessitated disputes over evidentiary matters and the overall suitability of this summary trial that already has and will continue to occupy significant court time. These problems likely will fall away if the 1974 Plan is granted discovery prior to proceeding to a summary trial – as it customary.

325. The orderly use of court time will not be enhanced by proceeding summarily on the present record. The 1974 Plan submits that the Walter Canada Group's summary trial will not assist in the efficient resolution of the proceeding and should be dismissed.

D. Preliminary Issue #1: The 1974 Plan Claim Is Governed by U.S. Substantive Law

326. The 1974 Plan is a creditor of the Walter Canada Group by reason of a claim properly governed by U.S. law, specifically ERISA. It is a basic insolvency law principle that a foreigner with a proven claim governed by foreign law stands in the same position as a domestic creditor with a proven claim governed by domestic law.[277] To determine whether the 1974 Plan Claim is a valid, provable claim, the Court should apply domestic choice of law rules to determine the proper law of the claim.[278] The application of these rules points to U.S. law as the proper law of the obligation the Walter Canada Group owe to the 1974 Plan.

327. Determining the proper law of a claim requires applying the law of the forum in a series of steps:

(a) characterize the issue;

(b) identify the appropriate choice of law rule based on that characterization; and

(c) apply the connecting factor indicated by the appropriate choice of law rule.[279]

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[277] *Teleglobe, supra* note 1 at para. 8; and *Halsbury's Laws of England, Conflict of Laws, supra* note 1 at 710, para. 980

[278] Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws,* (Toronto: Irwin Law, 2010), 1974 Plan BOA, Tab 115 [*Pitel*] at 217.

[279] *Ibid* at 211.

1. Characterization of 1974 Plan Claim

328. The objective of categorization of a claim is to find a choice of law rule that is fair to the parties.[280] What is fair to parties cannot be known without an understanding of the factual matrix underlying the claim. Choice of law categories are defined not by their content, but by their purpose:

> The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issues which the law recognizes at the first stage [i.e. for characterisation] are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived.[281]

329. Characterization is critical in conflicts as depending on how the claim is characterized different conflict rules will apply and the application of different conflicts rules can lead to different outcomes.[282] The 1974 Plan Claim must be characterized or categorized so that the appropriate "connecting factor" can be determined.[283]

330. The issue underlying the claim is characterized according to the law of the forum (*lex fori*).[284] The legal categories used for characterization are ones with which the forum is familiar: property law, law of obligations, family law, and law of corporations and insolvency.[285] Within each category are sub-categories. Under the law of obligations the sub-categories are: contract, tort and unjust enrichment.

331. Courts are to take the following approach in respect of characterization:

> The *lex fori* will characterise in accordance with its rules in a liberal manner, not insisting that all its technical requirements are complied with...Therefore under private international law, concepts such as

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[280] T.M. Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004), 1974 Plan BOA, Tab 116 [*Yeo*] at 72, para 3.10.

[281] A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London: Sweet & Maxwell, 2012), 1974 Plan BOA, Tab 102 [*Dicey*] at 51, endorsing and quoting the view expressed in *Raiffeisen Zentralbank Osterreich AG v An Feng Steel Co Ltd*, [2001] EWCA Civ 68, 1974 Plan BOA, Tab 65 at para. 27.

[282] Janet Walker, *Castel & Walker Canadian Conflict of Laws,* 6 ed., loose-leaf (consulted on 10 December 2016), (Toronto, ON: LexisNexis, 2005), [*Castel & Walker*], 1974 Plan BOA, Tab 111, vol. 1, ch. 3 at 3-1.

[283] *Pitel, supra* note 278 at 211.

[284] *Pitel, supra* note 278 at 217.

[285] *Dicey, supra* note 281 and *Yeo, supra* note 280 at 76.

> "contract", "tort", "corporation" and "unjust enrichment" are to be given a liberal interpretation.[286]

332. *Dicey* suggests that when a court must characterize a claim, the court should consider the rationale of the potentially applicable conflict rules:

> The way the court should proceed is to consider the rationale of the [forum's] conflict rule and the purpose of the rule of substantive law to be characterized. On this basis it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created.[287]

333. Choice of law categories are functional categories in the sense that they are intended to bring together problems which, because of their similarity, ought to share the same connecting factor.[288] The "proper approach" to characterization is to "identify according to the *lex fori* the true issue or issues thrown up by the claim and defence."[289] Characterization is ultimately a question of substance and not form.[290]

334. The 1974 Plan's characterization of the 1974 Plan Claim rests on settled law. The 1974 Plan Claim arises under the Pension Plan Document, the CBA and the provisions of ERISA implicated thereby. There is a consistent line of authority in which courts have addressed the appropriate characterization for choice of law purposes of the precise issue to be decided here.[291]

335. Those cases specifically address the situation where, as in this case, a statute confers a right of action against an entity that itself was not a party to the contract to which the claim relates.[292] That unbroken line of authority establishes that where, as here, the

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[286] George Panagopoulos, R*estitution in Private International Law* (Oxford: Hard Publishing, 2000), 1974 Plan BOA, Tab 106 [*Panagopoulos*] at 31 [citing *Bonacina (Re),* [1912] 2 Ch 394, where the Court of Appeal characterised a matter as contractual, even though the relevant foreign agreement was not supported by consideration].

[287] *Dicey, supra* note 281 at 51, para 2-039.

[288] *Yeo, supra* note 280 at 71, para. 3.09.

[289] *MacMillan Inc v Bishopsgate Investment Trust (No 3),* [1995] EWCA Civ 55, 1974 Plan BOA, Tab 64 at para 78.

[290] *Panagopoulos, supra* note 286 at 31.

[291] See: *Dicey, supra* note 281 at 48-49; and for example: *Through Transport, supra* note 2; *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain,* [2013] EWHC 3188, 1974 Plan BOA, Tab 63 [*London Steam-Ship*]; and *Youell v Kara Mara Shipping Company Ltd,* [2000] EWHC 220, 1974 Plan BOA, Tab 67 [*Kara Mara Shipping*].

[292] See: *Dicey, supra* note 281 at 48-49; and for example: *Through Transport, supra* note 2; *London Steam-Ship, supra* note 291; and *Kara Mara Shipping, supra* note 291.

"essential nature" of a claim authorized by statute "is to enforce the terms of [a] contract," then, for choice of law purposes, the correct characterization of the claim is as a claim in contract.[293] That is so notwithstanding that the defendant was not a party to the contract.

336. What ERISA grants to the 1974 Plan "is essentially a right to enforce" against the Walter Canada Group the contractual obligations to the 1974 Plan of Walter Resources.[294] As such, just as in the settled line of authority relied on by the 1974 Plan, the issue "is one of obligation under the contract" and therefore appropriately is characterized as a claim in contract.

337. In contrast to the cases directly on point which support the 1974 Plan's characterization of the claim, neither the Walter Canada Group nor the Steelworkers is able to cite a single case which supports characterizing a claim seeking to impose civil liability on a corporation as one "implicating legal personality".[295]

338. Tellingly, the section of Walter Canada Group's written submission addressed to the question of characterization of the claim[296] does not cite a single case where characterization of a claim for choice of law purposes was the issue decided in the case (apart from *Minera Aqualine Argentina SA v. IMA Exploration Inc. And Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102, WCG BOA, Tab 10 *[Minera]*, which the Walter Canada Group cites only for the general, and uncontroversial, statement of the "importance of properly characterizing a claim").[297]

339. The principal case cited by the Walter Canada Group and the Steelworkers in support of their argument on characterization (*JTI-Macdonald*) is a case concerning the constitutional validity of provincial legislation in which the issue of choice of law did not arise for decision.[298]

340. The argument of the Steelworkers further illustrates that the arguments contrary to the 1974 Plan are unsound in law. The Steelworkers go so far as to argue that "British

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[293] *Through Transport, supra* note 2 at para. 59.
[294] *Ibid.*
[295] WCG Written Submissions, *supra* note 3 at para. 57.
[296] *Ibid* at paras. 48-61.
[297] WCG Written Submissions, *supra* note 3 at para. 49.
[298] *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312, WCG BOA, Tab 9.

Columbia substantive law applies in this proceeding because the 1974 Plan Claim is brought against the Walter Canada Group in British Columbia, where Walter Canada is ordinarily resident."[299] That argument conflates choice of law with jurisdiction. If the proper law were invariably the law of the forum, then choice of law would not exist as a subject within the topic of the conflict of laws. The Walter Canada Group then compounds the confusion by relying on the case of *Beals*.[300] *Beals*, yet again, is not a case involving a decision on choice of law. *Beals* concerns, and the statements made in it relate to, the discrete subject within the conflict of laws of the enforceability of a foreign judgment.

341. The unbroken line of authority cited by the 1974 Plan are directly applicable to the case at bar because they decide precisely the issue raised by the Walter Canada Group's notice of application.[301]

342. In *Through Transport Mutual Assurance Association (Eurasia) Ltd v. New India Assurance Association Co Limited*, [2004] EWCA Civ 1598, the English Court of Appeal considered Finnish legislation that gave a direct right to sue an insurer rather than the insured. The Court of Appeal agreed with the trial judge's characterization of the claim for choice of law purposes:

> If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterized as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterized as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law.[302]

343. The Court of Appeal held that the judge below was correct to find that the obligations arose under the contract because the Act in question gave the claimant a right of action directly against the insurer without the need for the formalities of an assignment (i.e. to

[299] USW Written Submissions, *supra* note 235 at para. 31.

[300] WCG Written Submissions, *supra* note 3 at para. 56; *Beals, supra* note 232.

[301] *Through Transport*, *supra* note 2; *London Steam-Ship, supra* note 291; and *Kara Mara Shipping, supra* note 291.

[302] *Through Transport*, *supra* note 2 at para. 57, emphasis added.

obtain the benefit that the insured would himself have been entitled to obtain under the contract).[303] Therefore, pursuant to the terms of the contract that stated English law applied, English law was the proper law of the claim.[304]

344. In *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain,* [2013] EWHC 3188, the Court followed the analysis from *Through Transport,* stating that in deciding whether or not a direct action right under an insurance statute is "in substance" a claim to enforce the contract or a claim to enforce an independent right of recovery, what matters most is the content of the right, rather than the derivation of its content.[305] The Court held that the essential content of the right was provided by a contract. However, because a section of the statute at issue created a liability for an event that would not normally be insurable, the question became whether the extent of the exceptions was such as to change the essential nature of the right created so that it could no longer be regarded as being in substance a contractual right. The Court held the exceptions in the statute did not go this far.[306] The direct action right conferred by Spanish law against liability insurers was found to be in substance a right to enforce the contract rather than an independent right of recovery.[307]

345. The Court in *Youell v Kara Mara Shipping Company Ltd,* [2000] EWHC 220, also held that a Louisiana direct action statute created a right that was contractual in nature.[308] This is because the statute "confers a statutory right to make a claim on a contract to which [the defendant] was not originally a party."[309]

346. These three cases all involve a party advancing a claim against another party in respect of a lability arising under a contract. In all three cases, the defendant was not a party to the contract. In all three cases, the plaintiff claimed that a statute from a law other than the *lex fori* caused the defendant to be liable. In all three cases, the court characterized the claim under contracts because the claim only existed by reference to the contract. The case at bar is the same. The 1974 Plan Claim exists because Walter Resources

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[303] *Ibid* at para. 59.
[304] *Ibid* at paras. 57-60.
[305] *London Steam-Ship, supra* note 291 at para. 87.
[306] *Ibid* at para. 90.
[307] *Ibid* at para. 95.
[308] *Kara Mara Shipping, supra* note 291 at para. 61.
[309] *Ibid* at para. 58.

was a signatory to the CBA. ERISA says that the Walter Canada Group is liable in relation to Walter Resources' rejection of the contract and withdrawal from the 1974 Plan. The 1974 Plan is pursuing the Walter Canada Group in Canada in respect of the withdrawal liability. For choice of law purposes, the character of the 1974 Plan Claim is contractual.

2. Choice of Law Rule Applicable to 1974 Plan Claim

347. Claims for obligations related to contract are determined with reference to the "proper law" of the obligation.[310] The "proper law" of the obligation is the law of the country with which the claims have their "closest and most real connection" or "closest and most substantial connection."[311]

348. The trend in choice of law analysis is towards a more principled approach, rather than a blind application of rules.[312] In *Minera,* Koenigsberg J. rejected a categorical approach to the choice of law analysis for unjust enrichment claims and instead adopted a "principled approach", looking for the "closest and most substantial connection" to the claim. Similarly, in contract, rather than apply blanket rules, Canadian courts seek to find the system of law with which, in all the circumstances, the contract has its closest and most real connection.[313]

349. Thus, a principled approach that analyzes the factual matrix to determine which forum has the closest and most real connection to the 1974 Plan Claim aligns with Canadian jurisprudence.

350. The Court should examine the following non-exhaustive list of factors to determine which set of laws has the closest and most real connection to the obligation in that case:

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[310] *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443, 1974 Plan BOA, Tab 29 at 448; *Etler v. Kertesz,* [1960] O.R. 672, 26 D.L.R. (2d) 209 (C.A.) at 215-218; and *Richardson International Ltd v. Zao RPK "Starodubskoe",* 2002 FCA 97, 1974 Plan BOA, Tab 48 [*Richardson International*]; and *Castel & Walker, supra* note 282 at 31-11 to 31-13.

[311] *Minera Aquáline Argentina SA v. IMA Exploration Inc. And Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102, WCG BOA, Tab 10 [*Minera*] at paras. 195 and 200, aff'd 2007 BCCA 319, leave to appeal ref'd [2007] S.C.C.A. No. 424; *Colmenares, supra* note 310 at 448; *Barrick Gold Corp v Goldcorp Inc,* 2011 ONSC 3725, 1974 Plan BOA, Tab 5 at paras. 770-777 and 839-848; *Castel & Walker, supra* note 282at ch. 32, 32-1-32-2; *Christopher v Zimmerman,* 2000 BCCA 532, 1974 Plan BOA, Tab 17.

[312] See: *Minera, supra* note 311 at paras. 195-200.

[313] The approach evolved through *Etler, supra* note 310, *Colmenares, supra* note 310, and *Richardson International, supra* note 310.

(a) the law applicable to the contract, if any;

(b) the language, nature and subject matter of the contract;

(c) other factors that serve to localize the contract;

(d) where the transaction underlying the obligation occurred or was intended to occur;

(e) where the transaction underlying the obligation was or was intended to be carried out;

(f) where the parties are resident;

(g) where the parties carry on business;

(h) what the expectations of the parties were with respect to governing law at the time the obligation arose; and

(i) the country where the immovable, if any, is situated;

(j) whether the application of a particular law would cause an injustice to either of the parties.[314]

The factors should be given weight according to a reasonable view of the evidence and the importance of the factors to the issue at stake.[315]

351. The characterization advocated by the Walter Canada Group and the Steelworkers is incompatible with a principled analysis. In fact, the approach they advocate purposefully ignores any connections a claim has with any jurisdiction other than the jurisdiction in which the defendant is incorporated.

3. Application of Choice of Law Rule to 1974 Plan Claim

352. The record does not allow the Court to find all of the facts necessary to apply the factors set out above and to determine which law has the closest and most real connection. The

[314] *Minera, supra* note 311 at paras. 195 & 200; *Colmenares*; *Richardson International* at para. 82; and *Castel & Walker*, *supra* note 282 at 31-12 et seq; *Etler, supra* note 310; *Canaccord Capital Corp v 884003 Alberta Inc,* 2005 BCCA 124, 1974 Plan BOA, Tab 12 at para 9; *Pitel, supra* note 278 at 275;

[315] *Minera, supra* note 311 at para 201.

1974 Plan has pleaded facts relevant to this determination and sought discovery from the Walter Canada Group of evidence to enable the 1974 Plan to establish these facts. Because the 1974 Plan was denied discovery prior to the summary trial application, the 1974 Plan has been forced into trial without being afforded the means to prove its claim.

353. The following facts are established on the record and support application of U.S. law as the law with the closest and most real connection to the 1974 Plan Claim:

(a) The Pension Document and the Trust Document are governed by the law of the District of Columbia and the federal laws of the United States applicable therein.[316] The Pension Document was signed in Washington, DC.[317] The Trust has its principal place of business in Washington, DC.[318] The CBA provides that trusts and plans connected with the CBA must conform to the requirements of ERISA and other U.S. federal laws.[319]

(b) Withdrawal from the 1974 Plan occurred and was carried out in the United States, and was intended to occur and be carried out, with approval from the U.S. Bankruptcy Court.[320]

(c) The 1974 Plan and its trustees are all resident in the United States.[321] All participating employers in the 1974 Plan are resident in the United States.[322]

(d) The 1974 Plan carries on business in the United States.[323]

(e) Walter Energy Canada and its U.S. parent company, Walter Energy, were enriched when Walter Energy Canada failed to pay the withdrawal liability. After the sale transactions accomplished in these proceedings, the New Walter Canada Group has more cash than allowed claims.[324] If the 1974 Plan Claim is

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[316] Pension Plan Document, *supra* note 18 at 181 (see: Article XII, B(14)); and 185 (see: Article XIV(A)_; and Trust Document, *supra* note 18 at 200 (see: Article VI (12)); and 205 (see: Article XIII).

[317] Pension Plan Document, *supra* note 18 at 193.

[318] Trust Document, *supra* note 18 at 197 (see: Article II).

[319] CBA, *supra* note 18 at 29 (see: Article XX(g)(4)(b)).

[320] Rejection Order, *supra* note 92.

[321] Stover Affidavit, *supra* note 13, at paras. 12-13.

[322] *Ibid* at para. 39.

[323] Stover Affidavit, *supra* note 13, at paras. 11-13.

[324] Monitor's Seventh Report, dated December 11, 2016, ["Monitor's Seventh Report"], 1974 Plan BOE, vol. 3, Tab 6, at paras 35 (c) and 38.

disallowed, the New Walter Canada Group will have cash available to pay to Walter Energy qua creditor.[325] Specifically, Walter Energy will have a claim against the New Walter Canada Group for nearly $40 million.[326] This claim is in respect of interest accrued on the intercompany transfers made to Canada Holdings to fund the Western Acquisition.[327]

(f) Application of Canadian law works an injustice on the 1974 Plan because of the removal of assets out of reach of ERISA.[328]

The 1974 Plan has pled more connections between the 1974 Plan Claim and the United States, which it expects to be able to prove.[329]

354. In *Mayer*, *supra* note 9, the British Columbia Court of Appeal commented on the unfairness and injustice resulting from a plaintiff's not being permitted "to develop his case fully through discovery."[330] The Court in that case found that a summary trial application brought by the defendants added to the injustice.[331]

> The traditional order of trial is described in Rule 40(53) [now Civil Rule 12-5(72)]: plaintiffs lead their evidence first and then defendants lead their responding evidence, if any. In this way, plaintiffs are able to present the evidence in support of their claims fully, in an orderly way and in its best light, before it is challenged by the defendants.[332]

The 1974 Plan have been prejudiced by its inability to develop and present its case. As such, the 1974 Plan has been "deprived of the advantages accruing to plaintiffs in a normal trial."[333]

355. Although the 1974 Plan is of the view that the Harvey Affidavit is admissible for the truth of its contents, statements therein point to U.S. law as having the closest and most real

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[325] *Ibid;* and Joint Proposal, *supra* note 119.

[326] Monitor's Seventh Report, *supra* note 119 at paras. 35 (c) and 38; 7th Affidavit of Miriam Dominguez, 1974 Plan BOE, Tab 4, Exhibit "A", p. 4.

[327] Joint Proposal, *supra* note 119 and Monitor's Seventh Report, *supra* note 119 at para. 32.

[328] Amended NOCC, *supra* note 15 at paras 46, 52-53.

[329] *Ibid* at paras 15, 26, 80-101.

[330] *Mayer*, *supra* note 9 at para. 83.

[331] *Ibid* at para 84.

[332] *Ibid.*

[333] *Ibid.*

connection. These statements demonstrate that there are relevant facts worthy of further inquiry:

(a) The global Walter Energy Group operated as a consolidated enterprise.[334] This consolidated enterprise, which includes Walter Energy's Canadian and U.S. operations, benefitted from the Walter Canada Group's refusal to acknowledge the withdrawal liability. The entire global enterprise in both Canada and the United States were enriched when the Walter Canada Group refused to pay the withdrawal liability.

(b) Walter Energy is incorporated under the laws of Delaware, is headquartered in Birmingham, Alabama, and did business in West Virginia and Alabama.[335] Walter Energy's board of directors and management team operated out of Birmingham, Alabama.[336] Walter Resources is incorporated in and did business in Alabama. Walter Resources' management team operated out of Birmingham, Alabama.[337] While most of the Walter Canada Group is incorporated in Canada, it appears that their management team and key decision makers were also involved in the decision making for Walter Energy.[338] More than just payroll services, the Walter Canada Group shared with the global enterprise finance, tax, treasury, human resources, payroll, benefits and communications, information technology, legal, operations and health, safety and environment and other services.[339]

(c) The management team of the Walter Canada Group was guided by the U.S. legal system. Specifically, Walter Energy's legal department provided services for the global group and specifically for the Walter Canada Group.[340] With discovery, the 1974 Plan believes it can prove that the U.S. legal system was the legal system that guided the key players and directing minds of all the Walter Canada Group entities. The Walter Canada Group's management team and key decision makers would have been familiar with ERISA and other U.S. law. They expected

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[334] Harvey Affidavit, Exhibit "B", *supra* note 10 at paras. 32, 47, 66-69, 75, 105, 106, 128, 129, 136, 148, 149, 151, 161.

[335] Harvey Affidavit, *supra* note 10 paras. 10 and 22.

[336] Harvey Affidavit, Exhibit "B", *supra* note 10 at paras 1 (n. 1), 66 and 128.

[337] *Ibid.*

[338] *Ibid* at paras. 66-67; and Aziz Affidavit, *supra* note 91.

[339] *Ibid* at paras. 66-67.

[340] *Ibid* at para. 67.

> U.S. law to govern elements of the business they directed, and were guided by U.S. law in their actions. While the management team of the Walter Canada Group resigned, they did so after the Bankruptcy Court authorized and directed Walter Energy to withdraw from the Plan.[341]

356. As *Dicey* on the conflict of laws states at Rule 173-(2):

> A corporation is resident in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or more countries then the corporation is resident in each of these countries.[342]

357. *Dicey* cites the example of *De Beers Consolidated Mines Ltd v Howe*, [1906] AC 455 (HL), as authority for this rule. In considering a tax issue, the House of Lords in *De Beers* had reason to consider where a company incorporated in South Africa was resident. The company's work focussed on mines in South Africa, which was also the location of the company's head office. Directors of the company lived in South Africa and England. Directors' meetings were held in South Africa and England. The Court found that it was clear that the majority of directors lived in England and that the directors' meetings in London were the meetings where "real control" was exercised over the important business of the company. As a result, the Court held that the company was resident in England.[343]

358. The 1974 Plan has alleged that the majority of the directors of the Walter Canada Group lived and met in Birmingham, Alabama.[344] If this is proven, on the authority of *De Beers*, the Walter Canada Group has a residence in the United States, as well as in BC where its mines were situate.

359. This Court should not be put in the position of having to make a choice of law decision without a full understanding of the facts on which law has the closest and most real connection. The fact that the directing minds of a defendant were informed and guided

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[341] Aziz Affidavit, *supra* note 91 at para. 21.

[342] *Dicey, supra* note 281 at 1528, 30R-001, Rule 173(2).

[343] *De Beers Consolidated Mines Ltd v Howe,* [1906] AC 455, 1974 Plan BOA, Tab 62 (H.L.). Canadian authorities have relied on *De Beers* in considering the residence of a corporation in numerous contexts: see *Pet Milk Canada Ltd v. Olympia & York Developments* (1974), 4 O.R. No. 48, 1974 Plan BOA, Tab 40.

[344] Amended NOCC, *supra* note 15 at paras 86-87 and 91-92.

by a particular law has been found to be determinative. In *Minera*, the BC Supreme Court found that, where:

(a) the defendant had mining properties in Argentina (which were presumably governed by Argentinian mining laws and regulations, and inspected by Argentinian inspectors);

(b) the principal actors on both sides were aware of Canadian or Colorado law in relation to a specific legal relationship and obligation;

(c) the U.S. and Canadian systems were the systems of law under which both parties routinely conducted their affairs; and

(d) a principal of the defendant admitted to being familiar with Canadian law and its implications,

"the legal system that informed and guided the perceptions and actions of the key players at the time the [actions underlying the dispute] occurred was Canadian and American law".[345] As a result, the Court found that, notwithstanding that "some important choice of law factors point[ed] to Argentine law," British Columbia law had the "closest and most real connection to the obligation" between the parties.[346]

360. The 1974 Plan alleges that the U.S. legal system informed and guided the perceptions and actions of the global enterprise including the Canadian entities at all relevant times. Certain statements put before the Court by the Walter Canada Group support this statement. The Walter Canada Group and the Steelworkers tell the Court to ignore this possibility, and all other ties the Walter Canada Group has to the U.S. They ask the Court to find that all facts indicating a connection with the U.S. are irrelevant, while maintaining that the facts indicating a connection to Canada are relevant. This approach cannot be supported given existing case law on characterization in Canada and a principled approach to choice of law.

4. The Choice of Law Rule Advocated by the Walter Canada Group and the Steelworkers Is Inappropriate

[345] *Minera, supra* note 311 at para. 206.
[346] *Ibid* at 207.

361. The Walter Canada Group and the Steelworkers ask this Court to characterize the 1974 Plan Claim on the basis of the effect of applying ERISA, rather than on the basis of the nature of the underlying claim. Yet they do not cite a case that supports such an effects-based approach to characterization. Further, the Walter Canada Group and the Steelworkers ask this Court to ignore all relevant facts indicating connections between the Walter Canada Group and its U.S. affiliates. Such relevant facts and connections are specifically referenced in the materials filed by the Walter Canada Group and the Steelworkers and discussed in the 1974 Plan's submissions.

362. The choice of law rule advocated by the Walter Canada Group and the Steelworkers is intended for matters related to corporate existence, such as whether a corporate entity has the capacity to sue or be sued.[347] The rule may also apply to issues of corporate governance, such as shareholder rights, authority of directors, power to make contracts, or rights to issue or transfer stock.[348]

363. The characterization method advocated in *Dicey* provides that the choice of law rule and the substantive law to be applied should have the same or similar purposes.[349] The purpose of the substantive law sought to be applied, here ERISA, is to ensure that employees who are promised retirement benefits actually receive those benefits.[350] This purpose is entirely different from a choice of law rule whose purpose is the determination of corporate capacity or corporate governance.

364. The cases cited by the Walter Canada Group and the Steelworkers illustrate how inappropriate their preferred choice of law rule is for the circumstances of this case. *JTI-Macdonald Corp.* is a case about whether a Provincial Act was *ultra vires* due to its intended extraterritorial effect.[351] The case does not deal with characterization for choice of law purposes.

365. *National Trust Co. v. Ebro Irrigation and Power Co.*, cited by the Walter Canada Group, is about what law governs the acts of shareholders related to the issuance of shares,

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[347] *Castel & Walker*, *supra* note 282 at ch 30, 30-1, 30.1; and *Halsbury's Laws of Canada*, 1st ed. (2016 Reissue) (Toronto, ON: LexisNexis, 2016), 1974 Plan BOA, Tab 107, Foreign Corporations at 970-71, para. 269.

[348] *Castel & Walker*, *supra* note 282 at ch 30, 30-1, 30.1; and *Halsbury's Laws of Canada, supra* note 347.

[349] *Dicey, supra* note 281 at 51, para. 2-039.

[350] Mazo Report, *supra* note 2 at para. 25; *Connolly v P.B.G.C.*, 475 US 211, 214 (1986), 1974 Plan BOA, Tab 71.

[351] *Supra*, note 298.

election of boards of directors, and other corporate governance issues.[352] *Singer Sewing Machine Co of Canada Ltd (Re)* is a pre-UNCITRAL model law insolvency case regarding whether to recognize a U.S. judgment where the U.S. court appeared to exercise its jurisdiction improperly.[353] *Concept Oil Services Ltd v En-Gin Group LLP* is a case about whether a UK-incorporated company can be transformed into an Anguillan-incorporated company by virtue of an Anguillan statute.[354] It is a case about a company's status and existence. None of these cases are remotely analogous to the case at bar because they deal with corporate existence, capacity and governance whereas the 1974 Plan Claim does not.

366. The only choice of law case cited by the Steelworkers is *Minera*.[355] All of the other cases cited by the Steelworkers are about application of different laws, not about the method a court uses to determine the appropriate law applicable to a claim.[356] The Steelworkers do not cite any authority that supports their apparent contention that the Court should choose the applicable law based on the results of application of such law.

367. The 1974 Plan Claim does not raise an issue about the corporate status or existence of the Walter Canada Group entities. Being subject to a form of civil liability – withdrawal liability under ERISA – does not affect the corporate existence *qua* incorporated entities of the Walter Canada Group. The legal basis of withdrawal liability under ERISA does not equate to a loss of corporate status or existence.

368. As described by *Castel & Walker*,

> [q]uestions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation.

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[352] [1954] O.R. 463 (S.C.), WCG BOA, Tab 11.

[353] 2000 ABQB 116, WCG BOA, Tab 16.

[354] [2013] EWHC 1897 (Comm.), WCG BOA, Tab 5.

[355] USW Written Submissions, *supra* note 235 at 8-16.

[356] *Shoppers Drug Mart v 6470360 Canada Inc*, 2014 ONCA 85, Brief of Authorities of the Respondent Steelworkers on Summary Trial Application ("USW BOA"), Tab 10 (about piercing the corporate veil); *Gregorio v Intrans-Corp*, [1994] O.J. No. 1063, 115 D.L.R. (4th) 200, USW BOA, Tab 4 (C.A.) (about piercing the corporate veil; *Harrington v Dow Corning Corp*, [1998] B.C.J. No. 831 (S.C.), USW BOA, Tab 5 (about alter ego or agency relationship between a parent and a subsidiary); *Emtwo Properties Inc v Cineplex (Western Canada) Inc*, 2011 BCSC 1072, USW BOA, Tab 3 (about piercing the corporate veil); *Beals, supra* note 232 (about recognition of a foreign judgment).

...

> The law of the state, province or territory under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts and the rights of shareholders. Furthermore, the instrument of incorporation and the laws of a corporation's domicile govern not only its creation and continuing existence, but also all matters of internal management, the creation of share capital and related matters. The issues governed by the laws of the corporation's domicile include its capacity to sue, the authority of directors, who may be appointed a director, its power to make contracts, the validity of conveyances of corporate property, the corporation's right to issue stock, and the validity of transfers of its stock.[357]

None of these matters of corporate existence or internal management dictate whether civil liability attaches to a corporate entity.

369. Characterization of a claim under ERISA as the Walter Canada Group has framed it would result in a blanket denial of all ERISA claims against Canadian entities in Canadian courts. Such denial would occur notwithstanding how connected the Canadian entity may be with its American affiliates. The Canadian entity might have assets and operations in the U.S., but because ERISA would cause one entity to be liable in respect of a contract of an affiliate, it cannot be liable in Canada. Such blanket denial of ERISA was rejected by the Canadian Bar Association's statutory review of the CCAA.[358] The joint legislative review task force of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals (the "**Joint Task Force**") similarly concluded that broader consideration of the enforceability of ERISA claims may be warranted.[359]

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[357] *Castel & Walker*, *supra* note 282 at 30-1, s. 30.1.

[358] Canadian Bar Association Bankruptcy, Insolvency and Restructuring Law Section and Canadian Corporate Counsel Association, *Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act,* July 2014, 1974 Plan BOA, Tab 104 [*Canadian Bar Association Report*] at 28 (available at: https://www.cba.org/CMSPages/GetFile.aspx?guid=f5f60f1c-9440-4c12-8a03-9b8ab9066606).

[359] Joint legislative review task force of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals, *Report on the statutory review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act,* July 15, 2014, 1974 Plan BOA, Tab 112 [*Joint Task Force Report*] at 31 (available at https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Joint_IIC_CAIRP_submission_July_15_2014.pdf/$FILE/Joint_IIC_CAIRP_submission_July_15_2014.pdf).

370. Such a characterization would threaten principles of international comity. Using the choice of law rule advocated by the Walter Canada Group, a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability.

371. The 1974 Plan does not advocate for such a blanket approach. Rather, the 1974 Plan suggests that, where facts exist such that U.S. law is the "proper law of the obligation", a Canadian entity is liable for withdrawal liability under ERISA. Where U.S. law is not the "proper law of the obligation", then ERISA would not apply. But that is a different situation from the case at bar.

E. Preliminary Issue #2: The Withdrawal Liability Provisions of ERISA Apply to the Walter Canada Group

372. Application of ERISA to the 1974 Plan Claim is a domestic application of U.S. law. On the evidence before the Court on this application, this is the only available conclusion.

373. The experts on both sides cite the PBGC Opinion 97-1, the United States federal agency responsible for administering ERISA.[360] The PBGC's view is that circumstances such as those at issue in this case do "not implicate extraterritorial application of ERISA."[361] The 1974 Plan's expert reaches the same conclusion: "all of the events involved in the creation, computation and assertion of the withdrawal liability have taken place within the United States."[362]

374. The Walter Canada Group's experts express no conclusion to the contrary. The written submissions of Walter Canada Group concede that their expert does not comment on "whether the application of ERISA to Walter Canada Group is domestic or extraterritorial."[363]

375. The PBGC is the "expert agency charged by Congress with interpreting" ERISA.[364] As such, the PBGC's opinion is entitled to deference under U.S. law.[365] In any

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[360] Mazo Report, *supra* note 4 at para 51 and Abrams Report, supra note 4 at 10.
[361] Opinion Letter, *supra* note 5.
[362] Mazo Report, *supra* note 4 at para. 54.
[363] WCG Written Submissions, *supra* note 3 at para 100.
[364] Mazo Report, *supra* note 4 at para 51; *Beck*, *supra* note 5.
[365] Mazo Report, *supra* note 4 at para 51.

circumstances, a Canadian court should be slow to reject the considered opinion of the PBGC on the operation of ERISA. Rejection of such opinion ceases even to be an option where, as in this case, there is no contrary opinion in evidence, and indeed there is expert opinion evidence agreeing with it. Given the evidence before the Court, the only available conclusion is that reached by the PBGC: "the liability in question represents the domestic application of United States law."[366]

376. The Walter Canada Group and the Steelworkers resist the 1974 Plan Claim, arguing that requiring it to pay would be an extraterritorial application of U.S. law. The Walter Canada Group and the Steelworkers contend that this is improper because, in their view, the U.S. Congress never intended for foreign trades or businesses to be jointly and severally liable for the withdrawal liability of a related American trade or business.

377. The Walter Canada Group and the Steelworkers are mistaken. This case does not present any extraterritorial application of U.S. law. And even if it did, the U.S. Congress has made clear that ERISA and its withdrawal liability provisions apply extraterritorially.

1. The Presumption Against Extraterritoriality Is Not a Substantive Prohibition

378. The presumption against extraterritoriality is simply a canon of statutory interpretation.[367] It is not a substantive prohibition on the reach of federal law.[368] Congress can regulate extraterritorial conduct when it chooses to do so. The presumption against extraterritoriality helps courts decide whether, in a particular statute, Congress has chosen to do so. The decisions that the Walter Canada Group cites and quotes say as much. They recognize that the presumption is "a canon of statutory construction."[369]

379. The presumption against extraterritoriality is implicated only when a court is asked to apply U.S. law to conduct occurring outside of that country. The presumption is rebutted when Congress has clearly expressed its intent to regulate extraterritorial conduct; the presumption is irrelevant when the "focus" of the federal statute is conduct that, in a particular case, occurred domestically (*i.e.*, within the United States).[370] The two parts of

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[366] Opinion Letter, *supra* note 5.

[367] *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016), Abrams BOA, Tab 33 [*RJR Nabisco*].

[368] *See Morrison v. Nat'l Australian Bank*, 561 U.S. 247, 255 (2010), Abrams BOA, Tab 23 [*Morrison*].

[369] WCG Written Submissions, *supra* note 3 at para. 75.

[370] *RJR Nabisco, supra* note 367 at 2101; Mazo Report, *supra* note 4 at para. 50.

this framework for analyzing extraterritoriality are separate and distinct, and a court is free to consider the parts in either order.[371]

380. The question whether Congress intended for ERISA's withdrawal liability provisions to apply extraterritorially has yet to be addressed by any U.S. court but has been addressed by the PBGC. This case involves no extraterritorial application of ERISA, but even so, Congress has clearly expressed its intent to hold related trades or businesses jointly and severally liable without regard to whether or where they may be incorporated.[372]

2. This Case Presents No Extraterritorial Application of U.S. Law

381. The Walter Canada Group's extraterritoriality challenge flows from a false premise – that applying U.S. law to an entity incorporated in a foreign country is inherently "extraterritorial". However extraterritoriality does not depend on the identity, domicile, or citizenship of a defendant in litigation.[373] Foreign entities often are held liable for conduct that occurred in the United States without implicating extraterritoriality concerns.[374]

382. Whether application of a statute is extraterritorial, or not, depends on the "focus" of the statute.[375] Once the "focus" is determined, a court then examines where the actions related to that focus occurred. The focus of the applicable provisions of ERISA is withdrawal from multiemployer pension plans.[376] All actions related to such withdrawal in this case occurred in the U.S.

383. The focus inquiry is not restricted to the actions of the defendant, here the Walter Canada Group.[377] Even if it were, the 1974 Plan alleges that the Walter Canada Group

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[371] See *RJR Nabisco*, *supra* note 367 at 2101 n.5.

[372] Mazo Report, *supra* note 4 at para. 51; PBGC Opinion Letter, *supra* note 5.

[373] *Meridian Funds Grp. Secs. & Emps. Ret. Income Sec Act (ERISA) Litig. (Re)*, 917 F. Supp. 2d 231, 237 (S.D.N.Y. 2013), 1974 Plan BOA, Tab 80 ("The test for extraterritoriality is not simply whether a foreign entity is made to comply with a provision of U.S. law."); see Mazo Report *supra* note 4 at para. 54; *Mastafa v. Chevron Corp.*, 770 F.3d 170, 184 n.11 (2d Cir. 2014), 1974 Plan BOA, Tab 79 ("[D]omestic conduct must be the focal point of our inquiry.").

[374] See, e.g., *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoreman's Ass'n Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989), 1974 Plan BOA, Tab 77 at 1540 [*Korea Shipping 2d Cir.*] (holding Korean business subject to ERISA withdrawal liability); *P.B.G.C. v. Asahi Tec Corp.*, 979 F. Supp. 2d 46 (D.D.C. 2013), Abrams BOA, Tab 36 (holding Japanese business subject to ERISA liability for domestic conduct of member of Japanese business's controlled group).

[375] *Morrison*, *supra* note 368 at 266.

[376] Mazo Report, *supra* note 4 at para. 54.

[377] *Ibid.*

shared common control with Walter Resources in the United States. Even so, Congress intended ERISA to apply extraterritorially.[378]

(a) The "Focus" of a Statute Determines Whether It Is Being Applied Extraterritorially or Domestically

384. A statute's "focus" is the "object[] of the statute's solicitude," determined by what the statute "seeks to regulate" and who the statute "seeks to protect."[379] Identifying a statute's "focus" is essentially a matter of statutory interpretation, looking to all of the relevant statutory provisions.[380]

385. When the "focus of congressional concern" behind a statute is conduct that, in a particular case, occurred domestically, a plaintiff relying on that statute "seek[s] no more than domestic application" of the law.[381] That is, "[i]f the conduct relevant to the statute's focus occurred in the United States," then application of the statute is domestic, "even if other conduct occurred abroad."[382] Only where "the conduct relevant to the focus occurred in a foreign country" does a case involve an extraterritorial application, and only in such a case is it necessary to decide whether Congress clearly intended for extraterritorial application of a statute.[383]

386. This approach to the focus of U.S. statutes reflects common sense. A U.S. statute that prohibits robbery is not extraterritorial whenever a foreign citizen commits a robbery inside the United States; the focus of that statute is robbery, not foreigners. Likewise, a U.S. statute that regulates employment discrimination is not extraterritorial whenever a business operating in the U.S. has foreign officers and/or owners who make employment policies from foreign offices. Again, the focus of that statute is ending workplace discrimination, not foreigners. These statutes may have consequences that play out

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[378] Mazo report, *supra* note 4 at 49-54.

[379] *Morrison*, *supra* note 368 at 267.

[380] See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring), Abrams BOA, Tab 31 (analyzing related provisions to determine the focus of a statute); *Loginovskaya v. Batrachenko*, 764 F.3d 266, 272 (2d Cir. 2014), 1974 Plan BOA, Tab 78 (looking to the "common thread" of the relevant statutory provisions to determine their "focus"); *Elsevier, Inc. v. Grossman,* No. 12 Civ. 5151, 2016 WL 7077109 (S.D.N.Y. 2016), 1974 Plan BOA, Tab 72 at *10 (interpreting *Morrison* as setting a statute's "focus" on "the set of transactions that the statute seeks to regulate" and concluding that the "focus" of the statute at issue was on a "class" of conduct).

[381] *Morrison*, *supra* note 368 at 266.

[382] *RJR Nabisco*, *supra* note 367 at 2101.

[383] *RJR Nabisco*, *supra* note 367 at 2101.

extraterritorially, but extraterritorial consequences that are outside the "focus" of a U.S. statute are not material considerations.

(b) The "Focus" of the Relevant ERISA Statutory Provisions Is Employer Withdrawal from Multiemployer Plans

387. The "focus of congressional concern" in enacting ERISA's withdrawal-liability provisions is the conduct of employers withdrawing from multiemployer plans.[384] "Congress was *concerned* about the threat to the solvency and stability of multiemployer plans caused by employer withdrawals."[385]

388. The text of the withdrawal-liability provisions reflects Congress's focus on withdrawal. "If an employer withdraws from a multiemployer plan in a complete or partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability."[386] "When an employer withdraws from a multiemployer plan, the plan sponsor" is to take certain actions.[387] "[A] complete withdrawal from a multiemployer plan occurs when an employer ... permanently ceases to have an obligation to contribute under the plan, or ... permanently ceases all covered operations under the plan."[388] These are just examples; "withdrawal" is the focal point throughout the provisions of the *Multiemployer Pension Plan Amendments Act* ("MPPAA") of ERISA.[389]

389. Congress's deliberate focus on withdrawal throughout the operative withdrawal liability provisions confirms that the "objects of the statute's solicitude"[390] are employer withdrawals from multiemployer plans. In other words, employer withdrawals are what the statute "seeks to regulate"[391] and the employees or other plan beneficiaries threatened by withdrawals are whom the statute "seeks to protect."[392]

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[384] Mazo Report, *supra* note 4 at paras. 49, 54.

[385] *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoreman's Ass'n Pension Trust Fund*, 663 F.Supp. 766, 768-69 (S.D.N.Y. 1987) (emphasis added); accord *Connolly*, *supra* note 350 at 216-17 (Congress enacted MPPAA "[t]o alleviate the problem of employer withdrawals"); Mazo Report, *supra* note 4 at paras. 49, 54-55.

[386] 29 U.S.C. § 1381(a) (emphasis added), Abrams BOA, Tab 11.

[387] 29 U.S.C. § 1382 (emphasis added), Abrams BOA, Tab 12.

[388] 29 U.S.C. § 1383(a) (emphases added), Abrams BOA, Tab 29.

[389] *Multiemployer Pension Plan Amendments Act*, 29 USC § 1381 *et seq.*, *supra* note 386.

[390] *Morrison*, *supra* note 368 at 267.

[391] see 29 U.S.C. §§ 1381-83, *supra* notes 402-03, Mazo BOA, Tab 29.

[392] see *Korea Shipping 2d Cir.*, *supra* note 374 at 1537 (threats to "plans' financial viability" was "the precise threat Congress aimed to shield [the plans] from when it enacted the MPPAA"); *Bd. of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. – Pension Fund v. Centra*, 983 F.3d 495, 504 (3d Cir. 1992), Abrams BOA,

390. In this case, the conduct relevant to that statutory focus occurred in the United States. In a U.S. Bankruptcy proceeding, in a U.S. Bankruptcy Court in Alabama, Walter Resources (a U.S. company) withdrew from the 1974 Plan (a U.S. pension plan).[393] The beneficiaries of the 1974 Plan – the individuals that Congress sought to protect from employer withdrawal from multiemployer plans – are (or were at the relevant time) U.S. workers. Assessing withdrawal liability on Walter Resources or any entity under common control involves a domestic application of U.S. law.[394]

391. The PBGC has adopted the same analysis. In PBGC Opinion 97-1, the agency considered whether companies incorporated in the United Kingdom would be subject to withdrawal liability arising out of a U.S.-based controlled group member's withdrawal from a multiemployer plan through U.S. bankruptcy proceedings.[395] The PBGC explained that the UK entities would be subject to withdrawal liability and that the imposition of withdrawal liability on the UK entities would "not implicate extraterritorial application of ERISA."[396] Consistent with the focus analysis, the PBGC's conclusion turned on the facts that the "events that triggered liability under ERISA took place in the United States and involved the cessation of the contribution obligation ... of one or more United States entities."[397] Because all of the relevant conduct took place in the United States, and because ERISA treats controlled group members as a "single employer" for withdrawal liability purposes, the PBGC found irrelevant "[t]he fact that this liability may ultimately include within its scope certain foreign affiliates."[398]

392. Insofar as there is any ambiguity as to the withdrawal-liability provisions' "focus", the PBGC's reasonable interpretation would be entitled to deference.[399]

393. The Walter Canada Group alleges that this analysis "eviscerates the presumption against extraterritoriality."[400] That makes no sense. The presumption plays its part

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Tab 19 ("MPPAA was designed to protect the interests of participants and beneficiaries in financially distressed multiemployer plans.")

[393] Stover Affidavit, *supra* note 12 at paras. 75-76.

[394] Mazo Report, *supra* note 4 at paras. 53-54.

[395] PBGC Opinion, *supra* note 5.

[396] *Ibid* at 2.

[397] *Ibid* (emphasis added).

[398] *Ibid*; and see Mazo Report, *supra* note 4 at paras. 51-55.

[399] See, e.g., *Beck, supra* note 5 ("We have traditionally deferred to the PBGC when interpreting ERISA, for to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embark upon a voyage without a compass.").

whenever the conduct relevant to the focus of the statute at issue occurs outside the United States, like withdrawal from multiemployer plans that are not based in the United States. Any employer's withdrawal from such a plan, whether the employer be American, Canadian, or Chinese, would not be covered by ERISA.

394. The Walter Canada Group also complains that, under this analysis, "it does not matter where [an] affiliate is incorporated."[401] That is true, but it has nothing to do with extraterritoriality. The U.S. Congress expressly decided to treat all related "trades or businesses" as a "single employer" under ERISA "whether or not" those trades or business are "incorporated."[402] A U.S. affiliate of Walter Resources is jointly and severally liable for Walter Resources' withdrawal, even though the affiliate may be incorporated in a state far away from Alabama. Such affiliate is liable even though the affiliate may have had nothing to do with Walter Resources' decision to withdraw from the 1974 Plan. The Walter Canada Group is misapplying principles of extraterritoriality to undermine Congress's purpose and the text of ERISA.

(c) The Walter Canada Group and the Steelworkers Misapprehend the "Focus" Inquiry

395. The Walter Canada Group and the Steelworkers compare the "focus" inquiry with U.S. law concerning personal jurisdiction, *i.e.*, the power of U.S. courts to adjudicate disputes against particular defendants.[403] The two doctrines are unrelated.[404] As noted above, the presumption against extraterritoriality and the correlative "focus" inquiries are canons of statutory construction. The U.S. constitutional limitations on personal jurisdiction have nothing to do with the meaning of statutes. Those limitations protect liberty and property interests by requiring "fair play and substantial justice."[405] Even the cases Mr. Abrams cites make clear that "jurisdiction and liability are two separate inquiries."[406]

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[400] WCG Written Submissions, *supra* note 3 at para. 104.

[401] *Ibid.*

[402] 29 U.S.C. § 1301(b)(1), Abrams BOA, Tab 9.

[403] See: WCG Written Submissions, *supra* note 3 at paras. at 89-95.

[404] Mazo Report, *supra* note 4 at para. 56.

[405] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), 1974 Plan BOA, Tab 75.

[406] *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000), Abrams BOA, Tab 19; see *Smit v. Isiklar Holding*, 354 F. Supp. 2d 260, 267 (S.D.N.Y. 2005), 1974 Plan BOA, Tab 84 (whether defendants are a "single employer and a controlled group under common control" for ERISA purposes is irrelevant to whether court has "personal jurisdiction over foreign defendants").

396. The Supreme Court of Canada has found in relation to the respective analyses of jurisdiction and choice of law that, in the United States,

> state laws are given generous application to disputes with limited connections to the enacting jurisdiction (see, e.g., *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981)) to the point where Professor Laurence Tribe has commented:
>
> > There is much to be said for the view that the current state of the Supreme Court's personal jurisdiction and choice-of-law doctrines is precisely backwards. It is easy for a state to apply its law (which is by definition outcome-determinative) to a case, but relatively difficult for it to obtain jurisdiction over a dispute, even though jurisdiction is never directly outcome-determinative. Jurisdictional issues are unpredictable and endlessly litigated; choice-of-law matters are largely unregulated.
> >
> > (L. H. Tribe, American Constitutional Law (3rd ed. 2000), vol. 1, at p. 1292)[407]

397. The Walter Canada Group and the Steelworkers link extraterritoriality and personal jurisdiction by arguing that both focus on *conduct of a defendant*.[408] In the view of Walter Canada Group, if a defendant's conduct inside the United States does not reach the minimum-contacts threshold (such that the defendant is subject to the personal jurisdiction of U.S. courts), "it does not seem possible for a court to conclude that conduct displaces the presumption against extraterritoriality."[409] This argument proceeds from a false assumption: the extraterritoriality analysis is not limited to considering only the conduct of the defendant.[410]

398. The *Morrison* case disproves the assumption of the Walter Canada Group and the Steelworkers. *Morrison* considered the extraterritorial effect of U.S. securities laws and held that the "focus" of Section 10(b) of the *Securities Exchange Act* is the "purchases and sales of securities in the United States."[411] In a private suit under Section 10(b), the defendant rarely, if ever, will be the entity that purchased or sold securities in the United

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[407] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, 1974 Plan BOA, Tab 57 at para. 74

[408] See WCG Written Submissions, *supra* note 3 at para. 91.

[409] *Ibid.*

[410] *Ibid* at 92-95.

[411] *Morrison*, *supra* note 368 at 266.

States. Usually, it is the plaintiff who has purchased or sold securities domestically, and the defendant is the person or persons whose fraudulent statements or omissions injured the plaintiff in connection with that purchase or sale. Indeed, in *Morrison*, the plaintiffs were the buyers of securities, but the defendants were not the sellers.[412] The defendants were the persons who allegedly committed fraud.[413] Even though the defendants acted inside the United States, Morrison involved an extraterritorial application of Section 10(b) because the plaintiffs bought securities at issue outside of the United States.[414]

399. Thus, the assertion of the Walter Canada Group and the Steelworkers that the Walter Canada Group's own conduct must be the focus of the relevant ERISA provisions is incorrect.[415] As Ms. Mazo and the PBGC have found, the focus of ERISA's withdrawal liability provisions is withdrawal from a multiemployer pension plan governed by ERISA.[416] It is undisputed that the multiemployer pension plan at issue here (the 1974 Plan) was based in the U.S., and that the withdrawal from that plan (by Walter Resources) occurred within the U.S. Thus, the conduct that is the "focus" of the relevant ERISA provisions happened in the United States, so no extraterritoriality issue is even presented by this case.

400. The Walter Canada Group and Mr. Abrams also argue that the ERISA provision whose focus matters is not Section 1381, but Section 1301(b)(1).[417] Section 1301(b)(1) is not a conduct-regulating provision, but a definition. It defines "single employer" as all "trades or businesses (whether or not incorporated) which are under common control." The focus of this statutory provision is ownership and control of trades or businesses, and on the facts of this case, that is domestic to the United States as well: Walter Energy owned and controlled the Walter Canada Group from its headquarters in the state of Alabama.

401. Mr. Abrams posits a different, incorrect statutory "focus" for Section 1301(b)(1) – the "fractioning [of] operations into many separate entities."[418] Mr. Abrams does so by

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[412] *Ibid* at 250-52.
[413] *Ibid.*
[414] *Ibid.* at 266, 273.
[415] WCG Written Submissions, *supra* note 3 at paras 98-103.
[416] Mazo Report, *supra* note 4 at paras. 49-55; PBGC Opinion, *supra* note 5 at 2.
[417] See 29 U.S.C. § 1301(b)(1), *supra* note 402.
[418] Abrams Report, *supra* note 4 at 17; see WCG Written Submissions, *supra* note 3 at para. 98.

isolating Section 1301(b)(1) – what he calls the "controlled group liability provision[]"[419] – from the other relevant statutory provisions.

402. As noted, Section 1301(b)(1) defines "employer" as all "trades or businesses (whether or not incorporated) which are under common control." As a definitional provision, Section 1301(b)(1) does not directly regulate anything in isolation and so cannot truly be "extraterritorial" in isolation. Regardless, Section 1301(b)(1) protects the same individuals as the operative withdrawal liability provisions that it helps define. "Congress extended liability to all entities in common control with the actual withdrawing employer because the existing legislation prior to MPPAA did not adequately protect plans from the adverse consequences that resulted when individual employers terminated their participation in, or withdrew from, multiemployer plans."[420] Were it proper to consider Section 1301(b)(1) in isolation, the "focus" would remain employer withdrawal from multiemployer plans.[421]

403. Section 1301(b)(1) may "prevent businesses from shirking their ERISA obligations by fractionalizing operations in many separate entities."[422] However that *consequence* of Section 1301(b)(1) is not Section 1301(b)(1)'s *focus*. Section 1301(b)(1) does not regulate corporate machinations generally or for withdrawal liability in particular. A different ERISA provision does that.[423]

404. Even if Mr. Abrams's "focus" were the correct one, there would be no extraterritorial application of U.S. law here because all of the conduct relevant to the controlled group still occurred in the United States. The single-employer concept in Section 1301(b)(1) was designed "to make it clear that [ERISA's] coverage and antidiscrimination provisions cannot be avoided by operating through separate corporations instead of separate branches of a one corporation."[424] On this view of Section 1301(b)(1), the "focus" would be on the enterprise of related trades and businesses – that is, the "single employer" –

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[419] Abrams Report, *supra* note 4 at 17.

[420] *Centra*, *supra* note 392 at 503-04 (citing *P.B.G.C. v. R.A. Gray & Comp.*, 104 S.Ct. 2709, 467 U.S. 717, 1974 Plan BOA, Tab 83 at 722).

[421] See *Morrison*, *supra* note 368 at 267 (statutory "focus" is the transactions that affect the individuals "that the statute seeks to protect").

[422] *Bd. of Trustees v. H.F. Johnson Inc.*, 830 F.2d 1009, 1013 (9th Cir. 1987), 1974 Plan BOA, Tab 70.

[423] See 29 U.S.C. § 1392(c) ("If a principle purpose of any transaction is to evade or avoid liability under this part [i.e., withdrawal liability], this part shall be applied (and liability shall be determined and collected) without regard to such transaction.").

[424] *H.F. Johnson*, *supra* note 422 at 1013 (citing legislative history).

without regard to each branch's place of incorporation. Only if that enterprise were a foreign enterprise would applying withdrawal liability be extraterritorial.

405. Before the U.S. Supreme Court held in *RJR Nabisco* that the *Racketeer Influenced & Corrupt Organizations Act* ("RICO") clearly overcomes the presumption against extraterritoriality, many U.S. courts examined the focus of RICO and held that "focus" is the corrupt "enterprise." To determine whether an enterprise was foreign or domestic, those courts applied the so-called "nerve centre" test.[425] A RICO enterprise is located where its "brains" reside-i.e., where "the decisions effectuating the relationships and common interest of its members" are made.[426] In other words, the enterprise lives where it is controlled.[427] *Dicey* affirms this reasoning, holding that a "corporation is resident in the country where its central management and control is exercised."[428]

406. The 1974 Plan has not been permitted discovery to put forward admissible, trial-quality evidence in respect of application of the "nerve centre" test. What can be said on the current record is that Walter Energy wholly owned every member of the Walter Canada Group. What the Harvey Declaration indicates could be proven, if permitted, is that:

(a) Walter Energy was based in the U.S. and from the U.S. "provided essential management services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions, and legal advice";[429]

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[425] See, e.g., *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistic, Inc.*, 871 F. Supp. 2d 933, 940 (N.D. Cal. 2012), 1974 Plan BOA, Tab 82. (This is same test US courts use to determine which US state is "home" to a corporation. See Hertz Corp. v. Friend, 559 U.S. 77, 93 (2010).)

[426] *Mitsui*, *supra* note 425 at 940.

[427] To be clear, the US Supreme Court in *RJR Nabisco* held that this inquiry is not necessary for RICO cases because Congress clearly rebutted the presumption against extraterritoriality. In passing, the Supreme Court listed many reasons why it would be peculiar and counterproductive for the "focus" of any statute to be the identity of the regulated party rather than conduct. "A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results. It would exclude from RICO's reach foreign enterprises—whether corporations, crime rings, other associations, or individuals—that operate within the United States": *RJR Nabisco*, *supra* note 367 at 2105. The Court rejected the suggestion that transnational enterprises be "carved" up into foreign and domestic components, as that suggestion actually shows that Congress was not "concerned about whether an enterprise is foreign or domestic, but whether the relevant conduct occurred here or abroad." *Id.* "Our point in reciting these troubling consequences ... is simply to reinforce our conclusion, based on RICO's text and context, that Congress intended the prohibitions ... to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise." *Ibid* at 2105.

[428] *Dicey, supra* note 281 at 1528, 30R-001, Rule 173(2).

[429] Abrams Report, *supra* note 4; and Harvey Affidavit, Exhibit "B", *supra* note 10 at paras 66-67.

(b) Walter Canada's Chief Financial Officer worked out of Walter Energy's headquarters in Alabama;[430]

(c) all or almost all enterprise decisions were made in the U.S.[431]

407. Thus, even if the enterprise – rather than the withdrawal – were the relevant statutory focus, this case would still concern only a domestic application of U.S. law.

3. Congress Clearly Indicated Its Intent that ERISA Withdrawal Liability Apply Extraterritorially

408. This case does not involve any extraterritorial application of U.S. law, but even if it did, such application would be appropriate. To overcome the presumption against extraterritoriality requires a "clear indication of extraterritorial effect," but "an express statement of extraterritoriality is not essential."[432] Other signals, including statutory context, can clearly indicate extraterritorial effect and even can be "dispositive" of the question.[433] For instance, in *RJR Nabisco*, the U.S. Supreme Court held that RICO's cross-references to other statutes with clear extraterritorial application were enough to show that Congress intended RICO to have extraterritorial application as well.[434]

409. As Ms. Mazo and the PBGC have found, in ERISA, Congress clearly expressed its extraterritorial intent by using cross-references to the U.S. Internal Revenue Code.[435] The drafters of MPPAA selectively incorporated the Internal Revenue Code's controlled-group provisions in order to ensure that ERISA applied to all related trades or businesses wherever incorporated.[436]

410. In particular, Congress intentionally elected not to incorporate a provision that exempts foreign corporations from membership in the controlled group. That election was

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[430] *Ibid.*
[431] Harvey Affidavit, Exhibit "B", *supra* note 10 at paras. 66-67.
[432] *RJR Nabisco*, *supra* note 367 at 2101.
[433] *Ibid.*
[434] *Ibid* at 2102.
[435] Mazo Report, *supra* note 4 at paras 39-45.
[436] *Ibid,* at para. 41 n.24.

deliberate and makes clear that Congress wanted ERISA to extend to foreign members of a controlled group.[437]

411. The relevant incorporations (and non-incorporations) start with Section 1301(b)(1), 29 U.S.C. § 1301(b)(1), and end without incorporating Section 1563(b) of the Internal Revenue Code, 26 U.S.C. § 1563(b), which includes the foreign-entity exemption:

(a) Step 1. Congress directed that "common control" for ERISA be "consistent and coextensive with" principles of "common control" under Section 414(c) of the Internal Revenue Code.[438]

(b) Step 2. Section 414(c), in turn, instructs that common control be determined as provided in Section 414(b).[439]

(c) Step 3. Section 414(b) treats related entities as a "single employer" if they are "members of a controlled group of corporations (within the meaning of Section 1563(a)."[440]

(d) Step 4. Section 1563(a) includes foreign corporations. Foreign corporations are exempted by Section 1563(b),[441] but Section 1563(b) is not incorporated into ERISA.

412. Thus, ERISA's definition of a single-employer expressly borrows from Section 414(c) (Step 1), which expressly borrows from Section 414(b) (Step 2), which expressly borrows from Section 1563(a) (Step 3) to the exclusion of Section 1563(b) (Step 4). Congress's deliberate decision to legislate by cross-reference demonstrates clear intent that ERISA's withdrawal liability provisions apply extraterritorially.

413. This legislation by cross-reference is not unusual with statutory schemes as complex, "comprehensive[,] and reticulated" as ERISA.[442] Indeed, cross-references were dispositive in *RJR Nabisco*.[443]

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[437] *Ibid* at paras. 29-41 & n.24.
[438] 29 U.S.C. § 3201(b)(1).
[439] 26 U.S.C. § 414(c), *supra* note 105.
[440] 26 U.S.C. § 414(b), *supra* note 105.
[441] see 26 U.S.C. § 1563(b)(2)(C),

414. The Walter Canada Group argues that Ms. Mazo misapplied the presumption against extraterritoriality, supposedly because she misstates the presumption as in favour of extraterritoriality.[444] The Walter Canada Group misunderstands Ms. Mazo and takes snippets of her analysis out of context. Ms. Mazo and the PBGC correctly stated and applied the presumption against extraterritoriality.[445] The absence of a congressional intent to restrict ERISA to the U.S. shows that nothing in ERISA contradicts the clear import of Congress's affirmative cross-references to the Internal Revenue Code.

415. The Walter Canada Group purports to locate "other provisions of ERISA [that] indicate that Congress did not intend for ERISA's 'controlled group' liability provisions to apply extraterritorially."[446] Specifically, the Walter Canada Group points to statutory provisions that give U.S. federal courts exclusive jurisdiction over certain ERISA claims.[447] Those provisions have nothing to do with extraterritoriality. None of the Walter Canada Group, Mr. Abrams, nor Mr. Gropper cites a single case involving any federal statute where a court mentioned such a provision as relevant to the presumption against extraterritoriality.

416. Under U.S. law, exclusive-jurisdiction provisions serve a distinct purpose. The United States is a federal system: the federal government has its own courts, and the fifty states have their own courts. In the absence of a contrary statement by Congress, state and federal courts have concurrent jurisdiction.[448] Exclusive-jurisdiction provisions like the ones in ERISA simply prohibit state courts from exercising concurrent jurisdiction. These provisions have no bearing on courts of foreign nations.[449]

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[442] *R.A. Gray*, *supra* note 420 at 720. See: Mazo Report, *supra* note 4, at para. 41 n.24 ("[T]he use of incorporation-by-reference in the drafting of U.S. tax and related laws has become a fine art. The governing ideas are so complex and detailed that drafters are wary of copying them when the same idea is used in different provisions, out of concern that something might be left out or they may make a formatting or other mistake that could change the meaning of the rule.").

[443] See *RJR Nabisco*, *supra* note 367 at 2102.

[444] See WCG Written Submissions, *supra* note 3 at para. 80.

[445] PBGC Opinion Letter, *supra* note 5 at 2 ("It is well settled that Congress has the power to enact laws that have extraterritorial application, but is presumed not to have exercised that power unless its intent to do so is clear from the statute. We think controlled group liability under ERISA was intended to have extraterritorial application, and that this is clear from the relevant statutes."); Mazo Report, *supra* note 4 at para. 50 (summarizing the presumption inquiry as "whether the law gives a clear indication that it is intended to have extraterritorial effect").

[446] WCG Written Submissions, *supra* note 3 at para 81.

[447] *Ibid.*

[448] *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 748 (2012)

[449] See, e.g., *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 953 (9th Cir. 2008) ("Congress has no power to tell courts in foreign countries whether they could entertain suit against an American defendant. It would be up to

417. In fact, other ERISA provisions support the conclusion that the multiemployer plan withdrawal liability provisions are designed to apply extraterritorially. Section 1321 of ERISA defines the scope of subchapter III, which includes Section 1301 ("single employer" definition) and Section 1381 (operative withdrawal liability provision), as reaching any plan established or maintained by any employer engaged in commerce.[450] While plain references to "commerce" are usually not enough to rebut the presumption against extraterritoriality,[451] Congress manifested a broader intent here. Section 1321(b) exempts specific plans from subchapter III, including plans "established and maintained outside of the United States," but not all such plans; the exemption is limited to those foreign plans established or maintained "primarily for the benefit of individuals substantially all of whom are nonresident aliens."[452] This exception is limited to purely foreign benefit plans. The exception is necessary because Section 1321(a)'s reference to "commerce" includes transnational trades and businesses, like the Walter Canada Group.

4. Conclusion on Extraterritoriality

418. In summary, on the evidence before the Court, the only conclusion open to the Court is that application of ERISA to the 1974 Plan Claim is domestic, not extraterritorial. The "focus" of a statute and the actions related to such focus determine whether application of a statute is extraterritorial. The focus of the relevant provisions of ERISA is on employer withdrawal from multiemployer plans. This withdrawal occurred in the U.S.

419. The factual circumstances here are similar to other cases where U.S. courts applied ERISA to foreign entities without implicating extraterritoriality concerns.[453]

420. The "focus" of a statute is not restricted to the conduct of a defendant, but even if it were, application of ERISA to the 1974 Plan Claim would still be domestic. This is because, as the 1974 Plan alleges, the Walter Canada Group was controlled from the United States.

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any foreign court to determine whether it wanted to apply [US law] to litigation occurring within its borders."); *Gucci (Re)*, 309 B.R. 679, 683-84 (S.D.N.Y. 2004) (US law granting exclusive jurisdiction provision to US federal courts does not apply to foreign courts).

[450] See 29 U.S.C. § 1321(a), 1974 Plan BOA, Tab 98.

[451] See *RJR Nabisco*, *supra* note 367 at 2105,

[452] 29 U.S.C. § 1321(b)(7), 1974 Plan BOA, Tab 99.

[453] See, e.g., *Korea Shipping 2d Cir.*, *supra* note 374 at 1540 (holding Korean business subject to ERISA withdrawal liability); *PBGC v. Asahi Tec. Corp.*, *supra* note 374 (holding Japanese business subject to ERISA liability for domestic conduct of member of Japanese business's controlled group).

421. Even if application of ERISA to the 1974 Plan Claim were extraterritorial, such is not precluded by the presumption against extraterritoriality. Congress intended for members of a corporate group, wherever incorporated, to be treated as a single employer and to be held liable for withdrawal liability.

F. Preliminary issue #3: The Withdrawal Liability Provisions of ERISA Do Not Conflict with Canadian Public Policy

422. The Walter Canada Group submits that all else failing, ERISA's withdrawal liability provisions should not be enforced as they violate Canadian public policy. There is a high bar for this narrow exception to the application of a foreign law to apply. Fundamental values, and the essential justice and morality of Canadians must be at stake.[454] As stated by Carthy J.A. in *Boardwalk Regency Corp. v. Maalouf (*1992), 88 D.L.R. (4th) 612 (Ont. C.A.) at 622:

> This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.

423. It is plainly not the case that the exception is invoked merely because a foreign law differs from the law of the forum. Where foreign law is applicable, Canadian courts will generally apply the law even if the result may be contrary to domestic law.[455]

424. There is nothing to indicate that ERISA's withdrawal liability provisions violate Canadian public policy. In *Robbins v Pepsi-Cola Metropolitan Bottling Co,* 636 F. Sp. 641 (N.D. Ill. 1986), the Court held at 669:

> The challenged sections of ERISA and the MPPAA [the *Multiemployer Pension Plan* Amendments *Act of 1980*, 29 U.S.C. § 1381 et seq.] are neither criminal nor penal in nature; they are remedial provisions designed to protect the vested rights of workers covered by a given pension plan.[456]

425. As a general principle, the notion that, in some circumstances, a legislature may decide that others are to participate in the liability of a limited company is not contrary to

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[454] *Block Brothers Realty, supra* note 231.
[455] *Boardwalk Regency Corp. v. Maalouf (*1992), 88 D.L.R. (4th) 612 (Ont. C.A.), 1974 Plan BOA, Tab 9 at 616.
[456] Abrams BOA, Tab 41.

Canadian public policy. Canadian legislatures have done that in areas ranging from tax to labour and employment to corporate to environmental law, to name a few examples.[457]

426. In addition, in the specific insolvency or CCAA context, corporate group withdrawal liability legislation is not contrary to Canadian public policy. It is something under consideration in the context of the statutorily mandated review of the *Bankruptcy and Insolvency Act* and the CCAA. Faced with a suggestion that Canada consider a blanket prohibition on claims based on ERISA, the Joint Task Force has recently weighed in favour of claims based on ERISA being considered on a case-by-case basis in CCAA proceedings. Moreover, Industry Canada, as part of a statutory review of the CCAA has been considering implementing similar legislation in Canada.[458]

427. In making submissions in the course of that review, the Canadian Bar Association questioned whether the *Bankruptcy and Insolvency Act* and the CCAA should impose a blanket prohibition of claims based on ERISA. The Canadian Bar Association believed to

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[457] For example, federal and provincial employment and labour statutes affix such liability on related corporations or successor corporations. *The Employment Standards Act*, R.S.B.C. 1996, c 113, s. 95, 1974 Plan BOA, Tab 91, states that if the employment standards director considers that certain businesses are carried on by or through more than one corporation under common control or direction, the director may treat those corporations as one employer and they will be jointly and separately liable for amounts owed from any or all of them. There are similar provisions in Labour Codes (see: *Labour Relations Code*, R.S.B.C., 1996, c. 244, s. 38, 1974 Plan BOA, Tab 96). Similarly, successor provisions in labour legislation hold the purchaser of a business to the vendor-employer's collective agreement and obligations, binding the successor to all rights and duties of its predecessor (i.e., *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 43, 1974 Plan BOA, Tab 89; and *Labour Relations Code,* R.S.B.C. 1996, c. 244, s. 35, 1974 Plan BOA, Tab 96). Labour boards rely on the provisions to look behind the form of a transaction and assess its substance. Employment statutes also hold directors liable for wages owed to employees of the corporation; see: *Employment Standards Act*, s. 96, 1974 Plan BOA, Tab 91, and *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 s. 119(1), 1974 Plan BOA, Tab 87.

Numerous other statutes cause others to participate in the liability of a company. Corporate statutes create liability for shareholders in certain situations; see: the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, s. 226(4), 1974 Plan BOA, Tab 87; and the *Business Corporations Act*, R.S.O., 1990 C. B.16, s. 243(1), 1974 Plan BOA, Tab 86. Similarly, the BC *Business Corporations Act,* S.B.C. 2002 c. 57, s. 154, 1974 Plan BOA, Tab 85, creates liability for directors of a corporation in several circumstances. Tax legislation holds directors of a corporation liable for the corporation's unremitted income tax deducted at source from wages (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 227.1(1), 1974 Plan BOA, Tab 95; see also: *Excise Tax Act,* R.S.C. 1985, c. E-15, s. 323(1), 1974 Plan BOA, Tab 94). The *Environmental Protection Act,* R.S.O. 1990, c. E.19, s. 99(2), 1974 Plan BOA, Tab 93, creates liability for an "owner of the pollutant" or "the person having control of the pollutant". The *Environmental Management Act*, SBC 2003, c 53, s. 121, 1974 Plan BOA, Tab 92, states that an offence committed by a corporation is an offence committed by certain officers and directors of the corporation. The *Construction Lien Act,* R.S.O. 1990, c. C.30, s. 13, 1974 Plan BOA, Tab 90 holds certain directors, officers and others who have effective control of a corporation liable for a breach of trust by the corporation.

[458] Industry Canada, "Corporate, Insolvency and Competition Law Policy: Statutory Review of the Bankruptcy and Insolvency Act and the Companies Creditors Arrangement Act, Discussion Paper, 2014 at 28: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Discussion_Paper_StatutoryReview-eng.pdf/$FILE/Discussion_Paper_StatutoryReview-eng.pdf

do so may have unintended consequences in the context of cross-border insolvencies involving a globally integrated group of companies.[459] The Canadian Bar Association suggested that insolvency legislation be amended to give the court jurisdiction to determine on a case-by-case basis whether to recognize foreign-law based claims. The Joint Task Force submitted that a broader consideration of the enforceability of ERISA claims may be warranted. The Joint Task Force noted the inconsistency in denying the enforceability of ERISA claims in Canada while adopting similar pension legislation in Canada.[460]

428. That enforcement of a foreign law might have serious repercussions for a Canadian defendant is not sufficient for the law to be contrary to public policy. In *Ivey*, the Court stated it is not the case that enforcement will be refused simply because the foreign law is more strict or severe than the law of the forum.

429. As discussed at Section IV.C.1.c, the Supreme Court of Canada has found, citing *Castel and Walker*, that "the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts."[461] A law seeking to protect pension plan beneficiaries is not a repugnant law. So then, the only reasons to object to ERISA on public policy grounds are because of the relative size of claims in this case, or because of the nationality of the claimants.

430. Moreover, the Steelworkers simultaneously argue that ERISA is unenforceable on public policy grounds and that the Court has a mechanism by which it can mitigate the harm they allege is done by allowing the 1974 Plan Claim. Given how narrow the public policy exception is, and the exception's focus on laws that are repugnant to Canadian morals, how can a law be unenforceable on public policy grounds if its "repugnant" effects can be so easily remedied?

431. That Canada does not have similar pension legislation does not mean ERISA violates public policy or essential Canadian morality. Rather it would be against public policy to permit the CCAA regime to adopt a policy that permits the CCAA court to distinguish

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[459] *Canadian Bar Association Report, supra* note 358 at 28.

[460] *Joint Task Force Report, supra* note 359 at 31.

[461] *Beals, supra* note 232 at para 71.

between claimants based on nationality. Foreign creditors stand equal with domestic creditors in CCAA proceedings.[462]

V. CONCLUSION

432. U.S. law is the proper law applicable to the 1974 Plan Claim. Such application does not involve extraterritorial application of ERISA but rather furthers the goals of ERISA and international principles of comity. There is nothing morally offensive about applying ERISA to the 1974 Plan Claim, unless there is something offensive about recognizing the valid legal claims of American pensioners over Canadian workers by virtue of their nationality.

433. The 1974 Plan submits that, on the evidentiary record, the preliminary issues raised by the Summary Trial Application are unsuitable for summary determination without affording the 1974 Plan an opportunity for discovery. The deficient evidentiary record supplied by the Walter Canada Group and the Steelworkers prevents this Court from finding the facts necessary to resolve the preliminary issues against the 1974 Plan.

434. Further, the 1974 Plan's inability to obtain discovery despite repeated attempts renders it unjust for the Court to proceed summarily. The 1974 Plan should be afforded the opportunity to develop the facts necessary to put its best foot forward in advancing its claim. Given the present record, the amount of the 1974 Plan Claim, the complexity of the issues raised, and the risks of litigating in slices, the Summary Trial Application should be dismissed as unsuitable for summary determination.

435. The 1974 Plan respectfully requests an Order from this Court:

(a) granting the application of the 1974 Plan dated December 2, 2016; and

(b) dismissing the Summary Trial Application; or

(c) in the alternative, those of the three preliminary issues that the Court determines to be suitable for summary determination be answered as proposed by the 1974 Plan.

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[462] *Teleglobe, supra* note 1 at para. 8; and *Halsbury's Laws of England, Conflict of Laws*, *supra* note 1 at 710, para. 980.

All of which is respectfully submitted this 30th day of December, 2016.

DENTONS CANADA LLP

Per: _____

Craig Dennis, Q.C.
John R. Sandrelli
Owen James
Tevia Jeffries
Counsel for the United Mine Workers of America 1974 Pension Plan and Trust

SCHEDULE "A"

1. Walter Energy provided numerous administrative services to all entities in the Walter Group from its global headquarters in Birmingham, Alabama. In addition to payroll services, these services included finance, tax, treasury, human resources, benefits and communications, information technology, legal, operations and health, safety and environment, among others.

    a. **Finance**: Walter Energy's Finance Department was responsible for creating and maintaining company-wide accounting policies, performing accounting research for all of Walter Energy's subsidiaries. The Finance Department also was responsible for financial reporting, including SEC reporting and consolidations, forecasts, and budgets. The Finance Department was also involved in creating and monitoring company-wide internal controls.

    b. **Tax**: Walter Energy's Tax Department maintained all income tax items for the Walter Energy global operations, including financial reporting, regulatory filings and audit controversy settlement in the U.S. The Tax Department also was responsible for directing and concluding regulatory filings, audit and other tax controversy efforts for the Walter Canada Group, as well as restructuring and financial tax reporting activities associated with the Canadian entities. In addition, the Tax Department directed and managed all U.S., U.K., Canadian and state and provincial financial tax reporting to manage the accuracy and timeliness of tax disclosures and financial filings in addition to all regulatory filings required in these jurisdictions.

    c. **Treasury**: Walter Energy's Treasury Department was involved in the monitoring of bank accounts and cash needs daily; the borrowing and repayment of debt; funds transfers; intercompany payments; bank services management, administration and communications; and foreign exchange transactions for Walter Energy's global operations. Walter Energy also provided risk management activities, including risk identification and development of risk retention and transfer solutions (e.g., the design and management of various insurance programs). The Treasury Department also handled claims management, which included managing pollution legal liability, general liability, automobile liability and property damage claims, as well as managing loss control activities.

d. **Human Resources** ("**HR**"): Walter Energy's HR Department provided various HR activities, including compensation, equity and benefits, payroll and other related services for the Walter U.S. Group and the Walter Canada Group.

e. **Legal**: Walter Energy's Legal Department supported the Walter U.S. Group and their U.S. operations. Certain legal personnel were involved in activities that provided either a global benefit or a direct benefit to the Walter Canada Group or Walter UK Group.

f. **Sourcing and Logistics**: Walter Energy's Sourcing Department provided assistance in the negotiation and implementation of global supply contracts for the Walter Group. Walter Energy's sourcing personnel assisted with supplier selection and development, contract negotiations, competitive bid events and asset relocations.

g. **Sales and Marketing**: Walter Energy's Sales and Marketing Department managed sales of U.S. coal for the Walter U.S. Group and provided strategic marketing services for the Walter Canada Group and Walter UK Group. These activities included setting the global sales and marketing strategy for the Walter Group, the development of new sales and marketing procedures and similar activities.

2. In the normal course of business, Walter U.S., Walter Canada, Walter UK and other affiliates engaged in various intercompany activities which gave rise to intercompany transactions (collectively, the "**Intercompany Transactions**"). The Intercompany Transactions gave rise in the ordinary course to payables and receivables between, among and on behalf of Walter U.S. Group, Walter Canada, and other affiliates.

SCHEDULE "B" TO THE WRITTEN SUBMISSIONS OF THE 1974 PLAN

SUMMARY OF THE POSITIONS OF THE 1974 PLAN ON THE WALTER CANADA GROUP'S "STATEMENT OF UNCONTESTED FACTS"

Para.	Statement of Uncontested Facts	Source	Where Cited	Position
Walter US Corporate Parties				
1.	A: Walter Energy Inc. ("Walter Energy") is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama.	*Claim para. 24; Walter admits; USW no knowledge*.	**Walter Canada Group Written Submissions** Para. 5	Not admitted by both the Walter Canada Group and the United Steelworkers, and so not properly considered by the Court as an admission ("**NAB**")
2.	A: Walter Energy did business in West Virginia and Alabama.	*Claim para. 79; Walter admits; USW no knowledge*		NAB
3.	NK: Walter Energy's board of directors and its management team operated out of Birmingham, Alabama.	(*Claim para. 80; Walter no knowledge; USW no knowledge*)		NAB
4.	A: Jim Walter Resources Inc. ("Walter Resources") is wholly owned by Walter Energy.	*Claim para. 25; Walter admits; USW no knowledge*.	**Walter Canada Group Written Submissions** Para. 18	NAB
5.	NK: Walter Resources is incorporated in Alabama and did business in Alabama.	*Claim para. 81; Walter no knowledge; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 18	NAB
6.	NK: Walter Resources' management team operated out of Birmingham, Alabama.	*Claim para. 82; Walter no knowledge; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 18	NAB
The 1974 Plan				
7.	NK: The United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") is a pension plan and irrevocable trust established in accordance with section 302(c)(5) of the *Labour Management Relations Act of 1947*, 29 U.S.C. § 186(c)(5).	*Claim para. 1; Walter no knowledge; USW no knowledge* *1st Affidavit of Dale Stover, para. 11 and Exhibit A*	**Walter Canada Group Written Submissions** Para. 16.	Demonstrated by the admissible evidence of Dale Stover and so properly a fact the Court can rely on ("**YES -- DS**")
8.	CR: The 1974 Plan was established in 1974	*1st Affidavit of Miriam Dominguez, Exhibit A (1974 Proof of Claim), para. 2*. *1st Affidavit of Dale Stover, para. 14*		YES – DS

9.	NK: The 1974 Plan is resident in Washington, DC.	*Claim para. 83; Walter no knowledge; USW no knowledge* *1st Affidavit of Dale Stover, para. 12*	**Walter Canada Group Written Submissions** Para. 104	YES – DS
10.	NK: The trustees of the 1974 Plan are resident in the United States.	*Claim para. 84; Walter no knowledge; USW no knowledge* *1st Affidavit of Dale Stover, para. 13*		YES – DS
11.	NK: The 1974 Plan is a multiemployer, defined benefit pension plan under section 3(2), (3), (35), (37)(A) of ERISA, 29 U.S.C. § 1002(2), (3), (35), (37)(A).	*Claim para. 22; Walter no knowledge; USW no knowledge* *1st Affidavit of Dale Stover, paras. 11, 20, and 21*		YES – DS
12.	NK: All participating employers in the 1974 Plan are resident in the United States.	*Claim para. 85; Walter no knowledge; USW no knowledge* *1st Affidavit of Dale Stover, para. 39*	**Walter Canada Group Written Submissions** Paras. 16, 104	YES – DS
13.	CR: Only one of the Walter US entities, Walter Resources, is a party to a collective bargaining agreement with the 1974 Plan.	*Reasons for Madam Judgment of Justice Fitzpatrick dated January 26, 2016, para. 13*	**Walter Canada Group Written Submissions** Paras. 17, 51	The Petitioners cannot rely on a statement in this Court's previous judgments to prove a fact in this summary trial ("**NJ**"). Not an accurate summary of the evidence ("**NAS**").
14.	NK: Walter Resources (or a predecessor entity) had been a signatory to the 1978, 1981, 1984, 1988, 1993, 2002, 2007 and 2011 National Bituminous Coal Wage Agreements (the 2011 National Bituminous Coal Wage Agreement, the "CBA"), and, pursuant thereto, had been a participating employer in the 1974 Plan.	C*laim para. 23; Walter no knowledge; USW no knowledge* *1st Affidavit of Dale Stover, paras. 34, 37, and 38*	**Walter Canada Group Written Submissions** Paras. 18, 51	YES – DS
15.	CR: No member of the Walter Canada Group is or ever has been party to the CBA.	*Inference based on Claim para. 23; Walter Response para. 24; Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 13*	**Walter Canada Group Written Submissions** Paras. 19, 51	NJ/NAS
16.	NK: The 1974 Plan is in financial distress and had unfunded vested benefits of approximately US$5.8 billion as of July 1, 2015.	*1974 Plan Reply to USW, para. 3*		Addressed in part in the 1st Affidavit of Dale Stover at paras. 44 and 61-69.

The Western Acquisition				
17.	A: Before 2011, Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom.	*Claim para. 47; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 8	NAB
18.	A: On March 9, 2011, Walter Energy incorporated Walter Energy Canada Holdings, Inc. ("Canada Holdings").	*Claim para. 40; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 12	NAB
19.	A: Canada Holdings is a company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 2; Walter admits; USW admits*	**Walter Canada Group Written Submissions** Para. 22	Admitted by all parties and so properly a fact the Court can rely on ("**YES**")
20.	A: Canada Holdings is wholly owned by Walter Energy.	*Claim para. 41; Walter admits; USW admits*		YES
21.	A: Canada Holdings was incorporated specifically to hold the shares of Western Coal Corp. ("Western") and its subsidiaries.	*Claim para. 42; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 12	NAB
22.	A: Western and its subsidiaries operated coal mines in British Columbia, the United Kingdom and the United States.	*Claim para. 43; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Paras. 9, 99(a), 99(b)	NAB
23.	CR: Walter Energy's Western Acquisition was publicly announced and was completed pursuant to a plan of arrangement approved by the British Columbia Supreme Court.	*Order of Mr. Justice McEwan dated March 10, 2011 approving Western Acquisition Plan of Arrangement*	**Walter Canada Group Written Submissions** Paras. 13, 99(a)	With respect to Walter Energy's Western Acquisition being publicly announced, NJ. Otherwise, properly admitted as a court record.
24.	CR: Walter Energy and Western began negotiating the Western Acquisition in late October 2010.	*1st Affidavit of Keith Calder dated February 1, 2011, para. 35*[1]	**Walter Canada Group Written Submissions** Para. 9	Unclear whether from personal knowledge or on information and belief.
25.	DE: On November 18, 2010, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly-available EDGAR system. In the press release, Walter Energy stated that Walter Energy had entered into a share purchase agreement seeking to acquire approximately 19.8% of the outstanding common shares of Western. The press release referred to Walter Energy's intention to complete a "business combination" with Western.	*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit A*	**Walter Canada Group Written Submissions** Paras. 10, 99(a)	No admissible evidence of date press release issued because affiant has no personal knowledge. Not disputed that affiant found document on EDGAR on date she looked (which date she does not disclose)("**NPK**")
26.	DE: On December 2, 2010, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that it had extended its exclusivity agreement with Western. Walter Energy also stated "Under the terms of the agreement, which was announced on November 18, 2010, both companies are working exclusively with each other toward the negotiation of a definitive agreement to give effect to Walter Energy's proposal to acquire Western".	*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit B*	**Walter Canada Group Written Submissions** Para. 99(a)	NPK

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27.	DE: On December 2, 2010, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that: (a) it had entered into an Arrangement Agreement with Western whereby Walter Energy would acquire all of the outstanding common shares of Western; (b) the "transaction will be implemented by way of a court-approved plan of arrangement under British Columbia law"; and (c) in connection with the arrangement, Walter Energy entered into a debt commitment letter pursuant to which Walter Energy would borrow $2,725 million of senior secured credit facilities, "the proceeds of which will be used (i) to fund the cash consideration for the transaction, (ii) to pay certain fees and expenses in connection with the transaction, (iii) to refinance all existing indebtedness of the Company and Western Coal and their respective subsidiaries and (iv) to provide for the ongoing working capital of the Company and its subsidiaries".	*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit C*	**Walter Canada Group Written Submissions** Paras. 11, 99(a)	NPK
28.	DE: On January 21, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy stated that the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 had expired and that the Canadian Competition Bureau had issued a "no-action" letter.	*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit D*	**Walter Canada Group Written Submissions** Para. 99(a)	NPK
29.	DE: On February 15, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced the Company's fourth quarter and full-year 2010 results. Walter Energy also reported that the Western Acquisition was progressing.	*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit* E	**Walter Canada Group Written Submissions** Para. 99(a)	NPK
30.	DE: On March 2, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that once the Western Acquisition was complete, Joseph B. Leonard (then-CEO of Walter) would step down from his position and Keith Calder (then-CEO of Western) would be appointed as CEO.	*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit F*	**Walter Canada Group Written Submissions** Para. 99(a)	NPK

31.	DE: On March 11, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that the shareholders of Western overwhelmingly voted in favour of the proposed plan of arrangement. Walter Energy also attached a press release stating that the Supreme Court of British Columbia had issued a final order approving the proposed plan of arrangement.	*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit G*	**Walter Canada Group Written Submissions** Para. 99(a)	NPK
32.	CR: No one filed a Response to Petition in respect of the application to approve the Plan of Arrangement.	*2nd Affidavit of Keith Calder dated March 8, 2011, para. 16*	**Walter Canada Group Written Submissions** Paras. 20, 99(a)	No position.
33.	DE: On March 28, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that the Minister of Industry, under the Investment Canada Act, approved the proposed acquisition of Western.	*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit H*		NPK
34.	A: On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western (the "Western Acquisition").	*Claim para. 44; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 14	NAB
35.	NK: At the time of the Western Acquisition, the 1974 Plan had an unfunded liability of greater than US$4 billion.	*Claim para. 56; Walter no knowledge; USW no knowledge* *1st Affidavit of Dale Stover, para. 48*	**Walter Canada Group Written Submissions** Paras. 20, 100 **United Steelworkers Written Submissions** Para. 16	YES – DS
36.	A: The Western Acquisition included the Brule, Wolverine and Willow Creek mines.	*Claim para. 45; Walter admits; USW no knowledge*		NAB
37.	A: Total consideration paid by Walter Energy in respect of the Western Acquisition was approximately US$3.7 billion.	*Claim para. 46; Walter admits; USW no knowledge*		NAB
38.	A: Concurrently, and in connection with entering into the arrangement agreement with Western, Walter Energy, Western, and Canada Holdings entered into a credit facility (the "Credit Facility") with Morgan Stanley Senior Funding, Inc., the Bank of Nova Scotia and the other lenders thereunder (the "Bank Lenders").	*Claim para. 48; Walter admits; USW no knowledge*		NAB
39.	CR: The Credit Facility was also used to pay existing Walter US Group debt and to pay fees.	*Walter Response para. 34; 1st Affidavit of William G. Harvey dated December 4, 2015, para. 32*		Evidence is inadmissible because it fails to distinguish between facts within personal knowledge and facts on information and belief ("**FTD**") Addresses a point on which the 1974 Plan needs discovery ("**ND**")
40.	A: The majority of the funding Canada Holdings paid for the Western Acquisition was obtained under a hybrid debt transaction (the "Hybrid Financing").	*Claim para. 51; Walter admits; USW no knowledge*		NAB

41.	A: As part of the Hybrid Financing, in substance, Walter Energy advanced approximately US$2 billion in cash to Canada Holdings to enable Canada Holdings to purchase the Western Coal entities.	*Claim para. 52; Walter admits; USW no knowledge*		NAB
42.	A: Walter Energy incurred significant debt in relation to the Western Acquisition.	*Claim para. 54; Walter admits; USW no knowledge*		NAB
43.	CR: After completing the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Group into geographical business segments, the Walter US Group, the Walter Canada Group and the Walter UK Group.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 36*	**Walter Canada Group Written Submissions** Paras. 15, 99(b)	FTD/ND
Walter Canada Corporate Parties and Structure				
44.	A: The Petitioners in these CCAA Proceedings comprise Canada Holdings and all entities owned directly or indirectly by Walter Energy that are incorporated or organized under the laws of Canada or its provinces.	*Claim para. 27; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 6	NAB
45.	A: Walter Canadian Coal ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 .	*Claim para. 3; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 22	NAB
46.	CR: Walter Canadian Coal ULC was formed on June 28, 2012.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 12*		FTD
47.	A: Walter Canadian Coal Partnership is a partnership organized under the laws of British Columbia, with an address for service at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 11; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Paras. 23, 70	NAB
48.	A: Canada Holdings is the general partner of Walter Canadian Coal Partnership.	*Claim para. 29; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 70	NAB
49.	PD: Walter Canadian Coal Partnership was registered on July 25, 2012.	*1st Affidavit of Linda Sherwood, Exhibit D*	**Walter Canada Group Written Submissions** Para. 70	Admissible as public document and so properly a fact the Court can rely on ("**YES – PD**")
50.	A: Walter Canadian Coal Partnership is the Petitioners' principal operating entity.	*Claim para. 28; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 70	NAB
51.	A: Walter Canadian Coal Partnership is a partner of each of the three B.C. partnerships that operate the Canadian mines: Wolverine Coal Partnership, Brule Coal Partnership and Willow Creek Coal Partnership.	*Claim para. 31; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 70	NAB

52.	A: Each of the partnerships has a separate B.C. unlimited liability company as its other partner:	*Claim para. 32; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Paras. 22, 23, 70	NAB
	(a) A: Wolverine Coal ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 4; Walter admits; USW admits*		YES
	(b) PD: Wolverine Coal ULC was incorporated on June 27, 2012.	*1st Affidavit of Linda Sherwood, Exhibit E*		YES – PD
	(i) A: Wolverine Coal Partnership is a partnership organized under the laws of British Columbia, with an address for service at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 12; Walter admits; USW no knowledge*		NAB
	(ii) PD: Wolverine Coal Partnership was registered on July 16, 2012.	*1st Affidavit of Linda Sherwood, Exhibit F*		YES – PD
	(c) A: Brule Coal ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 5; Walter admits; USW no knowledge*		NAB
	(d) PD: Brule Coal ULC was incorporated on June 27, 2012.	*1st Affidavit of Linda Sherwood, Exhibit A*		YES – PD
	(i) A: Brule Coal Partnership is a partnership organized under the laws of British Columbia, with an address for service at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 13; Walter admits; USW no knowledge*		NAB
	(ii) PD: Brule Coal Partnership was registered on July 25, 2012.	*1st Affidavit of Linda Sherwood, Exhibit B*		YES -- PD
	(e) A: Willow Creek Coal ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 7; Walter admits; USW no knowledge*		NAB
	(i) [*sic*] A: Willow Creek Coal Partnership is a partnership organized under the laws of British Columbia, with an address for service at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 10; Walter admits; USW no knowledge*		NAB
53.	A: Cambrian Energybuild Holdings ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 6; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 22	NAB
54.	PD: Cambrian Energybuild Holdings ULC was incorporated on June 27, 2012.	*1st Affidavit of Linda Sherwood, Exhibit C*		YES -- PD

55.	A: Pine Valley Coal Ltd. is a company incorporated under the laws of Alberta, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 8; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 22	NAB
56.	A: 0541237 BC Ltd. is a company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2.	*Claim para. 9; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 22	NAB
The Walter Canada Group's Business				
57.	CR: The Walter Group operates its business in two distinct segments: (i) US Operations, and (ii) Canadian and UK Operations.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 10(c)*	**Walter Canada Group Written Submissions** Para. 3.	FTD/ND
58.	CR: After the Western Acquisition, the Walter Group's public reporting divided the Walter Group into the Walter US Group and the Walter Non-US Group reporting segments.	*Walter Response para. 14; 1st Affidavit of William G. Harvey dated December 4, 2015, paras. 106-107*		FTD/ND
59.	CR: Walter Energy, a public company, reported its financial results by segment and does not provide financial reporting for the Walter Canada Group or the Walter UK Group independently.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 10(c)*		FTD/ND
60.	CR: The Walter Canada Group and the Walter UK Group are operated separately and there is little overlap between the two corporate groups, other than the fact that the President of Canada Holdings is also the President of Energybuild Group Limited, the parent company of all of the UK members of the Walter Group.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 48*		FTD/ND
61.	CR: British Columbia is the Walter Canada Group's chief place of business.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 15*		FTD/ND
62.	CR: The Walter US Group provided essential management services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions, and legal advice.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 30*		Substantially similar to admissions led by 1974 Plan at paras. 1-3 of Schedule "A" to the 1974 Plan's Written Submissions.
63.	CR: Walter Energy and its subsidiaries provided these services to the Walter Canada Group, including services pursuant to certain management agreements and other intercompany agreements (collectively, the "Shared Services").	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 149*	**Walter Canada Group Written Submissions** Para. 100	FTD/ND
64.	CR: As of December 2015, the Walter Canada Group paid approximately $1 million per month to the Walter US Group for the Shared Services, based on a historical overhead allocation methodology.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 30*	**Walter Canada Group Written Submissions** Para. 101	FTD/ND

65.	CR: Given the importance of these Shared Services to the Walter Canada Group's operations, the expertise and experience of the Walter US Group and the significant extent to which the Walter Canada Group relied on the Walter US Group to provide these essential services, the Walter Canada Group paid the Walter US Group during the CCAA proceeding on a basis consistent with then-current payment terms and business practices but subject to certain changes to reflect the set of services then needed by the Walter Canada Group.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 149*		FTD/ND
66.	CR: The Walter Canada Group and the Walter US Group negotiated to address the provision of these Shared Services and the pricing of such services until the consummation of the transaction contemplated by the US APA.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 30*		FTD/ND
67.	CR: William Harvey, of the City of Birmingham, Alabama, was the Executive Vice President and Chief Financial Officer of Canada Holdings.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 1*		FTD/ND
68.	A: Mr. Harvey was also the Chief Financial Officer and Executive Vice President of Walter Energy.	*Claim para. 90; Walter admits; USW no knowledge*		NAB
69.	CR: Mr. Harvey, and four other officers of various Walter Canada Group companies who were also employees of Walter Energy, resigned on January 20, 2016.	*1st Affidavit of William E Aziz dated March 22, 2016, para. 21*		YES
70.	CR: In certain circumstances, directors and officers of the Walter Canada Group can be held liable for certain obligations owing to employees and government entities. As of December 2015, the Walter Canada Group estimated (with the assistance of the Proposed Monitor) that the obligations in respect of Walter Canada Group unpaid wages, unremitted source deductions, unpaid accrued vacation pay and certain taxes could amount to a total potential director liability of approximately $2.5 million.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 155*	**Walter Canada Group Written Submissions** Para. 115	FTD. Inadmissible as the evidence draws a legal conclusion ("**LC**")
71.	CR: The Canadian operations principally included the Brule and Willow Creek coal mines, located near Chetwynd, BC, and the Wolverine coal mine, near Tumbler Ridge, BC.	*Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 3*	**United Steelworkers Written Submissions** Para. 23	NJ
72.	CR: The principal assets of the Petitioners are the cash proceeds of the Brule, Willow Creek and Wolverine mines, located in northeast British Columbia, and the Petitioners' 50% interest in the Belcourt Saxon Coal Limited Partnership.	*Claim para. 30, which did not refer to the cash proceeds; Reasons for Judgment of Madam Justice Fitzpatrick dated September 23, 2016, paras. 12 and 14*		NJ
73.	CR: The Walter Canada Group did not and does not have assets or carry on business in the United States.	*Walter Response para. 28; 1st Affidavit of William G. Harvey dated December 4, 2015, paras. 48-70*	**Walter Canada Group Written Submissions** Paras. 99(b), 99(c)	FTD/ND

74.	CR: As of December 4, 2015, the Walter Canada Group cumulatively employed a total of approximately 315 active and inactive employees in Canada, including approximately 280 inactive, unionized employees employed at the Wolverine Mine and certain employees on disability leave.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 72*		FTD/ND
75.	CR: Some of the Walter Canada Group's former employees were members of one of the following two unions: the Respondent Steelworkers (para. 80) and the Christian Labour Association of Canada (para. 76).	*1st Affidavit of William G. Harvey dated December 4, 2015*		FTD/ND
76.	CR: The collective agreements with the Respondent Steelworkers and the Christian Labour Association of Canada were governed by the B.C. *Labour Relations Code*.	*1st Affidavit of William G. Harvey dated December 4, 2015, paras. 76 and 81*	**Walter Canada Group Written Submissions** Para. 114(a)	FTD/ND/LC
77.	CR: The Respondent Steelworkers asserted claims relating to the Northern Living Allowance and certain claims related to the notice provisions under s. 54 of the B.C. *Labour Relations Code*.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 84*	**Walter Canada Group Written Submissions** Para. 114(b) **United Steelworkers Written Submissions** Para. 27	FTD/ND
78.	CR: The 1974 Plan does not allege that the Walter Canada Group employed any beneficiaries of the 1974 Plan or any person who was a member of the United Mine Workers of America union. As a matter of fact, the Walter Canada Group did not employ any such persons.	*Walter Response para. 25; Inference drawn from 1st Affidavit of William G. Harvey dated December 4, 2015, paras. 76, 80*	**Walter Canada Group Written Submissions** Paras. 52, 99(c)	FTD/ND
79.	CR: The 1974 Plan does not allege that the Walter Canada Group contributed to the 1974 Plan. As a matter of fact, the Walter Canada Group did not contribute to the 1974 Plan.	*Walter Response para. 26; Inference based on Claim para. 23; Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 13*	**Walter Canada Group Written Submissions** Paras. 19, 52, 99(c)	NJ/NAS
80.	CR: In the period when Walter Resources was a contributing employer to the 1974 Plan, the Walter Canada Group did not have any obligation to contribute to the 1974 Plan nor does the 1974 Plan allege that the Walter Canada Group had such an obligation.	*Walter Response para. 27; Inference based on Claim para. 23; Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 13*	**Walter Canada Group Written Submissions** Paras. 19, 52	NJ/NAS

81.	CR: The Walter Canada Group's operations were subject to environmental assessment under the B.C. Environmental Assessment Act and its predecessor legislation, the Mine Development Assessment Act. Each mine was issued an environmental assessment certificate that sets out the criteria for designing and constructing the project, along with a schedule of commitments the Walter Canada Group made to address concerns raised through the environmental assessment process. If, for any reason, the Walter Canada Group's operations were not conducted in accordance with the environmental assessment certificate, the Walter Canada Group's operations could have been temporarily suspended until such time as its operations were brought back into compliance.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 85*	**Walter Canada Group Written Submissions** Para. 114(c)	FTD/ND/LC
82.	CR: Any significant changes to the Walter Canada Group's operations or further development of its properties in B.C. could have triggered a federal or provincial environmental assessment or both.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 86*	**Walter Canada Group Written Submissions** Para. 114(e)	FTD/ND/LC
83.	CR: Each of the Walter Canada Group's mining sites were inspected by the British Columbia Ministry of Energy and Mines in September 2014.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 87*	**Walter Canada Group Written Submissions** Para. 114(f)	FTD/ND
84.	CR: Pursuant to the BC *Mines Act*, the Walter Canada Group's operations required permits outlining the details of the work at each mine and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land and watercourses affected by the mine. The Chief Inspector of Mines could issue a permit with conditions, including requiring that the owner, agent, manager or permittee give security in an amount and form specified by the Chief Inspector for mine reclamation and to provide for the protection of watercourses and cultural heritage resources affected by the mine. The reclamation security could have been applied towards mine closure or reclamation costs and other miscellaneous obligations if permit conditions were not met. Detailed reclamation and closure requirements are contained in the *Health, Safety and Reclamation Code for Mines in British Columbia* (the "*Mine Code*") established under *Mines Act*.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 88*	**Walter Canada Group Written Submissions** Para. 114(g)	FTD/ND/LC
85.	CR: Under the *Mines Act* and the Mine Code, the Walter Canada Group filed mine plans and reclamation programs for each of its operations. The Walter Canada Group accrued for reclamation costs to be incurred related to the operation and eventual closure of its mines. Additionally, under the terms of each mine permit, the Walter Canada Group was required to submit an updated mine plan every five years. The Walter Canada Group submitted updated five-year mine plans for Wolverine Mine and Brule Mine in 2013.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 89*	**Walter Canada Group Written Submissions** Para. 114(h)	FTD/ND

86.	CR: The Walter Canada Group experienced some issues in meeting the revised provincial water quality guidelines relating to selenium, nitrate and sulphate levels at the Brule Mine.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 57*	**Walter Canada Group Written Submissions** Para. 114(d)	FTD/ND
87.	CR: The Walter Canada Group's Mining Permits were non-assignable and non-transferrable unless amended, pursuant to s. 11.1 of the *Mines Act*, by way of application to the Chief Inspector or its delegate. The Mining Permits also required the permittee to notify the Chief Inspector of Mines of any intention to depart from either the work plan or reclamation program "to any substantial degree", and to not proceed without written authorization.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 92*		FTD/ND/LC
88.	In addition to the Mining Permits, each of the mining sites had obtained the following types of permits/licenses to operate: (a) Environmental Assessment Certificates ("EACs"); (b) Coal leases or licences; (c) Various environmental permits including (i) air contaminant discharge permits (due to the dust or fine particulate matter created during the operations), (ii) water permits (due to the need to use or divert water existing on the site for the operations) and (iii) waste / effluent discharge permits (together, "Environmental Permits"); (d) licenses to cut and remove timber and permits to use forestry service roads issued under the *Forestry Act*; (e) Explosive storage and handling permits issued under the Mines Act; an (f) Other land tenures such as statutory right of ways and licenses of occupation.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 93*		FTD/ND
89.	CR: It was imperative that the Walter Canada Group retain all of their EACs, coal leases and licenses, Environmental Permits and other rights throughout the restructuring proceedings to ensure that they could continue to operate and, should conditions prove favourable, ramp up mining at one or more of the Canadian mines. Without the EACs, coal leases and licences, Environmental Permits and other rights described above, the Walter Canada Group was prohibited from undertaking any activity on the site, including ongoing maintenance and remediation.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 94*		FTD/ND/LC
Walter US Chapter 11 Proceedings				
90.	A: On July 15, 2015, the US Debtors commenced proceedings (the "Chapter 11 Proceedings") under Chapter 11 of Title 11 of the United States Code (the "US Bankruptcy Code").	*Claim para. 58; Walter admits; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 4	NAB

91.	CR: The US Bankruptcy Court found as a fact that: "However, despite the high quality of met coal that the Debtors sell, the Debtors, like many other US coal producers, were unable to survive the sharp decline in the global met coal industry and filed for Chapter 11 relief on July 15, 2015".	*1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 3, para. 1*		NJ
92.	The US Bankruptcy Court found as a fact that: "The decline of the global met coal industry since 2011 is well established and has devastated the industry. Fundamental downward shifts in the Chinese economy, coupled with the increase of low-cost supply of met coal from Australia and Russia, have driven met coal prices down from their historic high of $330 per metric ton in 2011 to their current low of $89 per metric ton."	*1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 6, para. 7*		NJ
Walter Canada Group CCAA Proceedings				
93.	The timing of the Western Acquisition could not have been worse. Since 2011, the market for metallurgical coal fell dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014.	*Reasons for judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 4*		NJ
94.	CR: As part of the CCAA Proceedings, the Willow Creek Coal Partnership and Brule Coal Partnership planned to enter into an agreement with Walter Resources whereby Walter Resources would buy three bulldozers from the Partnerships.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 97*	**Walter Canada Group Written Submissions** Para. 116	FTD/ND
95.	CR: Only one of the three bulldozers met certain US regulatory requirements for import into the United States.	*1st Affidavit of William E. Aziz dated March 22, 2016, para. 28*	**Walter Canada Group Written Submissions** Para. 116	YES
96.	CR: By way of Bill of Sale dated December 29, 2015, Brule Coal Partnership sold one bulldozer to Walter Resources.	*1st Affidavit of William E. Aziz dated March 22, 2016, Exhibit A*		YES (although it is not dated December 29, 2015)
97.	CR: The Bill of Sale was "made under and shall be governed by and construed in accordance with the law of the Province of British Columbia and the federal laws of Canada applicable in the Province of British Columbia".	*1st Affidavit of William E. Aziz dated March 22, 2016, Exhibit A*	**Walter Canada Group Written Submissions** Para. 117	YES
1974 Plan's Proofs of Claim in the Chapter 11 Proceedings				
98.	NK: On October 8, 2015, the 1974 Plan filed proofs of claim in the Chapter 11 Proceedings.	*Claim para. 59; Walter no knowledge; USW no knowledge*	**Walter Canada Group Written Submissions** Para. 24	NAB
99.	CR: The 1974 Plan filed a proof of claim against Walter Resources.	*1st Affidavit of Miriam Dominguez, Exhibit A* *1st Affidavit of Dale Stover, para. 76*	**Walter Canada Group Written Submissions** Para. 24	Demonstrated by the admissible evidence of Miriam Dominguez and so properly a fact the Court can rely on ("**YES – MD**")

100.	CR: The 1974 Plan filed a proof of claim against Walter Energy and all other US Debtors.	*1st Affidavit of Miriam Dominguez, Exhibit B;* *2nd Affidavit of Miriam Dominguez, Exhibit D, p. 82*	**Walter Canada Group Written Submissions** Para. 24	YES – MD
101.	CR: The 1974 Plan filed a proof of claim against Walter Energy which refers to "each of the debtors and debtors-in-possession" in the Chapter 11 Proceedings.	*1st Affidavit of Miriam Dominguez, Exhibit B, para. 4*	**Walter Canada Group Written Submissions** Para. 24	YES – MD
102.	CR: The Proofs of Claim filed by the 1974 Plan in the Chapter 11 Proceedings do not refer to the Walter Canada Group.	*USW response para. 9; 1st Affidavit of Miriam Dominguez, Exhibits A & B*	**Walter Canada Group Written Submissions** Para. 24	YES – MD
The Granting and Implementation of the Global Settlement Order in the Chapter 11 Proceedings				
103.	CR: On December 22, 2015, the US Bankruptcy Court entered an order (the "Global Settlement Order").	*2nd Affidavit of Miriam Dominguez, Exhibit A*	**Walter Canada Group Written Submissions** Para. 25	YES – MD
104.	CR: The Global Settlement Order states: "The terms of the Global Settlement set forth in the Settlement Term Sheet, a copy of which is attached hereto as Exhibit 1, are approved and are binding on the Parties to the extent provided therein".	*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 2, para. 2*		YES – MD
105.	CR: The Settlement Term Sheet entitles unsecured creditors to receive 1% of the common equity issued in the Stalking Horse Purchaser on closing as well as the right to participate in any exit financing.	*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 7, para. 2(a)*	**Walter Canada Group Written Submissions** Para. 25	YES – MD
106.	CR: The Global Settlement Order states: "This Court shall retain jurisdiction to hear and determine all matters arising from or related to the interpretation, implementation, or enforcement of this Order".	*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 4, para. 4*		YES – MD
107.	CR: Exhibit 1 to the Global Settlement Order states: "This Term Sheet constitutes a legally binding obligation of the Debtors, Steering Committee, Stalking Horse Purchaser and UCC".	*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 6*	**Walter Canada Group Written Submissions** Para. 25	YES – MD
108.	CR: Exhibit 1 to the Global Settlement Order does not include the Walter Canada Group as Parties.	*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 6*	**Walter Canada Group Written Submissions** Para. 26	YES – MD
109.	CR: The Notice of Joint Motion for an Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief filed jointly by the US Debtors and the Unsecured Creditors Committee states: "Notably, the relief this Motion requests does not increase or diminish the aggregate distribution to unsecured creditors from the Chapter 11 Estates. Unsecured creditors are not entitled to any recovery from the Chapter 11 Estates beyond that established by the Global Settlement, which is fixed at the Equity and corresponding participating in any exit financing".	*2nd Affidavit of Miriam Dominguez, Exhibit D, p. 65, para. 11*	**Walter Canada Group Written Submissions** Para. 27	YES – MD

110.	CR: On March 24, 2016, the US Bankruptcy Court entered an order (the "Global Settlement Implementation Order").	*2nd Affidavit of Miriam Dominguez, Exhibit E*	**Walter Canada Group Written Submissions** Para. 29	YES – MD
111.	CR: The Global Settlement Implementation Order stated: "The Global Settlement may be implemented and consummated in accordance with its terms and the terms hereof, including the application of the Participation Procedures, the Aggregate Claim Amount, and the Minimum Claim Amount for purpose of making distributions on account of the Global Settlement to holders of unsecured claims and the solicitation of creditors in any exit financing".	*2nd Affidavit of Miriam Dominguez, Exhibit E, para. 3*		YES – MD
112.	CR: Pursuant to the Global Settlement Implementation Order, the Equity Trust is not permitted to make a distribution to claims below $2 million.	*2nd Affidavit of Miriam Dominguez, Exhibit D, p. 64, para. 10; 2nd Affidavit of Miriam Dominguez, Exhibit E, para. 3*		YES – MD
The US Bankruptcy Court Grants the 1113/1114 Order in the Chapter 11 Proceedings				
113.	NK: On December 28, 2015, the US Bankruptcy Court entered an order (the "1113/1114 Order") authorizing Walter Energy and its US affiliates to reject the CBA and declaring that Walter Resources had no further obligation to contribute to the 1974 Plan.	*Claim para. 16; Walter no knowledge; USW no knowledge; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order); 1st Affidavit of Dale Stover, para. 83*	**Walter Canada Group Written Submissions** Para. 30	YES -- DS/ YES – MD
114.	CR: The 1113/1114 Order was issued following a hearing on December 15 and 16, 2015, of the US Bankruptcy Court.	*USW response para. 5; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 1*	**Walter Canada Group Written Submissions** Para. 31	YES -- MD
115.	CR: The US Debtors and the 1974 Plan participated in the US Bankruptcy Court hearing in respect of the 1113/1114 Order.	*USW response para. 5; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 1*	**Walter Canada Group Written Submissions** Para. 31	YES -- MD
116.	CR: None of the Walter Canada Group participated in the US Bankruptcy Court hearing in respect of the 1113/1114 Order.	*USW response para. 5; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 1-2*	**Walter Canada Group Written Submissions** Para. 31	YES -- MD

117.	CR: In granting the 1113/1114 Order, the US Bankruptcy Court did not consider any of the assets of the Petitioners or the Canadian operations in making the 1113/1114 Order. The US Bankruptcy Court did not treat the Petitioners as a controlled group with the Walter Energy US affiliates.	*USW response para. 8; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order)*	**Walter Canada Group Written Submissions** Para. 31	YES – MD
118.	118. CR: On January 4, 2016, the 1974 Plan filed an Application Response in the Supreme Court of British Columbia stating: (a) At paragraph 10: "As set forth in the findings of fact in the 1113/1114 Order, Walter Energy US intends to seek approval of a stalking horse bid or superior bid at the scheduled sale hearing, which will require a rejection, and sale free and clear, of Walter Energy US' obligations under the CBAs. If such sale is not approved or fails to close, Walter Energy US is expected to withdraw from the 1974 Plan"; and (b) At paragraph 11: "If the 1974 Plan's claim remains a contingent claim, Walter Energy US has expressed its intention to cause the contingency – withdrawal from the 1974 Plan – to come to pass, the US Bankruptcy Court has confirmed and authorised the actions that Walter Energy US must take to cause the contingency to come to pass, and such actions are expected to take place in the very near term".	*Application Response of the 1974 Plan filed January 4, 2016*	**Walter Canada Group Written Submissions** Para. 32	YES, if relevance is only that the statement was made.
119.	CR: On March 29, 2016, the 1974 Plan filed an Application Response in the Supreme Court of British Columbia stating at paragraph 7: "On February 16, 2016, the collective bargaining agreement was ratified by the UMWA, resulting in the withdrawal by the UMWA of its appeal of the 1113/1114 Order, pending closing of the sale to CA. Accordingly, the appeal of the 1113/1114 Order is not proceeding with respect to the 1974 Plan".	*Application Response of the 1974 Plan filed March 29, 2016*	**Walter Canada Group Written Submissions** Para. 33	YES, if relevance is only that the statement was made.
The US Bankruptcy Court Approves a Sale of the US Assets				
120.	NK: During the Chapter 11 Proceedings, the US Debtors sought authority from the Bankruptcy Court to sell their US assets and operations free and clear of all liabilities, including any obligations to make ongoing monthly pension contributions to the 1974 Plan under the CBA.	*Claim para. 63; Walter no knowledge; USW no knowledge*	**United Steelworkers Written Submissions** Para. 17	NAB
121.	NK: On April 1, 2016, the US Debtors closed a sale of its core mining assets in the United States to Coal Acquisition, LLC.	*Claim para. 70; Walter no knowledge; USW no knowledge*		NAB
122.	NK: The equity interests in the members of the Walter Canada Group and the assets held by the members of the Walter Canada Group are not part of the purchased assets under the credit bid.	*1st Affidavit of William G. Harvey dated December 4, 2015, para. 6*		Affidavit of William Harvey is inadmissible if led by the Walter Canada Group, but the statement could be admitted as evidence if properly led.

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