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VANCOUVER
SUPREME COURT SCHEDULING

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

REPLY SUBMISSIONS OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION
PLAN AND TRUST (THE "1974 PLAN") ON RULE 9-7(11) APPLICATION

DENTONS CANADA LLP
20th Floor, 250 Howe Street
Vancouver, BC V6C 3R8
Telephone: 604-687-4460
Facsimile: 604-683-5214

Craig P. Dennis, Q.C.
John R. Sandrelli
Owen James
Tevia Jeffries
Counsel for the 1974 Plan

1. In relation to suitability, the Walter Canada Group misstates the test for admissibility. It is not the 1974 Plan's burden to show that evidence proffered by the Walter Canada Group that does not meet the legal pre-conditions to admissibility "could be disproven on a balance of probabilities".ⁱ When a party seeks to adduce evidence and another party objects to its admissibility, the question is not "are the facts alleged by this evidence true?" The question is "is this evidence admissible?"

2. The Walter Canada Group's statements on the purpose of the Statement of Uncontested Facts are inconsistent with the document itself.ⁱⁱ The document purported to be a list of "facts the Court can accept as true based on admissions in the pleadings or that are otherwise uncontested and supported by documents that this Court can consider without additional formal proof". Creating a curated list of facts the Walter Canada Group is willing to admit for this application does not make those facts admissible and it does not make them "uncontested".

3. The cases cited by the Walter Canada Group at paragraphs 27-31 of its reply do not support the proposition that everything in the Harvey Affidavit was within Mr. Harvey's personal knowledge by virtue of his position as CFO.ⁱⁱⁱ Where a corporate representative lacks personal knowledge, he or she may rely on direct evidence exhibited to the affidavit or otherwise before the Court. Such direct evidence must be admissible pursuant to common law rules of evidence.^{iv}

4. The cases cited by the Walter Canada Group at paragraph 33 of its reply make clear that the statement containing the admission is only admissible to the extent it "is necessary to the understanding and appreciation of the meaning and extent of the admission".^v

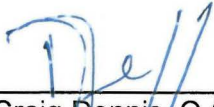
5. It is incorrect that the 1974 Plan refused to accept the Walter Canada Group's admissions of the facts that the 1974 Plan pleaded.^{vi} As set out in Schedule "B" to its written submissions, the 1974 Plan accepts that the facts that it has pleaded and that have been admitted by all parties can and should be accepted as true for all purposes. The issue is that there are different material factual disputes between the 1974 Plan and the Walter Canada Group and between the 1974 Plan and the Steelworkers.^{vii}

6. The 6th affidavit of Miriam Dominguez is adduced and is admissible solely for the 1974 Plan's 9-7(11) application.^{viii} It does not stand on the same footing as the Sherwood Affidavit.

All of which is respectfully submitted this 6th day of January, 2017.

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

ⁱ Walter Canada Group Reply Submissions ("RS"), para. 33.

ⁱⁱ RS, para. 15.

ⁱⁱⁱ See *Metal World Inc. v. Pennecon Energy Ltd.*, 2015 NLCA 12, Walter Reply BOA, Tab 7 at paras. 21-24; *Vapor Canada Ltd. v. MacDonald*, 1972 CarswellNat 526, Walter Reply BOA, Tab 3 at paras. 10-11 (F.C.T.D.), aff'd on other grounds 1972 CarswellNat 66 (F.C.A.), rev'd on other grounds [1977] 2 S.C.R. 134; *603262 B.C. Ltd. v. Eiyom Properties Ltd.*, 2014 BCSC 1155, Walter Reply BOA, Tab 13 at para. 10; *Alberta Treasury Branches v. Leahy*, 1999 ABQB 185, Walter Reply BOA, Tab 2 at para. 57-58 and 72-76; *Indian Residential Schools, Re*, 2002 ABQB 667, Walter Reply BOA, Tab 4 at paras. 25-36; *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655, Walter Reply BOA, Tab 8 at paras. 60-63 and 72 rev'd on other grounds 2006 ABCA 392, rev'd 2008 SCC 14.

^{iv} *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120, 1974 Plan BOA, Tab 1 at paras. 87-88, aff'd 2015 ABCA 406.

^v *R. v. Tyhurst*, 1996 CarswellBC 240 at para. 45 (C.A.), Walter Reply BOA Tab 9.

^{vi} RS, paras. 21, 34.

^{vii} See *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959, 974-5 (plaintiff should not be driven from the judgement seat at this very early stage unless it is quite plain that alleged cause of action has no chance of success).

^{viii} *Calder v. King* (1994), 91 B.C.L.R. (2d) 336 at para. 6 (S.C.), 1974 Plan BOA, Tab 2.

LIST OF AUTHORITIES

- 1 *603262 B.C. Ltd. v. Eiyom Properties Ltd.*, 2014 BCSC 1155
- 2 *Alberta Treasury Branches v. Leahy*, 1999 ABQB 185
- 3 *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB
120
- 4 *Calder v. King (1994)*, 91 B.C.L.R. (2d) 336 (S.C.).
- 5 *Indian Residential Schools (Re)*, 2002 ABQB 667
- 6 *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959
- 7 *Metal World Inc. v. Pennecon Energy Ltd.*, 2015 NLCA 12
- 8 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655,
rev'd on other grounds 2006 ABCA 392, rev'd 2008 SCC 14
- 9 *R. v. Tyhurst*, 1996 CarswellBC 240
- 10 *Vapor Canada Ltd. V. MacDonald*, 1972 CarswellNat 526 (F.C.T.D.), aff'd on other
grounds 1972 CarswellNat 66 (F.C.A.), rev'd on other grounds [1977] 2 S.C.R. 134