Court of Appeal File No. CA44448

COURT OF APPEAL

ON APPEAL FROM the Order of the Honourable Madam Justice Fitzpatrick of the Supreme Court of British Columbia, pronounced the 1st day of May, 2017.

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 A 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
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

(APPELLANT)

FACTUM OF THE APPELLANT,
UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST
("1974 PLAN")

United Mine Workers of America 1974 Pension Plan and Trust, Appellant

Counsel for the Appellant:
Craig P. Dennis, Q.C, John R. Sandrelli and Eric Aitken

Dentons Canada LLP
Barristers and Solicitors
20th Floor, 250 Howe Street
Vancouver, BC V6C 3R8
Tel: 604-687-4460
Fax: 604-683-5214

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, Respondents

Counsel for the Respondents:
Marc Wasserman, Mary Paterson and Patrick Riesterer

Osler, Hoskin & Harcourt LLP
1055 West Hastings Street
Suite 1700, The Guinness Tower
Vancouver, BC V6E 2E9

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Serve Workers International Union, Local 1-424, Respondent

Counsel for the Respondent:
Craig D. Bavis and Jeff Sanders

Victory Square Law Office LLP
710-777 Hornby Street
Vancouver, BC V6Z 1S4
Tel: 604-684-8421
Fax: 604-684-8427

The Monitor, KPMG Inc., Respondent

Counsel for the Respondent:
Peter J. Reardon

McMillan LLP
1500-1055 West Georgia Street
P.O. Box 11117
Vancouver, BC V6E 4N7
Tel: 604-689-9111
Fax: 604-685-7084

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CHRONOLOGY

Date	**Event**
March 9, 2011	Walter Energy, Inc. ("**Walter Energy U.S.**") incorporates Walter Energy Canada Holdings Inc. ("**Canada Holdings**") and becomes the sole shareholder of Canada Holdings.
April 1, 2011	Canada Holdings acquires all outstanding common shares of Western Capital Corp. for an estimated total consideration of approximately U.S. $3.7 billion.
December 9, 2011	Jim Walter Resources, Inc. ("**Walter Resources**"), a wholly-owned subsidiary of Walter Energy U.S., enters into a collective bargaining agreement with the United Mine Workers of America ("**2011 CBA**"). The 2011 CBA incorporates by reference the National Bituminous Coal Wage Agreement of 1974, the United Mine Workers of America 1974 Pension Plan Document and the United Mine Workers of America 1974 Pension Trust Document.
July 15, 2015	Walter Energy U.S., Walter Resources and other subsidiaries of Walter Energy U.S. in the United States (the "**U.S. Debtors**") file under Chapter 11 of the U.S. *Bankruptcy Code* (the "**Chapter 11 Proceedings**").
October 8, 2015	The United Mine Workers of America 1974 Pension Plan and Trust ("**1974 Plan**") files proofs of claim in the Chapter 11 Proceedings against all of the U.S. Debtors for the anticipated withdrawal liability of the U.S. Debtors contingent on Walter Resources' withdrawal as a participating employer from the 1974 Plan.
December 7, 2015	The Supreme Court of British Columbia grants an initial order under the CCAA to the companies and partnerships comprising the "Walter Canada Group" ("**CCAA Proceedings**").

Date	Event
December 28, 2015	The U.S. Bankruptcy Court makes an order authorizing Walter Energy U.S. and its U.S. affiliates to reject the 2011 CBA in connection with the sale of their principal mining assets. The order further provides that, upon such sale, Walter Resources has no further obligations to participate in or contribute to the 1974 Plan under the 2011 CBA.
April 1, 2016	The sale of the U.S. assets, as approved by the U.S. Bankruptcy Court, closes. Walter Resources ceases to be a party to the 2011 CBA and ceases to have any obligation to participate in or contribute to the 1974 Plan. Upon the cessation of its obligation to participate in the 1974 Plan, withdrawal liability arose under the terms of the 2011 CBA, the plan and trust documents governing the 1974 Plan and the *Employee Retirement Income Security Act of 1974*, 29 U.S.C. §§ 1001, *et seq.,* as am. That withdrawal liability was estimated to be in excess of U.S. $933 million.
August 16, 2016	The B.C. Supreme Court grants a claims process order, including a specific claims process to address the 1974 Plan's claim against the entities comprising the Walter Canada Group.
August 26, 2016	Pursuant to the claims process order, the 1974 Plan files a notice of civil claim in the CCAA Proceedings asserting a joint and several claim for withdrawal liability against all of the entities in the Walter Canada Group (subsequently amended on November 9, 2016).
September 23, 2016	The Walter Canada Group files a response to civil claim opposing the 1974 Plan's claim against the entities in the Walter Canada Group (subsequently amended on November 15, 2016).
September 26,	The United Steelworkers, Local I-424 files a response to civil claim

Date	Event
2016	opposing the 1974 Plan's claim against the entities in the Walter Canada Group (subsequently amended on November 14, 2016).
November 16, 2016	The Walter Canada Group files a notice of application seeking determination of what the notice describes as "certain preliminary issues" concerning the 1974 Plan's claim.
May 1, 2017	The B.C. Supreme Court grants an order that the 1974 Plan's claim is governed by Canadian substantive law and not U.S. substantive law such that the 1974 Plan's claim is not valid.
June 9, 2017	Kirkpatrick J.A. grants the 1974 Plan leave to appeal from the order of the chambers judge and stays the order under appeal pending determination of the appeal.

OPENING STATEMENT

Neither principle nor authority commends the approach taken in the court below to the point of law involved in this appeal: namely, which country's legal system – Canada or the United States – governs a claim by a U.S. pension plan against affiliates in Canada of a corporate group headquartered in the U.S.?

The analysis of choice of law by the chambers judge led her to decide the applicable law based on one fact alone: the country where the affiliates claimed against were incorporated (if incorporated) or organized (if not). That was the result of her characterization of the claim (the first step in a choice of law analysis) as "one relating to the status, legal existence and personality of corporations and partnerships".

To reduce the determination of choice of law to a single fact – to the exclusion of such other potentially relevant facts as the location of the guiding mind of the business – does not accord with the aim of the conflict of laws. Choice of law seeks to resolve claims according to the legal system with the closest and most real connection to the dispute. The traditional process chooses the applicable law without focusing on the content of that law or on the result it will reach when applied. By contrast, the effect of applying U.S. law pervaded the chambers judge's reasoning. By eliminating from consideration all facts other than the place of incorporation (or organization), she deprived herself of the ability to identify the legal system with the closest and most real connection to the dispute.

No authority compelled the approach taken by the chambers judge. She did not cite a single choice of law case supporting her characterization of the claim. She provided no analysis of how a claim against partnerships can be characterized as implicating the separate corporate personality of limited liability companies. Even for limited liability companies, the claim at issue does not challenge the status, existence or separate legal personality of those entities. By contrast, English authority supports characterizing the claim as one of obligation. On that (correct) view, the applicable law is the law of the country with which the claim has its closest and most real connection.

PART 1 – STATEMENT OF FACTS

1. The appeal is from the following order: "The 1974 Plan's claim … is governed by Canadian substantive law and not U.S. substantive law … such that the 1974 Plan's claim … is not valid."

Appeal Record ("**AR**"), p. 27.

2. The order arose from proceedings under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as am. ("**CCAA**"). The proceedings involve three limited liability companies, five unlimited liability companies and four partnerships. Those entities comprise the "Walter Canada Group". They sought protection from creditors under the CCAA. The 1974 Plan brought its claim against the Walter Canada Group within the CCAA proceedings. The United Steelworkers, Local I-424 ("**Steelworkers**") participated and opposed the 1974 Plan's claim.

A. Defined Benefit Pension Plan for Coal Workers

3. The 1974 Plan is a multiemployer, defined benefit pension plan established as a pension plan and irrevocable trust in 1974. The 1974 Plan is governed by the *Employee Retirement Income Security Act of 1974*, 29 U.S.C. §§ 1001, *et seq.,* as am. ("***ERISA***") and Section 302(c)(5) of the *Labor Management Relations Act of 1947*, 29 U.S.C. § 186(c)(5). The beneficiaries of the 1974 Plan are retired or disabled former coal production employees and their eligible surviving spouses. There are approximately 88,000 such beneficiaries.

Reasons for Judgment ("**RJ**"), paras. 51, 55; AR, p. 16.

4. The 1974 Plan was established pursuant to the National Bituminous Coal Wage Agreement of 1974. That collective bargaining agreement was negotiated between the United Mine Workers of America ("**UMWA**") and the Bituminous Coal Operators' Association Inc., a multiemployer bargaining association. The agreement has been amended from time to time since 1974. The operative version of that collectively bargained agreement was negotiated in 2011 (the "**2011 NBCWA**").

RJ, paras. 53-57; AR, pp. 47-48.

5. The 2011 NBCWA incorporates by reference the United Mine Workers of America 1974 Pension Plan Document (the "**Pension Plan Document**") and the United Mine Workers of America 1974 Pension Trust Document (the "**Trust Document**"). The Pension Plan Document and the Trust Document both provide that they are to be construed, regulated and administered in accordance with U.S. law.

Affidavit #1 of Dale Stover made November 21, 2016 ("**Stover Affidavit**"), Exhibit "A", p. 6, Exhibit "B", p. 181, Exhibit "C", p. 205; Appeal Book ("**AB**"), pp. 139, 314, 338.

6. The 1974 Plan is resident in Washington, D.C. and administered there. The trustees are resident in the U.S. and all participating employers in the 1974 Plan are resident in the U.S.

RJ, para. 52; AR, p. 47.

B. Walter Energy Group Headquartered in Alabama

7. The Walter Energy Group conducted coal mining operations in Alabama and West Virginia through a variety of U.S. corporations. The parent corporation of all entities within the Walter Energy Group was Walter Energy, Inc. ("**Walter Energy U.S.**"). Walter Energy U.S. was a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama. The Walter Energy Group included a wholly-owned subsidiary of Walter Energy U.S. called Jim Walter Resources, Inc. ("**Walter Resources**"). Walter Resources was incorporated in Alabama.

RJ, paras. 41-42; AR, p. 45.

8. Walter Resources was a participating employer in the 1974 Plan from 1978 onwards by virtue of being a signatory to various collective bargaining agreements with the UMWA. The operative agreement was signed by Walter Resources in 2011 and adopted each and every term of the 2011 NBCWA that affected the 1974 Plan (the "**2011 CBA**"). As a participating employer, the contribution obligations of Walter Resources to the 1974 Plan included: (a) monthly pension contributions for as long as

there were operations covered by the 1974 Plan; and (b) "withdrawal liability" accruing upon a partial or complete withdrawal from participation in the 1974 Plan.

RJ, paras. 54, 57; AR, pp. 47-48; Stover Affidavit, Exhibit "D", p. 208; AB, p. 341.

C. Walter Energy Group's Canadian Expansion

9. Before 2011, Walter Energy U.S. did not have any operations or subsidiaries in Canada. In October of 2010, Walter Energy U.S. and Western Coal Corp. ("**Western**") began negotiating the acquisition of Western's coal mining operations in British Columbia, as well as the U.K. and the U.S.

RJ, paras. 43-44; AR, p. 45.

10. On March 9, 2011, Walter Energy incorporated Walter Energy Canada Holdings Inc. ("**Canada Holdings**") and became the sole shareholder of Canada Holdings. Canada Holdings was incorporated specifically to hold the shares of Western and Western's subsidiaries. On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western for an estimated U.S. $3.7 billion.

RJ, paras. 47, 49; AR, p. 46.

11. Canadian subsidiaries of Walter Energy U.S. comprised: (a) three limited liability companies (Canada Holdings, Pine Valley Coal, Ltd. and 0541237 B.C. Ltd.); (b) five unlimited liability companies (Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Cambrian Energybuild Holdings ULC and Willow Creek Coal ULC); and (c) four partnerships (Walter Canadian Coal Partnership, Wolverine Coal Partnership, Brule Coal Partnership and Willow Creek Partnership). Schedule A to this factum is an organization chart for the Walter Canada Group as it existed prior to the CCAA proceedings.

RJ, paras. 64-65; AR, p. 49.

12. All of the named limited and unlimited liability companies, save one, were incorporated under the laws of B.C. Pine Valley Coal, Ltd. was incorporated under the

laws of Alberta. The four partnerships were organized under the laws of B.C. The Canadian business operations principally consisted of the operation of three coal mines in B.C., being the Brule, Willow Creek and Wolverine mines. Those mining properties since have been sold with court approval.

RJ, paras. 63-65; AR, p. 49.

D. Walter Energy Group Seeks Creditor Protection

13. In 2015, the Walter Energy Group commenced court proceedings seeking protection from creditors. That followed the downturn in 2011 in the market for metallurgical coal, which affected operations of the entire Walter Energy Group in the U.S., Canada and the U.K.

RJ, paras. 66-67, 71; AR, pp. 49-50.

14. On July 15, 2015, Walter Energy U.S., Walter Resources and other subsidiaries of Walter Energy U.S. in the U.S. ("**U.S. Debtors**") filed voluntary petitions for relief under Chapter 11 of the U.S. *Bankruptcy Code* ("**Chapter 11 Proceedings**").

RJ, para. 67; AR, p. 50.

15. The 1974 Plan filed proofs of claim in the Chapter 11 Proceedings on October 8, 2015 against all of the U.S. Debtors, including Walter Resources and Walter Energy U.S. The claim was for the anticipated withdrawal liability of the U.S. Debtors if Walter Resources withdrew as a participating employer from the 1974 Plan.

RJ, para. 68; AR, p. 50.

16. In Canada, the Supreme Court of British Columbia granted an order on December 7, 2015 granting protection from creditors under the CCAA to the companies and partnerships comprising the Walter Canada Group ("**Initial Order**").

RJ, para. 71; AR, p. 50.

17. On December 28, 2015, the U.S. Bankruptcy Court made an order authorizing Walter Energy U.S. and its U.S. affiliates to reject the 2011 CBA in connection with the sale of their principal mining assets. The order further provided that, upon such sale, Walter Resources had no further obligations to participate in or contribute to the 1974 Plan under the 2011 CBA.

RJ, para. 76; AR, pp. 51-52; Affidavit #1 of Miriam Dominguez made January 4, 2016, Exhibit "C"; AB, pp. 27-89.

18. The sale of the U.S. assets, as approved by the U.S. Bankruptcy Court, closed on April 1, 2016. Accordingly, on that date Walter Resources ceased to be a party to the 2011 CBA and ceased to have any obligation to participate in or contribute to the 1974 Plan. Upon the cessation of its obligation to participate in the 1974 Plan, withdrawal liability arose under (i) the terms of the 2011 CBA, (ii) the Pension Plan Document and the Trust Document and (iii) *ERISA*. That withdrawal liability was estimated to be in excess of U.S. $933 million.

RJ, para. 80; AR, p. 52.

19. The 1974 Plan participated in the CCAA proceedings from the onset. In January 2016, the 1974 Plan filed materials asserting that the Walter Canada Group entities were jointly and severally liable for withdrawal liability to the 1974 Plan.

RJ, paras. 75, 79; AR, pp. 51-52.

20. On December 21, 2016, in order to permit the Walter Canada Group to realize value from its tax attributes, the B.C. Supreme Court granted an order transferring certain assets to the "New Walter Canada Group". The order provided that (a) each member of the New Walter Canada Group is deemed liable for all claims against the corresponding Walter Canada Group entity, and (b) for the purposes of determining the nature and priority of such claims, the applicable member of the New Walter Canada Group (and the assets transferred to such member) stands in the place and stead of the member of the Walter Canada Group formerly liable for such claim.

Order of the Supreme Court of British Columbia, Vancouver Registry, dated December 21, 2016, paras. 7, 9; AB, pp. 427-429.

E. Walter Canada Group *Prima Facie* Liable Under *ERISA*

21. Withdrawal liability under *ERISA* arises in connection with multiemployer pension plans. A multiemployer pension plan, such as the 1974 Plan, is a collectively-bargained pension plan maintained and funded by more than one unrelated employer, typically within the same or related industries.

RJ, para. 87(a); AR, p. 54.

22. If one of the contributing employers withdraws from a multiemployer plan, either partially or completely, then *ERISA* requires the "employer" to pay withdrawal liability to the plan, calculated to be the employer's share of the plan's unfunded vested benefits. Under *ERISA*, the "employer" is defined to include all entities under "common control" with the employer, collectively known as the "controlled group". *ERISA* defines entities under "common control" to mean entities connected through a controlling interest with a common parent that own at least 80% voting power or value, directly or indirectly, of each group member.

RJ, paras. 87(b), (d), 89; AR, pp. 54-55.

23. The withdrawal liability obligation of Walter Resources and all other members of its "controlled group" were expressly set out in the contractual documents forming part of the 2011 CBA. Article XIV of the Pension Plan Document contains provisions concerning withdrawal liability, including the determination of whether there has been a withdrawal from the 1974 Plan and the calculation and payment of withdrawal liability. Article XIV of the Pension Plan Document makes it clear that common control entities are considered a single employer and are subject to every provision in the Article:

> D. For purposes of determining whether a withdrawal has occurred and for purposes of assessing withdrawal liability under this Article, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as

> employed by a single Employer and all such trades and businesses as a single Employer. …

Stover Affidavit, Exhibit "A", p. 6, Exhibit "B", pp. 185-186, Exhibit "D", p. 208; AB, pp. 139, 318-319, 341.

24. Withdrawal liability is the joint and several obligation of not only the participating employer, Walter Resources, but also each member of Walter Resources' "controlled group". It is a liability that crystallizes simultaneously for all entities under common control. All such entities are deemed to be a single employer.

RJ, paras. 88(a), (d); AR, p. 55.

25. The chambers judge found that, *prima facie*, under *ERISA* the entities in the Walter Canada Group are part of the same "controlled group" as Walter Resources because they met the numerical (80%) test for stock ownership or voting control under *ERISA*. The Walter Canada Group and the Steelworkers agreed in the court below "that it can be assumed that … the Walter Canada Group entities were under common control and within the "controlled group" of the Walter Energy Group."

RJ, paras. 91-92; AR, p. 56.

F. Walter Canada Group's Application to Determine Preliminary Issues

26. The B.C. Supreme Court granted a claims process order on August 16, 2016 that put in place a specific claims process designed to address the 1974 Plan's claim. Pursuant to that order, the 1974 Plan, the Walter Canada Group and the Steelworkers exchanged pleadings. The 1974 Plan subsequently delivered its list of documents.

RJ, paras. 6, 29; AR, pp. 35, 42.

27. Shortly after the close of pleadings, the Walter Canada Group filed a notice of application seeking determination of what the notice described as four "preliminary issues". The first preliminary issue – and the only issue decided by the chambers judge – was stated in the following terms:

> Under Canadian conflict of laws rules, is the 1974 Plan's claim against the Walter Canada Group governed by Canadian substantive law or United States substantive law (including *ERISA*)?

AR, pp. 2-3.

28. The parties agreed to a case plan order which set deadlines for the delivery of application responses, evidence and written arguments all in advance of a hearing in January 2017. After the delivery of evidence, the Walter Canada Group abandoned the third issue set out in its notice of application (*i.e.* whether *ERISA* is unenforceable as a penal, revenue or other public law of the United States). In view of the chambers judge's conclusion on the first issue of law before her, she found it unnecessary to decide the second and fourth issues in the Walter Canada Group's notice of application.

RJ, paras. 10, 81; AR, pp. 36, 82.

29. In the result, the chambers judge held as follows:

> [177] In conclusion, I find that the 1974 Plan's claim is characterized as one of corporate or partnership law and specifically, one relating to the status, legal existence and personality of corporations and partnerships. The appropriate choice of law rule is one of domicile or place of incorporation or organization. In the case of the entities within the Walter Canada Group, that is British Columbia or Alberta.
>
> …
>
> [182] In conclusion, I grant a declaration that, under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*).

RJ, paras. 177-182; AR, pp. 81-82.

30. On June 9, 2017, Kirkpatrick J.A. granted the 1974 Plan leave to appeal and stayed the order under appeal pending determination of the appeal.

AR, p. 108.

PART 2 – ERRORS IN JUDGMENT

31. The chambers judge erred in law in concluding that the 1974 Plan's claim against the entities comprising the Walter Canada Group is governed by Canadian substantive law. This error stemmed from two inter-related errors in the chambers judge's analysis:

(a) the chambers erred in law in characterizing the 1974 Plan's claim as concerning the status, legal existence and personality of the entities in the Walter Canada Group; and

(b) the chambers judge erred in law in selecting as the appropriate choice of law rule in this case the domicile, or place of incorporation or organization, of the entities in the Walter Canada Group.

PART 3 – ARGUMENT

A. Overview

32. The issue on appeal is whether the chambers judge erred in law in concluding that the 1974 Plan's claim is governed by Canadian substantive law. The resolution of that choice of law issue depended upon the chambers judge's application of Canadian conflicts of law principles to identify the most appropriate law to govern the 1974 Plan's claim. The analytical process to identify that law involves several stages. First, the court characterizes the judicial nature of the question or issue upon which adjudication is required. Second, the court identifies the appropriate choice of law rule (or connecting factor) to apply based on that characterization. Third, the court selects the proper law and applies the law selected to the facts of the case.

Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed. (Toronto: LexisNexis, 2005) (loose-leaf) at pp. 3-1-3-2.

33. This appeal concerns the chambers judge's analysis at the characterization stage of the choice of law analysis. The chambers judge concluded that the 1974 Plan's claim should be characterized "as one of corporate or partnership law and specifically, a claim which results in a challenge to the status and separate legal

personalities of the entities within the Walter Canada Group." This led her to the further conclusion that the appropriate choice of law rule to apply in this case is one of domicile, or place of incorporation or organization. As all of the entities in the Walter Canada Group are incorporated or organized in Canada, that resulted in the application of Canadian law and a bar to the 1974 Plan's claim under *ERISA*.

RJ, paras. 145-146, 177-178; AR, pp. 74, 81-82.

34. The chambers judge's characterization of the 1974 Plan's claim is not supported by authority or principle and constitutes legal error. While the *effect* of *ERISA* in this case is to impose liability on the entities in the Walter Canada Group by reason of Walter Resources' participation in the 1974 Plan, the continued and separate existence of those entities is neither challenged nor denied.

35. The chambers judge further fails to reconcile how the foundation of her analysis (*i.e.* that *ERISA* "ignores the separate legal existence and personality of the Walter Canada Group entities (and limited liability per *Salomon*)") has any application in this case, where: (a) no Canadian shareholder is being made liable; (b) five of the eight companies in the Walter Canada Group are unlimited liability companies; and (c) four of the entities, being partnerships, do not even have a separate legal personality.

RJ, para. 143; AR, p. 74.

36. The true issue raised in this case is one of obligation. That obligation arises from the intersection of statute and the contractual relationship between Walter Resources and the 1974 Plan. The 1974 Plan submits that, for choice of law purposes, its claim properly is characterized as a claim in contract. Thus, the appropriate choice of law rule to apply in this case is the proper law of the obligation, which is the law of the legal system that has the closest and most real connection to the 1974 Plan's claim.

37. The 1974 Plan submits, alternatively, that this is the appropriate choice of law rule to apply in this case even if the claim is not ultimately characterized as a claim in contract. That is because the rejection of a contractual characterization will necessarily require the court to fashion a new conflicts rule to fit the circumstances of this particular

claim. A new choice of law rule should be based on a meaningful connection between the law and the obligation it will govern. The authorities reveal that this is best done by resolving a dispute by the most proximate law, which in this case is the law of the legal system with the closest and most real connection to the dispute.

B. The Characterization Process

38. In a choice of law analysis, characterization is the process of determining which legal category applies to a given claim. That process is determined by the law of the forum, and the legal categories used for characterization are ones with which the forum is familiar. Those categories include property law, law of obligations, family law, and law of corporations and insolvency. Within each category are sub-categories. Under the law of obligations the sub-categories are contract, tort and unjust enrichment.

> A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London: Sweet & Maxwell, 2012) at p. 39; Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law Inc., 2016) at p. 227.

39. In characterizing a claim, the court considers 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. (Emphasis added.)
>
> *Dicey*, para. 2-039, p. 51.

40. Choice of law categories are intended to bring together problems which, because of their similarity, ought to share the same connecting factor. The categories are not intended to lead to the application of rigid rules but, rather, to aid the court in its search for the appropriate principles to meet particular situations:

> … The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issue which the law

> recognises at the first stage 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. (Emphasis added.)

Raiffeisen Zentralbank Osterreich AG v. Five Star General Trading L.L.C. and others, [2001] EWCA Civ 68 at para. 27 [*Raiffeisen*]; T.M. Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004) at p. 72.

41. Choice of law categories are not restricted by technical requirements imposed upon them by the *lex fori*. The selection of the issues is done in a liberal manner:

> The *lex fori* will characterise in accordance with its rules in a liberal manner, not insisting that all its technical requirements are complied with. This method of characterisation could be referred to as the "liberal" or "enlightened" *lex fori.* Therefore, under private international law, concepts such as "contract", "tort", "corporation" and "unjust enrichment" are to be given a liberal interpretation.

George Panagopoulos, *Restitution in Private International Law* (Oxford: Hard Publishing, 2000) at p. 31.

42. The flexibility inherent in the choice of law categories equips courts to determine the appropriate connecting factor even when a foreign claim is unknown to the forum. In such circumstances, the court analyzes the claim in light of the foreign legal system in which it is based in order to find a proxy. The court can then characterize the claim as its closest functional equivalent under the law of the forum.

Pitel & Rafferty, p. 227; Panagopoulos, p. 31.

C. The Chambers Judge Erred in Characterizing the Claim as one of Status, Legal Existence and Personality

43. The chambers judge's characterization of the 1974 Plan's claim as one relating to the status, legal existence and personality of corporations and partnerships is rigid. It ignores facts or circumstances connected with the claim other than the jurisdiction in which the defendants are incorporated or organized. The result is a bar to the 1974 Plan's claim without analysis of whether there are competing factors that are relevant to

the strength of the connection between the obligation arising under *ERISA* and the competing legal systems.

44. The chambers judge's characterization analysis suffers from a number of flaws. First, it is not supported by authority or principle. Second, it places an inordinate focus on the effect of *ERISA*, which is contrary to choice of law principles. Third, it fails to account for the nature of the liability being asserted against the Walter Canada Group. Fourth, it relies on an argument concerning the partnerships within the Walter Canada Group that was abandoned by the Walter Canada Group prior to the summary hearing.

(1) The chambers judge's characterization is not supported by authority or principle

45. Neither the Walter Canada Group nor the Steelworkers was able to provide the chambers judge with a single choice of law case that supported their characterization of the 1974 Plan's claim. The chambers judge thus drew on secondary sources to support her characterization, citing passages suggesting that questions concerning the "status of a foreign corporation, especially whether it possesses the attributes of legal personality, are governed by the law of the domicile of the corporation".

Castel & Walker, p. 30-1 (RJ, para. 127; AR, p. 66); *Pitel & Rafferty*, p. 233 (RJ, para. 151; AR, p. 75); *Dicey*, pp. 1532-33 (RJ, para. 152; AR, pp. 75-76).

46. The passages the chambers judge cites in her choice of law analysis cannot be read in a vacuum. To understand the nature and scope of the choice of law rule being presented by the authors, one must consider the context in which the statements are made and the case authorities cited in support. That context reveals that this choice of law rule developed and is intended to address matters of corporate existence, such as whether a corporate entity has the capacity to sue or be sued. That becomes abundantly clear when the passage from *Pitel & Rafferty* cited by the chambers judge (highlighted below in bold) is read in its broader context:

> A common preliminary issue in litigation is the status, standing, or capacity of either the plaintiff to commence proceedings or the defendant to be sued. …In conflicts cases, the general rule is that

> issues concerning a party's status are governed by the law of the forum, on the basis that these are issues of procedure and not of substance. …
>
> However, this rule would cause significant problems if strictly applied to non-natural persons. For example, for a corporation to sue in Ontario, must it meet Ontario's requirements for a valid corporation, in terms of share structure, number of directors, and so on? In practice this would mean a large number of foreign corporations would lack status to sue in Ontario. Each jurisdiction can allow non-natural persons like corporations, partnerships, and trusts to be created in slightly different ways. Strict insistence on the law of the forum for status questions would be a major barrier to cross-border litigation.
>
> Accordingly, **the status of non-natural persons is governed by the law of the person's "home" jurisdiction**, such as the place of incorporation for a corporation. If the person has the status to sue or be sued under that law, that will be accepted by the forum.
>
> [Emphasis added.]
>
> *Pitel & Rafferty*, p. 245.

47. Pitel, Castel and Dicey all cite the Alberta Court of Appeal decision in *International Association of Science & Technology for Development v. Hamza* (1995), 122 D.L.R. (4th) 92 (Alta. C.A.) [*Hamza*]. A review of *Hamza* further reveals that this choice of law rule is concerned with issues of legal existence.

48. In *Hamza*, the court had to determine which law governed whether two Swiss societies had standing to advance a claim in Alberta. The court concluded that the issue should be determined by Swiss law, holding that "the law tends to support a granting of status in cases where the entity in question is recognized as a legal or juridical person by the laws of its home jurisdiction, in the sense of having status to sue." The court explained that the rationale of this rule is to ensure that there is a legal person subject to the court's authority:

> The entity before the court must be capable of assuming fully the rights and liabilities of a legal person. Someone must be answerable for judgments, court directions, costs, etc. The court can satisfy itself this concern will be met if the foreign litigant is proven to be a legal person, separate and apart from its members,

> under the law of the foreign jurisdiction. … This court is entitled to know that its directions and judgments are enforceable against identifiable legal persons. If satisfied of that, by proof of the foreign law, I am of the view the foreign entity with status to sue in its home jurisdiction should be allowed to sue in Alberta. … (Emphasis added.)

Hamza, pp. 103-104.

49. With this context in mind, it is clear that the conflict of law rule upon which the chambers judge relied is directed at true issues of existence, status or legal personality. The reason there is a special rule concerning the "status and legal personality" of corporations and other non-natural entities is because, unlike natural persons, those entities derive their legal existence from statute. Resort must be had to the laws of the foreign entity's domicile to determine whether it enjoys a distinct legal personality.

50. The chambers judge suggested that the 1974 Plan's formulation of this choice of law rule constituted a "narrow approach" and that the cases supported a more "far-ranging and holistic analysis". However, the chambers judge did not cite any case purporting to apply this choice of law rule to a claim concerning liability on the basis that the nature of the claim implicated the legal personality of a corporate entity.

RJ, para. 125; AR, p. 65.

51. Further, the chambers judge did not actually engage in the "holistic analysis" advocated by the authorities. As set out above, the way the court should proceed in determining whether a problem fits within a choice of law category is to consider the rationale of the forum's conflict rule and the purpose of the rule of substantive law to be characterized. The chambers judge concluded that "*ERISA* has been employed by the U.S. Congress with the *intention* and *purpose* of seeking to ensure that U.S. retirees receive contracted for benefits" (emphasis in original). The chambers judge did not go on to explain how this purpose intersects with the rationale of the conflicts rule she selected, which the authorities reveal is to facilitate cross-border litigation and to ensure that a foreign party is capable of assuming the rights and obligations of a legal person.

RJ, para. 129; AR, p. 67.

52. The chambers judge also purported to draw support for her characterization from another passage in *Castel & Walker*:

> There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced. (Emphasis of the chambers judge.)

Castel & Walker, p. 30-1; RJ, para. 127; AR, p. 66.

53. As an initial point, it must be noted that this passage is not dealing with the situation presented by the 1974 Plan's claim. None of the entities in the Walter Canada Group is a shareholder of Walter Resources. The claim against the Walter Canada Group thus does not implicate the legal relationship between a shareholder and the corporate entity in any way. The only company whose veil is being pierced in this case (if that is an apt description) is Walter Resources, and the only "shareholder" being held jointly and severally liable for the withdrawal liability obligation is Walter Energy U.S. Both of those corporations are domiciled in the United States. Accordingly, if the 1974 Plan's claim is to be resolved by the place of incorporation of the foreign subsidiary, that place is the U.S. where Walter Resources is incorporated.

54. In addition, the chambers judge did not quote, and apparently failed to consider, the remainder of the paragraph from *Castel & Walker*, which continues:

> For other matters, the law governing the contract or tort that gives rise to the litigation against the foreign subsidiary would determine whether its corporate veil should be pierced since, arguably, piercing the corporate veil should be characterized as a function of the dispute and not of the status of the corporation.

Castel & Walker, pp. 30-1-30-2.

55. That passage suggests that "veil piercing" is not a distinct legal issue fit for characterization for the purposes of formulating a choice of law rule involving disputes stemming from an obligation. Issues of veil piercing will necessarily arise pursuant to an underlying relationship between a corporate entity and a claimant. It is the nature of

that relationship and the claim said to give rise to the direct obligation of the corporate entity to the claimant that should be characterized. As will be seen, any issues concerning "veil piercing" in this case arise as a function of a dispute stemming from and properly characterized as a claim in contract for choice of law purposes.

56. The choice of law categories are intended to bring together problems which, because of their similarity, ought to share the same connecting factor. The chambers judge did not offer any principled basis for why a claim against Canadian entities for withdrawal liability under *ERISA* should share the same connecting factor as questions concerning whether a foreign entity bears the indicia of legal personhood.

57. The chambers judge erred by characterizing the claim as one challenging the status, legal existence and personality of the Walter Canada Group entities. *ERISA* imposes joint and several liability on the entities in the Walter Canada Group by reason of Walter Resources' participation in the 1974 Plan. It does not challenge the status, legal existence and separate personality of those entities.

(2) The chambers judge's focus on the effect of *ERISA* is contrary to choice of law principles

58. The chambers judge's characterization was not grounded in authority. It appears rather to have been grounded in her consideration of the *effect* of *ERISA*:

> [129] … I agree that *ERISA* has been employed by the U.S. Congress with the intention and purpose of seeking to ensure that U.S. retirees receive contracted for benefits; however, the effect of the "controlled group" provisions is to collapse the corporate structure to ensure that as many entities within a corporate group are liable for retirement plan withdrawal and that their assets are available to meet obligations to those retirees.
>
> [130] Seen in that vein, the purpose of the choice of law rule proposed by the Walter Canada Group intersects with the substantive law under *ERISA*, in that both address the corporate status or the separate legal existence or personality of other persons, including the Walter Canada Group entities. *ERISA* ascribes liability based solely on corporate and other legal relationships.

> [Emphasis added.]

RJ, paras. 129-130; AR, p. 67.

59. The chambers judge's focus on the effect of *ERISA* contradicts a core principle of the choice of law analysis. As provided by *Pitel & Rafferty*:

> One hallmark of the traditional process is that it chooses the applicable law without focusing on the content of that law or on the result it will reach when applied.

Pitel & Rafferty, p. 221.

60. The chambers judge's focus on the effect of the application of *ERISA* and the result that would be reached when that law was applied was an error. The correct approach is to consider the nature of the claim or issue. The nature of the claim in this case is the protection of the 1974 Plan's contractual expectation to recover upon the withdrawal liability obligation of a contributing employer.

61. The chambers judge's preoccupation with the effect of applying *ERISA* in this case likely was the result of her reliance on *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312 [*JTI*]. That was the only case the chambers judge cited in support of her characterization in this case. But *JTI* is not a choice of law case. Characterization was not in issue. It was a constitutional division of powers case concerned with whether a provincial statute was *ultra vires* the provincial legislature. Mr. Justice Holmes thus followed the analysis laid down in *Reference re Upper Churchill Water Rights Reversion Act, 1980,* [1984] 1 S.C.R. 297 [*Churchill Falls*] and considered the purpose and effect of the tobacco legislation at issue to determine its dominant characteristic or "pith and substance".

62. The analysis in *JTI* is not transferable to the characterization analysis. It speaks of a company's domicile in order to follow the *Churchill Falls* analysis and situate the civil rights affected by the statute. It is not a choice of law case and the issue it considers is so different that it has no bearing upon the characterization issue that

was before the chambers judge. Tellingly, *JTI* is not cited in any of the conflict of laws textbooks that the Walter Canada Group put before the chambers judge.

63. The emphasis on the effect of the impugned legislation is critical in evaluating the constitutional validity of provincial legislation. But it is not supposed to take centre-stage in a choice of law analysis, particularly when the foreign law at issue has as its purpose the vindication of contractually-promised benefits. Choice of law principles and constitutional principles are distinct from one another. The chambers judge's analysis in this case has blurred that distinction.

(3) The chambers judge's characterization is inconsistent with the nature of the liability being imposed by *ERISA*

64. There is another reason why the analysis in *JTI* is not transferable to this case. In *JTI*, it was the piercing of the veil of the domestic company, in order to reach extra-provincial parent corporations, that revealed the impermissible extraterritorial legislative purpose. In this case, there is no piercing of the veil of the Walter Canada Group companies, as none of them is a shareholder of Walter Resources. The chambers judge did not appear to appreciate this distinction, concluding that the "controlled group" provisions of *ERISA* disregard the "limited liability" of the Walter Canada Group entities:

> [143] … it is clear that the "controlled group" provisions simply disregard the separate corporate personalities of other companies within the Walter Energy Group (including those within the Walter Canada Group) by lifting their corporate veils. It does this by ignoring the separate legal existence and personality of the Walter Canada Group entities (and limited liability per *Salomon*), effectively amalgamating or consolidating those entities, in deeming them to be one "employer" along with Walter Resources.
>
> [144] I agree that *JTI-Macdonald* provides substantial support that a claim which purports to impose liability arising purely as a result of corporate relationships, such as *ERISA* does, are properly classified as claims concerning the status and legal personality of corporations. To use the words of Holmes J., the application of *ERISA* to the Walter Canada Group results in those entities' "separate legal personality" being removed or "stripped away" such that they lose their legal status as distinct from their shareholders.

[Emphasis added.]

RJ, paras. 143-144; AR, p. 74.

65. It is incorrect to say that the application of *ERISA* to the Walter Canada Group entities causes them to "lose their legal status as distinct from their shareholders". The 1974 Plan's claim does not have any impact on the limited liability of the entities in the Walter Canada Group, as none of those entities is a shareholder of Walter Resources.

66. The chambers judge also failed to acknowledge that 9 of the 12 entities that comprise the Walter Canada Group do not enjoy limited liability, being unlimited liability corporations or partnerships. A partnership is not a legal entity separate from its partners. Each partner in a general partnership is jointly liable for the debts of the partnership, while limited partners may be liable for the partnership's debts and obligations to the extent they contributed to them. Similarly, shareholders of unlimited liability companies are liable for the debts of the company on its liquidation or dissolution if the company has insufficient assets to satisfy its obligations.

Partnership Act, R.S.B.C. 1996, c. 348, ss. 7, 57; *Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal)*, 2012 BCCA 313 at para. 34, aff'd 2014 SCC 39; *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 51.11 and 51.3(1).

67. This raises the question of how a claim against partnerships and unlimited liability companies can be characterized as implicating the separate corporate personality of limited liability companies. The chambers judge did not answer that question or provide any analysis. Instead, she skipped straight to applying the same connecting factor she used for limited liability corporations without explaining why the connecting factor she regarded as appropriate for a limited liability company also was appropriate for entities that do not enjoy limited liability (and in the case of the partnerships do not possess a separate legal personality).

(4) The chambers judge relied on an argument that was abandoned

68. At this stage the chambers judge also based her decision, in part, on an argument initially raised by the Walter Canada Group that the 1974 Plan's claim against the partnerships was time-barred since the claims bar date had passed.

69. However, the Walter Canada Group abandoned this line of argument and the chambers judge was advised not to rely on it. Nevertheless, the chambers judge relied on it in her judgment:

> [159] This "claims bar date" argument may have some merit, but I do not propose to base my decision as regards the partnerships solely on this basis. The simple answer is that the same analysis set out above in relation to the corporations applies equally to the partnerships, as was noted in Dicey at 1532-33, quoted above, which refers to the law of the country in which an "entity" was formed. (Emphasis added.)

RJ, paras. 158-159; AR, p. 77.

70. While the chambers judge did not rely "solely" on this argument, relying on it at all constitutes an error of process.

D. Proper Characterization of the Claim is as a Claim in Contract

71. At the root of the 1974 Plan's claim is an obligation. That obligation arises because Walter Resources agreed to and was bound by the 2011 CBA, a written contract that incorporates the terms of the 2011 NBCWA and the Pension Plan Document. It is the contractual relationship between the UMWA and Walter Resources obligating Walter Resources to participate in the 1974 Plan and to be bound by the terms of the 1974 Plan that gives rise to this claim. Absent that contractual relationship, Walter Resources would not have been a participating employer in the 1974 Plan, *ERISA* would have no application to the facts of this case and the members of the Walter Canada Group would have no withdrawal liability. The contractual underpinnings of the claim point to contract as the most appropriate characterization of this claim.

72. The chambers judge's analysis downplays the contractual genesis of the 1974 Plan's claim against the Walter Canada Group, focusing exclusively on the statutory nature of the claim. This is evident from a number of passages in her judgment:

> - "Simply put, the 1974 Plan's claim arises solely by reason of Walter Energy U.S. owning more than an 80% stake in both Walter Resources and the Walter Canada Group entities. Arising from that "arithmetic" rule, *ERISA* dictates that the Walter Canada Group is liable for any withdrawal liability of a signatory (i.e. Walter Resources) under the 1974 Plan."
>
> - "…The 1974 Plan has not advanced any other theory of liability for its claim under British Columbia law or any other law; rather, it relies exclusively on *ERISA*'s "controlled group" provisions as the basis for its claim against the Walter Canada Group. Further, as I have already stated, the 1974 Plan's claim against the Walter Canada Group does not stem from any conduct by or contract with the Walter Canada Group."

RJ, paras. 136-137, 157; AR, pp. 70, 77

73. It is true that the 1974 Plan relies on *ERISA*'s controlled group provisions as the basis of its claim. But the fact that the right of action derives from a foreign statute does not determine the characterization when the rights being vindicated by the statutory claim derive from contract. And for characterization purposes it is that contractual right which is the more telling guide to the substance of the claim.

74. Characterizing this claim as a claim in contact for choice of law purposes is consistent with the flexible approach that courts must take to characterizing claims that are unknown to the forum. It is also the lesson drawn from a trilogy of cases from the United Kingdom, being *Youell v. Kara Mara Shipping Company Ltd,* [2000] EWHC 220, *Through Transport Mutual Assurance Association (Eurasia) Ltd v. New India Assurance Association Co Limited*, [2004] EWCA Civ 1598 and *The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain,* [2013] EWHC 3188.

75. Those cases specifically address the situation where the court was called upon to characterize a claim based on statute but dependent upon an underlying contract. Each case involved non-signatories to insurance contracts seeking to rely on foreign

statutes granting them a direct right of action against the insurer under the contract. Each case involved a proceeding commenced by the insurer in reliance on choice of forum and choice of law provisions in the contract to shut down foreign proceedings on the basis of the terms of the contract. In each case, the court characterized the claim as contractual. In doing so the court was aware that the parties were not in privity of contract. The court was also aware that there could not be liability without the foreign statute. None of those decisions is about liability. Indeed, none of the claims were contract cases *per se*. But the court in each case concluded that under existing taxonomy the claims fit best into the category of contract for characterization purposes.

76. The same applies here. The 1974 Plan's claim under *ERISA* does not exist separately from Walter Resources' underlying contractual relationship. *ERISA* gives the 1974 Plan the right to enforce against the Walter Canada Group entities the withdrawal liability that arose when Walter Resources rejected the 2011 CBA and ceased to have the contractual obligation to participate in the 1974 Plan. The lack of privity does not stand in the way of characterizing the claim as contractual.

77. The chambers judge purported to distinguish the English cases. She noted that in those cases, the foreign statutes authorized a direct action by a non-party claimant against a party to the contract, whereas here the claimant is the party seeking to enforce contractual rights against a non-party to the contract.

RJ, para. 117; AR, pp. 63-64.

78. But drawing that distinction overlooks what the task is. The task is about characterizing the substance of the claim to identify the "closest functional equivalent" under the law of the forum. The English cases do not purport to set down strict criteria for when a direct action statute connected with a contract is appropriately characterized as contractual for choice of law purposes. They are merely examples of courts undertaking a characterization analysis when met with a claim arising by statute but not independent of contract and searching for the most appropriate law to govern that claim.

79. Further, the fact that the 1974 Plan has rights under the contract in this case provides an even stronger foundation than in the English cases for characterizing the claim as contractual. This case is about vindicating the contractual expectations of the 1974 Plan.

80. The chambers judge attempted to answer that point by suggesting that, although the 1974 Plan may have had "contractual expectations" in relation to Walter Resources, it could only have had "statutory expectations" in relation to other "controlled group" members in the Walter Energy Group. This again misses the point of why the characterization analysis is being done. An acknowledgement that the 1974 Plan had contractual expectations vis-à-vis Walter Resources is enough to support characterizing the claim as contractual for choice of law purposes. Although aided by the statute, those are the precise expectations that the statutory claim vindicates. There is only one set of expectations and they derive from the underlying contract.

RJ, para. 122; AR, p. 64.

81. The chambers judge's suggestion also ignores that the withdrawal liability obligation of Walter Resources and "controlled group" members were expressly set out in the contractual documents forming part of the 2011 NBCWA. As set out above, Article XIV of the Pension Plan Document sets out detailed provisions concerning withdrawal liability, including the "controlled group" concept. It also sets out a number of provisions concerning the assessment and collection of the withdrawal liability obligation that, absent their inclusion in the Pension Plan Document, would not arise. For instance, paragraph "C" sets out the method for calculating the withdrawal liability obligation. This method is not the default method under *ERISA* and is only applicable because it is expressly included in the Pension Plan Document. To suggest that the 1974 Plan only had "statutory expectations" with respect to its claim is to ignore the terms of the 2011 NBCWA and the withdrawal liability provisions of the Pension Plan Document that are incorporated by reference and made a part of that agreement.

Stover Affidavit, Exhibit "B", pp. 185-189; AB, pp. 318-322; 29 U.S.C. § 1391.

82. Ultimately, the chambers judge's reasons for distinguishing the English cases and electing not to characterize this claim as contractual mistake the forest for the trees. There is no question that the statutory claims at issue in the English cases are different than the statutory claim arising under *ERISA*. The claims are aimed at different actors and seek to regulate different conduct. But the substance of both situations is that the legislation provides a direct link between a party who has contractual rights (like the 1974 Plan under *ERISA*) or owes a contractual obligation (like the insurers in the English cases) and a third party who would otherwise have no connection with the underlying contractual obligation.

83. Those English cases demonstrate that this link is sufficient to characterize a claim as contractual for choice of law purposes even though the parties to the claim are not in privity of contract and the actual claim is not for breach of contract. The contractual relationship between the 1974 Plan and Walter Resources is the foundation for the obligation at issue in this case. The claim under *ERISA* for withdrawal liability does not exist separately from that underlying contractual relationship. Rather, the rights being vindicated by the statutory claim are rights that the 1974 Plan derives from its contractual relationship with Walter Resources.

84. The 1974 Plan's approach, unlike the respondents', has the virtue of working as well for the partnerships and unlimited liability companies as it does for the limited liability companies. For all but the three limited liability companies there is no characterization on offer to compete with the 1974 Plan's.

85. The 1974 Plan submits that the chambers judge erred in failing to identify that withdrawal liability under *ERISA* arises by right of the employer's agreement to accept the contribution obligations. Absent that agreement, no claim for withdrawal liability could possibly arise. The 1974 Plan's claim is properly characterized as contractual.

E. Choice of Law Rule Applicable to the 1974 Plan's Claim

86. The chambers judge's mischaracterization of the issue in this case as one of status and legal personality led her to apply the wrong connecting factor. The 1974

Plan's claim, for choice of law purposes, properly is characterized as a claim in contract and it should be resolved by reference to the proper law of the obligation. 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".

Imperial Life Assurance Co. of Canada v. Colmenares, [1967] S.C.R. 443 at 448 [*Colmenares*]; *Castel & Walker*, pp. 31-11-31-13.

87. The 1974 Plan further submits that this is the appropriate choice of law rule in this case even if it were determined that its claim cannot be accommodated within the category of contract. As indicated in *Dicey*, where the court concludes that the rule of substantive law should not be regarded as falling within any potentially applicable conflict rules, a new rule should be created. In *Raiffeisen*, Lord Justice Mance stated that the creation of a new choice of law rule accords with the purpose of the characterization process of finding the most appropriate law to govern a dispute:

> ….The classes or categories of issue which the law recognises at the first stage 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. <u>They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law</u>. (Emphasis added.)

Raiffeisen, para. 27; Dicey, 2-039, p. 51.

88. The creation of a new rule is the approach the chambers judge should have taken had she properly rejected the characterization advocated by the Walter Canada Group but not been satisfied that the claim could fit within the category of contract.

89. There is British Columbia precedent for tailoring a conflict rule to meet a particular situation. In *Minera Aqualine Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102, aff'd 2007 BCCA 319, Madam Justice Koenigsberg characterized the claim at issue as an equitable claim for unjust

enrichment arising from a breach of confidence. She was then met with competing and seemingly conflicting choice of law rules from *Dicey* at the second stage of the analysis.

90. Faced with these competing rules Koenigsberg J. did not pick one to the exclusion of the other. Instead, she opted for what she described as a more "principled approach", examining all of the factors that could be relevant to the strength of the connection between the obligation and the competing legal systems. The following portions of Koenigsberg J.'s analysis are instructive:

> [195] In my view, any difficulty arising from the apparent clash of the first two subrules can be resolved by taking a principled rather than a categorical approach to the choice of law issue. The essential question to be answered in choosing the appropriate law to govern a claim is, "what legal system has the closest and most real connection to the obligation?" …
>
> …
>
> [200] In my view, a more principled approach to a case such as this one, where the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land, would be to examine all the factors that could be relevant to the strength of the connection between the obligation and the competing legal systems. Such factors should be given weight according to a reasonable view of the evidence and their relative importance to the issues at stake.
>
> [Emphasis added.]

Minera, paras. 195-200.

91. The selection of this choice of law rule accords with the reason courts apply foreign law in the first place, which is to resolve disputes by the most appropriate and proximate law. As noted in *Pitel & Rafferty*, this is accomplished by determining which legal system has the closest and most real connection to the dispute:

> Once we accept that any decision to resolve a dispute using foreign law is a decision for our own courts, not something being imposed on us or demanded of us, there is no true concern about sovereignty. We control the application of foreign law in our courts. Nonetheless, we still need some explanation for why we do not always apply the law of the forum.

> The most convincing explanation is based on notions of justice and convenience. This explanation was put best by the English scholar Cheshire who wrote "when the circumstances indicate that the internal law of a foreign country will provide a solution more just, more convenient, and more in accord with the expectations of the parties than the internal law of England, the English judge does not hesitate to apply the foreign rules." It is important to explain what is meant by "justice" in this context. This refers not to the fairness of the eventual outcome but rather to whether a just decision is being made about which legal system to apply. Central to this idea of justice is the principle of proximity, which provides that a dispute should be resolved by the most proximate law: the legal system with the closest and most real connection to the dispute. (Emphasis added.)
>
> *Pitel & Rafferty*, pp. 119-120.

92. The 1974 Plan submits that taking a "principled approach" to the choice of law issue modelled on *Minera* is appropriate in this case if the court is required to develop a new choice of law rule. Determining the applicable law entails an examination of all of the factors relevant to the strength of the connection between the obligation imposed by *ERISA* and the competing legal systems. This is accomplished by determining which legal system has the closest and most real connection to the dispute.

93. The characterization adopted by the chambers judge is incompatible with a principled approach. It purposefully ignores any connections a claim has with any jurisdiction other than the jurisdiction in which the defendant is incorporated. This approach does not accord with choice of law principles, as it will invariably lead the court to apply its own law regardless of whether the foreign legal system is the most appropriate and proximate law.

F. Application of Choice of Law Rule to the 1974 Plan's Claim

94. Whether looked at as akin to a contract claim, or on the basis of the more principled approach employed in *Minera*, the appropriate choice of law rule in this case is the law of the legal system with the closest and most real connection to the dispute. To apply this rule, the court must have a full understanding of the facts and circumstances relevant to the strength of the connection between the obligation and the

competing legal systems. Accordingly, the 1974 Plan has pleaded facts regarding the Walter Canada Group that, if proven, point towards U.S. law as the legal system with the closest and most real connection to the 1974 Plan's claim. These facts cannot be proven by the 1974 Plan absent pre-trial discovery, as they concern the location of the Walter Canada Group's management and its business operations.

Amended Notice of Civil Claim filed November 9, 2016, Part 1, paras. 15, 74-102; AB, pp. 92, 99-102.

95. The chambers judge acknowledged that her conclusions on the choice of law issue "have the effect of rendering moot the 1974 Plan's objections arising from the lack of discovery". But she nevertheless was critical of the 1974 Plan's attempts to obtain discovery in this case, suggesting that the 1974 Plan was attempting to engage in a "full-scale litigation process" and was "angling for a "fishing expedition"".

RJ, paras. 34, 169; AR, pp. 43-44, 79.

96. The chambers judge's suggestion that the 1974 Plan was attempting to engage in a "full-scale litigation process" is erroneous. The 1974 Plan took the position throughout that a summary hearing was appropriate, but that the choice of law issue could not be decided without pre-hearing document and oral discovery because the applicable choice of law rule was fact dependent. The 1974 Plan never suggested that the issues in this case should be resolved by a full trial (counsel for the Walter Canada Group fairly conceded the chambers judge's error at the hearing of the leave application). All of the chambers judge's comments about process must be read with the understanding that she misapprehended the position of the 1974 Plan.

97. Further, the statement that the 1974 plan is "angling for a fishing expedition" ignores that all that the 1974 Plan sought to do is to obtain discovery of facts that it has pleaded and that are relevant to the issues in this case. The words of Mr. Justice Seaton in *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142 at 149 (C.A.) are apt:

> … I take it that a fishing expedition describes an examination for discovery that has gone beyond reasonable limits into areas that

> are not and cannot be relevant. In those waters one may not fish. In other waters one may. That one fishes is not decisive, it is where the fishing takes place that matters.

98. Important to the 1974 Plan's claim is its contention that Walter Energy U.S. and all of its U.S., Canadian and U.K. subsidiaries constitute a single global enterprise with management decisions for the Canadian entities being made in the United States. 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.

99. The 1974 Plan submits that the order of the chambers judge should be set aside and the matter remitted to the court below with the direction that the first issue in the Walter Canada Group's summary trial application must be resolved following necessary discovery by reference to the law of the legal system with the closest and most real connection to the dispute.

PART 4 – NATURE OF ORDER SOUGHT

100. The appellant seeks the following orders:

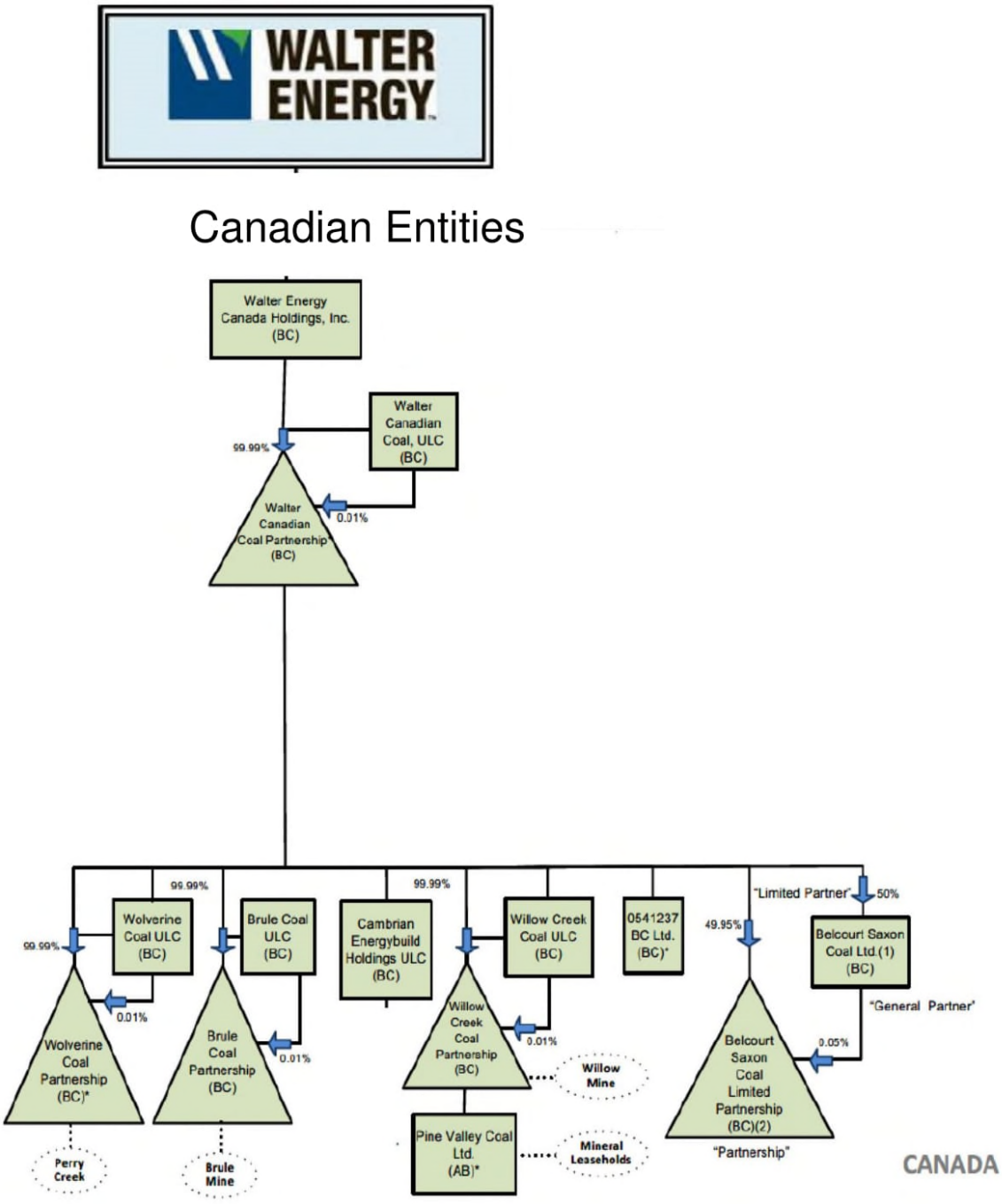
(a) that the appeal be allowed, with costs, and the order of the chambers judge that the 1974 Plan's claim as against the Petitioners and against the entities listed on Schedule "A" to that order is governed by Canadian substantive law and not U.S. substantive law be set aside; and

(b) that the matter be remitted to the chambers judge with the direction that the first issue in the Walter Canada Group's summary trial application must be resolved following necessary discovery by reference to the law of the legal system with the closest and most real connection to the dispute.

Dated at the City of Vancouver, Province of British Columbia, this 6th day of July, 2017.

Counsel for the Appellant
per Craig P. Dennis, Q.C.

SCHEDULE "A"


WALTER ENERGY
Canadian Entities
Walter Energy Canada Holdings, Inc. (BC)
Walter Canadian Coal, ULC (BC)
99.99%
0.01%
Walter Canadian Coal Partnership (BC)
99.99%
99.99%
99.99%
Wolverine Coal ULC (BC)
Brule Coal ULC (BC)
Cambrian Energybuild Holdings ULC (BC)
Willow Creek Coal ULC (BC)
0541237 BC Ltd. (BC)*
"Limited Partner"
50%
49.95%
Belcourt Saxon Coal Ltd.(1) (BC)
"General Partner"
0.01%
0.01%
0.01%
0.05%
Wolverine Coal Partnership (BC)*
Brule Coal Partnership (BC)
Willow Creek Coal Partnership (BC)
Belcourt Saxon Coal Limited Partnership (BC)(2)
"Partnership"
Willow Mine
Pine Valley Coal Ltd. (AB)*
Mineral Leaseholds
Perry Creek
Brule Mine
CANADA

APPENDIX: ENACTMENTS

INTERNAL REVENUE CODE
26 U.S.C.

§ 414. Definitions and special rules

(b) Employees of controlled group of corporations.--For purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3) (C)) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the applicable limitations provided by section 404(a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

(c) Employees of partnerships, proprietorships, etc., which are under common control.--

(1) In general.--Except as provided in paragraph (2), for purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

...

§ 1563. Definitions and special rules

(a) Controlled group of corporations.--For purposes of this part, the term “controlled group of corporations” means any group of--

(1) Parent-subsidiary controlled group.--One or more chains of corporations connected through stock ownership with a common parent corporation if--

(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d) (1)) by one or more of the other corporations; and

(B) the common parent corporation owns (within the meaning of subsection (d) (1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974
29 U.S.C. CH. 18, SUB. CH. C, §§ 1001, ET SEQ., AS AM.

§ 1301. Definitions

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

§ 1321. Coverage

(a) Plans covered

Except as provided in subsection (b) of this section, this subchapter applies to any plan (including a successor plan) which, for a plan year--

(1) is an employee pension benefit plan (as defined in paragraph (2) of section 1002 of this title) established or maintained--

(A) by an employer engaged in commerce or in any industry or activity affecting commerce, or

(B) by any employee organization, or organization representing employees, engaged in commerce or in any industry or activity affecting commerce, or

(C) by both,

which has, in practice, met the requirements of part I of subchapter D of chapter 1 of Title 26 (as in effect for the preceding 5 plan years of the plan) applicable to the plans described in paragraph (2) for the preceding 5 plan years; or

(2) is, or has been determined by the Secretary of the Treasury to be, a plan described in section 401(a) of Title 26, or which meets, or has been determined by the Secretary of the Treasury to meet, the requirements of section 404(a)(2) of Title 26.

For purposes of this subchapter, a successor plan is considered to be a continuation of a predecessor plan. For this purpose, unless otherwise specifically indicated in this subchapter, a successor plan is a plan which covers a group of employees which includes substantially the same employees as a previously established plan, and provides substantially the same benefits as that plan provided.

(b) Plans not covered

This section does not apply to any plan--

…

(7) which is established and maintained outside of the United States primarily for the benefit of individuals substantially all of whom are nonresident aliens...

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer--

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

…

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

…

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of--

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2) **(A)** An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending--

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which--

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of--

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of--

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction--

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of--

(A) such unamortized amount; multiplied by--

(B) a fraction--

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers--

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4) **(A)** An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of--

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.[1]

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines

to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for

the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of--

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan… may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. ...

…

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of--

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction--

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

…

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of the Internal Revenue Code of 1986, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c).

…

§ 1392. Obligation to contribute

(a) “Obligation to contribute” defined

For purposes of this part, the term “obligation to contribute” means an obligation to contribute arising--

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

BUSINESS CORPORATIONS ACT

S.B.C. 2002, c. 57

51.3 Liability of shareholders of unlimited liability companies

51.3(1) Subject to subsection (2), shareholders and former shareholders of an unlimited liability company are jointly and severally liable as follows:

> (a) if the company liquidates, the shareholders and former shareholders are jointly and severally liable, from the commencement of the company's liquidation to its dissolution, to contribute to the assets of the company for the payment of the unlimited liability company's debts and liabilities;
>
> (b) whether or not the company liquidates, the shareholders and former shareholders are jointly and severally liable, after the company's dissolution, for payment to the company's creditors of the unlimited liability company's debts and liabilities.

51.3(2) A former shareholder of an unlimited liability company is not liable under subsection (1) unless it appears to the court that the shareholders of the unlimited

liability company are unable to satisfy the debts and liabilities referred to in subsection (1), and, even in that case, is not liable under subsection (1)

(a) in respect of any debt or liability of the unlimited liability company that arose after the former shareholder ceased to be a shareholder of the unlimited liability company,

(b) in a liquidation of the company, if the former shareholder ceased to be a shareholder of the unlimited liability company one year or more before the commencement of liquidation, or

(c) on or after a dissolution of the company effected without liquidation, if the former shareholder ceased to be a shareholder of the unlimited liability company one year or more before the date of dissolution.

51.3(3) The liability under subsections (1) and (2) of a shareholder or former shareholder of an unlimited liability company continues even though the unlimited liability company transforms, and, in that event,

(a) a reference in subsections (1) and (2) to

(i) **"shareholder"** is deemed to be a reference to a person who was a shareholder of the unlimited liability company at the time it transformed, and

(ii) **"former shareholder"** is deemed to be a reference to a person who ceased to be a shareholder of the unlimited liability company before it transformed, and

(b) a reference in subsection (1)(a) or (b) or (2)(b) or (c) to **"the company"** is deemed to be a reference to the successor corporation.

51.3(4) In subsection (3) and this subsection:

"successor corporation", in relation to an unlimited liability company, means any corporation that results from the company, or any of its successor corporations, transforming;

"transform", in relation to an unlimited liability company or any of its successor corporations, means to

(a) alter its notice of articles to become a limited company,

(b) continue into another jurisdiction, or

(c) amalgamate with another corporation.

51.11 Notice of articles of unlimited liability company must include statement

A company formed under section 10 is an unlimited liability company if its notice of articles contains the following statement:

> The shareholders of this company are jointly and severally liable to satisfy the debts and liabilities of this company to the extent provided in section 51.3 of the Business Corporations Act.

PARTNERSHIP ACT
R.S.B.C. 1996, c. 348

7. Liability of partners

(1) A partner is an agent of the firm and the other partners for the purpose of the business of the partnership.

(2) The acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member bind the firm and his or her partners, unless

(a) the partner so acting has in fact no authority to act for the firm in the particular matter, and

(b) the person with whom he or she is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.

57. Liability of limited partner

Except as provided in this Part, a limited partner is not liable for the obligations of the limited partnership except in respect of the amount of property he or she contributes or agrees to contribute to the capital of the limited partnership.

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