Form 33 (Rule 8-1 (10))

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 A PLAN OF COMPROMISE OR ARRANGEMENT OF
WALTER ENERGY CANADA HOLDINGS, INC.
AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

APPLICATION RESPONSE

Application response of: **KEVIN JAMES,** a party (the "application respondent").

THIS IS A RESPONSE TO the notice of application of **WALTER ENERGY CANADA HOLDINGS, INC. and the other petitioners** listed on Schedule "A" of their Notice of Application dated August 9, 2016 (collectively with the partnerships listed on Schedule "A", the "Walter Canada Group") and set down for hearing on August 15, 2016.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: **NONE**.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in **ALL** paragraphs of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent take no position on the granting of the orders set out in paragraphs **NONE** of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. Mr. James is a professional geologist and was a founder of Western Canadian Coal Corporation, the predecessor holder of the properties at issue to Walter Energy Canada Holdings, Inc. (the "Company") which was incorporated as a public company in 1997. He was one of the first officers and directors of the Company.

2. In 1998 Mr. James identified a property known as Burnt River that they considered had coal mining potential. Mr. James and another director, Mr. Fawcett, personally advanced funds, and obtained the coal licences and carried out work relating to the same. They sold them to the Company at a price equivalent to out of pocket expenses.

3. In 1999 Mr. James and Mr. Fawcett identified another set of promising coal licences in what was called the West Brazion property. The Company did not have the funds to obtain the licences so Mr. James again obtained the licences which were registered in his wife's name and paid for by Mr. Fawcett and himself. In early 2000 they granted the Company an option to purchase these licences in exchange for their out-of-pocket expenses plus a 1% royalty on any coal produced from the property.

4. Mr. James and Mr. Fawcett identified a third group of promising coal properties in 1999 which are referred to as the Wolverine Group which comprised Mount Spieker, Perry Creek, and Hermann. Again, the Company lacked sufficient capital to acquire the licences. Eventually an agreement was reached whereby Mr. James and Mr. Fawcett gave up their right to acquire a separate royalty interest in the West Brazion licences if the Company exercised the option to acquire them. In return they received a 1% royalty in the coal produced from any of the West Brazion or Wolverine licences which 1% would be shared between them and one other investor as per their respective recognized contributions and a right to have the licences returned to them if forfeit. (Royalty Sharing Agreement "RSA")

5. The document was prepared by the Company's solicitors.

6. On April 1, 2011 the Company acquired all of the outstanding common shares of Western Coal Corp., pursuant to an Arrangement Agreement approved by the Supreme Court of British Columbia on March 10, 2011 under the provisions of the British Columbia *Business Corporations Act*. The RSA was part of that plan.

7. The Company recognized the RSA and paid Mr. James royalties pursuant to the RSA from the date they took over the mine until the mine shut down.

8. The effect and enforcement of the RSA has been the subject of two cases in the British Columbia courts.

9. In 2006 the Company alleged that the directors had not complied with the *Company Act* disclosure requirements and sought, among other things, to set the agreement aside. The Company's claim was dismissed. Tysoe J. found the agreement to be fair and reasonable and that the amount of royalties was in the low range for similar transactions.

10. In 2007 the Company then refused to pay Mr. James and Mr. Fawcett the full amount of royalties owing under the RSA on the basis that they claimed the payments were of a debt and included interest which had exceeded the criminal rate of interest. A claim had to be initiated to obtain the proper payment.

11. The chambers judge concluded that "……the royalty was not in substance a cost paid by [the Company] in order to receive credit. Rather, the royalty was the principal consideration flowing from [the Company] to the Investors for their contributions to [the Company's] acquisition of the coal licence".

12. The Company appealed. All of the royalties owed to Mr. James under the RSA were found not to be interest and unaffected. A portion of Mr. Fawcett's payments were found to be affected by the interest provisions.

13. The third investor sold back his royalty rights under the RSA to the Company.

14. The amount of the royalty to be paid to Mr. James as per his proportionate share is approximately 0.219%. The amount of the royalty to be paid to Mr. Fawcett after the Court of Appeal decision is approximately 0.15% for a total interest to be paid to the two remaining royalty holders under the RSA being 0.37%.

15. The RSA also gives Mr. James and Mr. Fawcett rights associated with the coal licences themselves. It was the intention at the time of the RSA that the 'investors' would have a right to the coal licences if they were to be forfeited. The coal licences cannot be forfeit without the consent of Mr. James and Mr. Fawcett or they are to be transferred to them 30 days prior to any such forfeit giving them an interest in the coal licences themselves and in the land.

16. The investors agreed to take a lower royalty amount over a longer period of time with an increased risk in both the potential for production and a longer time of production for the benefit of the Company.

17. I am a party to a Share Purchase Agreement dated October 31, 1997 which provides for payment of royalties relating to all coal sales from the Belcourt property.

18. Upon being advised of the proceedings herein the Monitor was notified that Mr. James considered that the RSA provided him with an interest in the Wolverine property and that the RSA should be part of any proposed transaction.

19. In or about June 9, 2016 the Monitor was contacted by counsel for Mr. James to ask about the attendance before the court that was scheduled for June 24, 2016, to obtain an update on the matter and to see if there was any information or issues regarding the RSA. The Monitor did not provide any information regarding the RSA or the proposed transaction at that time or at any time prior to service of the matters herein despite Mr. James' proactive contact regarding the same.

20. There has been no dialogue between the Monitor, its counsel and Mr. James regarding his rights, their position or an explanation as to why his royalty agreement is not being

assigned despite Mr. James being proactive in providing his position and concerns to the Monitor.

21. Mr. James has not been given a copy of the Pine Valley Mining Corporation royalty agreement which is being assigned as part of the Proposed Transaction for consideration.

22. The Monitor has provided no explanation as to why the RSA is not being assumed.

23. There is no persuasive basis provided as to why Mr. James' royalty agreement is not part of the proposed transaction and why the Pine Valley Mining Corporation Royal Agreement is being assumed. To exclude this agreement from agreement is improper, unjust and unfair.

24. Mr. James is a party to a Share Purchase Agreement dated October 31, 1997 which provides for payment of royalties to him relating to all coal sales from the Belcourt Saxon mines. He has not been given a copy of the Belcourt Put Agreement for review or consideration to be able to determine the effect of the Put Agreement on his rights and as such is unable to approve that portion of the Proposed Transaction.

25. Mr. James is willing to enter into a Non-Disclosure Agreement regarding the confidential information relating to the matters at issue production of which is required to be able to fully inform himself of the matters at issue and provide a full response.

26. Assuming the information required to fully address this matter, including the Pine Valley royalty agreement, any terms or conditions regarding Mr. James' royalty agreement and an explanation regarding the decision not to include Mr. James' royalty agreement in the proposed transaction is in Confidential SISP materials. These materials can be shared with the application respondent without any prejudice to the Petitioners or the Transaction.

Part 5: LEGAL BASIS

REAL PROPERTY INTEREST

1. The Proposed Transaction improperly does not include the RSA.

2. The RSA provides for an interest in land to Mr. James and is binding upon an assignee and is not a right that the Monitor can extinguish.

Bank of Montreal v. Dynex Petroleum Ltd., [2002] 1 SCR 146
Blue Note Mining Inc. v. Fern Trust (Trustee of) [2008] N.B.J. No. 360
Bensette and Campbell v. Reece, 1973 CanLII 975 (SK CA)

3. As stated by the Supreme Court of Canada "A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest of a profit a prendre, if that is the intention of the parties."

Bank of Montreal v. Dynex Petroleum Ltd., [2002] 1 SCR 146 at 21

4. It was the intention of the parties that the RSA provides Mr. James with an interest in land. The RSA must be reviewed as a whole and not only does it provide for the royalty payment as consideration, it also provides, as part of the consideration set out therein, an interest in the underlying coal licences. The interest lasts for the duration of the underlying estate as there is no end date and is to ensure to the benefit and be binding upon the parties, their heirs, executors, administrators, successors and assigns demonstrating it is intended to be an interest in land.

Bank of Montreal v. Dynex Petroleum Ltd., [2002] 1 SCR 146
Blue Note Mining Inc. v. Fern Trust (Trustee of) [2008] N.B.J. No. 360
Keyes v. Saskatchewan Minerals [1972] S.C.R. 703
RSA sections 2.1, 4.3, 9.1

5. Further the surrounding circumstances of the formation of the RSA support such an interpretation. The surrounding circumstances, include those found by the court in previous actions, including: the involvement of Mr. James in being the party who identified the properties, purchased them to preserve them for the Company at a time in which the Company did not have the funds to do so themselves and then transferred them on the basis that he would be compensated over time, sharing the risk with the Company. The royalty is small but lasts over the lifetime of the mine, which was done for the benefit of the Company and to share the risk moving forward as an interest in land.

Blue Note Mining Inc. v. Fern Trust (Trustee of) [2008] N.B.J. No. 360
Keyes v. Saskatchewan Minerals [1972] S.C.R. 703

6. Even if the language of the grant of royalty interest is not clear, upon review if the entire agreement and the circumstances relating thereto support such a conclusion, it will be found.

Canco Oil and Gas Ltd. v. Saskatchewan, 1991 CanLII 7788 (SK QB)

FAIRNESS

7. In the alternative, if the RSA is not found to be an interest in land that cannot be extinguished, which is denied, the overriding requirements of the CCAA of appropriateness, good faith and due diligence have not been properly addressed in relation to the claims of Mr. James.

Century Services Inc. v. Attorney General of Canada, 2010 SCC 60 (CanLII)

8. Appropriateness under the CCAA is assessed by enquiring whether the order sought advances the policy objectives underlying the CCAA of a restructuring situation rather than a sale of an asset under Bankruptcy avoiding the social and economic losses resulting from liquidation. All stakeholders are to be treated as advantageously and fairly as the circumstances permit.

Century Services Inc. v. Attorney General of Canada, 2010 SCC 60 (CanLII)

9. The Proposed Transaction accepts one royalty agreement while denying Mr. James'. No explanation is given. The royalty agreement proposed to be assumed is more onerous than the 0.219% owed to Mr. James.

10. Fairness is the "touchstone by which CCAA proceedings are conducted" and there is no basis upon which to determine that the Proposed Transaction is fair to Mr. James.

TLC The Land Conservancy of British Columbia (Re), 2015 BCSC 1890 (CanLII)
Skeena Cellulose Inc. v. Clear Creek Contracting Ltd, 2003 BCCA 344 (CanLII)

11. The Proposed Transaction violates section 36 of the *CCAA*. The sale is not reasonable without the assumption of the RSA, the creditor affected has not been contacted nor have they been involved in any discussions relating to the same. The Proposed Transaction seeks to extinguish rights which run with the land which is not permitted, or in the alternative, seeks to extinguish rights which where to continue in perpetuity and are of significance to the recipients. It is highly unlikely, given the amount of the royalty at issue, it would have a significant negative effect on the proposed transaction.

Company Creditors Arrangement Act s. 36

PROCEDURAL FAIRNESS

12. Mr. James has had little to no notice of the position of the Monitor and the Petitioners in this matter.

13. The Petitioner seeks to extinguish Mr. James' rights summarily with no explanation.

14. The Monitor has had no communication with Mr. James or his counsel regarding the proposed Transaction or their position herein.

15. Mr. James does require full information to be able to properly defend his position.

Century Services Inc. v. Attorney General of Canada, 2010 SCC 60 (CanLII)

16. Any delay in the matter to address this issue is as a result of the Monitor failing to communicate with Mr. James who has taken proactive steps to inform the Monitor of his position months ago.

17. Mr. James and his counsel are willing to execute a non-disclosure agreement relating to the confidential information filed herein. As a result there is no harm to the Petitioners or the Sale Process in providing access to the Confidential SISP Materials to Mr. James and his counsel so that they may use such information to inform their position relating to the proposed Transaction.

CLAIMS PROCEDURE

18. The claims procedure is to be fair, reasonable and transparent.

Bul River Mineral Corporation (Re), 2014 BCSC 1732 (CanLII)

19. The proposed Claims Process Order is not, it is submitted, fair or reasonable with respect to Mr. James and the Monitor has not been transparent in the materials provided regarding the same.

20. Mr. James' claim which appears to be unique. He has a right to royalties that have been acknowledged and paid by the Petitioners.

21. The proposed Claims Process seeks to require that Mr. James serve materials seeking to provide his claim is enforceable before having a dialogue about the same.

22. It is submitted that the Petitioners and the Monitor should be required to provide the basis for their determination and the matter addressed thereafter.

23. It is submitted that the enforceability of the RSA has been admitted and thus should be allowed by the Court.

SEALING ORDER

24. In determining the extent and scope of a sealing order the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 found that a Court must consider reasonable alternatives to the confidentiality Order as well as to restrict the order as much as reasonably possible while still preserving commercial interests.

25. It is our understanding that there is information in the Confidential SISP that in fairness Mr. James needs to know so that he can properly defend his rights and position with respect to the RSA.

26. Mr. James and his counsel are willing to sign a Non-Disclosure Agreement and certainly are in no position and have no intention to bid on any of the assets of the Petitioners or enter into any transaction relating to the matters at issue.

27. Mr. James's position is that he is a stakeholder, that his RSA runs with the land and should be part of the agreement or in any event it is not appropriate that the RSA is not part of the Transaction. The RSA has been admitted by Mr. Azziz.

28. A review of the relevant confidential information is essential to enable Mr. James to have a full understanding of the proposed Transaction and the effect of his RSA. Mr. James needs to know the full extent of the Brule Put Agreement to be able to determine his position regarding the same.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #3 William Aziz, made August 9, 2016;

2. The Monitor's Fourth Report to Court, dated August 11, 2016;

3. Affidavit #1 of Kevin James made August 12, 2016;

4. Such other and additional material as counsel may advise and the Court may admit; and

5. Pleadings and proceedings filed herein.

The application respondent does not offer a time estimate for the application.

[ ] The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

[X] The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Sager Legal Advisors LLP
Barristers and Solicitors
1495 Marine Drive
West Vancouver, BC V7T 1B8

Date: 12 / Aug / 2016

"Heather L. Jones"

Signature of [X] lawyer for application respondent

Heather L. Jones,
Sager Legal Advisors LLP