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 AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER
PETITIONERS LISTED ON SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

WALTER CANADA GROUP'S SUMMARY HEARING WRITTEN SUBMISSIONS

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PART I - INTRODUCTION

1. In this summary hearing, this Court is asked to decide whether ERISA[1], a US pension scheme, can override the separate corporate personalities of Walter Canada Group[2] to supplement the underfunded 1974 Plan[3] at the expense of Walter Canada Group's unsecured creditors. Walter Canada Group asks this Honourable Court to decide three of the four questions in its Notice of Application in a summary fashion in this CCAA claims process. If this Court decides any of the questions in Walter Canada Group's favour, the 1974 Plan Claim fails.

2. The three questions – and Walter Canada Group's position on each question – are:

(a) ***Under Canadian conflict of laws rules, is the 1974 Plan Claim against Walter Canada Group governed by Canadian substantive law or US substantive law (including ERISA)?***

Under the 1974 Plan's theory, liability only attaches to Walter Canada Group if the Court ignores separate legal personalities and effectively amalgamates the Canadian and US Walter entities. As a result, under BC choice of law rules the Court should characterize

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[1] The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406,88 Stat. 829, enacted September 2, 1974, codified in part at 29 USC. ch 18.

[2] Walter Energy Canada Holdings, Inc. and the other Petitioners listed on Schedule "A" to the Initial Order (collectively with the partnerships listed on Schedule "C" to the Initial Order), the "Walter Canada Group".

[3] The United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan").

the claim as one of corporate personality. Questions of corporate personality are governed by the law of the corporation's domicile, which is the place of incorporation. All Walter Canada Group entities were incorporated in Canada. ERISA is not part of Canadian law.

(b) ***If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), as a matter of US law does controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA extend extraterritorially?***

ERISA does not extend extraterritorially under US law. Congress did not evidence a clear intention that ERISA's controlled group provisions would capture foreign corporations. ERISA's application to Walter Canada Group is not domestic.

(c) ***If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), and ERISA applies extraterritorially, is that law unenforceable because it conflicts with Canadian public policy?***

The controlled group provisions of ERISA are not enforceable in Canada because they conflict with Canadian public policy. Canadian courts should not enforce a foreign law that expropriates assets from Canadian companies based solely on their corporate relationship in order to fund highly regulated foreign pension plans.

PART II - SUMMARY OF FACTS

The Walter Group Chapter 11 and CCAA Proceedings

3. The Walter Group operates its business in two distinct segments: (i) US Operations, and (ii) Canadian and UK Operations (Statement of Uncontested Facts ("**SUF**") para 57).

4. On July 15, 2015, the US Debtors commenced proceedings (the "**Chapter 11 Proceedings**") under Chapter 11 of Title 11 of the US Code (SUF para 90).

5. The Walter US Debtors include Walter Energy Inc. ("**Walter Energy**"), which is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama (SUF para 1), as well as the other entities incorporated or organized in the US.

6. About five months later, on December 7, 2015, this Court granted an Initial Order in this proceeding. The Petitioners in these CCAA Proceedings comprise Canada Holdings and all entities owned directly or indirectly by Walter Energy that are incorporated under the laws of Canada or its provinces (SUF para 44).

7. Walter Canada Group did not seek recognition of the CCAA Proceedings in the US, and the Walter US Debtors did not seek recognition of the Chapter 11 proceedings in Canada.

The Walter US Group 2011 Acquisition of Western Coal Resulting in Walter Canada Group

8. Before 2011, Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom (SUF para 17).

9. In late October 2010, Walter Energy and Western Coal Corp. ("**Western**") began negotiating the acquisition of Western (the "**Western Acquisition**") (SUF para 24). Western and its subsidiaries operated coal mines in BC, the UK and the US (SUF para 22).

10. Walter Energy's Western Acquisition was publicly announced in November 2010, when Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly available EDGAR system. The press release referred to Walter Energy's intention to complete a "business combination" with Western (SUF para 25).

11. In the subsequent months, Walter Energy released many press releases and made many filings with the SEC. By December 2010, Walter Energy announced that:

(a) it had entered into an Arrangement Agreement with Western whereby Walter Energy would acquire all of the outstanding common shares of Western;

(b) the "transaction will be implemented by way of a court-approved plan of arrangement under British Columbia law"; and

(c) in connection with the arrangement, Walter Energy had entered into a debt commitment letter pursuant to which Walter Energy would borrow $2,725 million of senior secured credit facilities, "the proceeds of which will be used (i) to fund the cash consideration for the transaction, (ii) to pay certain fees and expenses in connection with the transaction, (iii) to refinance all existing indebtedness of the Company and Western Coal and their respective subsidiaries and (iv) to provide for the ongoing working capital of the Company and its subsidiaries" (SUF para 27).

12. On March 9, 2011, Walter Energy incorporated Walter Energy Canada Holdings, Inc. ("Canada Holdings") (SUF para 18). Canada Holdings was incorporated specifically to hold the shares of Western and its subsidiaries (SUF para 21).

13. On March 10, 2011, the BC Supreme Court approved the proposed plan of arrangement through which the Western Acquisition was accomplished (SUF para 23).

14. On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western (SUF para 34).

15. After completing the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Group into geographical business segments: the Walter US Group, the Walter Canada Group and the Walter UK Group (SUF para 43). As a result, the US assets previously held by Western were transferred from Canada Holdings to Walter Energy and no longer formed part of the Canadian assets.

Walter Resources and the 1974 Plan

16. The 1974 Plan is a pension plan and irrevocable trust established in 1974 in accordance with section 302(c)(5) of the Labour Management Relations Act of 1947, 29 U.S.C. § 186(c)(5) (SUF para 7). It is a multiemployer, defined benefit pension plan under section 3(2), (3), (35), (37)(A) of ERISA, 29 U.S.C. § 1002(2), (3), (35), (37)(A) (SUF para 11). All participating employers in the 1974 Plan are resident in the US (SUF para 12).

17. Only one of the Walter US entities, Jim Walter Resources Inc. ("**Walter Resources**"), is a party to a collective bargaining agreement with the 1974 Plan (the "**2011 CBA**") (SUF para 13).

18. Walter Resources is wholly owned by Walter Energy (SUF para 4), is incorporated in Alabama, did business in Alabama (SUF para 5), and was operated out of Alabama (SUF para 6). Walter Resources (or a predecessor entity) had been a signatory to the 1978, 1981, 1984, 1988, 1993, 2002, and 2007 collective bargaining agreements, and, pursuant thereto, had been a participating employer in the 1974 Plan (SUF para 14).

19. No member of Walter Canada Group is or ever was party to any National Bituminous Coal Wage Agreement, including the 2011 CBA (SUF para 15). Walter Canada Group did not contribute to and had no obligations to contribute to the 1974 Plan (SUF para 79, 80).

20. At the time of the Western Acquisition, the 1974 Plan had an unfunded liability of more than US$4 billion (SUF para 35). The 1974 Plan did not take a position on the application in the BC Court seeking approval of the Acquisition (SUF para 32). Walter Resources and the 1974 Plan entered into the 2011 CBA after the Walter Acquisition was completed.

Walter Canada Corporate Parties and Structure

21. It is an admitted fact that all Walter Canada Group companies are incorporated in Canada, most in BC, and that all of the partnerships are organized under the laws of BC.

22. In particular, Canada Holdings, Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Cambrian Energybuild Holdings ULC and 0541237 BC Ltd. are all incorporated under the laws of BC (SUF paras 19, 45, 52, 53, and 56). Pine Valley Coal Ltd. is a company incorporated under the laws of Alberta (SUF para 55).

23. Walter Canadian Coal Partnership, Wolverine Coal Partnership, Brule Coal Partnership, and Willow Creek Coal Partnership are organized under the laws of BC (SUF paras 47 and 52).

1974 Plan's Proofs of Claim in the Chapter 11 Proceedings

24. On October 8, 2015, the 1974 Plan filed proofs of claim in the Chapter 11 Proceedings against Walter Resources and the other Walter US Debtors (SUF paras 98-101). The Proofs of Claim filed do not refer to Walter Canada Group (SUF para 102).

The Global Settlement Order in the Chapter 11 Proceedings

25. On December 22, 2015, the US Bankruptcy Court entered an order (the "**Global Settlement Order**") (SUF para 103) approving a Settlement Term Sheet between the Walter US Debtors, Steering Committee, Stalking Horse Purchaser and UCC (SUF para 107). The Settlement Term Sheet entitles unsecured creditors to receive 1% of the common equity issued in the Stalking Horse Purchaser on closing as well as the right to participate in any exit financing (SUF para 105).

26. Walter Canada Group is not party to the Settlement Term Sheet (SUF para 108).

27. The Unsecured Creditors Committee made it clear that the Global Settlement and its implementation "does not increase or diminish the aggregate distribution to unsecured creditors from the Chapter 11 Estates" because "Unsecured creditors are not entitled to any recovery from the Chapter 11 Estates beyond that established by the Global Settlement" (SUF para 109).

28. Because the 1974 Plan became entitled to recovery through the Global Settlement, a negotiated agreement, the US Bankruptcy Court did not review the merits of the 1974 Plan's claim and "determine" that the 1974 Plan's claim was valid as against the Walter US Debtors.

29. On March 24, 2016, the US Bankruptcy Court entered an order (the "**Global Settlement Implementation Order**") (SUF para 110).

Walter Resources Withdraws from the 1974 Plan CBA

30. The parties agree that on December 28, 2015, the US Bankruptcy Court entered an order (the "**1113/1114 Order**") authorizing Walter Energy and its US affiliates to reject the 2011 CBA and declaring that Walter Resources had no further contribution obligations (SUF para 113).

31. The 1113/1114 Order was issued following a hearing on December 15 and 16, 2015, of the US Bankruptcy Court (SUF para 114). The US Debtors and the 1974 Plan participated in this hearing (SUF para 115); Walter Canada Group did not (SUF para 116). In granting the 1113/1114 Order, the US Bankruptcy Court did not consider any of the assets of the Petitioners or the Canadian operations in making the 1113/1114 Order. The US Bankruptcy Court did not treat the Petitioners as a controlled group with the Walter Energy US affiliates (SUF para 117).

32. The parties agree that as of January 4, 2016, Walter Resources had not withdrawn from the 2011 CBA. On January 4, 2016, the 1974 Plan filed an Application Response stating "Walter Energy US *is expected to withdraw* from the 1974 Plan" (SUF para 118).

33. Finally, the parties agree that the 1974 Plan appealed the 1113/1114 Order. The 1974 Plan represented to this Court that it only withdrew that appeal as of February 16, 2016 (SUF para 119). On that date, the 1113/1114 Order became final.

34. There is debate about when Walter Resources withdrew from the 1974 Plan. The 1974 Plan appears to suggest December 28, 2015 or January 11, 2016 as possible withdrawal dates. Walter Canada Group suggests February 16, 2016 as the earliest possible date. However, Walter Canada Group submits nothing turns on the resolution of this debate for the purposes of this application.

1974 Plan Files Notice of Civil Claim in this Court

35. On August 26, 2016, 1974 Plan filed a Notice of Civil Claim in accordance with the Claims Procedure Order. As set out in paragraph 14 of that document, the 1974 Plan alleges that the 1974 Plan has a claim pursuant to ERISA in conjunction with the Pension Document, Trust Document and 2011 CBA on the theory that pursuant to ERISA the Petitioners are jointly and severally liable to the 1974 Plan for the claimed pension withdrawal liability of Walter Resources.

36. Walter Canada Group, the Respondent Steelworkers and the Monitor filed responses, and Walter Canada Group filed a Notice of Application seeking summary determination of four issues.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

37. The Notice of Application lists four issues to be determined by this Court in a summary hearing. Walter Canada Group proposes to proceed on only three issues as follows:

(a) Under Canadian conflict of laws rules, is the 1974 Plan Claim against Walter Canada Group governed by Canadian substantive law or US substantive law (including ERISA)? ***Walter Canada Group submits that under BC choice of law rules, BC substantive law applies.***

(b) If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), as a matter of US law does controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA extend extraterritorially? ***Walter Canada Group submits that ERISA does not extend extraterritorially under US law.***

(c) If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), and ERISA applies extraterritorially, is that law unenforceable by Canadian courts because it conflicts with Canadian public policy? ***Walter Canada Group submits that applying ERISA conflicts with Canadian public policy.***

38. Before making its submissions on the merits, Walter Canada Group will explain why the evidence in its Book of Evidence is admissible in the summary hearing. After making its submissions on the merits, Walter Canada Group will submit that it is suitable to decide these three issues in a summary hearing.

Evidence in Walter Canada Group Book of Evidence Is Admissible

39. For the Court's convenience, Walter Canada Group compiled a Statement of Uncontested Facts at Tab 1, Volume 1 of its Book of Evidence (the "SUF"). Many of the facts in the SUF are not relevant to the questions this Court must decide. For each fact listed in the SUF, the source is identified and that source is included in the Book of Evidence. Furthermore, the evidentiary quality of the evidence supporting each statement is indicated for each fact (*i.e.*, "A" for admission, etc.).

40. The SUF includes (1) pleaded facts that were admitted or that have been admitted for the limited purpose of this summary hearing, and (2) facts based on three types of documents that this Court can consider without formal proof: court records, public documents, and other documents.

41. With respect to court records, the Court is entitled to look at its own records without further proof of those documents.[4] Walter Canada Group has included the following court records:

(a) *Decisions in this CCAA Proceeding.* Where this Court has made a factual finding, absent an appeal, that fact must be accepted as found. The 1974 Plan has participated in these proceedings since late December 2015.

(b) *Evidence previously filed in this CCAA Proceeding.* This evidence was filed by the 1974 Plan or referred to by the 1974 Plan as evidence on which it intended to rely. All of the statements in the SUF were in the affiant's personal knowledge, except for SUF paragraph 70, which states that liability can attach to directors and officers.

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4 *Petrelli v Lindell Beach Holiday Resort Ltd*, 2011 BCCA 367, Walter Canada Group's Book of Authorities ("BOA") Tab 12 at paras 36-37.

(c) *The BC Court's decision approving the plan of arrangement related to the Western Acquisition.* This was a well-publicized event, and it would be an inappropriate collateral attack on this decision to not accept the facts found in that decision.

(d) *Evidence filed in the Western Acquisition proceeding.* This evidence was relied upon by the Court to make its decision.

42. With respect to the public documents included in the Book of Evidence, the Supreme Court of Canada has made it clear that this Court is permitted to rely on statements made in public documents for the truth of their contents.[5] This is a recognized exception to the hearsay rule. The only public documents are the Corporations Reports maintained by provincial governments.

43. The last category, "other documents", are materials filed by Western Energy with the SEC and retrieved through the SEC's EDGAR system. They are not filed for the truth of their contents but only for the fact that the statements were made. As a result, there is no hearsay concern.

44. Finally, Walter Canada Group served a notice to admit the facts listed in the Statement of Uncontested Facts and the authenticity of the documents included in the Book of Evidence. The 1974 Plan declined to admit the truth of any of the facts, even those facts the 1974 Plan pleaded, or the authenticity of any documents, even the affidavits filed by the 1974 Plan with this Court.

Question A: The 1974 Plan Claim is Governed by Canadian Law

45. The first question for this Court to consider is what choice of law governs the 1974 Plan's claim. Walter Canada Group submits that the 1974 Plan Claim is governed by the laws of BC. If this Court concludes that the proper law governing the 1974 Plan Claim is BC law, then the 1974 Plan Claim cannot succeed. The 1974 Plan conceded as much in the October 26 hearing.[6]

46. As the 1974 Plan has chosen to assert its claim in a Canadian Court, Canadian choice of law principles govern the analysis of what law applies to the 1974 Plan Claim.[7] Determining choice of law is a

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5 *Finestone v The Queen*, [1953] 2 SCR 107, BOA Tab 7 at paras 7-8. This exception to the prohibition against hearsay applies when four conditions are met: (1) the subject matter of the statement must be of a public nature; (2) the statement must have been prepared with a view to being retained and kept as a public record; (3) the statement must have been for a public purpose and available to the public for inspection at all times; and (4) the statement must have been prepared by a public officer in pursuance of his duty: *Radke v S(M) (Litigation Guardian of)*, 2005 BCSC 1355, BOA Tab 13 at para 51.

6 Transcript of the October 26, 2016 hearing, Judge's Pleadings Binder Tab 62 (Affidavit #3 of Miriam Dominguez) p 8, lines 21-23: "And I'll say for today's purposes, My Lady, if the proper law governing this claim is British Columbia law then it's unlikely our claim can succeed."

7 Canadian courts apply conflict of laws principles of the forum, regardless of how far the claim is dominated by foreign elements: Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, (Toronto, On; LexisNexis, 2005) (loose-leaf, 6 ed) [*Castel & Walker*] vol 1, ch 1, BOA Tab 22 at 1-2.

two-step process. First, the Court characterizes the claim to determine which choice of law rule applies. Second, the Court applies the proper choice of law rule to the claim.

47. As is set out below, the 1974 Plan's claim against Walter Canada Group does not flow from any conduct by or contract with Walter Canada Group. Rather, the 1974 Plan alleges that liability attaches to Walter Canada Group because ERISA overrides the separate legal personalities of Walter Canada Group. Under Canadian choice of law principles, the legal personality of corporations is governed by the law of the place of incorporation. It is an admitted fact that the Petitioners are incorporated under the laws of Canada or its provinces and the partnerships are organized under the laws of BC. As a result, under Canadian choice of law rules, BC law determines whether the separate legal personalities of Walter Canada Group can be ignored. As ERISA is not part of BC law, the 1974 Plan Claim must fail.

(a) The 1974 Plan Claim Is an Issue of Legal Personality

48. The 1974 Plan asserts that Walter Canada Group is liable under ERISA for Walter Resources' withdrawal from the 1974 Plan. Pursuant to ERISA, liability incurred by an employer for withdrawing from a multiemployer plan also attaches to businesses under "common control" with the employer.[8] Since Walter Canada Group entities and Walter Resources are owned directly or indirectly by Walter Energy, the 1974 Plan argues that the Petitioners are under "common control" and are liable under ERISA for Walter Resources' withdrawal from the 1974 Plan.

49. The starting point for any choice of law analysis is to classify the legal nature of the claim.[9] The legal nature of the claim dictates the choice of law principle pursuant to which the Court selects the applicable governing law. The importance of properly characterizing a claim is emphasized in the *Minera* decision, where the question of what law applied turned on whether the claim was properly characterized as a claim of breach of confidence or a claim of title over foreign land.[10] In that case, the Court determined that the claim was more appropriately characterized as an equitable claim for unjust enrichment arising from breach of confidence, with the consequence that the relevant choice of law rule was the "proper law of the obligation".

50. The legal nature of the claim can be equated with the manner in which liability is alleged to attach to the defendant. For example, liability can attach through breach of contract. If the claim is characterized as a contractual claim, the court will apply the law selected in a contract's express choice of law provision or, if there is no such clause, then the court will apply the law that has the closest and most real

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[8] Expert Report of Marc Abrams, served November 14, 2016 ("Abrams Report"), Walter's Book of Evidence ("BOE"), vol 6, Tab 20 at p 6.

[9] *Castel & Walker*, vol 1, ch 3, BOA Tab 22 at 3-1.

[10] *Minera Aquiline Argentina SA v IMA Exploration Inc and Inversiones Mineras Argentinas SA*, 2006 BCSC 1102 [*Minera*], BOA Tab 10 at paras 166-167, aff'd 2007 BCCA 319.

connection to the contractual claim. In contrast, where liability attaches to the defendant through tort, the court will apply the law of the place where the tort was committed.[11]

51. The 1974 Plan does not assert a contractual claim. It is admitted that Walter Canada Group has no contractual relationships with the 1974 Plan. Walter Resources, a Walter US entity, was the only Walter signatory to the 2011 CBA (SUF paras 13-15).

52. Similarly, the 1974 Plan does not assert that Walter Canada Group is liable based on its conduct. It is admitted that Walter Canada Group did not employ any beneficiaries of the 1974 Plan or have any type of direct relationship with 1974 the Plan. Nor did Walter Canada Group contribute to or have any obligations to contribute to the 1974 Plan (SUF para 78-80).

53. Rather, the 1974 Plan says that liability attaches to Walter Canada Group through the "common control" provisions of ERISA. The question of whether an entity is part of an ERISA "controlled group" is entirely mathematical. It is a bright-line ownership test that does not depend on conduct or contract.[12] The 1974 Plan says that because Walter Energy owned more than an 80% stake in both Walter Resources and Walter Canada Group, they are part of the same controlled group. The 1974 Plan therefore says that although Walter Canada Group engaged in no conduct and entered no contract related to the 1974 Plan, it is liable for the withdrawal liability that attached to Walter Resources through Walter Resources' contractual relationship with the 1974 Plan.

54. It is trite law in BC and Canada that corporations have separate legal personalities. It has been recognized for hundreds of years that a corporation is a legal entity distinct from its shareholders and affiliates.[13] A corporation has the rights and privileges at law of a natural person.[14] One of these rights and privileges is not to be liable for the debt of any other person. BC courts have repeatedly affirmed strict respect for separate corporate personality.[15]

55. The "controlled group" provisions impose liability by ignoring separate corporate personalities and effectively amalgamating "common control" entities.[16] US courts recognize this effect of the "controlled

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[11] Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law Inc, 2016) [*Pitel*], BOA Tab 23 at 266 and 291.

[12] Abrams Report, BOE, vol 6, Tab 20 at p 7; Expert Report of Judith Mazo of November 24, 2016 ("Mazo Report") at paras 43-44.

[13] *Salomon v Salomon & Co*, [1897] AC 22 (HL), BOA Tab 15.

[14] *British Columbia Business Corporations Act*, SBC 2002, C-57, s 30.

[15] See for example *Edgington v Mulek Estate*, 2008 BCCA 505 [*Edgington*], BOA Tab 6; *BG Preeco I (Pacific Coast) Ltd v Bon Street Holdings Ltd* (1989), 37 BCLR (2d) 258 (CA) [*BG Preeco*], BOA Tab 3.

[16] Abrams Report, BOE, vol 6, Tab 20 at p 6.

group" liability provisions, describing ERISA as a "veil-piercing" statute that disregards formal business structures to impose liability on related businesses.[17]

56. Under the 1974 Plan's "controlled group" approach to liability, Walter Canada Group would become liable based ***solely*** on its corporate affiliation with Walter Resources. This method of attaching liability to Walter Canada Group strikes at the heart of their separate status and legal personalities. As the only way for liability to attach to Walter Canada Group is to ignore their separate legal personalities, the essence and legal nature of the 1974 Plan Claim is to challenge the status and legal personalities of Walter Canada Group.

57. Classifying the 1974 Plan Claim as one implicating legal personality is consistent with BC case law. In *JTI-Macdonald Corp v British Columbia (Attorney General)*,[18] the BC Supreme Court was asked to find – and did find – the *Tobacco Damages and Health Care Costs Recovery Act* (the "***Damages Act***") unconstitutional because it exceeded the Province's territorial legislative competence and trenched on Parliament's power to incorporate federal companies.

58. The *Damages Act* defined "manufacturer" broadly. Coupled with the group liability provisions, the Act extended liability to affiliated companies.[19] Similar to ERISA, the *Damages Act* "imposed liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act."[20]

59. In finding that the *Damages Act* was unconstitutional, the Court noted that:

(a) The *Damages Act* had "the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia" (para. 173). The *Damages Act* therefore exceeded the Province's territorial legislative competence because, rather than regulating the operations of extra-provincial and foreign tobacco corporations within BC, it derogated from the status and legal personality of these corporations conferred on them by the laws of their domiciles; and

(b) The cumulative effect of the provisions of the *Damages Act* was to "amalgamate" or "merge" defendant companies to impose liability for civil claims. This type of involuntary merger was a "fundamental interference with a federal jurisdiction" under the CBCA and trenched on Parliament's power to incorporate federal companies (para. 214).

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17 Abrams Report, BOE, vol 6, Tab 20 at p 6.

18 2000 BCSC 312, BOA Tab 9 [*JTI-Macdonald*].

19 In the *Damages Act*, the affiliation between companies was based on: (i) shareholdings that entitle election of a director or have a market value equal to 50% of the total shares; (ii) a partnership, trust or joint venture having an entitlement to 50% of the profits or assets on dissolution; and (iii) control by direct or indirect influence.

20 *JTI-Macdonald*, BOA Tab 9 at para 233.

60. Like ERISA, the *Damages Act* went beyond merely piercing the corporate veil. The Court characterized the *Damages Act*'s "affiliate group" liability scheme as being "not so much designed to "pierce the corporate veil" as [it is] to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the Act is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence" (para. 218). The Court viewed the "affiliate group" liability scheme through the lens of legal personality because liability only attached to affiliates by ignoring separation of legal personalities.

61. The decision in *JTI-Macdonald* confirms that claims dealing with the imposition of "affiliate group" liability are properly classified as claims concerning the status and legal personality of corporations. Accordingly, the 1974 Plan's claim that ERISA applies to impose extraterritorial "controlled group" liability on the Petitioners should be classified as concerning the status and legal personality of corporations.

(b) The Law of the Place of Incorporation Applies to Issues of Corporate Personality

62. Under Canadian choice of laws rules, issues concerning a person's legal personality are governed by the law of the person's domicile.[21] In the case of a corporation, the domicile is the place in which the corporation was incorporated. As the Ontario Court stated in *National Trust Co v Ebro Irrigation and Power Co*:

> It is well established that the domicile of a corporation is in the country in which it was incorporated. In *Cheshire on Private International Law* [citation omitted] it is stated that: "Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, *i.e.* by the law of the domicil... In the case of the natural person it is the domicil of his father, in the case of the juristic person it is the country in which it is born, *i.e.* in which it is incorporated."[22]

63. In the insolvency context, an Alberta court concluded that the question of whether one corporation can be assimilated into another is determined by the law of the place of incorporation. In *Singer Sewing Machine Co of Canada Ltd (Re)*,[23] a US court extended creditor protection to a wholly-owned Canadian subsidiary of a US-resident debtor company, reasoning that treating the group of companies as a single entity for insolvency purposes would advance the purpose of the Chapter 11 bankruptcy proceeding. The Alberta court refused to enforce the US court's stay order, emphasizing that

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[21] *Pitel*, BOA Tab 23 at pp 26-27, 245-246; *Castel & Walker*, vol. 2, ch 30, BOA Tab 22 at 30:1; A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws*, vol 2, 15th ed (London: Sweet & Maxwell, 2012) [*Dicey*], BOA Tab 21 at pp 1528, 1532-1533).

[22] [1954] OR 463 (SC), BOA Tab 11 at para 31.

[23] 2000 ABQB 116, BOA Tab 16.

the question of whether the Canadian subsidiary could be treated as a single entity with the US parent was governed by Canadian rather than US law:

> Canadian law says that a corporation is a person in law. Canadian law says that a corporation has an existence separate from its shareholders. Canadian law says that a shareholder is not liable for the corporation's debts. Canadian law says that a shareholder does not own the corporation's assets. Canadian law says that a corporation's business activities are not the shareholder's business activities. [...]
>
> The Murrays are creditors only of Singer Canada...If they are to be prohibited from pursuing their claim against Singer Canada it must be by Canadian law, not American law (paras 11, 24).

64. Similarly, the question of whether one corporation has merged with another is characterized as an issue concerning the legal personality of the corporation and is governed by the law of the place of incorporation.[24] If the corporations said to have merged were incorporated in different jurisdictions, then the merger must be valid under the laws of both jurisdictions.[25]

65. For instance, in the English case of *Concept Oil Services Ltd v En-Gin Group LLP*,[26] persons controlling an English company attempted to protect the assets of the company from its creditors by continuing the English company as an Anguillan corporation. The English Court refused to recognize the continuation, finding that the validity of a purported amalgamation is governed by the law of the place in which the company was incorporated. As English law did not embrace the Anguillan law concept of continuation, the continuation was not recognized.

66. The 1974 Plan Claim turns entirely on whether the separate legal personalities of Walter Canada Group on the one hand and Walter Resources on the other can be ignored. Whether Walter Canada Group's separate legal personalities can be ignored is subject to the rule that the status and legal personality of a corporation are governed by the law of the place in which it was incorporated.

(c) The Partnerships

67. Walter Canada Group notes that 1974 Plan has only filed its claim against the Petitioners (all of which are corporations listed in Schedule A to the Initial Order), not the other members of Walter Canada Group (*i.e.* the partnerships listed in Schedule C of the Initial Order). In the Amended Notice of Civil Claim, the 1974 Plan states (emphasis added):

(a) Paragraph 14: "The 1974 Plan's claim *against the Petitioners*..."

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[24] *Castel & Walker*, vol. 2, ch 30, BOA Tab 22 at 30-5.

[25] *Dicey*, BOA Tab 21 at p 1534 and fn 50.

[26] [2013] EWHC 1897 (QBD), BOA Tab 5 at paras 70-72.

(b) Paragraph 38: "As a result, under ERISA, *each of the Petitioners*, whether or not a participating employer under the 1974 Plan and whether or not a signatory to the CBA, is an employer."

(c) Paragraph 103: the 1974 Plan seeks a declaration that "US$904,367,132 is validly due and owing [...] on a joint and several basis by *each of the Petitioners*".

(d) Paragraph 104: the 1974 Plan seeks a declaration "that the 1974 Plan Claim in an amount of US$904,367,132 is an Allowed Claim against *each of the Petitioners*."

68. Furthermore, in this Court's reasons for decision released January 26, 2016, the Court approved the SISP, among other things, and described the 1974 Plan submissions on that motion as: "the 1974 Pension Plan contends that ERISA provides that all companies under common control with [Walter Resources] are jointly and severally liable for this withdrawal liability, *and that some of the entities in the Walter Canada Group come within this provision*".[27] The 1974 Plan did not correct this statement.

69. As 1974 Plan has chosen to assert its claim only against the Petitioners, any claim against the Schedule C partnerships is barred pursuant to the claims bar date.

70. Regardless, as with corporations, the question of whether a partnership has a legal personality is governed by the law of the place in which the entity was constituted.[28] The parties agree that the partnerships were organized under BC law (SUF paras 47 and 52). The choice of law analysis leads to the same result: to the extent the 1974 Plan is asserting or is able to assert a separate claim against the partnerships, BC law governs such claims.

(d) Walter Canada Group are Canadian Entities and Canadian Law Applies

71. All Walter Canada Group entities are incorporated or organized under the laws of Canada or its provinces. The places of incorporation or organization are pled by the 1974 Plan and admitted by Walter Canada Group.[29] These admitted facts are the only facts relevant to this Court's choice of law analysis.

72. Because all Walter Canada Group entities are incorporated or organized under the laws of Canada or its provinces, the question of whether their separate legal personalities can be ignored is governed by BC law. The 1974 Plan has not advanced any theory of liability under BC law, relying exclusively on the controlled group provisions of ERISA to ground its claim. ERISA is not part of BC law. The 1974 Plan claim must fail.

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[27] BOE, vol 2, Tab 7 at para 14.

[28] *Dicey*, BOA Tab 21 at p 1532-1533.

[29] SUF, BOE, vol 1, Tab 1 at paras 45-56, Amended Notice of Civil Claim, BOE, vol 1, Tab 2 at paras 2-13 and 27.

Question B: Controlled Group Liability Under ERISA Does Not Extend Extraterritorially

73. In the alternative, if the Court concludes that the 1974 Plan claim should be characterized in a such a way that the applicable choice of law principle dictates that US law governs, then the Court must consider the second issue, which is whether as a matter of US law controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extends extraterritorially to Walter Canada Group. According to the experts, ERISA's "controlled group" liability provisions do not apply extraterritorially to impose liability on Walter Canada Group.

74. US law is a matter of fact that must be proven. As is set out in more detail below, the evidence of two independent expert witnesses confirms that that (i) there is a presumption against extraterritorial application of US statutes; (ii) that presumption has not been rebutted by any statement in ERISA that "affirmatively and unmistakably" authorizes extraterritorial application of the "controlled group" liability provisions; and (iii) this case does not involve a domestic application of ERISA. As such, US law does not support the 1974 Plan Claim against Walter Canada Group.

(a) Presumption Against Extraterritorial Application of US Law

75. US law contains a strong presumption against extraterritoriality. As Marc Abrams and Judge Allan Gropper explain, the US Supreme Court reaffirmed in the recent *RJR Nabisco* decision that "[i]t is a basic premise of our legal system that, in general, US law governs domestically but does not rule the world."[30] "This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[31]

76. This presumption "serves to avoid the international discord that can result when US law is applied to conduct in foreign countries. But it also reflects the more prosaic 'common sense notion that Congress generally legislates with domestic concerns in mind.'"[32]

77. Pursuant to US law, the onus is on the 1974 Plan to rebut the presumption against extraterritoriality. The Walter Canada Group says that the presumption is not rebutted because ERISA

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[30] Abrams Report, BOE, vol 6, Tab 20 at p 8,; *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016) [*RJR Nabisco*], Walter Canada Group's US Book of Authorities RE: Abrams Report, served November 14, 2016 ("US BOA") Tab 40; see also *Morrison v. Nat'l Australia Bank Ltd.*, 561 US 247 (2010) [*Morrison*], US BOA Tab 33 at 255 ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) [*Arabian*], US BOA Tab 27 at 248).

[31] Abrams Report, BOE, vol 6, Tab 20 at p 8; *RJR Nabisco*, US BOA Tab 40 at 2100. Although Ms. Mazo on behalf of the 1974 Plan concedes that *RJR Nabisco* is the leading case on this issue, she fails to apply the presumption against extraterritoriality in her analysis: Mazo Report at para 50.

[32] Expert Report of Allan L Gropper, dated December 1, 2016 ("Gropper Report") at p 4, citing *RJR Nabisco*, US BOA Tab 40 at 2100.

does not contain "a clear, affirmative indication" that the "controlled group" liability provisions apply extraterritorially. In the second stage of the analysis, Walter Canada Group states that the 1974 Plan Claim does not involve a "domestic application" of ERISA.

(b) No Congressional Intent to Apply ERISA "Controlled Group" Provisions Extraterritorially

78. The US Supreme Court has held that the presumption against extraterritoriality is only rebutted where "Congress has affirmatively and unmistakably instructed that the statute will" apply to foreign conduct.[33] As Mr. Abrams notes, this approach is consistent with the US Supreme Court's direction that US courts should "assume that Congress legislates against the backdrop of the presumption against extraterritoriality."[34]

79. As explained by Mr. Abrams and Judge Gropper, the "controlled group" liability provisions of ERISA do not contain any clear, affirmative or unmistakable expression of Congress's intent that they should apply extraterritorially. To the contrary, these provisions are silent on the issue of extraterritorial application.[35]

80. The 1974 Plan asserts through Ms. Mazo that "there is no indication that Congress expected controlled group membership to be cut off at the borders of the US."[36] However, as Judge Gropper explains, this approach turns the presumption against extraterritoriality on its head.[37] As the US Supreme Court has repeatedly held, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[38] The importance of this principle is magnified in this case because imposing liability throughout a corporate group is "highly unusual", even under US law, and might result in "international discord".[39]

81. Furthermore, other provisions of ERISA indicate that Congress did not intend for ERISA's "controlled group" liability provisions to apply extraterritorially. For example, ERISA contemplates that pension plans or sponsoring employers will file their lawsuits relating to Title IV of the statute in federal or state courts in the US, not foreign jurisdictions.[40] Mr. Abrams notes that ERISA provides that US federal

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33 Abrams Report, BOE, vol 6, Tab 20 at p 8; *RJR Nabisco*, US BOA Tab 40 at 2100.

34 Abrams Report, BOE, vol 6, Tab 20 at p 8; *Arabian*, US BOA Tab 27 at 248.

35 Abrams Report, BOE, vol 6, Tab 20 at p 9; Gropper Report at p 4.

36 Mazo Report at para 65.

37 Gropper Report at pp 2-3.

38 Abrams Report, BOE, vol 6, Tab 20 at p 13; Gropper Report at p 4; *Morrison*, US BOA Tab 33 at 255; *RJR Nabisco*, US BOA Tab 40 at 2100.

39 Gropper Report at p 4.

40 Abrams Report, BOE, vol 6, Tab 20 at p 13; *See, e.g.*, 29 USC. § 1401(b)(1), US BOA Tab 16 (collection proceeding by plan sponsor may be brought in "a State or Federal court of competent jurisdiction").

courts have exclusive jurisdiction over lawsuits, ***including those asserting claims for withdrawal liability***, by a "plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining."[41] These provisions undercut any inference that Congress intended for ERISA to apply outside of the US.

82. The absence of any Congressional intent that ERISA's "controlled group" liability provisions apply extraterritorially is consistent with US court decisions that other ERISA provisions do not apply extraterritorially.[42] For example, in *Chong v InFocus Corp*,[43] a Singaporean citizen working in Singapore for the Singaporean subsidiary of a US company commenced a suit in a US court asserting that he was entitled to benefits under a severance plan established by the US company under ERISA. The district court granted summary judgment against the plaintiff on his ERISA claims because, absent clear Congressional intent to extend the reach of ERISA extraterritorially, the statute would not apply to a foreign employee providing services outside of the US for a foreign subsidiary even if the applicable plan was administered by a US company in the US and the decision to deny the employee benefits was made in the US.

83. Similarly, in *Maurais v Snyder*,[44] a Canadian doctor who treated a US citizen in Canada sought compensation from the patient and his US insurance company. The doctor sued in US court and asserted claims under Pennsylvania state law. In response, the insurance company argued that the Canadian doctor's state law claims should be dismissed because they were preempted by ERISA. In considering this defense, the court concluded that the plaintiff's claims could be preempted by ERISA only if the statute applied extraterritorially, *i.e.*, to the medical procedures performed by the Canadian doctor in Canada. Relying on the presumption that federal laws do not apply extraterritorially, the court concluded that there was no language in ERISA evidencing clear congressional intent to legislate extraterritorially.

84. For these reasons, and the reasons set out in Mr. Abrams' and Judge Gropper's reports, there is no evidence of congressional intent in the text of ERISA's "controlled group" provisions that would overcome the strong presumption that US statutes do not apply extraterritorially.[45]

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[41] Abrams Report, BOE, vol 6, Tab 20 at p 13; 29 USC. § 1451(a)(1), US BOA Tab 17; *see also* 29 USC. § 1370(c), US BOA Tab 10 (similar jurisdictional provision in respect of single-employer pension plans).

[42] Abrams Report, BOE, vol 6, Tab 20 at pp 14-15.

[43] No. CV-08-500-ST, 2008 WL 5205968 (D. Ore. Oct. 24, 2008), US BOA Tab 24, at *5-6; Abrams Report, BOE, vol 6, Tab 20 at p 14.

[44] No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000), US BOA Tab 32 at *2-3; Abrams Report, BOE, vol 6, Tab 20 at p 15.

[45] Abrams Report, BOE, vol 6, Tab 20 at p 15; Gropper Report at p 4.

(c) The 1974 Plan Claim Is Not a Domestic Application of ERISA

85. As the presumption against extraterritoriality is not rebutted, the 1974 Plan must show that applying ERISA's "controlled group" liability provision to Walter Canada Group is a "domestic application" of US law. If the 1974 Plan Claim is *not* a "domestic application" of ERISA, then it is an impermissible extraterritorial application of the statute, and the 1974 Plan claim must fail.

86. Determining whether the application of ERISA is a "domestic application" of US law entails looking to the statute's "focus" and determining whether the conduct relevant to that focus primarily occurred in the US.[46] In the words of the US Supreme Court, "[i]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in US territory."[47]

87. Importantly, more than just *some* of the relevant conduct must occur in the US. Rather, Mr. Abrams explains, that conduct must touch the US "with sufficient force to displace the presumption against extraterritorial application."[48] As the US Supreme Court cautioned in *Morrison*, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[49]

88. No case considers whether applying ERISA's controlled group liability provisions to foreign defendants is a "domestic application" of US law. However, there is analogous law considering whether a US Court can exercise personal jurisdiction over foreign defendants alleged to be in a "controlled group" for purposes of joint and several liability under ERISA. In virtually every case, the US Court held that it did not have personal jurisdiction over the foreign defendant.[50]

(i) US Courts Decline to Take Personal Jurisdiction Over Foreign Defendants in ERISA Claims

89. Although they are not the same, under US law both the "personal jurisdiction" and "domestic application" analyses consider how closely a claim relates to the US. The domestic application analysis considers whether the conduct relevant to the focus of the statute touches the US "with *sufficient force* to

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[46] Abrams Report, BOE, vol 6, Tab 20 at p 16; *RJR Nabisco*, US BOA Tab 40 at 2101.

[47] *RJR Nabisco*, US BOA Tab 40 at 2101.

[48] Abrams Report, BOE, vol 6, Tab 20 at p 16; *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) [*Kiobel*], US BOA Tab 31 at 1669.

[49] *Morrison*, US BOA Tab 33 at 266 (emphasis in original); *see also Sec. Investor Protection Corp. v. Bernard L. Madoff Investment Sec. LLC*, 513 B.R. 222 [*Madoff*], US BOA Tab 42 at 227 ("[A] mere connection to a US debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic.").

[50] Abrams Report, BOE, vol 6, Tab 20 p 17-19.

displace the presumption against extraterritorial application".[51] Conduct relevant to the "focus" is conduct that ERISA is aimed at regulating.

90. Similarly, the personal jurisdiction analysis considers US contacts connected with the conduct that ERISA is aimed at regulating. A US court will have personal jurisdiction over a foreign "controlled group" member only if there are sufficient minimum contacts with the US that the exercise of jurisdiction does not "offend traditional notions of fair play and substantial justice".[52] According to US law, the US contacts necessary to ground personal jurisdiction must be *related to and give rise to the claim.*[53] Relevant contacts *giving rise to the claim* for the purposes of the personal jurisdiction include conduct that ERISA is aimed at regulating (*i.e.*, the "focus" for the domestic application analysis). It would not seem to be possible for a contact to give rise to claim under a statute if that statute is not seeking to regulate that contact.

91. The domestic application analysis requires US conduct relevant to the focus of the statute that touches with sufficient force to characterize the conduct as domestic. If the conduct does not meet the "minimum contacts" threshold necessary for personal jurisdiction, it does not seem possible for a court to conclude that conduct displaces the presumption against extraterritoriality.

92. Establishing US personal jurisdiction over the foreign defendant is a threshold step that appears to be necessary, though not sufficient, to establish that the application of ERISA to the foreign defendant is a domestic application of the Act. If the plaintiff cannot establish sufficient minimal contacts with the US to justify taking jurisdiction over a foreign "controlled group" member, neither can the plaintiff establish that applying the common controlled liability provisions to that foreign "controlled group" member is a "domestic" application of ERISA.

93. As a result, US cases considering personal jurisdiction in ERISA "controlled group" cases are a useful comparison providing guidance on what conduct is relevant to the focus of ERISA, and when that conduct touches the US "with sufficient force" that the application of the Act is domestic.

94. In the context of considering a claim for withdrawal liability under ERISA, US jurisprudence on personal jurisdiction establishes that:

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[51] *Kiobel*, US BOA Tab 31 at 1669.

[52] Abrams Report, BOE, vol 6, Tab 20 at p 18; *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (internal citations omitted), US BOA Tab 25.

[53] Abrams Report, BOE, vol 6, Tab 20 at p 18; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984), US BOA Tab 30.

(a) Corporate affiliation between the Canadian and US corporations, or even Canadian corporate ownership of the shares in a US entity, are not sufficient to ground personal jurisdiction over the foreign affiliate.[54]

(b) The provision of payroll services by the Canadian entity to the US entity was not sufficient to ground personal jurisdiction over the foreign affiliate.[55]

(c) The negotiation of a loan agreement by the Canadian parent on behalf of the US employer was not sufficient to ground personal jurisdiction over the foreign affiliate. Personal jurisdiction was not established even though the Canadian parent's negotiation allegedly resulted in the US employer's withdrawal from the pension plan.[56] These connections to the US were "too attenuated" and did not "'directly' relate" to the subsidiaries' withdrawal and could not ground jurisdiction.

95. If these contacts with the US are not sufficient to meet the minimum threshold for personal jurisdiction, the logical conclusion is that these US contacts would also not have sufficient force to characterize the conduct as domestic, displacing the presumption against extraterritoriality.

(ii) ERISA's Application to Walter Canada Group Would Not Be a Domestic Application

96. Based on both the law on personal jurisdiction and the test to establish the domestic application of ERISA, Walter Canada Group submits that the presumption against extraterritorial application is not displaced.

97. The "focus" of ERISA's "controlled group" liability provisions is to "prevent businesses from shirking their ERISA obligations by fractioning operations into many separate entities."[57] The legislation seeks to prevent a US parent company from using a shell company to employ American employees so that it can avoid its pension obligations to those employees. Ms. Mazo notes that "a much-cited purpose

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54 *Central States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000) [*Central States*], US BOA Tab 21 at 943-45.

55 *Central States,* US BOA Tab 21 at 943-45.

56 *GCIU-Employer Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018 (7th Cir. 2009), US BOA Tab 29 at 1020-22, 1025.

57 *Cent. States, S.E. & S.W. Areas Pension Fund v. Messina Prods.*, LLC, 706 F.3d 874 (7th Cir. 2013), US BOA Tab 20 at 878; *Tamko Asphalt Prods., Inc. of Kan. v. Comm'r of Internal Revenue*, 658 F.2d 735, 740 (10th Cir. 1981), US BOA Tab 44; *NYSA-ILA Pension Trust Fund v. Lykes Bros., Inc.*, 1997 WL 458777, at *6 (S.D.N.Y. Aug. 11, 1997) (same), US BOA Tab 34; *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986) (same), US BOA Tab 41 at 648; *U.S. v. Vogel Fertilizer*, 455 US 16 (1982), US BOA Tab 45 at 26-27 ("Through the controlled-group test, Congress intended to curb the abuse of multiple incorporation – large corporations subdividing into smaller corporations and receiving unintended tax benefits . . . ."); *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. El Paso CGP Co.*, 525 F.3d 591 (7th Cir. 2008), US BOA Tab 23 at 595-596 (affirming ERISA liability against US members of withdrawing employer's "controlled group" and stating that "the controlled group provision allows a plan to deal exclusively with the defaulting employer known to the fund, while at the same time assuring itself that legal remedies can be maintained against all related entities in the controlled group") (internal quotations omitted).

of the controlled group rule is to prevent companies from devising corporate structures in ways that could complicate a pension plan's recovery of withdrawal liability."[58]

98. In this case, Mr. Abrams explains that the conduct relevant to ERISA's focus would be:

(a) The circumstances and transaction(s) leading to the foreign entity coming under the common control of the group parent;

(b) Transactions between the foreign entity and the contributing employer or other group entities;

(c) Contributions or other connections between the foreign entity and the pension plan or its members; and

(d) Any acts or omissions of the foreign entity relating to withdrawal of the contributing employer.[59]

99. Based on the uncontested facts, the relevant conduct occurred outside the US:

(a) Western Coal Corp. and its subsidiaries existed and operated in Canada before the Western Acquisition (SUF para 22); it is not possible to argue that they were incorporated to fractionalize the group or shield assets from US pension liabilities. The Western Acquisition was consummated in Canada and was approved by the BC Supreme Court on March 10, 2011 (SUF para 23). The 1974 Plan did not file any objection to the plan of arrangement at that time (SUF para 32), despite the fact that the transaction was disclosed in Walter Energy's news releases and public fillings numerous times starting in November 2010 (SUF paras 25-31).

(b) Subsidiaries or assets of Walter Canada were transferred to the US entities in connection with the internal restructuring following the Western Acquisition, thereby providing additional resources for the US pension liabilities. No subsidiaries or assets of the US entities were transferred to Walter Canada (SUF paras 22, 43, 73).

(c) Walter Canada Group does not have any assets or carry on any business in the US (SUF para 73). Walter Canada Group did not employ any persons who were members of the 1974 Plan and were not contributing employers to the 1974 Plan (SUF paras 78-79).

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[58] Mazo Report at para 60.

[59] Abrams Report, BOE, vol 6, Tab 20 at para 20-21.

(d) There is no allegation that Walter Canada Group made any decisions or engaged in any conduct leading to Walter Resources' withdrawal from the 1974 Plan.

Each of these factors points to the application of ERISA to Walter Canada Group being an extraterritorial application of the Act.

100. Mr. Abrams also points out that two factors may point to domestic conduct: the receipt of certain essential management services (the "Shared Services") pursuant to certain management agreements and other intercompany agreements with the Walter US Group (SUF para 63) and the existence of an unfunded liability at the time of the Western Acquisition (SUF para 35).[60] Mr. Abrams does not comment on the ultimate issue of whether the application of ERISA to Walter Canada Group is domestic or extraterritorial.

101. These two factors do not overcome the factors pointing to the application of ERISA to Walter Canada Group being an extraterritorial application of the Act. If the focus of ERISA is to prevent companies from shirking their obligations, it is hard to characterize the provision of Shared Services as such an attempt when Walter Canada Group was required to pay approximately $1 million per month to the Walter US Group for these Shared Services (SUF para 64).

102. In any event, a US court considered the situation in which the foreign parent provided payroll services to the US subsidiary (*i.e.* compensation was flowing from the US employer out of the country to the Canadian parent). The US court found that this type of "standard administrative service" was insufficient to justify the exercise of jurisdiction over the Canadian parent.[61] As is set out above, if the US court cannot take personal jurisdiction over the conduct, that conduct is not sufficient to support the conclusion that ERISA's application is domestic.

103. Similarly, the Western Acquisition was highly publicized over a period of months and was subject to BC Court approval in a hearing where the 1974 Plan made no submissions. The 1974 Plan now objects to the Western Acquisition on the basis that it drained funds out of the US. It had notice of the BC hearing to approve the Western Acquisition and ought not to be permitted question that Acquisition now with a hindsight appreciation of collapsing coal prices and the resulting insolvencies.

104. The 1974 Plan and Ms. Mazo suggest that the only facts relevant to determine whether or not ERISA's application to Walter Canada Group is domestic are the fact that the Plan was underfunded and the employer's withdrawal from the plan.[62] The 1974 Plan is resident in the US (SUF para 9). All of its participating employers are resident in the US (SUF para 12). As a result, under the 1974 Plan's

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[60] Abrams Report, BOE, vol 6, Tab 20 at p 22.

[61] *Central States*, US BOA Tab 21 at 946.

[62] Mazo Report at para 54.

approach, *every* application of the controlled group provisions is automatically a domestic application of ERISA. Under the 1974 Plan's approach, it does not matter where the affiliate is incorporated and it does not matter whether that entity engaged in any conduct or had any contacts related to or giving rise to the claim for withdrawal liability. Such an approach eviscerates the presumption against extraterritoriality.

105. The 1974 Plan approach also cannot be reconciled with the US courts' routine refusal to take personal jurisdiction over foreign defendants where claims for withdrawal liability under ERISA are advanced against them.[63] It does not make sense to conclude that the application of ERISA to foreign entities is automatically domestic even where there are not sufficient minimal contacts to ground personal jurisdiction over these entities.

106. In contrast, Mr. Abrams takes a more nuanced view, recognizing that ERISA's controlled group provisions could apply domestically to a foreign entity, but ***only if*** sufficient conduct relevant to ERISA's controlled group provisions occurred in the US. For example, if there was an allegation that the foreign entity not only owned the shares of but also forced the contributing employer to withdraw from the plan, there may be sufficient conduct relevant to the focus of ERISA's controlled group provisions to rebut the presumption of extraterritoriality. As the US Court has explained, that control cannot be "attenuated" or only indirectly related to the withdrawal.[64] There is no allegation that Walter Canada Group made any decisions or engaged in any conduct leading to Walter Resources' withdrawal from the 1974 Plan.

(d) Comity Militates Against Extending ERISA Outside of the US

107. Finally, as Judge Gropper explains, US Courts would refuse to extend ERISA's common control group provisions to Walter Canada Group due to the overarching principle of comity. Under US law, the principle of comity among nations "may have a strong bearing on whether application of US law should go forward."[65] Judge Gropper notes that comity is "a canon of construction [that] might shorten the reach of a statute".

108. US Courts have relied on comity in refusing to apply long-arm American statutes to the transactions of insolvent foreign entities. For example, in the recent *Picard* decision,[66] the US Court declined to extend the application of US bankruptcy laws to foreign transactions because of, among other things, considerations of comity. In that case, several foreign investment funds acted as "feeder funds" investing most of their assets with Bernard L. Madoff. These feeder funds went into liquidation in their

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[63] Mazo Report at para 56.

[64] *GCIU-Employer Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018 (7th Cir. 2009), US BOA Tab 29 at 1020-22, 1025.

[65] Gropper Report at p 6.

[66] Gropper Report at p 5; *Picard, Trustee for the Liquidation of Bernard L. Madoff Inv. Sec. LLC v. Bureau of Labor Insurance*, Adv. No. 11-02732 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016), *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014) Walter Canada Group's US Book of Authorities RE: Gropper Report served December 1, 2016, Tab 7.

domestic jurisdictions after the Madoff Ponzi scheme was revealed. The trustee of the Madoff estate in the US attempted to recover property redeemed from the feeder funds by the feeder funds' customers, on the theory that all redemptions had originated as transfers from Madoff. The trustee relied on §550(a)(2) of the US Bankruptcy Code that allows a plaintiff to seek recovery not only from the immediate transferee (in this case, the feeder fund) but also from a subsequent transferee (the feeder fund's customer who received the payment).

109. The US Court refused to extend the reach of US bankruptcy laws to the foreign transactions. As Judge Gropper elaborates, the Court found that even if the presumption against extraterritoriality was rebutted, the principle of comity among nations required a dismissal.[67] The US Court relied on the fact that (i) there was only an indirect relationship between the Madoff trustee and the feeder fund customers and (ii) the feeder funds were subject to their own insolvency proceedings where the liquidators had unsuccessfully sought similar relief from the same or similarly situated transferees. The Court concluded, "those foreign jurisdictions had a greater interest in the application of their own laws than the US had in the application of US law."[68]

110. Walter Canada Group submits that a US court would similarly apply the principle of comity to the 1974 Plan Claim and refuse to extend the reach of controlled group liability to Walter Canada Group, especially in light of the insolvency proceedings underway in Canada.

(e) Irrelevant Facts Alleged by 1974 Plan

111. In its Amended Notice of Civil Claim, the 1974 Plan alleges a series of facts in relation to its choice of law analysis, such as the location of officers and directors or the expectations of those officers and directors about the governing law. As is set out above, the correct approach to choice of law characterizes the claim as one of legal status and personality resulting in a choice of law rule based on domicile. The 1974 Plan's alleged facts are not relevant to questions of domicile.

112. These alleged facts are also not relevant to a US court's consideration of whether or not the application of ERISA to Walter Canada Group is domestic or extraterritorial. Indeed, none of the experts supports the conclusion that any of these alleged facts could be relevant to an assessment of whether ERISA applies to Walter Canada Group domestically.

113. Finally, these irrelevant alleged facts do not impact the outcome of this summary hearing. For example, the 1974 Plan pleads that there is an overlap between the officers and directors of Walter US Group and Walter Canada Group. If having a foreign parent is not sufficient to ground personal

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[67] Gropper Report at p 6.

[68] Gropper Report at p 6.

jurisdiction over a Canadian subsidiary,[69] the mere fact that certain officers and directors reside in or work from foreign jurisdictions is not sufficient to do so. As Judge Gropper notes, "It is a fundamental principle of American law... that each entity holds its own assets and is responsible for its own liabilities, and that creditors rely on the separateness of the entities with which they do business."[70] US cases make it clear that "respecting entity separateness is a fundamental ground rule" and the power to ignore separateness – even in the context of a Chapter 11 bankruptcy proceeding – can be used only in extreme circumstances.[71]

114. In another example, the 1974 Plan asserts that the management team and key-decision makers of the other Petitioners expected US law to govern Walter Canada Group. The 1974 Plan makes this allegation based on its reading of the *Minera* decision from this Court where the Court considered the fact that the principal actors "routinely conducted their affairs" under Canadian or Colorado law as part of its choice of law analysis.[72] In any event, the 1974 Plan will not be able to overcome the uncontested facts to establish that Walter Canada Group "routinely conducted their affairs" under US law because:

(a) Walter Canada Group's collective agreements with the Respondent Steelworkers and the Christian Labour Association of Canada were governed by the BC *Labour Relations Code* (SUF para 76).

(b) The Respondent Steelworkers have asserted claims relating to the Northern Living Allowance and certain claims related to the notice provisions under s. 54 of the BC *Labour Relations Code* in these CCAA Proceedings (SUF para 77).

(c) Walter Canada Group's operations were subject to environmental assessment under the BC. *Environmental Assessment Act* and its predecessor legislation, the *Mine Development Assessment Act* (SUF para 81).

(d) Walter Canada Group experienced some issues meeting the certain BC water quality guidelines at the Brule Mine (SUF para 86).

(e) Any significant changes to Walter Canada Group's operations or further development of its properties in BC could have triggered a federal or provincial environmental assessment or both (SUF para 82).

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69 *Central States*, US BOA Tab 21 at 943-45.

70 Gropper Report at p 3.

71 Gropper Report at p 3.

72 *Minera*, BOA Tab 10 at para 206. In *Minera*, the question was whether Argentine or Canadian/Colorado law applied. The Court characterized the claim as one of unjust enrichment and breach of confidence and concluded that the closest and most real connection choice of law rule applied to determine the governing law. In applying that test, the Court considered the fact that the principal actors "routinely conducted their affairs" under Canadian or Colorado law and were aware of the Lac Minerals case before receiving the confidential information.

(f) Each Walter Canada Group mining site was inspected by the BC Ministry of Energy and Mines in September 2014 (SUF para 83).

(g) Pursuant to the BC *Mines Act*, Walter Canada Group's operations required permits outlining the details of the work at each mine and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land and watercourses affected by the mine (SUF para 84).

(h) Walter Canada Group filed mine plans and reclamation programs for each of its operations and accrued for reclamation costs to be incurred related to the operation and eventual closure of its mines under the *Mines Act* and the *Mine Code*. Walter Canada Group submitted updated five-year mine plans for Wolverine Mine and Brule Mine in 2013 (SUF para 85).[73]

115. Furthermore, the 1974 Plan cannot establish that the management team and key-decision makers of the other Petitioners expected US law to govern their own conduct in respect of Walter Canada Group. As of December 2015, for the purpose of sizing the Directors' Charge, Walter Canada Group estimated (with the assistance of the then-Proposed Monitor) that obligations in respect of Walter Canada Group unpaid wages, unremitted source deductions, unpaid accrued vacation pay and certain taxes could amount to a total potential director liability of approximately $2.5 million (SUF para 70). These obligations arose under BC and Canadian law.

116. Finally, the 1974 Plan cannot establish that Walter Canada Group expected its relationship with Walter Resources – the contributing and withdrawing employer in the 1974 Plan – to be governed by US law. As part of the CCAA Proceedings, the Willow Creek Coal Partnership and Brule Coal Partnership planned to enter into an agreement with Walter Resources whereby Walter Resources would buy three bulldozers from the Partnerships (SUF para 94). This transaction has two telling features. First, only one of the three bulldozers was purchased because only one bulldozer met US regulatory requirements for import into the US (SUF para 95). If Walter Canada Group was operating in accordance with US law, it would not have owned the other bulldozers.

117. Second, the Bill of Sale dated December 29, 2015, pursuant to which Brule Coal Partnership sold one bulldozer to Walter Resources, was "made under and shall be governed by and construed in accordance with the law of the Province of British Columbia and the federal laws of Canada applicable in the Province of British Columbia" (SUF para 97).

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[73] If the 1974 Plan seeks to object to this list of statements as fact not proven, Walter Canada Group notes that the 1974 Plan refused to admit facts of this nature on the basis that they are "matters of mixed fact and law". If that is the case, the Court is competent to decide questions of Canadian law.

118. To summarize, if this Court concludes that ERISA applies to govern 1974 Plan's claim against Walter Canada Group, the expert evidence filed makes it clear that the presumption against extraterritoriality in US law has not been rebutted either by a clear statement of Congressional intent or by Walter Canada Group conduct touching the US "with sufficient force" to characterize the conduct as domestic, thereby displacing the presumption against extraterritorial application.

Question C: The 1974 Plan Claim Is Contrary to Public Policy and Is Unenforceable

119. Even if ERISA did apply to Walter Canada Group, the 1974 Plan Claim conflicts with Canadian public policy and is unenforceable in Canada. The public policy defence allows Canadian courts to refuse to give effect to foreign laws that are "contrary to the fundamental morality of the Canadian legal system", "inconsistent with the good order and solid interests of society", or in conflict with the essential public policy goals of Canadian legislation. [74] This exception to comity has a narrow application.

120. This Court only reaches the question of public policy if it has concluded that US law governs the 1974 Plan Claim and either Congress intended the controlled group provisions to apply to Canadian entities or the application of the controlled group provisions is domestic. From a public policy perspective, allowing another country to establish a detailed legislative scheme that has the effect of shifting the burden of its social policy onto Canadians offends the Canadian legal system's "view of basic morality". ERISA legislates minimum funding standards that participating employers must meet.[75] It was within Congress' control to change those funding standards to reduce underfunding of pension plans. It was within Congress' control to decide to "stand behind" the PBGC's obligations (which the US government refused to do).[76] To the extent that Canadian companies are asked to fill the withdrawal liability created by ERISA's funding requirements and the US government's refusal to back up the PBCG, this Court should refuse to enforce that legislation as failing to respect Canadian territorial sovereignty.

121. The importance of this policy is highlighted by the 1974 Plan's and Walter US's conduct in this case. The 1974 Plan entered into a Global Settlement with the Walter US Debtors pursuant to which the 1974 Plan may receive an equity distribution from the new purchaser of Walter US's assets. Walter Canada Group was not a party to this Global Settlement and the Canadian stakeholders had no say on the settlement terms. The US stakeholders have compromised their responsibility under ERISA. This Court should not now enforce ERISA to shift the burden of US social policy to Walter Canada Group and its Canadian stakeholders.

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[74] *Beals v Saldanha*, 2003 SCC 72, BOA Tab 2 at para 72; *Wende v Victoria (County) Official Administrator* (1998), 48 BCLR (3d) 219 (SC), BOA Tab 20 at paras 34 and 37.

[75] Mazo Report at para 26

[76] Mazo Report at para 27.

122. Second, this Court should acknowledge that the 1974 Plan's claim arises *within a CCAA claims process*. The CCAA was designed to ensure "a broad balancing of a plurality of stakeholder interests."[77] Throughout, the supervising CCAA judge must weigh a broad range of stakeholder interests. The Supreme Court of Canada has emphasized this responsibility:

> [T]he court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company... courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.[78]

123. Leaving aside the 1974 Plan, Walter Canada Group's stakeholders are the unsecured creditors of Walter Canada Group, which include approximately 280 former employees of Walter Canada Group who have an Allowed Claim of approximately $12 million. The stakeholders also include the Canadian and BC governments who seek payment of taxes, and businesses with pre-filing claims. Each of these stakeholders had a direct relationship with Walter Canada Group.

124. The 1974 Plan did not have a direct relationship with Walter Canada Group. In addition, as it is a multiemployer pension plan, which is funded by "more than one unrelated employer",[79] some of its beneficiaries must have worked for companies other than Walter Resources.

125. If the 1974 Plan claim succeeds, the 1974 Plan will receive the vast majority of the proceeds in Walter Canada Group's hands and the remaining stakeholders will receive nominal distributions, if anything at all. This Court should refuse to enforce ERISA in the context of the 1974 Plan Claim because it allows individuals who never had a relationship with any Walter company to benefit at the expense of Walter Canada Group employees and creditors. Enforcing the 1974 Plan Claim in this CCAA claims process would thwart a central policy goal of the CCAA: the equitable treatment of a broad balance of stakeholder interests.

PART IV - WALTER CANADA GROUP POSITION ON 1974 PLAN'S SUITABILITY APPLICATION: A SUMMARY HEARING IS SUITABLE

126. A summary hearing in this case is consistent with the principle of proportionality, the objects of the *Supreme Court Civil Rules* (the *Rules*), and the purposes of the CCAA.

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[77] *Air Canada (Re)*, [2004] OJ No 842 (SCJ), BOA Tab 1 at para 27.

[78] *Ted Leroy Trucking [Century Services] Ltd (Re)*, 2010 SCC 60, BOA Tab 18 at para 60.

[79] Abrams Report, BOE, vol 6, Tab 20 at p 5.

127. This summary hearing is convened as part of the claims process pursuant to the CCAA and this Court's inherent jurisdiction. Because this is a proceeding under the CCAA – a statute with national application – the claims process can be informed by local rules and practice but need not slavishly follow them. That said, the *Rules* provide a useful guide and, Walter Canada Group submits, in this case that guidance supports determining the three questions posed in Walter Canada Group's Summary Hearing Notice of Application in a summary fashion.

128. The choice of laws and public policy questions are like a proceeding on a point of law pursuant to Rule 9-4 because the facts upon which they turn are admitted facts. The questions of ERISA's application and of public policy are akin to summary trial proceedings under Rule 9-7 in that the Court must assess conflicting expert evidence. In both cases, the Court has the evidence it requires to apply the law and discovery on collateral issues ought not change the outcome.

129. The objectives of the *Rules*, the principle of proportionality, and the objectives of the CCAA are served by a summary hearing. Rule 1-3(1) states that "The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."[80] The Supreme Court has recently emphasized that judges must "actively manage the legal process in line with the principle of proportionality."[81] This principle makes particular sense in a CCAA proceeding, where creditors are seeking to share in insufficient assets and one Judge is seized of all matters. This summary hearing is proportional, just, speedy and inexpensive because, if the Court decides *any* of the three questions in favour of Walter Canada Group, then the 1974 Plan Claim fails, and the time and expense of a full trial can be avoided.

The 9-7(11) Suitability Test

130. In addition to the CCAA principles and the broad discretion granted to a Judge managing a CCAA proceeding, the law on 9-7(11) applications supports deciding the 1974 Plan Claim in a summary fashion. When a BC Court considers an application under Rule 9-7(11), it asks two questions: should an issue be severed and is that issue suitable for summary determination. The test for severance is whether there are "extraordinary, exceptional or compelling reasons" for the issues to be severed. One compelling reason is the likelihood of a significant savings in time and expense realized by summary determination.[82]

131. Severing the issue of ERISA's enforceability may lead to savings in time and expense. If ERISA does not apply, or applies but is not enforceable, then the 1974 Plan Claim must fail. Concerns about

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[80] *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 1-3.

[81] *Hryniak v Mauldin*, 2014 SCC 7, BOA Tab 8 at para 32.

[82] *Burg Properties Ltd v Economical Mutual Insurance Co*, 2013 BCSC 209, BOA Tab 4 at para 27. This case addresses summary trial procedures under Rule 9-7, and the Walter Canada Group has drawn upon these principles in proposing a summary hearing approach.

time and expense are particularly pronounced in a CCAA proceeding. Any delay may impede the efficient resolution of this insolvent estate. If this matter can be disposed of more expeditiously, it should be.

132. The threshold issues proposed by Walter Canada Group are suitable for determination in a summary hearing. There are sufficient admitted and agreed upon facts and sufficient evidence on the question of foreign law for this Court to decide the three questions before it.

133. It is settled law that the court will grant judgment on a summary proceeding if the necessary facts are adduced and it is not unjust to do so.[83] A conflict of evidence will not entitle the parties to a full trial.[84] The onus is on the application respondents, in this case the 1974 Plan, to demonstrate that a matter is unsuitable for summary determination. Arguing that "with the aid of the discovery processes something might turn up" is insufficient to discharge this onus.[85]

134. All of the facts necessary to answer the choice of law question are admitted. The characterization of the claim is based on the claim itself as pleaded. As BC courts have emphasized, "[t]he context of the claim should not be confused with the essence of the claim."[86] The choice of law rule that characterization necessitates in this case is applied by determining Walter Canada Group's place of incorporation, which is agreed.[87]

135. All the facts relied upon to determine whether ERISA applies extraterritorially are before this Court. Both parties have filed expert reports providing this Court with a sufficient evidentiary foundation to make findings of fact about applicable U.S. law. None of the three experts indicated that further facts were required to complete that exercise. In particular, Ms. Mazo relied upon only 35 facts in drafting her report on the application of US law.[88] Fact i describes the claim; fact xviii describes the structure of Walter Canada Group; and facts xv and xvi paraphrase contents from the SUF. The remaining 31 facts are direct quotes from the SUF.

136. Finally, this Court has all the evidence required to determine whether ERISA is unenforceable against Walter Canada Group because it conflicts with public policy. The 1974 Plan Claim arises within Walter Canada Group's CCAA proceedings. Accordingly, the public policy implications of this matter must be assessed with reference to the objectives of the legislation under which the 1974 Plan brings its claim: the CCAA. The other "fact" relates to ERISA itself, which is fully described in the expert reports. As public

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83 *Rogers v Tourism British Columbia*, 2010 BCSC 1562, BOA Tab 14 at para 59.

84 *Tassone v Cardinal*, 2014 BCCA 149 [*Tassone*], BOA Tab 17 at para 39.

85 *Tassone*, BOA Tab 17 at para 38.

86 *Tezcan v Tezcan* (1990), 44 BCLR (2d) 343 (SC), BOA Tab 19 at para 24, aff'd (1992), 62 BCLR (2d) 344 (CA).

87 SUF, BOE, vol 1, Tab 1 at paras 19, 44-45, 47, 52-53, and 55-56.

88 Mazo Report at Appendix B.

policy should not be rooted in the minutiae of a particular case, this Court has what it needs to assess the public policy implications of enforcing ERISA against Walter Canada Group.

A Summary Hearing Is Just

137. In BC, when assessing summary trials, the Court considers: the complexity of the matter; any urgency and prejudice likely to arise by reason of delay; the cost of taking the case forward to a conventional trial in relation to the amount involved; the course of the proceedings; whether credibility is a critical factor in the determination of the dispute; whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and whether the application would result in litigation in slices. In the circumstances of this case, it is just to resolve the 1974 Plan Claim in a summary hearing.

138. The complexity in this matter is legal, not factual. As a result, credibility (other than potentially that of the experts, who will be cross-examined in court during the summary hearing) is not a live issue. Furthermore, contrary to the assertions of the 1974 Plan, determining these issues in a summary hearing would not be "hypothetical"; if the Court agrees with Walter Canada Group's choice of law, extraterritoriality or public policy analysis, the 1974 Plan's claim will be dismissed. Such a result would not create unnecessary complexity.

139. There is urgency to these proceedings. Walter Canada Group cannot resolve its estate or make distributions to its creditors until the 1974 Plan Claim has been addressed. Unlike the beneficiaries of the 1974 Plan, Walter Canada Group's other stakeholders and former employees will not receive any funds until the distributions are made.

140. The cost and duration of a conventional trial would deplete Walter Canada Group's already-limited estate – to the prejudice of Walter Canada Group's creditors. It is just, suitable and appropriate to determine the three issues before this court in a summary fashion.

141. The concerns about "litigation in slices" and inconsistent decisions do not arise in a CCAA claims process. The same judge is seized with all matters. As a result, even if the Court is not able to resolve the 1974 Plan Claim as Walter Canada submits is appropriate, the Court will be well positioned to narrow the scope of any discoveries that the Court believes are required to resolve the claim.

142. This is a CCAA claims process. The Court has before it sufficient agreed and admitted facts to decide the three questions before it. If the Court decides any one of those questions in favour of Walter Canada Group, the 1974 Plan Claim will be disallowed. This summary hearing is just, speedy, inexpensive, proportional and consistent with the goals of the CCAA.

PART V - ORDER REQUESTED

143. Walter Canada Group respectfully requests an Order from this Court declaring that:

(a) Under the Canadian conflict of laws rules, the 1974 Plan's claim against Walter Canada Group is governed by Canadian substantive law.

(b) In the alternative, if the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), as a matter of US law controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA does not extend extraterritorially.

(c) In the further alternative, if the 1974 Pension Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA) and ERISA applies extraterritorially, that law is unenforceable by Canadian courts because it conflicts with Canadian public policies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of December, 2016.

DLA Piper (Canada) LLP
(Mary I.A. Buttery and H. Lance Williams)
and
Osler, Hoskin & Harcourt LLP
(Marc Wasserman, Mary Paterson
and Patrick Riesterer)

SCHEDULE "A"

LIST OF AUTHORITIES

Canadian and UK Case Law

1 *Air Canada (Re)*, [2004] OJ No 842 (SCJ)

2 *Beals v Saldanha*, 2003 SCC 72

3 *BG Preeco I (Pacific Coast) Ltd v Bon Street Holdings Ltd* (1989), 37 BCLR (2d) 258 (CA)

4 *Burg Properties Ltd v Economical Mutual Insurance Co,* 2013 BCSC 209

5 *Concept Oil Services Ltd v En-Gin Group LLP*, [2013] EWHC 1897 (QBD)

6 *Edgington v Mulek Estate*, 2008 BCCA 505

7 *Finestone v The Queen*, [1953] 2 SCR 107

8 *Hryniak v Mauldin*, 2014 SCC 7

9 *JTI-Macdonald Corp v British Columbia (Attorney General)*, 2000 BCSC 312

10 *Minera Aquiline Argentina SA v IMA Exploration Inc and Inversiones Mineras Argentinas SA*, 2006 BCSC 1102, aff'd 2007 BCCA 319

11 *National Trust Co v Ebro Irrigation and Power Co*, [1954] OR 463 (SC)

12 *Petrelli v Lindell Beach Holiday Resort Ltd*, 2011 BCCA 367

13 *Radke v S(M) (Litigation Guardian of)*, 2005 BCSC 1355

14 *Rogers v Tourism British Columbia*, 2010 BCSC 1562

15 *Salomon v Salomon & Co*, [1897] AC 22 (HL)

16 *Singer Sewing Machine Co of Canada Ltd (Re)*, 2000 ABQB 116

17 *Tassone v Cardinal*, 2014 BCCA 149

18 *Ted Leroy Trucking [Century Services] Ltd (Re)*, 2010 SCC 60

19 *Tezcan v Tezcan* (1990), 44 BCLR (2d) 343 (SC), aff'd (1992), 62 BCLR (2d) 344 (CA)

20 *Wende v Victoria (County) Official Administrator* (1998), 48 BCLR (3d) 219 (SC)

Secondary Sources

21 A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws*, 15th ed (London: Sweet & Maxwell, 2012)

22 Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, (Toronto, On; LexisNexis, 2005) (loose-leaf, 6 ed)

23 Stephen G.A. Pitel and Nicholas S. Rafferty, Conflict of Laws, 2nd ed (Toronto: Irwin Law Inc, 2016)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Canadian Statutes, Regulations & By-Laws

1. *British Columbia Business Corporations Act*, SBC 2002, C-57, s 30:

Capacity and powers of company

30 A company has the capacity and the rights, powers and privileges of an individual of full capacity.

2. *Supreme Court Civil Rules*, BC Reg 168/2009, 1-3.

Object

1-3 (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

(2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

(a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and

(c) the complexity of the proceeding.

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

PETITIONERS

WALTER CANADA GROUP'S SUMMARY HEARING WRITTEN SUBMISSIONS

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Client Matter No. 15375-00001 LZW/sd