

This is the 13th Affidavit of
William E. Aziz in this case and
was made on August 11, 2017



NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

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

AND

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

PETITIONERS

AFFIDAVIT

I, **WILLIAM E. AZIZ**, Chief Restructuring Officer, of the Town of Oakville, in the Province of Ontario,
MAKE OATH AND SAY AS FOLLOWS:

1. I am the President of BlueTree Advisors Inc. ("**BlueTree**") which has been retained to provide my services as Chief Restructuring Officer ("**CRO**") to the Petitioners (the "**New Walter Canada Group**"). As such, I have personal knowledge of the facts hereinafter deposed, except where such facts are stated to be based upon information and belief, and where so stated I do verily believe the same to be true.
2. This Affidavit is made in response and opposition to the joint application brought by the United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**") and the United Steelworkers, Local 1-424 (the "**Steelworkers**" and, with the 1974 Plan, the "**Applicants**") for an Order (a) directing KPMG Inc. in its capacity as the Monitor in these proceedings (the "**Monitor**") to distribute to Claimants who hold Allowed Claims determined as of the date of the Joint Application the amount of such Allowed Claims (the "**Proposed Distribution**"); and (b) directing that certain costs payable by the 1974 Plan to the Steelworkers should be paid by the estate and fixed in the amount of \$75,000 (the "**Costs Order**").

3. I was initially retained by Walter Energy Canada Holdings, Inc. ("**Walter Energy Canada**") to provide my services as CRO to Walter Energy Canada, its direct and indirect subsidiaries and affiliates, and the partnerships listed on Schedule "C" to the Order of this Honourable Court made on December 7, 2015 (the "**Initial Order**") (collectively, the "**Old Walter Canada Group**"). I was retained pursuant to an engagement letter dated December 30, 2015, as amended in response to certain requests made by Old Walter Canada Group stakeholders. BlueTree was appointed as CRO of the Old Walter Canada Group pursuant to the Order of this Honourable Court made on January 5, 2016 (the "**SISP Order**").
4. My engagement as CRO of the Old Walter Canada Group, other than as CRO of Cambrian Energy Build Holdings ULC ("**Cambrian**"), was terminated on December 15, 2016, when the entities comprising that group filed for bankruptcy.
5. The companies comprising the New Walter Canada Group (other than Cambrian) were incorporated on December 8, 2016, pursuant to the authorization granted in paragraph 5 of the Order of this Honourable Court made on December 7, 2016 (the "**CCA Procedure Order**"). Each such company became a Petitioner in these CCAA proceedings and subject to the CCAA Charges (as defined in the CCAA Procedure Order), and I became CRO of each new company in the New Walter Canada Group when the companies were formed.
6. Where I use capitalized terms in this Affidavit, but do not define them, I intend them to bear their meanings as defined in the Order of this Honourable Court made on August 16, 2016 (as amended, the "**Claims Process Order**").
7. The information in this Affidavit is arranged under the following headings:
 - I. **Background**.....2
 - II. **The Claims Process**3
 - III. **The Proposed Distribution**4
 - IV. **Costs Payable by the 1974 Plan**.....5
- I. **BACKGROUND**
8. The Old and the New Walter Canada Group have taken many steps since the commencement of these CCAA proceedings to maximize recoveries for their stakeholders and determine the universe of Claims with the objective of making a distribution to creditors with Allowed Claims. In particular,

they applied for and obtained the Claims Process Order, which established a Claims Process, a Claims Bar Date and a Restructuring Claims Bar Date, and addressed related matters.

9. The New Walter Canada Group has been proceeding in good faith and with due diligence in these proceedings, including in respect of the Claims Process. This Honourable Court has recognized that fact when extending the stay of proceedings granted in the Initial Order on numerous occasions.
10. The 1974 Plan has been asserting a Claim that exceeds \$1 billion throughout these CCAA proceedings. In an Order made on May 1, 2017 (the "**May 1 Order**"), this Honourable Court granted a declaration that, under Canadian conflict of laws rules, the 1974 Plan's Claim as against the New Walter Canada Group and the entities listed in Schedule "A" to the May 1 Order is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*). As a result, the 1974 Plan's Claim is not a valid Claim. The 1974 Plan sought leave to appeal that determination to the British Columbia Court of Appeal. It also sought an order that proceedings on the May 1 Order be stayed pending the hearing of the appeal.
11. Leave to appeal was granted on June 9, 2017, and the Court of Appeal also granted an order that proceedings on the May 1 Order be stayed pending the hearing of the appeal.

II. THE CLAIMS PROCESS

12. As of May 24, 2017, Claims in the amount of approximately \$13.4 million have been determined to be Allowed Claims.
13. Furthermore, there are a number of Claims that have not been finally adjudicated in accordance with the Claims Process yet. The Tenth Report of the Monitor, dated May 24, 2017 (the "**Tenth Report**") states that there were seven unresolved Claims that are still being adjudicated, including the 1974 Plan's claim, summarized in the following table:

Summary of Unresolved Claims as of May 24, 2017		
	Claim Type	Amount (CAD \$000)
James, Kevin	Restructuring	6,747
USW	Employee	293
USW	Pre-Commencement	12
Warrior Met Coal LLC	Pre-Commencement	9,892
Mitsui Matsushima Co. Ltd.	Restructuring	810

Summary of Unresolved Claims as of May 24, 2017

	Claim Type	Amount (CAD \$000)
Pelly Construction Ltd.	Pre-Commencement	1,323
1974 Pension Plan Claim	UMWA 1974 Pension Plan	1,220,896
Total Unresolved Claims		1,239,973

14. As of May 24, 2017, the total amount of Allowed Claims and disputed or unresolved Claims (excluding the 1974 Plan's Claim) was approximately \$32.5 million. That amount has been reduced to approximately \$32.0 million as the result of adjustments to 2 disputed Claims.
15. The New Walter Canada Group and the Monitor are aware of further claims that may be filed that might qualify as Restructuring Claims (as defined in the Claims Process Order). The New Walter Canada Group and the Monitor have been soliciting Restructuring Claims at the appropriate times pursuant to the Claims Process Order. However, given the size of the 1974 Plan's Claim, the New Walter Canada Group and the Monitor determined that it was prudent not to use estate resources to resolve disputed claims or call for new claims until the 1974 Plan's Claim was finally determined. As a result the New Walter Canada Group has not conclusively determined the potential universe of all Claims that may exist.

III. THE PROPOSED DISTRIBUTION

16. On July 24, 2017, the 1974 Plan advised the New Walter Canada Group and the Monitor by email that it had reached an agreement with the Steelworkers whereby the 1974 Plan would subordinate its Claim in favour of all current Allowed Claims, regardless of the outcome of the 1974 Plan's appeal. The 1974 Plan then took steps to schedule the hearing of the joint application.
17. The New Walter Canada Group and the Monitor engaged in discussions with the 1974 Plan following the July 24 email, and advised the 1974 Plan of certain issues with an immediate distribution of funds to Claimants with Allowed Claims. For example, the Notice of Application does not properly address the Unresolved Claims or the unknown claims. The joint application filed by the 1974 Plan does not address these issues.
18. The New Walter Canada Group would support the 1974 Plan's decision to subordinate its claim to any Allowed Claim, whether such Claims have already been allowed or are allowed in the future, regardless of the outcome of the appeal. The New Walter Canada Group wants to make a distribution to its creditors as soon as possible but are constrained to ensure that the process

leading to that distribution is fair to all stakeholders. The process proposed in the Notice of Application may not be fair to claimants with unresolved or currently uncalled-for Claims.

19. Although the 1974 Plan has agreed to subordinate its claim in favour of current Allowed Claims, it is not clear that the subordination extends to and benefits any disputed Claims in the event they are eventually determined to be Allowed Claims.
20. Moreover, it is necessary to identify Restructuring and Directors/Officers Claims (as defined in the Claims Process Order), and to quantify them and any unresolved Claims before making a distribution. Distribution before quantification risks some creditors being paid in full leaving too little in the estate to pay remaining creditors in full. Therefore, the Proposed Distribution potentially gives an undue benefit to the Steelworkers and other claimants who would be paid in full at the expense of Claims that are later determined to be Allowed Claims.
21. Furthermore, before a distribution can be made, the New Walter Canada Group must retain sufficient funds to pay professional fees and other costs necessary for the effective administration of these CCAA proceedings, including further litigation with the 1974 Plan.
22. After learning that the 1974 Plan has expressed an interest in subordinating its Claim to the Allowed Claims as of the date of the Notice of Application, the New Walter Canada Group and the Monitor have developed an updated claims process that will permit the determination of all Claims to allow the New Walter Canada Group and the Monitor to develop a plan of distribution that would treat all stakeholders fairly.
23. By changing its position and agreeing to subordinate its claim to at least some other claims, the 1974 Plan has changed the dynamic in this matter such that it is now appropriate to use the estate's resources to call for the remaining unknown claims. The Petitioners and Monitor can now move forward towards a distribution. However, the Proposed Distribution is premature and is inconsistent with the requirement of the CCAA that stakeholders be treated fairly.

IV. COSTS PAYABLE BY THE 1974 PLAN

24. This Honourable Court awarded costs to the Steelworkers and the New Walter Canada Group payable by the 1974 Plan on two occasions:
 - (a) **Preliminary Application:** On December 2, 2016, this Honourable Court delivered oral reasons dismissing the 1974 Plan's application to conduct discovery and to strike the expert report of Marc Abrams. The Court awarded costs to both the Steelworkers and the New Walter Canada Group payable by the 1974 Plan. The 1974 Plan did not appeal these costs awards. The 1974 Plan has not paid these costs.

(b) **Summary Trial Application:** On May 1, 2017, this Honourable Court awarded costs to both the Steelworkers and the New Walter Canada Group payable by the 1974 Plan. The 1974 Plan applied to vary the costs award, including having the Steelworkers' costs paid by the estate. However, that application was adjourned pending the 1974 Plan's appeal from the substance of the May 1 Order.

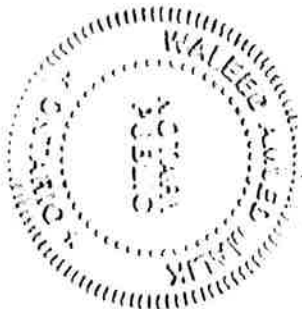
25. The 1974 Plan filed a Notice of Application dated May 30, 2017, seeking to vary the May 1 Order to require the parties to bear their own costs or have costs to be paid by the estate, but that application has not yet been heard. The New Walter Canada Group responded to the May 30 Application, opposing payment of costs by the estate. Copies of the May 30 Notice of Application and the New Walter Canada Group's response are attached hereto as Exhibits "A" and "B" respectively.

26. The 1974 Plan has also been ordered to pay costs to the New Walter Canada Group for the Preliminary Application and the Summary Trial Application. In addition, the 1974 Plan agreed to pay the expenses incurred by the New Walter Canada Group for having Judge Allan L. Gropper attend for a potential cross-examination. The 1974 Plan has not appealed from the Preliminary Application costs order or from the expenses for the attendance of Judge Allan L. Gropper for cross-examination. The New Walter Canada Group and the 1974 Plan have not agreed on the amount of these costs, and 1974 Plan has not paid any of the costs it owes to the New Walter Canada Group.

SWORN BEFORE ME at the Town
of Oakville, in the Province of
Ontario, on August 11, 2017.

Waleed Malik
Commissioner for Taking Affidavits
and Notary Public in the Province of
Ontario

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William E. Aziz
WILLIAM E. AZIZ

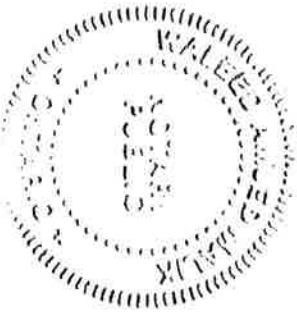


TAB A

This is Exhibit "A" referred to in Affidavit #13 of William E. Aziz sworn August 11, 2017 at the Town of Oakville, in the Province of Ontario.

Waleed Malik

Commissioner for Taking Affidavits and
Notary Public in the Province of Ontario





Supreme Court File No. S1510120
Supreme Court Registry Vancouver

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 NEW
WALTER ENERGY CANADA HOLDINGS, INC. NEW WALTER CANADIAN COAL
CORP., NEW BRULE COAL CORP., NEW WILLOW CREEK COAL CORP., NEW
WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS

NOTICE OF APPLICATION

Name of applicant: United Mine Workers of America 1974 Pension Plan and Trust
(the "1974 Plan")

To the respondent: Walter Canada Group

And to its solicitor: Marc Wasserman, Mary Paterson and
Patrick Riesterer
Osler, Hoskin & Harcourt LLP

To the respondent: The Monitor
KPMG Inc.
Anthony Tillman, Jordan Sleeth, and
Mike Schwartzenruber

And to its solicitor: Wael Rostom, Peter Reardon, and Caitlin
Fell
McMillan LLP

To the respondent: United Steelworkers, Local 1-424

And to its solicitor: Craig Bavis
Victory Square Law Office

To the service list:

See attached Schedule "A"

TAKE NOTICE that an application will be made by the 1974 Plan to the Honourable Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia on a date and time to be determined by the court or a registrar for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order that the parties bear their own costs of the application heard on January 9-13, 16, 18-20, 2017 (the "Summary Hearing");
2. In the alternative, an order that costs are to be paid from the estate;
3. In the further alternative, an order that the United Steelworkers, Local 1-424 are entitled to costs at Scale A.

Part 2: FACTUAL BASIS

The Judgment

4. On May 1, 2017, the Honourable Madam Justice Fitzpatrick released her reasons for judgment regarding the claim of the 1974 Plan (the "1974 Plan Claim") against the Petitioners.

***Walter Energy Canada Holdings Inc.
(Re), 2017 BCSC 709 ["Reasons for
Judgment"].***

5. The Court granted the application of the Petitioners and declared that under Canadian conflict of laws rules, the 1974 Plan Claim is governed by Canadian substantive law and not U.S. substantive law.
6. In the Reasons for Judgment, Fitzpatrick J. awarded costs against the 1974 Plan to both the Petitioners and the Steelworkers at the usual scale. She allowed any party to file an application to seek a different order of costs if such party was so inclined, failing which the costs award would stand.

History of the Proceedings

7. The Petitioners commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA], in December 2015.

***Walter Energy Canada Holdings Inc.
(Re), (7 December 2015), Vancouver (S-1510120) ["Initial Order"].***

The Claims Process

8. A claims process was implemented in August 2016.

***Walter Energy Canada Holdings Inc.
(Re), (16 August 2016), Vancouver (S-1510120) (B.C.S.C.) ["Claims Process Order"].***

9. The Claims Process Order authorized the 1974 Plan to file a notice of civil claim under which its claim would be adjudicated by the Court.

Claims Process Order at para. 32

10. Pursuant to the Claims Process Order, pleadings and other materials were exchanged between the 1974 Plan, the Petitioners, and the Steelworkers over August and September of 2016. An amended notice of civil claim and amended responses to civil claim were similarly exchanged in November 2016.
11. The notice of application on which the Summary Hearing was heard was filed by the Petitioners on November 16, 2016 (the "Summary Hearing Application").
12. Materials addressing the Summary Hearing Application were exchanged in November and December 2016, culminating in the Summary Hearing.
13. Simultaneous to the proceedings between the Petitioners, the Steelworkers, and the 1974 Plan, the Monitor conducted the claims process as otherwise set out in the Claims Process Order.

14. To date, the total allowed claims are \$13.4 million. The remaining unresolved claims, excluding the 1974 Plan Claim, amount to approximately \$19.1 million.

**Tenth Report of the Monitor, KPMG Inc.,
filed May 24, 2017, at paras. 29 and 32
[“Monitor’s Tenth Report”]**

The Sales Process

15. A sales process was also implemented in August 2016.

***Walter Energy Canada Holdings Inc.
(Re), (16 August 2016), Vancouver (S-
1510120) (BCSC) [“Approval and Vesting
Order”]***

16. The Petitioners generated approximately \$83 million through the sales process.

**Eighth Report of the Monitor, KPMG Inc.,
filed January 13, 2017, at para. 48**

17. Two significant assets – the Belcourt Interest (as defined in the Monitor’s Tenth Report) and the Petitioners’ interest in the U.K. entities – have yet to be realized upon.

Monitor’s Tenth Report

18. Without the sale of the remaining assets, the Petitioners are projected to have approximately \$61 million in cash at the end of the current stay period of September 30, 2017. This projection reflects the payment of the fees of counsel to the Petitioners on a solicitor and client scale.

**Monitor’s Tenth Report at para. 54 and
Schedule “B”**

Part 3: LEGAL BASIS

Parties to Bear Their Own Costs

19. Costs in insolvency proceedings under the CCAA are "sparingly asked for and even more sparingly given".

***Air Canada (Re) (2004), 47 C.B.R. (4th)
177 at para. 9 per Farley J.***

20. The usual rule in CCAA proceedings is that parties bear their own costs.

***Semcanada Crude Co. (Re), 2013 ABQB
102 at para. 5 per Romaine J.***

21. Consistent with this practice, neither the pleadings nor the written or oral submissions of the Petitioners or the Steelworkers sought costs.

22. Where ordered in the context of the adjudication of a claim, costs have been ordered to recognize misconduct on the part of the unsuccessful party or their disregard for the procedure outlined by the CCAA. Where so ordered, costs have further been set at a fixed amount well-below the usual scale.

23. In ***Air Canada (Re)***, Mr. Justice Farley ordered costs against the plaintiffs in a proposed class proceeding who re-sought without merit a lifting of the stay. The application was refused as there was no change in circumstances since the previous application. Mr. Justice Farley determined the issue was *res judicata*, or otherwise an abuse of process as a collateral attack on the previous decision.

Air Canada (Re) at para. 2

24. The successful parties were each awarded \$1,000. This order followed despite the fact that those parties requested costs of \$10,000 each, which amount was itself "nowhere near" the actual costs of the application.

Air Canada (Re) at para. 9

25. In ***Semcanada Crude Co (Re)***, Madam Justice Romaine awarded costs to the successful party in an application to strike an action filed after the expiry of the period set by the claims process order. The unsuccessful party was served with the plan of arrangement and the plan sanction order and was a sophisticated litigant represented by counsel, but nonetheless filed a statement of claim without leave of the Court. It was on this basis that "the usual practice with respect to

costs in insolvency matters" – that parties bear their own costs – was found not to apply.

***Semcanada Crude Co. (Re)* at para. 5**

26. In these proceedings, the 1974 Plan brought its claim in good faith and in accordance with the process set by the Court in the Claims Process Order.
27. The 1974 Plan Claim was further brought forward for determination given the substantial importance to U.S. pensioners, as well as to both Canadian subsidiaries of U.S. entities and their stakeholders. The issues raised involved matters of first impression in Canada. These considerations traditionally justify the court making no award of costs to either party.

***Brown v. Durham Regional Police Force* (1998), 116 O.A.C. 126 at paras. 81-83**

***Canada 3000 Inc. (Re)* (2004), 186 O.A.C. 116, 3 C.B.R. (5th) 288 at paras. 9-10**

28. As the 1974 Plan abided by the Claims Process Order and the procedures of the CCAA to determine the 1974 Plan Claim, the Court should not order costs against it.

Costs to be Paid from the Estate

29. If the Petitioners and the Steelworkers receive costs, those costs are more properly paid from the sale proceeds of the estate in the CCAA proceedings.
30. As addressed above, the nature of 1974 Plan Claim is an issue of first impression. That fact, as well as the fact of it being brought in CCAA proceedings, militates against awarding costs against the 1974 Plan.

31. However, to the extent the Petitioners and the Steelworkers are to be indemnified for having preserved value in the estate, they should be entitled to look to the estate to satisfy their costs. Such a procedure is particularly appropriate where, as here, there is a surplus of proceeds even after the deduction of both the proven and remaining uncontested claims.

Monitor's Tenth Report

Reduction of Costs to the Steelworkers

32. A creditor who would be affected by the claim of another potential creditor may be granted standing to participate in the motion addressing the validity of the potential creditor's claim. If the claim is denied the affected creditor may be awarded costs. However, those costs will be reduced to recognize the fact of the duplication of efforts between the debtor or Monitor and the creditor to whom standing was granted.

***Return on Innovation Capital Ltd. v.
Gandi Innovations Ltd., 2011 ONSC 7465
at paras. 16-17 per Newbould J.***

33. The Steelworkers consented to every order sought by the Petitioners. Their materials were filed or provided after those of the Petitioners and they agreed with the Petitioners on every point at issue at the Summary Hearing. The content of their materials was almost entirely duplicative of that of the Petitioners. The Court recognized this final point in the Reasons for Judgment, stating:

While I have referred to the arguments below as that of the Walter Canada Group, I have considered the similar arguments advanced by the Union even if they are not specifically referenced as such.

Reasons for Judgment at para. 13

34. Accordingly, if an award of costs is to be made at all as against the 1974 Plan, the costs awarded to the Steelworkers ought to be awarded at Scale A in recognition of the duplication of efforts between them and the Petitioners.

Part 4: MATERIAL TO BE RELIED ON

35. The pleadings and materials filed herein.

The applicant estimates that the application will take 2 hours.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

The Honourable Madam Justice Fitzpatrick is seized of these proceedings.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days of service of this Notice of Application,

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed Application Response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) If this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 30/05/2017



 Signature of lawyer for filing party
 for Craig P. Dennis, Q.C.

To be completed by the court only:	
Order made	
<input type="checkbox"/>	in the terms requested in paragraphs _____ of Part 1 of this Notice of Application
<input type="checkbox"/>	with the following variations and additional terms:
<hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> <hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> <hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/>	
Date:	<hr style="border: 0; border-top: 1px solid black;"/>
Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master	

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

SCHEDULE "A"

SERVICE LIST

<p>Osler, Hoskin & Harcourt LLP Box 50, 1 First Canadian Place Toronto, Ontario, Canada M5X 1B8</p> <p>Marc Wasserman <u>Email: mwasserman@osler.com</u> Tel: 416-862-4908</p> <p>Mary Paterson <u>Email: mpaterson@osler.com</u> Tel: (416) 862-4924</p> <p>Emmanuel Pressman <u>Email: epressman@osler.com</u></p> <p>Patrick Riesterer <u>Email: priesterer@osler.com</u></p>	<p>Counsel for the Petitioners</p>
<p>Longview Communications Inc. Suite 612 – 25 York Street Toronto, ON Canada M5J 2V5</p> <p>Joel Shaffer <u>Email: ishaffer@longviewcomms.ca</u></p> <p>Suite 2028 – 1055 West Georgia Vancouver, BC Canada V6E 3P3</p> <p>Alan Bayless <u>Email: abayless@longviewcomms.ca</u></p> <p>Robin Fraser <u>Email: rfraser@longviewcomms.ca</u></p>	<p>Communications Advisor to the Petitioners</p>
<p>KPMG Inc. 333 Bay Street, Suite 4600 Toronto, ON M5H 2S5</p> <p>Philip J. Reynolds <u>Email: pjreynolds@kpmg.ca</u></p> <p>Jorden Sleeth <u>Email: jsleeth@kpmg.ca</u></p> <p>KPMG Inc.</p>	<p>Monitor</p>

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<p>Email: ctobler@paulweiss.com</p> <p>Daniel Youngblut Email: dyoungblut@paulweiss.com</p> <p>Michael Rudnick Email: mrudnick@paulweiss.com</p>	
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<p>Stikeman Elliott LLP 199 Bay Street, Suite 4900 Toronto, Ontario M5L 1B9</p> <p>Tel: 416-869-6820 Fax: 416-947-9477</p> <p>Kathryn Esaw Email: kesaw@stikeman.com</p>	<p>Canadian Counsel to Morgan Stanley Senior Funding, Inc., as Administrative Agent and Collateral Agent under the First Lien Credit Facility</p>
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<p>James Savin Email: jsavin@akingump.com</p>	
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TAB B

This is Exhibit "B" referred to in Affidavit #13 of William E. Aziz sworn August 11, 2017 at the Town of Oakville, in the Province of Ontario.

Waleed Malik

Commissioner for Taking Affidavits and
Notary Public in the Province of Ontario





NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE REGISTRY OF THE COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c. C-36, AS AMENDED

AND

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

AND

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

PETITIONERS

APPLICATION RESPONSE

Application response of: The Petitioners.

THIS IS A RESPONSE TO the Notice of Application of the United Mine Workers of America 1974 Pension Plan and Trust ("1974 Plan") filed the 30th day of May, 2017 (the "Notice of Application").

Part 1. ORDER CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: none.

Part 2. ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: all.

Part 3. ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the order set out in Part 1 of the Notice of Application on the following terms: none.

Part 4. FACTUAL BASIS

1. This Application Response is delivered in response to Notice of Application filed by the 1974 Plan with respect to this Honourable Court's May 1, 2017 decision, 2017 BCSC 709 (the "Decision").

2. In Decision, this Court awarded costs against the 1974 Plan in favour of both the Walter Canada Group and the United Steelworkers. (Decision, para. 183).
3. The costs award set out in the Decision was entirely appropriate in the circumstances.

Part 5. LEGAL BASIS

1. Under the *Companies' Creditors Arrangement Act*, the Court has the power to "make any order it considers appropriate" (*Companies' Creditors Arrangement Act* ("CCAA"), s. 11). Courts have found that section 11 may include a costs award. See in 9007-7876 *Québec inc. (Steinberg inc.) (Arrangement relatif à)*, 2012 QCCS 4787, ("*Steinberg*") at paras. 8-9.
2. The costs award in the Decision was not extraordinary relief. Rather, the Decision simply gave effect to the powerful general presumption mandated in the BC Supreme Court Civil Rules and endorsed by the BC Court of Appeal that a successful party is presumptively entitled to costs.
3. Rule 14-1(9) of the BC Supreme Court Civil Rules states: "[s]ubject to subrule (12), costs of a proceeding must be awarded to the successful party unless this court orders otherwise."
4. Rule 14-1(12) is not applicable in the circumstance, but it provides: "Unless the court hearing an application otherwise orders, (a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition."
5. The BC Court of Appeal has recognized that "The general rule of costs stipulates that absent special considerations, a successful litigant has a reasonable expectation of obtaining an order for the payment of his costs" (*Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, at para. 26).
6. Although costs are not often awarded in CCAA proceedings, there is no rule that costs are not to be awarded. The Ontario Superior Court of Justice (Commercial List) has noted that costs awards in CCAA proceedings are not usual, but stated that it is incorrect to state that they are rarely made. See *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465 ("*Return on Innovation*"), at para. 7.
7. In *Return on Innovation*, the court awarded costs against an indemnity claimant in favour of a Monitor acting with enhanced powers and in favour of another significant creditor. This case was cited by the 1974 Plan in its Notice of Application.
8. Costs have been awarded in a number of other recent decisions made in CCAA proceedings, including by the Alberta Court of the Queen's Bench in *Re Calpine Canada Energy Ltd.*, 2008 ABQB 537, by the Quebec Superior Court in *Steinberg*, and by the BC Supreme Court in *League Assets Corp. (Re)*, 2015 BCSC 619.

9. In fact, the 1974 Plan has sought costs in its own favour in one of its earlier applications in these CCAA proceedings. In its notice of application dated November 24, 2016, the 1974 Plan unsuccessfully sought to have the expert report of Mr. Marc Abrams struck and also sought to require the Petitioners to engage in extensive documentary discovery. This was not the first time the 1974 Plan had sought such discovery and been denied. Nevertheless, the 1974 Plan asked for costs on that application. The 1974 Plan was unsuccessful on all fronts, and party-and-party costs were instead awarded to the Petitioners and the United Steelworkers. See *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 2470, at para. 52.
10. In the hearing on the validity of the 1974 Plan's claim, the 1974 Plan again sought discovery and devoted a significant portion of its lengthy written submissions to its further request for discovery. The discovery issue was also addressed in oral argument.
11. In the Decision, the court found for the third time that discovery was not necessary to provide the parties and the Court with sufficient evidence to advance the litigation. (The previous two decisions were made on October 26, 2016 and December 2, 2016 – see Decision, at para. 9).
12. In deciding for the third time that discovery was not necessary, the Court found that the 1974 Plan had “shown absolutely no willingness to consider and cooperate in the development of a streamlined process which would have allowed the Walter Canada Group to put what I consider uncontroversial facts before the court.” (Decision, at para. 33).
13. The court found that the Plan had refused to acknowledge its own facts and documents (Decision, at para. 32).
14. Further, the court found that “The 1974 Plan has raised virtually every possible objection toward blocking a summary or even hybrid hearing on these preliminary issues, presumably toward the end game of avoiding this hearing and engaging in an extensive and expensive fullscale litigation process with corresponding discovery.” (Decision, at para. 34)
15. These tactics unnecessarily relitigated issues that had already been decided. As the Quebec Superior Court has suggested, “Perhaps the time has come to hold sophisticated litigants to account for the damage or suffering they cause by the aggressive or even abusive exercise of their perceived rights” (*Steinberg*, at para. 15).
16. In *Steinberg*, the Court did not suggest that the creditor (the Government of Canada) had in any way abused its perceived rights, but found that it had adopted an aggressive and even proprietary interest in the proceeds of certain litigation where those proceeds belonged to the unsecured creditors of the debtor. As a result, the Court ordered costs against the Government of Canada.
17. Similarly, while the Petitioners do not suggest that the 1974 Plan abused their rights, the 1974 Plan certainly adopted a strategy that resulted in additional costs being incurred by the Petitioners and the United Steelworkers. These additional costs represent an unnecessary burden on the former employees of the Petitioners represented by the United Steelworkers Local 1-424. As noted above, courts in CCAA proceedings have awarded

costs to significant creditors where it found that costs were appropriate. See, e.g., *Return on Innovation*, at para. 17.

18. The courts have found that costs are appropriate where claimants are sophisticated (*Return on Innovation*, at para. 12) or where the litigation complex (*SemCanada Crude Company, (Re)*, 2013 ABQB 102, at para. 7). Further, the Petitioners were entirely successful on the application, unlike the situation in *Canada 3000 Inc.*, cited by the 1974 Plan, where additional costs were incurred addressing the winning party's unsuccessful arguments (See *Canada 3000 Inc. (2004)*, 186 O.A.C. 116, at para. 11).
19. Costs at the usual scale are not sufficient to cover the actual costs of the action, but can assist in defraying some of the additional expenses that were incurred by the Petitioners and the United Steelworkers. It is not appropriate to ask the estate to bear these costs, since such an order would impose the costs of the litigation on the other creditors who are entitled to payment of their claims.
20. In these circumstances, an award of costs is entirely appropriate and the Petitioners also seek costs on this application.
21. The Walter Canada Group further relies upon:
 - (a) *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;
 - (b) *Supreme Court Civil Rules*, B.C. Reg. 241/2010, as amended;
 - (c) the inherent and equitable jurisdiction of this Honourable Court; and
 - (d) such further and other grounds as counsel may advise and this Honourable Court may deem just.


Part 6. MATERIAL TO BE RELIED ON

1. The pleadings and materials filed in the CCAA proceedings.
2. Such other and additional material as counsel may advise and the Court may admit.

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

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

Date: 6 /June/2017

Per: 

Signature of lawyer for filing party

Patrick Riesterer
Counsel for the Petitioners

Respondent's address for service is:

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**Attention: Marc Wasserman, Mary
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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*
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WILLOW CREEK COAL CORP., NEW WOLVERINE
COAL CORP. AND CAMBRIAN ENERGYBUILD
HOLDINGS ULC**

PETITIONERS

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