



NO. S-1510120  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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

AND

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 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:** 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 (the "Petitioners").

THIS IS A RESPONSE TO the Joint Notice of Application of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") and the United Steelworkers, Local 1-424 ("Steelworkers", and together with the 1974 Plan, the "Applicants") filed the 4<sup>th</sup> day of August, 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 2 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 2 of the Notice of Application: *Paragraphs 1(a) and 1(b)*.

**Part 3. ORDERS ON WHICH NO POSITION IS TAKEN**

The application respondent takes no position on the granting of the orders 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 by the Petitioners in response to the Notice of Application for an Order (i) directing 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 (ii) 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**”).
2. Reference is made to the facts set out in the Notice of Application, the 13th Affidavit of William E. Aziz (the “**Thirteenth Aziz Affidavit**”), and the Twelfth Report of the Monitor, to be filed.
3. Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Thirteenth Aziz Affidavit, and the orders pronounced and the pleadings filed in these proceedings.

#### **Background**

4. On December 7, 2015, this Honourable Court granted an Initial Order in favour of the Old Walter Canada Group pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”).
5. On August 16, 2016, this Honourable Court granted an Order (the “**Claims Process Order**”) establishing the Claims Process for adjudicating the Claims of creditors in these proceedings and certain related matters.
6. The Petitioners have been proceeding in good faith and with due diligence in these proceedings, including in respect of the Claims Process.
7. The 1974 Plan has been asserting a Claim that exceeds \$1 billion throughout these CCAA proceedings.
8. In an Order made on May 1, 2017 (the “**May 1 Order**”), this Court declared that under Canadian conflicts of laws rules, the 1974 Plan’s claim 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.
9. The 1974 Plan sought leave to appeal the May 1 Order to the British Columbia Court of Appeal and requested that proceedings on the May 1 Order be stayed pending the hearing of the appeal.
10. Leave to appeal was granted on June 9, 2017. The Court of Appeal also granted an order that proceedings on the May 1 Order be stayed pending the hearing of the appeal.

#### **The Claims Process**

11. As of May 24, 2017, Claims in the amount of approximately \$13.4 million have been determined to be Allowed Claims. In addition, a number of Claims have been filed that have

not yet been resolved. The total amount of Allowed Claims and disputed or unresolved Claims (excluding the 1974 Plan's Claim) is approximately \$32 million.

12. The Petitioners 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 Petitioners and the Monitor have been soliciting Restructuring Claims at the appropriate times pursuant to the Claims Process Order. 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 claims until the 1974 Plan's Claim was finally determined. As a result the Petitioners have not conclusively determined the potential universe of all Claims that may exist.
13. Based on the information in the Notice of Application, the 1974 Plan has Committed to subordinate its claim to the Claims allowed as at the date of the Notice of Application. It is unclear whether the 1974 Plan will subordinate its claim to any of the unresolved or disputed claims.
14. In light of this new information, the Petitioners and the Monitor are developing a final claims process that will permit the determination of all Claims to allow the Petitioners and the Monitor to develop a plan of distribution that would treat all stakeholders fairly.

#### **The Proposed Distribution**

15. On July 24, 2017, the 1974 Plan advised the Petitioners and the Monitor by email that it had reached an agreement with the Steelworkers whereby the 1974 Plan would subordinate its claim to all current Allowed Claims, regardless of the outcome of the 1974 Plan's appeal.
16. The Petitioners and the Monitor advised the 1974 Plan of certain issues that precluded an immediate distribution of funds to Claimants with Allowed Claims. For example, the Notice of Application does not properly address the unresolved Claims or any unknown claims.
17. The Notice of Application does not resolve these issues. Rather, it proposes that all current Allowed Claims would be paid in full now, before the determination of the unresolved or unknown Claims. In addition, the 1974 Plan proposes to subordinate its claim in favour of only currently Allowed Claims and not in favour of disputed or unknown Claims.
18. The Petitioners 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 Petitioners want 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. Because the Petitioners have unresolved and unknown claims, the Petitioners do not know if they are in a position to pay all Allowed Claims in full. If the Petitioners were to pay the current Allowed Claims in full, the Petitioners may not have sufficient funds to pay future claims that become Allowed Claims in full. The Proposed Distribution may have the effect of preferring Claimants holding Allowed Claims today to the detriment of Claimants who

are found to hold Allowed Claims in the future. This result would be unfair to stakeholders and contrary to the objectives of the CCAA.

20. If the 1974 Plan wishes to expedite a distribution to any holders of Allowed Claims, the 1974 Plan can buy such Allowed Claims at face value and wait for a distribution from the Petitioners.

#### **Costs Payable by the 1974 Plan**

21. This Honourable Court awarded costs to the Steelworkers payable by the 1974 Plan on two occasions: (a) in oral reasons dismissing a Preliminary Application by the 1974 Plan; and (b) in the May 1 Order deciding that the 1974 Plan's Claim is invalid.
22. The 1974 Plan and the Steelworkers have agreed to fix these costs at \$75,000 (the "Steelworkers' Costs").
23. Presently, the May 1 Order requires the 1974 Plan to pay these costs.
24. The 1974 Plan filed a Notice of Application dated May 30, 2017, seeking to vary the May 1 Order by requiring the parties to bear their own costs or the costs to be paid by the estate, but that application has not yet been heard.
25. As is set out in the Petitioners' response to the May 30 Application, an order requiring the 1974 Plan to pay the Steelworkers' Costs is appropriate in this case.

#### **Part 5. LEGAL BASIS**

##### **The Proposed Distribution is Premature**

1. The Proposed Distribution is inappropriate because the Petitioners have not identified the universe of potential Claims, and paying current Allowed Claims in full may give certain creditors an unfair preference at the expense of other stakeholders.
2. As noted by this Honourable Court when granting the Claims Process Order, it is necessary to determine the true claims of the creditors that might be compromised before making a distribution.

*Re Walter Energy Canada Inc*, 2016 BCSC 1746 at para. 81.

See also *Re Bul River Mineral Corporation*, 2014 BCSC 1732 at para. 36.

3. As noted by Justice Morawetz in *Re Timminco*, determining the claims against a debtor company is an important step for debtors as well as their stakeholders in a CCAA proceeding:

For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

*Re Timminco Ltd*, 2014 ONSC 3393 at paras. 41 and 43.

4. This Court ought to ensure that the adjudication of Claims is carried out in a manner that is fair and reasonable to all stakeholders, including creditors who may have unfiled Claims.

*Re Steels Industrial Products Ltd*, 2012 BCSC 1501 at para. 38.

5. The Petitioners have not yet identified the universe of potential Claims. There also remain a number of unresolved Claims that are being evaluated in accordance with the Claims Process Order. As a result, the Petitioners do not know if they have enough funds to pay all Claims in full.
6. Before any distribution can be made, the Petitioners must ensure that they retain sufficient funds for any Claims that may be determined to be Allowed Claims in the future and for expenses that will be incurred in these CCAA proceedings, including any further litigation with the 1974 Plan.
7. The Proposed Distribution threatens to give the Steelworkers and other Claimants with current Allowed Claims a preference over other stakeholders. The Proposed Distribution would cause current Allowed Claims to be paid in full but may result in other Claimants recovering less if their Claims are determined to be Allowed Claims at a later date. In other words, a distribution today may be to the detriment of the creditors with unresolved or as-yet unfiled Claims.
8. In light of the 1974 Plan's agreement to subordinate to certain Claims, the Petitioners are moving forward with a claims process to identify the universe of potential Claims. Until all Claims are finally determined, it is not appropriate to make the Proposed Distribution. As noted by Justice Deschamps in *Century Services*, when evaluating if a requested order is appropriate, courts should remember that chances for a successful CCAA proceeding "are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit."

*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para. 70.

#### **The Steelworkers' Costs Should be Paid by the 1974 Plan, not the Petitioners' Estate**

9. In the May 1 Order, this Honourable Court ordered the 1974 Plan to pay the Steelworkers' Costs. The 1974 Plan filed a Notice of Application dated May 30, 2017, seeking to vary the May 1 Order by requiring the parties to bear their own costs or the costs to be paid by the estate, but that application has not yet been heard. As this issue is already the subject of the May 30 Notice of Application, it ought not be raised for a second time in the present Notice of Application.

10. Furthermore, the 1974 Plan and the USW are not authorized to decide how the Petitioners' funds will be expended. The proposed Costs Order would remove \$75,000 of value from the Petitioners' stakeholders for the sole benefit of the 1974 Plan.
11. Furthermore, as is set out in the Petitioners' response to the May 30 Application, an order requiring the 1974 Plan to pay the Steelworkers' Costs is appropriate in this case. The Petitioners' incorporate and rely on their responding submissions to the May 30 Application here.
12. In the present application, the Applicants rely on *Re Nortel Networks Corp* (2009), 53 CBR 5th 196 (Ont Sup Ct) ("*Nortel*") as justification for shifting responsibility for the Steelworkers' Costs to the Petitioners' estate. That case has no application on the facts of this case.
13. In *Nortel*, the Court found that it had the authority to order that the expenses incurred by a court-appointed employee representative counsel should be paid from the estate of a debtor company. The Steelworkers are not a court-appointed representative counsel. Therefore, *Nortel* does not provide any support for the Applicants' position.
14. In any event, the question before the Court is not whether the Steelworkers should receive the costs awarded to them. As things stand now, the 1974 Plan is responsible for paying those costs. The *Nortel* decision does not provide any reason for shifting responsibility for these costs from an unsuccessful litigant to the Petitioners.
15. The Petitioners further rely 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.

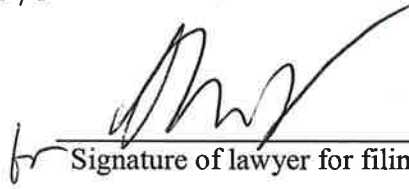
**Part 6. MATERIAL TO BE RELIED ON**

1. The Affidavit of William E. Aziz, sworn August 11, 2017, to be filed.
2. The Monitor's 12th Report, to be filed.
3. The pleadings and materials filed in the CCAA proceedings.
4. 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: 11 /August/2017



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Signature of lawyer for filing party

Mary Paterson  
Counsel for the Petitioners

Respondent's address for service is:

Osler, Hoskin & Harcourt LLP  
1055 West Hastings Street  
Suite 1700, The Guinness Tower  
Vancouver, BC V6E 2E9  
**Attention: Marc Wasserman, Mary  
Paterson and Patrick Riesterer**

Fax number address for service (if any):

416-862-6666

E-mail address for service (if any):

[mwasserman@osler.com](mailto:mwasserman@osler.com)

[mpaterson@osler.com](mailto:mpaterson@osler.com)

[priesterer@osler.com](mailto:priesterer@osler.com)

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**APPLICATION RESPONSE**

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**OSLER HOSKIN & HARCOURT LLP**

Barristers & Solicitors  
1055 West Hastings Street  
Suite 1700, The Guinness Tower  
Vancouver, BC V6E 2E9

Tel. No. 416.862.4924  
Fax No. 416.862.6666

Client Matter No. 1164807