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. 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 IN SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

EXPERT REPORT OF ALLAN L. GROPPER

Expert Report Filed by: Petitioners (the "Walter Canada Group")

A. Introduction

(a) Qualifications

I have been a member of the bar of the State of New York since 1969. From 1972 to 1999, I practiced commercial law in the New York office of the firm of White & Case, becoming a partner in the litigation department in 1978. In the 1980's I began to work extensively on bankruptcy and reorganization proceedings and was appointed head of the firm's Bankruptcy and Reorganization practice group. From 1999-2000 I was located in the firm's Hong Kong office.

In 2000 I was appointed a bankruptcy judge in the Southern District of New York, which encompasses Manhattan and the Bronx. I retired as a judge in January 2015 at the conclusion of my 14-year term. I am currently acting as an arbitrator and mediator and have provided expert testimony in the courts of Canada and England as well as in an arbitration proceeding in the United States.

I am an adjunct professor of law at Fordham Law School in New York City and have taught courses in basic business bankruptcy, Chapter 11 reorganization and international insolvency. I am a member of the National Bankruptcy Conference, the American College of Bankruptcy, and the National Conference of Bankruptcy Judges.

For many years I have had a particular interest in issues relating to cross-border insolvency. In addition to my judicial opinions, I was an editor of a two-volume text on International Insolvency, have written four articles on the subject published in law reviews, and have taught in the cross-border insolvency programs of the American College of Bankruptcy and INSOL International. I am a member of the United States delegation to UNCITRAL Working Group V on Insolvency Law. This is the working group that drafted the Model Law on Cross-Border Insolvency that has been adopted both in Canada and the United States, and it is now working on model laws on the enforcement of insolvency-related judgments and the insolvency of multinational enterprise groups.

During my pre-judicial career I was a member of White & Case's opinion committee and understand the nature and importance of a carefully considered and reasoned legal opinion.

A copy of my curriculum vitae is attached hereto as Exhibit A.

(b) Instructions Provided to Expert in Relation to Proceedings

I have been requested to reply to certain of the conclusions in the Report of Judith F. Mazo, submitted on behalf of the United Mine Workers of American 1974 Pension Plan and Trust (the "UMWA Plan"). Specifically, I have been asked for my opinion on the following question of United States law:[1]

Please review the report of Judith Mazo dated November 24, 2016, and provide such reply as you deem appropriate to the views expressed therein. In doing so, please review the report of Marc Abrams dated November 14, 2016, and advise whether or not you agree with his analysis of the question: If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially?

B. Factual Background

I have reviewed, among other materials, pleadings filed in the 1974 Plan's civil claim against Walter Canada Group arising under ERISA as well as Walter Canada Group's Statement of Uncontested Facts. A list of the materials I have reviewed in connection with this opinion is attached hereto as Exhibit C.

Based on my review of those materials, I adopt the statement of facts set out in the report of Marc Abrams submitted to this Court under the heading "Factual Background".

C. Opinion

Ms. Mazo's conclusion on the issue of controlled group liability is stated in paragraph 65 of her Report: "There is no indication that Congress expected controlled group membership to be cut off at the

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[1] A copy of the instructions I received from Osler is attached hereto as Exhibit B.

borders of the United States." In my view, the Mazo Report has it backwards, and applicable U.S law is precisely the reverse: where there is no indication that Congress intended legislation to apply overseas, it does not. I have reviewed the Abrams Report and agree fully with its reasoning and conclusions.

As the Abrams Report states, quoting the most recent U.S. Supreme Court authority on point, "It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world." *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2100 (2016). "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....When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

The key point is not whether there is language in the statute that would "cut off" controlled group liability "at the borders of the United States." The point is that there is nothing in the statute to support the proposition that Congress intended to extend controlled group liability to foreign entities throughout the world. See also *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("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, 248 (1991)).

The imposition of liability throughout a controlled group was itself a highly unusual result of ERISA pension legislation. It is a fundamental principle of American law – and I believe the law of most other nations – 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. In the event of an insolvency proceeding, U.S. bankruptcy courts have the power to pierce the corporate veil, and they also have the power to substantively consolidate separate entities, a power that many other countries refuse to countenance. But the cases make it clear that the power to ignore entity separateness can be used only "sparingly" and in extreme circumstances. A recent influential opinion reiterated that "respecting entity separateness is a fundamental ground rule", as the "general expectation of State law and of the

Bankruptcy Code, and thus of the commercial markets, is that courts respect entity separateness absent compelling circumstances.... Because substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this rough justice remedy should be rare and, in any event, one of last resort. " *In re Owens Corning Corp.*, 419 F.3d 195, 211 (3d Cir. 2005) (internal citation omitted); see also *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518-19 (2d Cir. 1988).

If the imposition of controlled group liability domestically was unusual, there is no reason to assume that Congress intended to extend that liability beyond the borders of the United States in the absence of a clear, affirmative indication. The Mazo Report does not cite any case in which a U.S. court has imposed withdrawal liability on a foreign affiliate of a U.S. company, or for that matter, where such liability has been imposed in a foreign proceeding.

One reason for the presumption against extraterritoriality is that "it serves to avoid the international discord that can result when U.S. 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.'" *RJR Nabisco*, 136 S.Ct. at 2100. [citations omitted] Both of these considerations are present here. Walter Energy Canada Holdings, Inc. and its Canadian affiliates have their own assets and liabilities, including very substantial liabilities to Canadian employees. They paid their own taxes to Canada, not to the United States. These Canadian entities are subject to their own insolvency proceedings, and there is no indication in the record that they took any part in the settlement negotiated in the United States that resulted in the acceptance of controlled group liability by the U.S. entities. As stated more fully in the Abrams Report, there is nothing in the statute to support the proposition that Congress intended to impose this liability on foreign entities – particularly where the imposition of liability throughout a control group is highly unusual and might result in "international discord" if applied to companies incorporated outside the U.S. "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

The Mazo Report argues that Congress' purpose in adopting the principle of controlled group liability was to deter U.S. employers from shifting assets overseas to escape joint and several pension

liabilities as well as to impose as much liability as possible on as many entities as possible. I have seen nothing in the record to indicate that the purchase of Walter Canada shifted material assets outside of the United States. It appears that the U.S. entities became subject to the 2011 collective bargaining agreement at issue and liable to the joint and several pension liability asserted by the 1974 Plan *after* the acquisition – and that the Canadian entities did not. As to the collection of revenues, the PBGC and U.S. multiemployer plans would of course advocate collecting the maximum amount from as many sources as possible, but that does not mean that Congress, in adopting the underlying statute, not only pierced the corporate veil in a virtually unprecedented manner but also intended to pierce it internationally as well.

In my view, the Mazo Report also fails to take into account the important principle of comity. Both comity and extraterritoriality were considered extensively in the insolvency context in a decision released 9 days ago and a similar, earlier case, which addressed claims by a U.S. bankruptcy trustee to apply U.S. bankruptcy laws to foreign transactions. In connection with the collapse of the massive Ponzi scheme perpetrated by Bernard L. Madoff, several foreign investment funds that had acted as "feeder funds" investing most of their assets with Madoff also went into liquidation in their domestic jurisdictions. The trustee of the Madoff estate in the United States attempted to recover property redeemed from the feeder funds by feeder fund customers, on the theory that all redemptions made by the feeder fund had originated as transfers from Madoff. The trustee relied on §550(a)(2) of the Bankruptcy Code that allows a plaintiff in an avoidance proceeding 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 payment from the fund of money that originated from Madoff).

The U.S. courts have held that the Madoff trustee cannot recover from subsequent transferees for two reasons. *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) First, they have held that application of U.S. avoidance law to a transfer that took place abroad would be an extraterritorial application of provisions of the U.S. Bankruptcy Code that Congress had not demonstrated a clear intent

to apply outside of the United States. Equally, they found that even if the presumption against extraterritoriality were rebutted, the principle of comity among nations required dismissal. Given the indirect relationship between the Madoff trustee and the subsequent transferees, and that 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 U.S. courts have held that "those foreign jurisdictions had a greater interest in the application of their own laws than the United States had in the application of U.S. law."

This grant of comity is particularly interesting in that it demonstrates once again the principle that "Comity may have a strong bearing on whether application of U.S. law should go forward." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984); see also *In re Maxwell Communications Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996), where the Court describes comity as, among other things, "a canon of construction [that] might shorten the reach of a statute".[2] Comity should shorten the reach of controlled group liability, and where foreign insolvency proceedings are pending, the U.S. courts should be particularly willing to apply comity in favor of the foreign proceeding. *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l. Arms, Inc.*, 466 F.3d 88, 92-93 (2d Cir. 2006).

The Mazo Report addresses the question of whether the controlled group liability provisions of ERISA constitute a "penal, revenue or other public law" of the United States. I would expect U.S. courts to defer to Canada on the issue of whether the imposition of controlled group liability internationally would be a penalty or revenue measure or against public policy.[3] The Mazo Report states, without citation of authority, that under U.S. law the imposition of controlled group liability on all members of a corporate group is not considered a penalty or the collection of a tax by the government. She does not, however,

[2] In U.S. law the classic definition of comity is from *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895): "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

[3] In the United States, comity is not granted to a foreign insolvency law or judicial determination that would contravene United States law or public policy. *Overseas Inns v. United States*, 911 F.2d 1146 (5th Cir. 1990).

explain why U.S. law would be relevant. I believe that the only relevant law on this issue would be the applicable law in Canada.

D. Conclusion

You have asked me to review the reports of Judith Mazo and Marc Abrams and reply to the views expressed in the Mazo Report. For the reasons set out above and in the Abrams Report, it is my view that there is no indication that Congress intended the controlled group liability provisions to extend to foreign affiliates of United States entities and thus, as a matter of US law, there is no such application under the presumption against extraterritoriality.

E. Certification

Pursuant to Rule 11-2 of the Supreme Court of British Columbia's Civil Rules, I hereby certify:

(a) I am aware of the duty of expert witnesses referred to in subrule (1) of Rule 11-2 that, in giving an opinion to the court, an expert appointed by one or more parties has a duty to assist the court and not to be an advocate for any party;

(b) I have made this report in conformity with such duty; and

(c) I will, if called on to give oral or written testimony, give such testimony in conformity with such duty.

Allan L. Gropper

EXHIBIT A

ALLAN L. GROPPER
115 CENTRAL PARK WEST
NEW YORK, NEW YORK 10023
917-714-7605

CURRICULUM VITAE

November 2016

Professional Employment

Arbitrator, mediator and expert witness
2015-present

United States Bankruptcy Judge
Southern District of New York
2000-2015

Partner, White & Case LLP
New York, New York
1978-2000

Associate, White & Case LLP
New York, New York
1972-1978

Education

Yale University, B.A., cum laude, 1965

Harvard Law School, J.D., cum laude, 1969

Professional Activities

Member, Roster of Arbitrators, American Arbitration Association

Adjunct Professor of Law, Fordham Law School

Fellow, American College of Bankruptcy

Member, National Bankruptcy Conference

Treasurer, Association of the Bar of the City of New York, 2011-2015, and past member and chair of the Executive Committee; past member, Committee on Bankruptcy Law

Publications

Author, The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases, 9 Brook. J. Corp. Fin. & Com. L. 57 (2015)

Author, The Arbitration of Cross-Border Insolvencies, 86 Amer. Bankr. L. J. 201 (2012)

Author, The Model Law After Five Years: The U.S. Experience with COMI, 2011 Norton Ann. Rev. of Intl. Insolvency 13

Author, The Payment of Priority Claims in Cross-Border Insolvency Cases, 46 Tex. Intl. L. J. 559 (2011)

Author, Comments on the Articles of Professors Baird and Janger, 4 Brook. J. Corp. Fin. & Com. L. 59 (2009)

Contributing author, Bufford, U.S. International Insolvency Law (Oxford Univ. Press 2009)

Author, Current Developments in International Insolvency Law, 15 J. Bankr. L. & Proc. 2 (Apr 2006)

Editor, International Insolvency, with Carl Felsenfeld and Howard Beltzer (2000)

Contributing Editor, Collier on Bankruptcy (to 2015)

Lectures, Continuing Legal Education, Awards

Adjunct Professor, Fordham Law School, teaching courses in Business Bankruptcy, Chapter 11 Reorganizations, and International Insolvency, since 2007

Lecturer, INSOL International Global Insolvency Practice Course, since 2012

Lecturer, Practicing Law Institute, on aspects of Chapter 11 practice, since 2006

Lecturer, American College of Bankruptcy course in international insolvency, since 2010

Frequent lecturer to bar and professional groups and to judges on all aspects of insolvency law and practice, in the United States, Canada and Europe

Recipient, International Insolvency Institute's Outstanding Contributions Award, 2016

Bar Admissions

New York, 1969

U.S. District Courts, Southern and Eastern Districts of New York, 1971, and
U.S. Supreme Court and Circuit Courts, various since 1971

EXHIBIT B

Paterson, Mary

From:	Paterson, Mary
Sent:	Thursday, December 1, 2016 10:23 AM
To:	'Allan Gropper'
Cc:	Patrick Riesterer (PRiesterer@osler.com); Wasserman, Marc; Buttery, Mary; Williams, Lance
Subject:	Walter - Retainer of Judge Gropper as Independent Expert
Attachments:	Supreme Court Civil Rules.pdf

Judge Gropper,

This email is intended to be the "instructions provided to the expert in relation to the proceeding" (see Rule 11-6) and should be included in your report.

I have attached for your review an excerpt of the Supreme Court Civil Rules (BC), which includes the statement, "In giving an opinion to the court, an expert appointed under this Part by one or more of the parties or by the court has a duty to assist the court and is not to be an advocate for any party".

The specific question on which we are asking you to opine is:

> Please review the report of Judith Mazo dated November 24, 2016, and provide such reply as you deem appropriate to the views expressed therein. In doing so, please review the report of Marc Abrams dated November 14, 2016, and advise whether or not you agree with his analysis of the question: If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially.

Thank you,

Mary

OSLER

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Partner

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EXHIBIT C

Index of Materials Reviewed

- Walter Canada Group's Statement of Uncontested Facts
- Amended Notice of Civil Claim (1974 Plan)
- Amended Response to Civil Claim (Walter Canada Group)
- Amended Response to Civil Claim (United Steelworkers)
- Response to Civil Claim (the Monitor)
- Reply to United Steelworkers (1974 Plan)
- Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016
- Reasons for Judgment of Madam Justice Fitzpatrick dated September 23, 2016
- Application Response of the 1974 Plan filed January 4, 2016
- Application Response of the 1974 Plan filed March 29, 2016
- Application Response of the Respondent Steelworkers filed November 24, 2016
- 1st Affidavit of William G. Harvey ("1st Harvey Aff.") dated December 4, 2015
    - List of Canadian Petitioners (Ex. A to the 1st Harvey Aff.)
    - List of U.S. Petitioners (Ex. C to the 1st Harvey Aff.)
- 1st Affidavit of William E. Aziz dated March 22, 2016
    - Monitor's First and Second Certificates related to Bulldozer Transaction
- 1st Affidavit of Miriam Dominguez ("1st Dominguez Aff.") dated January 4, 2016
    - Proof of Claim filed by the 1974 Plan against Walter Resources in the US Bankruptcy Proceedings against Jim Walter Resources, Inc. dated October 8, 2015 (Ex. A. to the 1st Dominguez Aff.)
    - Proof of Claim filed by the 1974 Plan against Walter Energy, Inc. in the US Bankruptcy Proceedings dated October 8, 2015 (Ex. B. to the 1st Dominguez Aff.)
    - US Bankruptcy Court Memorandum of Opinion and Order granting Walter US Debtors' 1113/1114 Motion dated December 28, 2015 (Ex. C. to the 1st Dominguez Aff.)

- 2nd Affidavit of Miriam Dominguez dated March 29, 2016 ("2nd Dominguez Aff.")
    - US Bankruptcy Court Order Approving Global Settlement Among the Debtors, Official Committee of Unsecured Creditors, Steering Committee and Stalking Horse Purchaser Pursuant to Fed. R. Bankr. P. 9019 dated December 22, 2015 (Ex. A. to the 2nd Dominguez Aff.)
    - Order Granting Motion to Alter or Amend Memorandum Opinion and Order dated December 30, 2015 (Ex. B. to the 2nd Dominguez Aff.)
    - Notice of Joint Motion for an Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 17, 2016 (Ex. D. to the 2nd Dominguez Aff.)
    - Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 24, 2016 (Ex. E to the 2nd Dominguez Aff.)
- Order of Mr. Justice McEwan dated March 10, 2011 approving Western Acquisition Plan of Arrangement
- 1st Affidavit of Keith Calder dated February 1, 2011 (without exhibits)
- 2nd Affidavit of Keith Calder dated March 8, 2011 (without exhibits)
- 1st Affidavit of Linda Sherwood ("1st Sherwood Aff.") dated November 7, 2016, exhibiting corporation reports
- 2nd Affidavit of Linda Sherwood ("2nd Sherwood Aff.") dated November 14, 2016, exhibiting selected items filed by Walter Energy with the United States Securities and Exchange Commission (the "SEC") on its publicly-available Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR")
- 4th Affidavit of Miriam Dominguez ("4th Dominguez Aff.") dated November 24, 2016
    - 2016 Annual Report of the Pension Benefit Guaranty Corporation
- 1st Affidavit of Dale Stover ("1st Stover Aff.") unsworn, with exhibits
- Expert Report of Marc Abrams
- Expert Report of Judith F. Mazo