COURT OF APPEAL FILE NO. CA44448

COURT OF APPEAL

ON APPEAL FROM the order of Madame Justice Fitzpatrick of the British Columbia Supreme Court pronounced on the 1st of May, 2017

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 A PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREE COAL CORP., NEW WOLVERINE COAL CORP., AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS (RESPONDENTS).

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

APPELLANT

FACTUM OF THE RESPONDENT, WALTER CANADA GROUP

United Mine Workers of America 1974 Pension Plan and Trust

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OPENING STATEMENT

This is a choice of law case. The 1974 Plan asserts a claim against Walter Canada Group pursuant to the controlled group provisions of ERISA. According to the 1974 Plan, ERISA imposes pension liabilities of US employers on Canadian affiliates by overriding the Canadian legislation that grants attributes and separate legal personalities to entities in the insolvent Walter Canada Group. The chambers judge correctly characterized this claim as one that challenges "the status and separate legal personalities" of Walter Canada Group. Her decision is supported by long-established choice of law principles and recent BC jurisprudence.

The 1974 Plan has not identified any legal errors in the chambers judge's decision. Rather, it repeats arguments based on distinguishable case law that the chambers judge rightly rejected.

Contrary to the 1974 Plan's submissions, the chambers judge correctly followed the choice of law process to characterize the claim and identify the one connecting factor for a claim of that character.

Contrary to the 1974 Plan's submission, the chambers judge did not err by examining how ERISA purports to impose liability on Walter Canada Group. She was required to consider how ERISA functions to determine its closest functional equivalent under Canadian law.

The chambers judge relied on relevant authority, which she carefully analyzed. Her decision is correct and should be upheld.

PART 1 - STATEMENT OF FACTS

1. The order under appeal was granted in the CCAA proceedings of Walter Canada Group. Walter Canada Group consists of seven companies incorporated in BC, one company incorporated in Alberta and four partnerships constituted in BC.

Reasons for Judgment ("RJ") paras 64-65

2. The parent corporation of Walter Canada Group is Walter Energy Inc. ("Walter Energy US"). Walter Energy US was incorporated in Delaware.

RJ para 41

3. Walter Energy US and its subsidiaries operated in two distinct segments: (a) the US operations; and (b) the Canadian and United Kingdom operations.

RJ para 40

A. Walter Resources Enters An Agreement with the 1974 Plan

4. Jim Walter Resources, Inc ("Walter Resources") was a wholly-owned subsidiary corporation of Walter Energy US. Walter Resources was incorporated in Alabama.

RJ para 42

5. Starting in 1978, Walter Resources entered collective bargaining agreements with the 1974 Plan. These gave rise to pension obligations. No other Walter Group entity signed agreements with the 1974 Plan.

RJ paras 57, 60

6. It was agreed and the chambers judge found that no Walter Canada Group entity signed an agreement with the 1974 Plan; no Walter Canada Group employee benefited from the 1974 Plan; and Walter Canada Group never had an obligation to contribute to the 1974 Plan.

RJ para 58

B. Walter Energy US Acquires Walter Canada Group

7. Walter Energy US had no Canadian subsidiaries or operations before 2011. In 2010, Walter Energy US announced its intention to acquire a Canadian coal company and its subsidiaries, which became Walter Canada Group. Walter Energy US widely publicised the acquisition both before and after it was completed.

RJ paras 43, 45, 46

8. In 2011, the BC Supreme Court approved the Plan of Arrangement by which Walter Energy US acquired Walter Canada Group for cash and share consideration. The 1974 Plan did not object.

RJ para 48

9. At the time of the acquisition, the 1974 Plan already faced an underfunded liability of more than US$4 billion.

RJ para 59

C. Walter Energy US Enters Chapter 11 Proceedings

10. In 2015 Walter Energy US and its US subsidiaries entered Chapter 11 bankruptcy proceedings in the US. Six months later, Walter Canada Group entered CCAA proceedings in Canada.

RJ paras 67, 71

11. The 1974 Plan participated in the Chapter 11 proceedings as an unsecured creditor. Walter Canada Group did not participate.

RJ para 74

12. In December 2015, the US bankruptcy court issued an order permitting Walter Resources to terminate its obligations to the 1974 Plan. Walter Resources withdrew from the 1974 Plan in April 2016, potentially generating a "withdrawal liability" owed by Walter Resources to the 1974 Plan. Walter Canada Group is not mentioned in the US bankruptcy court's order.

RJ paras 73, 76, 77

13. In December 2015, the 1974 Plan took part in a negotiated settlement in the Chapter 11 proceedings. This settlement gave the 1974 Plan an equity stake in the purchaser of Walter Energy US's business. Walter Canada Group took no part in the settlement.

RJ paras 74-75

14. As a result of the settlement, the 1974 Plan Claim has never been evaluated by a US court and no judgment on the asserted withdrawal liability has been rendered.

RJ para 82

D. The 1974 Plan Invokes ERISA

15. ERISA is a US pension statute that imposes withdrawal liability on related entities. Under ERISA, all members of a "controlled group" are liable for the withdrawal liability of one member of that group. Walter Energy US owned more than an 80% stake in both Walter Resources and Walter Canada Group. For the purposes of the summary hearing, the parties agreed that Walter Resources and all Walter Canada Group entities are in the same "controlled group" as defined in ERISA.

RJ paras 88, 89, 91, 136

16. Walter Canada Group was not notified of the withdrawal or given an opportunity to contest the amount of the withdrawal liability or given any other rights under the 1974 Plan agreements. Under ERISA, Walter Canada Group has no such rights.

RJ para 120, 121

17. The 1974 Plan asserted Walter Resources' withdrawal liability under ERISA as a claim against Walter Canada Group in Walter Canada Group's CCAA claims process. This appeal arises as a result of the chambers judge's determination of the validity of the 1974 Plan Claim in that CCAA claims process.

RJ para 6

18. The parties agree that if the 1974 Plan Claim is governed by Canadian law, then the 1974 Plan Claim cannot succeed.

RJ paras 12, 13

PART 2 - ISSUES ON APPEAL

19. The chambers judge did not err in concluding that the 1974 Plan Claim against Walter Canada Group is governed by Canadian substantive law.

    a. The chambers judge correctly characterized the 1974 Plan Claim as one concerning corporate and partnership law, and specifically, one "which results in a challenge to the status and separate legal personalities of the entities within the Walter Canada Group."

    RJ para 146

    b. The chambers judge correctly concluded that, as all Walter Canada Group entities are domiciled or organized in Canada, claims concerning their status are properly governed by Canadian law.

PART 3 - ARGUMENT

20. The issue is whether the chambers judge correctly characterized the 1974 Plan Claim. She characterized the claim as one involving the "status and separate legal personalities of the entities within the Walter Canada Group." Choice of law rules dictate that such status claims are governed by the law of a corporation, ULC or partnership's "place of incorporation or organization" — in this case, Canada.

    RJ paras 146, 162

21. The 1974 Plan objects to her characterization, suggesting that its Claim should be characterized as contractual. The chambers judge correctly rejected this argument because no contract or statutory right of action pursuant to a contract exists between the 1974 Plan and Walter Canada Group.

    1974 Plan Factum ("PF") para 36; RJ paras 117–118

22. In the alternative, the 1974 Plan asks this Court to craft a new choice of law rule, asserting that the appropriate connecting factor is the real and substantial connection between a legal system and the "dispute", or "claim", or "question", or "issue", or "obligation", or "obligation under ERISA". The chambers judge correctly

rejected this argument as well. The 1974 Plan's argument "essentially conflated [the steps in the choice of law] process by suggesting that the Court should consider connecting factors (most of which it says have yet to be disclosed through discovery from the Walter Canada Group) in the characterization exercise in the first step."

PF paras 32, 36, 37, 43, 94; RJ para 164

23. As is set out below, the chambers judge's decision correctly applies Canadian choice of law, corporate and partnership law. It should be affirmed.

A. Choice of Law Is Rule-Based

24. All parties agree that the choice of law process ensures claims are determined by the most appropriate governing law. Canada's rules-based choice of law process enables courts to determine governing law with stability and certainty, treating like claims alike.

25. All parties agree that:

    a. the Canadian choice of law process determines the most appropriate law to govern the 1974 Plan Claim;
    b. the choice of law process has three separate steps — characterization, rule selection, and rule application;
    c. characterization determines the choice of law rule;
    d. the choice of law rule specifies the connecting factor;
    e. the connecting factor identifies the substantive governing law; and
    f. claims that are functionally equivalent should use the same connecting factor.

PF paras 32, 38, 42; Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2e (Toronto: Irwin Law Inc., 2016) p. 221 [Pitel & Rafferty]

26. This rules-based approach ensures courts use the same connecting factor to identify the law governing functionally equivalent claims. The connecting factor tells courts which facts are relevant and which facts are not relevant to identifying the governing law. This rules-based approach promotes predictability and certainty. As the Supreme Court of Canada has stated, "One of the main goals of any conflicts

rule is to create certainty in the law." To avoid prolonged litigation, "[t]here is need for the law to be clear."

Pitel & Rafferty p. 221;
Tolofson v Jensen [1994] 3 SCR 1022 pp. 1061, 1062 [*Tolofson*]

27. Choice of law rules "should be simple and easy to apply; they should facilitate the judicial task." Most choice of law rules require courts to consider only one connecting factor — that is, courts look to a single fact or element of the claim to determine the governing law. For example, if a court characterizes a claim as governed by the tort choice of law rule, the court will apply the connecting factor of the "place of the tort".

Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, 6e (Toronto: LexisNexis, 2005) (loose-leaf updated 2017, release 62) p. 1-65 [*Castel & Walker*];
Pitel & Rafferty p. 221

28. The purpose of characterization is to identify the relevant connecting factor, which focuses the court's attention on specific facts. The court does not need to consider every fact the plaintiff must prove to win its case. It considers only the facts that are made relevant by the connecting factor to identify the governing law. Contrary to the 1974 Plan's submissions, which are not supported by any authority, once a claim has been characterized, the court does not analyze "whether there are competing factors." Characterization determines the connecting factor used to determine governing law.

PF para 43

29. The chambers judge understood her task and applied this rules-based approach. She characterized the 1974 Plan Claim as "one of corporate or partnership law and specifically, one relating to the status, legal existence and personality of corporations and partnerships". She then applied the resulting connecting factor of domicile or place of organization, because the Canadian choice of law rule in claims relating to the status of entities points to domicile or place of organization as the only relevant connecting factor. Because all Walter Canada Group entities are

domiciled or organized in Canada, she concluded that the appropriate law to govern the 1974 Plan Claim is Canadian law.

RJ 177

B. The Chambers Judge Correctly Characterized The 1974 Plan Claim

(a) The Chambers Judge Correctly Considered the Effect of ERISA

30. Every choice of law analysis begins by characterizing the legal nature of the claim. The legal nature of the claim can be equated to how liability attaches to the defendant. Canadian courts characterize claims using Canadian legal categories. Whether a claim is known or unknown in Canadian law, the court characterizes the claim according to its closest "functional equivalent" in Canadian law. This necessarily entails examining how the claim functions.

PF para 42; Pitel & Rafferty p. 227; James Gary McLeod, *The Conflict of Laws*, (Calgary: Carswell, 1983) p. 45 [McLeod]

31. The 1974 Plan Claim functions by relying on a US statute, ERISA, to make Walter Canada Group liable for the withdrawal liability incurred by Walter Resources. Under ERISA, all entities in a "controlled group" are liable for any member's withdrawal liability. Neither contract nor conduct is necessary for an entity to become a member of a controlled group. Controlled group status is determined solely by meeting an arithmetic ownership threshold. Since the claim against Walter Canada Group does not exist without controlled group liability, the nature of the claim against Walter Canada Group must be informed by the operation of ERISA.

RJ paras 115, 120, 136–137;
Appeal Book of the Respondent Walter Canada Group ("WCAB") p. 7;
Expert Report of Marc Abrams, served November 14 2016 ("Abrams Report") p. 6;
WCAB p. 38;
Expert Report of Judith F. Mazo, served November 24, 2016 ("Mazo Report") para 35;
WCAB p. 67;
Expert Report of Allan L. Gropper, served December 1, 2016 ("Gropper Report") p. 3

32. It is not disputed that ERISA functions by disregarding the boundaries between related entities. The 1974 Plan explains that all separate entities within an ERISA controlled group "are deemed to be a single employer". The 1974 Plan also submits that a claim unknown to the forum – like the 1974 Plan Claim – should be analyzed "in light of the foreign legal system". US authorities have held that ERISA "disregard[s] the corporate form", "disregards formal business structures" and "pierces corporate veils".

PF para 24, 42; RJ paras 134-135

33. For these reasons, the chambers judge found as a fact that "the *effect* of the 'controlled group' provisions is to collapse the corporate structure to ensure that as many entities within a corporate group are liable for retirement plan withdrawal liability and that their assets are available to meet obligations to those retirees."

RJ para 129 (emphasis in original)

34. Although the 1974 Plan concedes that the chambers judge was required to look for the claim's "closest functional equivalent", the 1974 Plan submits the chambers judge should not have considered how ERISA functions when characterizing the claim. It says that "[t]he chambers judge's focus on the effect of the application of ERISA and the result that would be reached when that law was applied was an error." The 1974 Plan implies the chambers judge should have focused on the purpose of ERISA to the exclusion of its effect. There are three problems with the 1974 Plan's submission.

PF paras 60, 63, 78

35. First, it is inconsistent with the Canadian and UK cases relied upon by the 1974 Plan, which characterize claims by examining how the claims functioned. In *Minera*, the BC court characterized a claim by explaining how liability attached to the defendant through principles of unjust enrichment. In three UK shipping cases, each court considered a foreign direct-action statute that allowed a non-party to claim under an insurance contract. To characterize the claims, the courts considered the statutory language and what the statutes allowed the non-party

claimant to do. In each of these cases the court considered the "effect" of the statute.

PF 74;
Minera Aquiline Argentina SA v IMA Exploration Inc and Inversiones Mineras Argentinas SA, 2006 BCSC 1102 para 167 [*Minera*] aff'd 2007 BCCA 319;
Youell v. Kara Mara Shipping Company Ltd, [2000] EWHC 220 para 52 [*Youell*];
Through Transport Mutual Assurance Association (Eurasia) Ltd v. New India Assurance Association Co Limited, [2004] EWCA Civ 1598 paras 57–58 [*Through Transport*];
The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain, [2013] EWHC 3188 para 17 [*London Steam-Ship*]

36. Second, there is a difference between looking at the "effect" of the legislation — which is necessary to understand how the claim functions — and the "result" of applying a certain governing law. It is clear that the chambers judge did not engage in results-oriented reasoning. To the contrary, she expressly rejected this approach, calling the outcome of the dispute "completely irrelevant". Rather, she properly considered how ERISA functions to impose the 1974 Plan Claim against Walter Resources upon Walter Canada Group. The chambers judge conducted the same analysis as the courts in *Minera* and the UK shipping cases.

RJ para 83

37. Third, the only authority relied upon by the 1974 Plan does not support the proposition that courts should only look to the purpose of the legislation and ignore its language when characterizing a claim advanced under that legislation. The 1974 Plan provides the following quotation from Pitel & Rafferty:

> One hallmark of the traditional process is that it chooses the applicable law without focusing on the content of that law or on the result it will reach when applied.

This passage does not refer to characterization and does not appear in Pitel & Rafferty's discussion of characterization. Instead, Pitel & Rafferty are considering the concept of the "connecting factor" — which only comes into play after

characterization has occurred. As Pitel & Rafferty note in the sentences immediately preceding those reproduced by the 1974 Plan:

> **The traditional choice of law process uses a series of rules, each of which links a legal category or issue with a particular system of law by means of a connecting factor.** For example, one such rule could be that claims in tort are governed by the law of the place where the tort was committed. In this example, tort is the legal category or issue and the connecting factor is the place of the tort. To apply the rule, we identify the place of the tort and that place, as the connecting factor, leads us to the applicable law. One hallmark of the traditional process is that it chooses the applicable law without focusing on the content of that law or on the result it will reach when applied.

In this passage, Pitel & Rafferty have already characterized the claim; they are not discussing the characterization step.

PF para 59; Pitel & Rafferty p. 221

38. Authority relied upon by the 1974 Plan also demonstrates that courts will look to the effect of a foreign statute to characterize a statutory claim. As Dicey notes, courts look beyond the intent of a statute to its effects to properly characterize a claim pursuant to that statute.

Dicey, Morris and Collins, *The Conflict of Laws*, 15e (London: Sweet & Maxwell, 2012) [*Dicey*] at 2-033 to 2-034, 2-036

39. Understanding ERISA is essential to characterizing the 1974 Plan Claim. Examining how a statute imposes liability in the characterization stage makes sense because a statute's purpose can be achieved in many different ways. ERISA's purpose could have been achieved by many means other than imposing liability based solely on corporate affiliation. ERISA could have permitted a claim against directors and officers; it could have provided a right to claim against debtors of the employer; it could even have provided state compensation. Each of these claims is different and would require a different characterization analysis, but the 1974 Plan's approach would conclude that they were all contractual claims.

There is no basis for the 1974 Plan's criticism of the chambers judge; she correctly characterized the claim by explaining how that claim functions.

RJ para 129; Dicey para 2-036

(b) *JTI* Supports the Chambers Judge's Characterization

40. Contrary to the 1974 Plan's assertion, recent British Columbia jurisprudence supports the chambers judge's characterization. In *JTI-Macdonald Corp v British Columbia (Attorney-General)* [*JTI*], the BC Supreme Court found that a statutory scheme with the same liability mechanism as ERISA "strip[ped] away" the "separate legal personality" of and effectively amalgamated related companies — including federal and foreign corporations. *JTI* demonstrates that whether one member of a corporate group can be made liable for an affiliate's acts is fundamentally a question of corporate status.

PF para 34; Pitel & Rafferty p. 221; RJ para 142; *JTI* 2000 BCSC 312 paras 214–218

41. The *Tobacco Damages and Health Care Costs Recovery Act* (the "*Damages Act*"), like ERISA, imposed liability based solely on corporate affiliation. If one member of a "Group" of related entities committed a "tobacco-related wrong", the *Damages Act* imposed liability on all Group members — including federally-incorporated corporations and foreign-incorporated affiliates. In *JTI*, the BC Court held the *Damages Act ultra vires* the Province because imposing liability based on affiliation effectively denied the separate legal personality of federal and foreign corporations:

> The provisions of the Act appear not so much designed to 'pierce the corporate veil' as they are **to strip away separate identities and treat them as if they had legally merged or amalgamated**. The effect of the 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**.

RJ para 142; *JTI* para 218; *Damages Act*, SBC 1997, c 41

42. The Court held that the *Damages Act* effected an "involuntary merger" of federal and foreign corporations and negated their separate corporate status by imposing liability — even though these corporations continued to exist for other purposes.

JTI para 214

43. The 1974 Plan misreads *JTI* when it says that "it was the piercing of the veil of the domestic company, in order to reach extra-provincial parent corporations, that revealed the impermissible extraterritorial legislative purpose." There were no BC corporations in *JTI*. The *Damages Act* imposed group liability on two types of defendant companies: federally-incorporated Canadian corporations that acted in BC; and their foreign-incorporated affiliates, which did not act in BC.

PF para 64; *JTI* para 173

44. The liability mechanism in the *Damages Act* is the functional equivalent of controlled group liability under ERISA. As the chambers judge concluded, Walter Canada Group's position under ERISA is similar to that of foreign-incorporated affiliates under the *Damages Act*; they are foreign entities made liable based solely on their affiliation. As said in *JTI*, such a scheme impermissibly "abolish[ed] the separate corporate personalities of companies incorporated under federal or foreign law."

JTI para 173; see also paras 172, 186–189 and 205 for further references to the personality of foreign corporations

45. The chambers judge further noted that, like the *Damages Act*, ERISA's controlled group liability operates by "effectively amalgamating or consolidating those [Walter Canada Group] entities, in deeming them to be one 'employer' along with Walter Resources." The question of whether one corporation has merged with another is also characterized as an issue of legal personality. Where two corporations domiciled in different jurisdictions amalgamate, that amalgamation must be valid under the laws of both jurisdictions. In this case, ERISA's liability provisions "effectively amalgamate" Walter Canada Group with Walter Resources for the

purposes of imposing liability. Such amalgamation is not valid under Canadian corporate law.

RJ para 143; *JTI* paras 214, 218; Castel & Walker p. 30-5; see also *Concept Oil Services Ltd v En-Gin Group LLP*, [2013] EWHC 1897 (QBD) paras 70–72, All ER (D) 90 (Jul)

46. The chambers judge agreed with both parties that *JTI* was a constitutional case. She correctly reasoned that JTI "provides substantial support" for characterizing claims that impose liability based solely on corporate affiliation as implicating the status and legal personality of the affiliated corporations.

RJ paras 142, 144

47. The chambers judge correctly considered *JTI* because characterizing the "claim" in choice of law is analogous to characterizing a law's "pith and substance" in Canadian federalism cases. The leading text Castel & Walker agrees:

> **Characterization in the conflict of laws is akin to characterization as it may present itself in connection with the division of legislative power in Canada**. In order to determine whether a particular statute is legislation in relation to a matter coming within a particular class of subjects in section 91 or section 92 of the Constitution Act, 1867, the true nature and character of the legislation must be determined, and regard must be had as to what the legislation was aimed at or devised for and what object it had in view. In the conflict of laws, the classes of questions or issues mentioned in various conflict of laws rules are described in such general terms as sometimes to render the rules ambiguous, and in order **to decide whether a particular provision of the law of a given country relates to a matter which falls within the question or issue identified in one rule or the question or issue identified in another rule, it is necessary to determine the underlying nature or character of the provision in question**.

All parties in this appeal rely on Castel & Walker. The 1974 Plan is simply incorrect when it contends that "[t]he analysis in *JTI* is not transferable to the characterization analysis."

PF paras 62–63; Castel & Walker p. 3-10

48. The chambers judge carefully reviewed the *JTI* court's characterization of the *Damages Act* and found that the 1974 Plan Claim relied on the same theory of liability: "To use the words of [the Court in *JTI*], the application of *ERISA* to the Walter Canada Group results in those entities' 'separate legal personality' being removed or 'stripped away' such that they lose their legal status as distinct from their shareholders." *JTI* provided the closest "functional equivalent" in Canadian law to the 1974 Plan Claim.

RJ para 144; Pitel & Rafferty p. 221

(c) The 1974 Plan Claim Should Not Be Characterized As Contractual

49. The chambers judge correctly rejected the 1974 Plan's submission that its claim should be characterized as contractual. The 1974 Plan has no contractual rights against Walter Canada Group because no member of Walter Canada Group is party to any contract with the 1974 Plan. Rather, as the chambers judge observed, the 1974 Plan Claim against Walter Canada Group "arises from the express legislative provisions of ERISA". Indeed, the 1974 Plan concedes that it "relies on *ERISA*'s controlled group provisions as the basis of its claim" and that its claim is an "obligation arising under ERISA".

RJ para 99; PF paras 22, 43, 73

50. No Canadian or foreign authority characterizes a claim like the 1974 Plan Claim as contractual. The three UK shipping cases put forward by the 1974 Plan were analysed in detail by the chambers judge, who applied the same choice of law process and correctly distinguished the results. These three cases each consider statutes that extend an insurer's liability under its insurance policy to specific non-insureds. As the 1974 Plan conceded before the chambers judge, these cases do not consider a statute imposing liability on a stranger to the contract.

RJ paras 116–120

51. In addition, the legislation in each of the UK shipping insurance cases is very different from ERISA: the statutory language refers to the insurance contract in the same breath in which it allows a non-party to make a claim. The statutory schemes

preserved all of the rights and defences that the insurer bargained for under the insurance contract. The statutory schemes do not impose liability on strangers to a contract based solely on affiliation. As the chambers judge found, "ERISA does not authorize the 1974 Plan to sue the Walter Canada Group as a party to the 2011 CBA, the pension plan and trust documents", nor does ERISA provide that Walter Canada Group became a party to the 1974 Plan agreements. The 1974 Plan Claim against Walter Canada Group is not functionally equivalent to the claims considered in the UK shipping cases.

RJ para 117, 120; *Youell* para 52; *Through Transport* para 10; *London Steam-Ship* para 17

52. The 1974 Plan suggests that characterizing the claim against Walter Canada Group as contractual makes sense because the 1974 Plan had "contractual expectations vis-à-vis Walter Resources". Walter Resources is not Walter Canada Group. It is uncontested that Walter Canada Group had no contractual expectations, no obligation to contribute to the Plan, and its employees did not benefit from the 1974 Plan. The 1974 Plan's reliance on statements in the 2011 CBA are similarly misplaced, because Walter Canada Group did not sign the contract.

PF paras 80, 812; RJ paras 104, 146

53. ERISA imposes liability based on corporate affiliation, not based on contract. However the 1974 Plan's withdrawal liability arose, the only basis for imposing that liability on Walter Canada Group is through the operation of ERISA's controlled group provisions.

(d) The Chambers Judge Correctly Applied the Status Rule

54. The chambers judge concluded that how ERISA functioned "challenge[d]... the status and legal personality of the entities in the Walter Canada Group." As the chambers judge stated, "the status of non-natural persons is governed by the law of the person's 'home' jurisdiction". She referenced Dicey:

> Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was

> formed. That law will determine whether the entity has a separate legal existence. The law of that country will determine the legal nature of the entity so create [*sic*], e.g. whether the entity is a corporation or partnership, and, if the latter, the legal incidents which attach to it.

RJ 151-152, quoting Pitel & Rafferty, p. 245 and Dicey pp. 1532-1533

55. The 1974 Plan submits that the chambers judge erred by applying the status rule too broadly, but the authorities support the chambers judge's approach. In any case, even on a narrow reading of the status rule, the Walter Canada Group entities' legal status is directly implicated by the 1974 Plan Claim.

i. The Status Rule Applies Broadly

56. The 1974 Plan suggests the status rule relates only to "*true* issues of existence, status or legal personality," such as the "capacity to sue and be sued". (The 1974 Plan conceded at first instance that the status rule "may also apply to issues of corporate governance, such as shareholder rights, the authority of directors, the power to make contracts or rights to issue or transfer shares").

PF paras 46 (emphasis added), 49; RJ para 124

57. However, case law shows the status rule governs a variety of claims that implicate aspects of legal personality, including a claim by a plaintiff pursuant to a contract against a non-party to the contract. In *National Bank of Greece and Athens SA v Metliss* [*National Bank of Greece*], the House of Lords characterized a contract claim as subject to the status rule because liability attached through corporate status and not through the contract directly. The Lords had to determine whether the plaintiff, a holder of mortgage bonds governed by English law, could claim against a defendant – a new Greek bank that had been designated as successor to the bonds' original guarantor by its constituting Greek decree. The Greek bank contended the claim was contractual, saying it could not be liable under English

governing law since there was no privity of contract. The Lords found this claim raised a question of status and should be governed by Greek law:

> English law will look at the Greek decree to determine the status of this new entity... It is said that 'status' is confined to the existence, powers and dissolution of the new corporation... In my view, the fact that this liability was attached to [the new bank] at birth by its creator can properly regarded as a matter pertaining to the status of [the new bank] and, accordingly, governed by the law of its domicil.

National Bank of Greece, [1957] 3 All ER 608 paras 615F–I

58. In the choice of law context, British Columbia courts have cited *National Bank of Greece* as authority that a corporation's "status and its duties, powers and liabilities are conferred on it by the law of its domicile, *i.e.*, the country of its incorporation."

Re Maple Leaf Mills Ltd, [1962] 35 DLR (2d) 684 p. 687 (BC SC)

59. In *National Trust Co v Ebro Irrigation & Power Co* [*Ebro*], an Ontario court considered whether a Spanish authority could seize the property of Canadian subsidiaries to satisfy their shareholder's debt. A Canadian stakeholder applied to the Ontario court to obtain relief in respect of the Spanish authority's actions.

Ebro [1954] 1954 CarswellOnt 61 (ON SC) para 1

60. The Ontario court held that the Spanish authority's actions implicated "the status and the regulation of the affairs of two Canadian companies" and were governed by the law of the corporations' domicile. The Court explained the status rule is broad:

> ...it is held that a corporation's charter and the laws of its domicile govern with respect to the fact and duration of the existence of the corporation, its internal affairs and management, its capacity to sue, the authority of its directors to represent it or to bring an action, its power to make particular contracts, the validity of conveyances of corporate property, the corporation's right to issue stock, its right to guarantee dividends upon stock, the validity of transfers of its stock, and the validity of bonus stock issued to directors."

Ebro paras 44, 52

61. The court highlighted that seizing the Canadian subsidiary corporations' assets to satisfy the parent company's debts overrode corporate separateness:

> **Equally startling is the fact that the assets of [the subsidiary corporations] were made subject to seizure** in consequence of the decree of bankruptcy against [the parent corporation] **on the theory that [the parent corporation] and these companies were not separate entities**... a corporation is regarded as something different from the aggregate of its members or shareholders as determined in *Salamon v. A Salamon and Company, Limited* [*sic*].

Ebro para 67

62. Finally, in *Risdon Iron and Locomotive Works v Furness* [*Risdon*], the UK Court of Appeal concluded the status rule governed claims made pursuant to a foreign law that imposed liability in a manner implicating legal personality. A California law purported to make shareholders personally liable for corporations' debts. An English mining company went bankrupt, and a creditor of the company made a claim against a UK shareholder, citing the California law. The UK court refused to apply the California law, holding that English law governed the shareholder's liability even though the company had carried on business in California.

Risdon, [1905] 1 KB 49 pp. 56, 59

63. In all three cases – a contract claim against a successor, a claim against subsidiaries' assets, and a claim imposing liability on shareholders – the courts applied the status rule because each claim implicated legal personality. In none of these cases was the status rule limited to circumstances in which the existence of the entity was challenged.

64. Ascribing liability to the Walter Canada Group entities only because their parent, Walter Energy US, owned shares in another company (Walter Resources) that had a contractual obligation implicates status, legal personality and other attributes as much as the claims in *National Bank of Greece*, *Ebro*, and *Risdon*.

65. The 1974 Plan cites two authorities for their "narrow approach" to the status rule: *International Association of Science and Technology for Development v. Hamza*

[*Hamza*], and Castel & Walker. In *Hamza*, the narrow factual issue was whether an entity had the capacity to sue or be sued. Unlike *National Bank of Greece* and *Ebro*, the court in *Hamza* did not need to comment on whether other matters fall within the ambit of the status rule.

RJ para 125; PF para 48; *Hamza*, 1995 ABCA 9

66. The passage from Castel & Walker the 1974 Plan quoted in support of the 1974 Plan's "narrow approach" is qualified by the word "arguably" and is distinguishable:

> **For other matters**, the law governing **the contract or tort that gives rise to the litigation *against* the foreign subsidiary** would determine whether its corporate veil should be pierced since, **arguably**, piercing the corporate veil should be characterized as a function of the dispute and not of the status of the corporation.

PF at para 54; Castel & Walker pp. 30-1–30-2

67. Here Castel & Walker assume there is litigation against a foreign subsidiary based on a contract with that foreign subsidiary or a tort by that foreign subsidiary. However, the 1974 Plan Claim does not pursue Walter Canada Group based on a contract with or tort by Walter Canada Group. Rather, the 1974 Plan Claim against Walter Canada Group entities is based on affiliation.

68. The chambers judge's characterization is consistent with the 1974 Plan's statement before her that characterization "is to be done in accordance with the rules and in a 'flexible manner'". The chambers judge correctly observed that this "flexible manner" was at odds with the 1974 Plan's "narrow" understanding of the status rule. Both the choice of law cases and texts support the conclusion that the status rule applies to claims where liability is imposed only through affiliation.

RJ para 125

ii. The Status Rule Is Informed By Canadian Corporate Law

69. The status rule says that claims implicating an entity's status, legal personality and other attributes are governed by the law of the entity's domicile or place of organization. All Walter Canada Group entities are domiciled or were organized in

Canada. Therefore, Canadian law governs the existence of and consequences flowing from the Walter Canada Group entities' legal personality.

70. The 1974 Plan appears to suggest that legal personality is limited to piercing the veil of a limited liability corporation to make the corporation's immediate shareholders liable for its debts. As the chambers judge and the authorities make clear, legal personality under Canadian law is much broader than veil-piercing.

PF para 67

71. A company is a creation of statute. Its nature and attributes are creations solely of domestic law. Similarly, Canadian statutes determine the attributes of partnerships. Under Canadian law, a company is a person at law with all the rights of a natural person. Like a natural person, a company is not liable for the obligations of another person, even if that person is a shareholder or a sister corporation. The circumstances where Canadian law permits piercing the veil between shareholder and corporation are few and based on conduct. None of the "sham", "agency", or "group enterprise" rationales for piercing the corporate veil under Canadian law were argued by the 1974 Plan.

RJ paras 131, 143–144;

British Columbia Business Corporations Act, SBC 2002, C-57, [*BCBCA*] ss. 30–31;

Partnership Act, RSBC 1996, c 348 s. 2; see also *BG Preeco (Pacific Coast) Ltd v Bon Street Holdings Ltd,* [1989] 37 BCLR (2d) 258 (CA)

72. The chambers judge uses the phrase "limited liability per *Salomon*" as shorthand for the fundamental separation between legal persons. *Salomon v Salomon & Co* [*Salomon*] affirmed that a company is a person separate from other persons, and more particularly, a person separate from its shareholders. ERISA purports to impose liability across a corporate group with a certain level of share ownership. As the chambers judge found, this makes the Walter Canada Group entities "lose their legal status as distinct from their shareholders", in violation of the principle established by *Salomon*.

RJ paras 143–144; *Salomon*, [1897] AC 22 (HL)

73. In contrast, the 1974 Plan uses the term "limited liability" to refer strictly to a shareholder's immunity from the liabilities of the corporation. The 1974 Plan then questions how the 1974 Plan Claim can implicate the status and legal personality of Walter Canada Group entities because "no Canadian shareholder is being made liable". In so doing, the 1974 Plan suggests that the concept of separate corporate legal personality extends no farther that limited liability of shareholders. This understanding of corporate personality, which threads throughout the 1974 Plan's submission fails to give effect to the fundamental principle that a Canadian corporation has the attributes of a natural person.

RJ paras 143–144, PF paras 35, 64–67

74. One implication of corporate legal personality is that where two companies are owned by the same shareholder, "the acts, rights, duties, liabilities, powers and capacities of each [subsidiary] are distinct from those which are attributable to the other." BC courts have repeatedly affirmed strict respect for corporate personality.

Kevin Patrick McGuinness, *Canadian Business Corporations Law*, 3e (Toronto: LexisNexis Canada Inc, 2017) [McGuinness] s. 6.18; see also *BG Preeco*

75. In other words, a company is an entity separate from its shareholders, such that a shareholder is not liable for the debts of the corporation (limited liability), and shareholders have no direct claim against a corporation's assets (entity shielding). "A shareholder's only interest in a corporation's assets is an entitlement to a proportionate share of the corporation's residual property in the event of a liquidation".

RJ para 131–132, citing *Salomon*; McGuinness s. 6.79

76. Moreover, Canadian courts have not accepted a "group enterprise" theory, wherein one corporation could be made responsible for a related corporation's obligations. As this court concluded in *BG Preeco (Pacific Coast) Ltd v Bon Street Holdings Ltd* [*BG Preeco*],

> While the group enterprise theory may be successful on certain facts, no cases were cited which would, through this

> theory, make one company liable for its associated company's contracts.

BG Preeco para 47

77. The Supreme Court of Canada has affirmed that such 'entity shielding' is a necessary corollary to a shareholder's limited liability.

Menillo v Intramodal Inc, 2016 SCC 51 para 65 (quoting H. Hansmann, R. Kraakman and R. Squire, "The New Business Entities in Evolutionary Perspective", [2005] U. Ill. L. Rev. 5, pp. 11–12 [*Hansmann*])

78. In the words of the Supreme Court of Canada, allowing the assets of a subsidiary corporation to be used to satisfy the liabilities of a shareholder, even one holding all the corporation's shares, would require "alter[ing] the fundamental principle of corporate separateness."

Chevron Corp. v Yaiguaje 2015 SCC 42 para 95

79. Contrary to the 1974 Plan's submissions, a careful review of the chambers judge's decision makes it clear that her discussion of "limited liability" relates not just to a shareholder's protection from a company's debt, but also to entity shielding. She is speaking about the separation of persons, not veil-piercing in the 1974 Plan's narrow sense.

RJ paras 143–144

80. The principle of corporate separateness is as fundamental to the existence of the ULCs as it is to the existence of other companies. The significant difference between ULCs and other companies is that shareholders of ULCs are liable for the debts of the ULC upon its dissolution or liquidation. Shareholders of ULCs are insulated from the liabilities of the ULC before its dissolution or liquidation. Shareholders have no claim against the assets of the ULC. Contrary to the 1974 Plan's submissions, the ULCs in Walter Canada Group enjoy limited liability prior to dissolution and liquidation.

BCBCA s. 51.3(1); PF para 66

81. If a shareholder has no claim against the assets of a company, neither does an affiliate of the company connected through a chain of share ownership, much less a creditor of an affiliate. Absent ERISA, the only relationship between the 1974 Plan and Walter Canada Group is that the 1974 Plan is a creditor of an affiliate of Walter Canada Group. To grant the 1974 Plan access to Walter Canada Group's assets based solely on affiliation overrides their separate legal personalities.

(e) The Chambers Judge Correctly Applied Partnership Law

82. Although partnerships are not legal persons under Canadian law, they are nonetheless entities whose attributes are defined by statutes. Much like corporations, they benefit from a form of entity shielding that is threatened by the 1974 Plan Claim. The chambers judge correctly characterized a claim that would alter the attributes of Canadian partnerships as one governed by the status rule.

83. Under Canadian law, a partnership is not a legal person; it is a group of persons (partners) carrying on business together. Canadian partnership law attaches liability to partners based on their status only in narrow circumstances. A partner becomes liable based on its status only when another partner incurs liability in the course of partnership business. At least one partner must have acted in the course of partnership business to generate a shared liability. ERISA does not respect the boundaries of status-based liability in Canadian partnership law. It purports to expand those boundaries, thereby attracting the status rule.

Partnership Act ss. 7, 9, 12

84. The chambers judge did not misunderstand the nature and legal attributes of partnerships. She acknowledged BC law, including the *Partnership Act*, applies to determine the characteristics of partnerships. The chambers judge heard detailed submissions regarding the legal characteristics of partnerships from both sides, and correctly rejected the 1974 Plan's position.

RJ para 157, 159–160; cf. PF 35, 66–67

85. Like corporations, partnerships also benefit from a form of entity shielding. Partnership assets are not generally available to satisfy the personal debts of the partners. Canadian statutes override the entity shield in specific circumstances, such as on the bankruptcy of a partnership. It would vary the attributes of a Canadian partnership if ERISA were to override the entity shield in circumstances not contemplated by Canadian law.

Partnerships Act s. 26; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s. 142; See also Hansmann p. 11

86. Further, all partners in the Walter Canada Group partnerships are ultimately Walter Canada Group companies.[1] If the 1974 Plan could impose ERISA liability on Walter Canada Group companies solely because of their status as partners in Canadian partnerships, the Plan would achieve indirectly what Canadian choice of law rules preclude it from achieving directly. The 1974 Plan has not explained how Canadian corporations not otherwise subject to ERISA may become subject to ERISA solely by organizing themselves into Canadian partnerships.

87. The chambers judge correctly applied the status rule in a manner consistent with Canadian corporate and partnership law and choice of law authorities.

RJ paras 144–145

(f) Controlled Group Liability Invokes a Form of Substantive Consolidation for the Sole Benefit of the 1974 Plan

88. As the chambers judge noted, the 1974 Plan Claim is effectively seeking substantive consolidation for the benefit of the 1974 Plan's beneficiaries to the detriment of Walter Canada Group's creditors. Substantive consolidation is a remedy in insolvency proceedings that disregards the boundaries between

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1 While each Brule, Willow Creek and Wolverine coal partnerships had Walter Canadian Coal Partnership as one of its partners and a ULC as the other, the ultimate partners who formed Walter Canadian Coal Partnership were Walter Energy Canada Holdings, Inc. and Walter Canadian Coal ULC, both of which are legal persons. RJ 65.

separate entities to consolidate their assets and liabilities into a common fund used to satisfy their creditors' claims. Similarly, ERISA consolidates the assets of members of a controlled group for the benefit of pension beneficiaries.

RJ 139; WCAB p. 67; Gropper Report p. 3

89. Whether substantive consolidation is appropriate is a matter of Canadian insolvency law. Under Canadian law, substantive consolidation is an extraordinary remedy that primarily aims to ensure the equitable treatment of all creditors. It is only available where entities have failed to act as separate entities or to maintain their assets separately. In *Re Northland Properties Limited*, [*Northland I*], the BC Supreme Court cited US authority to conclude that substantive consolidation is available only where it is "necessary to prevent harm or prejudice, or to effect a benefit generally" and that "the relevant inquiry asks whether 'the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition'".[2] This approach was affirmed in *Re Redstone Investment Corp.* [*Redstone*], where the court concluded that the benefits of substantive consolidation must both (i) outweigh the prejudice to particular creditors and (ii) be fair and reasonable in the circumstances.

Northland I, [1988] 1988 CanLII 2924 paras 37-38, 29 BCLR (2d) 257 (BC SC); *Redstone*, 2016 ONSC 4453 at para 78, 89

90. Unlike substantive consolidation, ERISA controlled group liability is not dependent on any act or omission by Walter Canada Group and need not confer a benefit on anyone but pension beneficiaries. Effecting a form of substantive consolidation solely for the benefit of the 1974 Plan to the prejudice of Walter Canada Group's

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[2] In *Northland I*, the court did not initially grant substantive consolidation, but did so in a subsequent decision on different facts. The second decision was later affirmed by the BCCA. *Re Northland Properties Limited*, [1988] 1988 CanLII 3250 (BC SC) [*Northland II*]; aff'd. *Northland Properties Limited v. Excelsior Life Insurance Company of Canada*, [1989] 1989 CanLII 2672 (BC CA).

creditors does not effect a benefit generally, but rather prejudices all creditors of Walter Canada Group for the benefit of a single creditor of Walter Resources.

C. Minera Does Not Support Using "Most Real and Substantial Connection" as a Connecting Factor

91. As an alternative to characterizing its claim as contractual, the 1974 Plan proposes that this Court create a new choice of law rule. The 1974 Plan's proposed approach conflates separate steps in the choice of law process by considering connecting factors during characterization. Further, it disregards the imperative that novel claims be characterized according to their "functional equivalent" under domestic law. The chambers judge correctly rejected the 1974 Plan's suggestion that she dispense with characterization and instead use "closest and most real connection" as the connecting factor to determine the governing law.

RJ para 164; PF paras 42, 78

92. The only Canadian authority the 1974 Plan cites in support of its proposed new rule is *Minera*. In *Minera*, a BC court applied the well-established three-step choice of law process and an existing choice of law rule. First, the court characterized the claim as "an equitable claim for unjust enrichment arising from a breach of confidence". The court then looked to Dicey for the choice of law rule governing such a claim. Dicey's rule offered a list of three connecting factors. The parties disagreed on whether or not Dicey's list was hierarchical. The court took a "principled approach" and concluded the rule was not hierarchical, but rather that each of the Dicey factors and should be considered in the context of the claim.

Minera paras 181, 185, 194–195

93. The *Minera* Court emphasized that its "principled approach" applies only "to a case such as this one, where the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land…". The court in *Minera* characterized the claim as one known to Canadian law, and applied the

relevant rule, interpreted in a principled way. It did not reject the three-step process or create a new rule.

PF para 90; *Minera* paras 181, 200, 204

94. Disregarding the court's approach and cautions, the 1974 Plan contends *Minera* is a formula for devising new choice of law rules. The 1974 Plan submits that "the appropriate choice of law rule in this case is the law of the legal system with the closest and most real connection to the dispute."

PF para 94

95. In the words of the UK Court of Appeal,

> It is impossible to quarrel with the contention that the governing law should be the law which has "the closest and most real connection with the transaction". In the present case, however, **the incantation of the formula is not particularly helpful. It is merely to state the question, not to solve it.** It is in order to identify the relevant transaction and ascertain the law which has the closest and most real connection with it that **it is necessary to undertake the process of identifying and characterizing the issue in question between the parties**.

MacMillan Inc v Bishopsgate Investment Trust plc and others (No 3), [1996] 1 All ER 585 p. 615; 1 WLR 387 (UK CA)

96. The Supreme Court of Canada has rejected a similarly unfocused approach to choice of law in tort:

> A means of achieving this has been attempted in the United States through an approach often referred to as the proper law of the tort. This involves qualitatively weighing the relevant contacts with the competing jurisdictions to determine which has the most significant connections with the wrong…
>
> **I leave aside for the moment the assumptions that a flexible rule better meets the demands of justice, fairness and practical results and underline what seems to be the most obvious defect of this approach -- its extreme uncertainty**.

Tolofson para 1056-f–i

97. The Supreme Court concluded that a choice of law rule based solely on "weighing relevant contacts with the competing jurisdictions" was "lacking in certainty and likely to create or prolong litigation". The Supreme Court instead adopted a choice of law rule with a single connecting factor: the place of the tort.

Tolofson para 1056-j–1057

98. Canadian conflicts authorities agree that characterization is conducted pursuant to the law of the forum, and that where a claim is unknown under domestic law it will be characterized according to its domestic "functional equivalent". There is no support for departing from this approach, and no justification for disturbing the chambers judge's decision.

PF para 42; RJ paras 163–164; *Minera* para 182

99. The overbreadth of the 1974 Plan's proposed approach is made clear by the list of facts it seeks to discover. According to the 1974 Plan's proposed approach, the court must identify "the legal system with the closest and most real connection to the 1974 Plan's claim." However, the 1974 Plan seeks discovery of facts that have no bearing on the cause of action that the 1974 Plan pleads. Such facts cannot be relevant to assessing what legal system has the "closest and most real connection" to that cause of action.

PF para 94

100. To establish the 1974 Plan Claim pursuant to ERISA, the 1974 Plan must prove the following: there is a contract between the 1974 Plan and Walter Resources; Walter Resources withdrew from that contract; this created a withdrawal liability; and Walter Canada Group is in the same controlled group as Walter Resources. Membership in a controlled group is calculated solely by share ownership. These are the only facts relevant to the 1974 Plan Claim.

RJ para 104

101. Nevertheless, the 1974 Plan seeks discovery "concern[ing] the location of the Walter Canada Group's management and its business operations". The 1974 Plan

does not need to prove the location of any aspect of Walter Canada Group to establish liability under its theory of US law. A fact that has no bearing on liability cannot be a connecting factor.

PF para 94; RJ 135–136

102. Similarly, the 1974 Plan seeks discovery to support its pleading that Walter Canada Group entities or management "were guided by U.S. law in their actions" or "expected U.S. law to govern the business they directed." The expectations of Walter Canada Group have no bearing on the pleaded cause of action and are irrelevant to helping a court assess connections between a legal system and the 1974 Plan Claim.

Amended Notice of Civil Claim paras 86–87, 98–99

103. The 1974 Plan's expert testified, and the chambers judge found as a fact, that the only factor relevant to ERISA's controlled group liability provisions is common ownership: "what emerges as crystal clear from the 1974 Plan's position… is that *ERISA* expressly makes such a factual enquiry entirely irrelevant."

PF paras 9, 22; RJ 135–136, 171; WCAB p. 46; Mazo Report para 35

104. The chambers judge repeatedly asked the 1974 Plan to specify the scope of the discovery it sought, and how that broad scope of discovery could show "a meaningful connection between the law and the obligation it will govern". The chambers judge appreciated that the 1974 Plan did not want a full trial but could not understand how the breadth of discovery the 1974 Plan sought had any bearing on a connection between any legal system and the claim. She therefore correctly declined to award the 1974 Plan the relief it seeks again before this Court.

PF para 37

105. The chambers judge followed the authorities and Canada's rules-based approach to conflicts of laws when she characterized the 1974 Plan Claim as one governed by the status rule. She appropriately considered how ERISA functions to impose liability on Walter Canada Group. She applied the established choice of law

connecting factor of domicile to determine that the 1974 Plan Claim is governed by Canadian law.

106. The 1974 Plan's suggestion the chambers judge erred is "not supported by authority or principle".

PF para 34

PART 4 - NATURE OF ORDER SOUGHT

107. The respondent seeks an Order:

a. Dismissing the 1974 Plan's appeal with costs in the appeal; and

b. Costs of the 1974 Plan's leave to appeal application.

108. All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this July 27 of 2017.

Mary Paterson
Solicitor for the Respondent

APPENDIX: ENACTMENTS

BANKRUPTCY AND INSOLVENCY ACT

RSC 1985, c B-3

Partners and separate properties

142 (1) Where partners become bankrupt, their joint property shall be applicable in the first instance in payment of their joint debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts.

Surplus of separate properties

(2) Where there is a surplus of the separate properties of the partners, it shall be dealt with as part of the joint property.

Surplus of joint properties

(3) Where there is a surplus of the joint property of the partners, it shall be dealt with as part of the respective separate properties in proportion to the right and interest of each partner in the joint property.

Different properties

(4) Where a bankrupt owes or owed debts both individually and as a member of one or more partnerships, the claims shall rank first on the property of the individual or partnership by which the debts they represent were contracted and shall only rank on the other estate or estates after all the creditors of the other estate or estates have been paid in full.

Costs out of joint and separate properties

(5) Where the joint property of any bankrupt partnership is insufficient to defray any costs properly incurred, the trustee may pay such costs as cannot be paid out of the joint property out of the separate property of the bankrupts or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be made, or, if the inspectors withhold or refuse their consent, with the approval of the court.

BUSINESS CORPORATIONS ACT

[SBC 2002] C 57

Capacity and powers of company

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

Joint tenancy in property

31 (1) Every corporation is capable of acquiring and holding property, rights and interests in joint tenancy in the same manner as an individual, and, if a corporation and one or more individuals or other corporations become entitled to property, rights or interests under circumstances or by virtue of an instrument that would, if the corporation had been an individual, have created a joint tenancy, they are entitled to the property, rights or interests as joint tenants.

(2) Despite subsection (1), acquiring and holding property, rights or interests by a corporation in joint tenancy is subject to the same conditions and restrictions as attach to acquiring and holding property, rights or interests by a corporation in severalty.

(3) On the dissolution of a corporation that is a joint tenant of property, rights or interests, the property, rights or interests devolve on the other joint tenant.

Liability of shareholders of unlimited liability companies

51.3 (1) Subject to subsection (2), shareholders and former shareholders of an unlimited liability company are jointly and severally liable as follows:

> (a) if the company liquidates, the shareholders and former shareholders are jointly and severally liable, from the commencement of the company's liquidation to its dissolution, to contribute to the assets of the company for the payment of the unlimited liability company's debts and liabilities;

(b) whether or not the company liquidates, the shareholders and former shareholders are jointly and severally liable, after the company's dissolution, for payment to the company's creditors of the unlimited liability company's debts and liabilities.

PARTNERSHIPS ACT
[RSBC 1996] Ch 348

Definitions

"firm" is the collective term for persons who have entered into partnership with one another;

Partnership Defined

2 Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

Liability of partners

7 (1) A partner is an agent of the firm and the other partners for the purpose of the business of the partnership.

(2) The acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member bind the firm and his or her partners, unless

(a) the partner so acting has in fact no authority to act for the firm in the particular matter, and

(b) the person with whom he or she is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.

No pledge of credit for nonfirm business

9 (1) If one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound unless the partner is in fact specially authorized by the other partners.

(2) This section does not affect any personal liability incurred by an individual partner.

Liability of firm

12 If, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his or her partners, loss or injury is caused to

any person who is not a partner in the firm or any penalty is incurred, the firm is liable for that loss, injury or penalty to the same extent as the partner so acting or omitting to act.

Execution against partnership property

26 (1) A writ of execution must not issue against partnership property except on a judgment against the firm.

(2) The Supreme Court within its territorial jurisdiction, may,

(a) on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest on it, and

(b) by the same or a subsequent order appoint a receiver of that partner's share of profits, whether already declared or accruing, and of any other money that may be coming to him or her in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions that might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or that the circumstances of the case may require.

(3) The other partner or partners is or are at liberty at any time to redeem the interest charged, or, in case of a sale being directed, to purchase it.

TOBACCO DAMAGES AND HEALTH CARE COSTS RECOVERY ACT
SBC 1997, CHAPTER 41

[eff July 19, 1999 to January 23, 2001]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Part 1 -- Introductory Provisions

SECTION 1

Definitions

1 (1) In this Act:

"affiliate" means affiliate as defined in section 1 of the Company Act;

"beneficiary" means a spouse, parent or child, as defined in the Family Compensation Act, of a deceased insured person;

"benefits claim" means a claim for the recovery of the cost of health care benefits;

"cost of future health care benefits" means the estimated total amount of the cost of health care benefits, resulting from tobacco related disease, that could reasonably be expected will be provided to an insured person after the date of settlement of a benefits claim or the first day of trial of an action for a benefits claim, whichever first occurs;

"cost of health care benefits" means the total amount of

(a) the cost of past health care benefits provided to an insured person, and

(b) the cost of future health care benefits to be provided to that insured person;

"cost of past health care benefits" means the total cost of the health care benefits, resulting from tobacco related disease, that are provided to an insured person before

the date of settlement of a benefits claim or the first day of trial of an action for a benefits claim, whichever first occurs;

"disease" REPEALED: SBC 1998-45-2 effective November 12, 1998 (B.C. Reg. 394/98).

"exposure" means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product;

"health care benefits" means

(a) benefits as defined under the Hospital Insurance Act, and

(b) benefits as defined under the Medicare Protection Act,

and includes any other health care benefits designated by regulation;

"insured person" means

(a) a person, including a deceased person, who was provided with health care benefits, or

(b) a person who is entitled to be provided with health care benefits;

"joint venture" means an association of 2 or more persons, if

(a) the relationship among the persons does not constitute a corporation, a partnership or a trust, and

(b) the persons each have an undivided interest in assets of the association;

"manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) owns a trade-mark, trade name or brand name, registered or not, under which a tobacco product is promoted to the public,

(c) is related to a person described in this definition and has a right to use a trade-mark, trade name or brand name, registered or not, for the purpose of promoting a tobacco product to the public,

(d) for any fiscal year of the person, generates at least 10% of its worldwide revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products,

(e) is related to a person described in this definition and is engaged in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(f) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

"person" includes a trust, joint venture or trade association;

"personal representative" means a person

(a) who is the personal representative of a deceased insured person, and

(b) who has the right to bring an action under section 3 of the Family Compensation Act on behalf of the beneficiaries,

and includes a person described in section 3 (4) of that Act;

"promote" or "promotion" includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product;

"tobacco product" means tobacco and any product that includes tobacco;

"tobacco related disease" means a disease caused or contributed to by exposure to a tobacco product;

"tobacco related wrong" means a tort or breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons who have been exposed or might become exposed to a tobacco product that causes or contributes to disease;

"type of tobacco product" means one or a combination of the following categories:

(a) cigarettes;

(b) loose tobacco intended for incorporation into cigarettes;

(c) cigars;

(d) cigarillos;

(e) pipe tobacco;

(f) chewing tobacco;

(g) nasal snuff;

(h) oral snuff;

(i) a prescribed form of tobacco.

(2) For the purposes of this Act, a person is related to another person if, directly or indirectly, the person is an affiliate of the other person or of an affiliate of the other person.

(3) For the purposes of subsection (2), a person is deemed to be an affiliate of another person if the person

(a) is a corporation and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, owns a beneficial interest in shares of the corporation

(i) carrying at least 50% of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii) having a fair market value, including a premium for control if applicable, of at least 50% of the fair market value of all the issued and outstanding shares of the corporation, or

(b) is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has an ownership interest in the assets of that person that entitles the other person or group to receive at least 50% of the profits or at least 50% of the assets on dissolution, winding

up or termination of the partnership, trust or joint venture.

(4) For the purposes of subsection (2), a person is deemed to be an affiliate of another person if the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has any direct or indirect influence that, if exercised, would result in control in fact of that person except if the other person deals at arm's length with that person and derives influence solely as a lender.

(5) For the purposes of determining the market share of a defendant manufacturer for a type of tobacco product sold in British Columbia, the court must

(a) consider the defendant manufacturer and the manufacturers related to that defendant manufacturer to be one manufacturer, and

(b) calculate the defendant manufacturer's market share for the type of tobacco product by the following formula:

$$dms = \frac{dm}{MM} \times 100\%$$

where

dms = the defendant manufacturer's market share for the type of tobacco product from the date of the earliest tobacco related wrong committed by that defendant manufacturer to the date of trial;

dm = the quantity of the type of tobacco product manufactured or promoted by the defendant manufacturer that is sold within British Columbia from the date of the earliest tobacco related wrong

committed by that defendant manufacturer to the date of trial;

MM = the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within British Columbia from the date of the earliest tobacco related wrong committed by the defendant manufacturer to the date of trial.

Part 2 -- Recovery of the Cost of Health Care Benefits

SECTION 13

Direct action by government

13 (1) The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits that have been incurred, or will be incurred, by the government resulting from a tobacco related wrong.

(2) An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.

(3) In an action under subsection (1), the government may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage resulting from the tobacco related wrong committed by the person against whom the government's action is brought.

(4) REPEALED: SBC 1999-39-62 (b) effective July 19, 1999 (B.C. Reg. 236/99).

(5) In an action under subsection (1), the government may recover the cost of health care benefits

(a) that have been provided or will be provided to particular individual insured persons, or

(b) on an aggregate basis, that have been provided or will be provided to that portion of the population of insured persons who have suffered disease as a result of exposure to a type of tobacco product.

(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

(a) it is not necessary

(i) to identify particular individual insured persons,

(ii) to prove the cause of disease in any particular individual insured person, or

(iii) to prove the cost of health care benefits that have been provided or will be provided to any particular individual insured person,

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons,

(d) despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include

directions concerning the nature, level of detail and type of information to be disclosed, and

(e) if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents that are disclosed.

SECTION 13.1

Recovery of cost of health care benefits on aggregate basis

13.1 (1) In an action under section 13 for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the government proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a) the defendant manufacturer breached a common law, equitable or statutory duty or obligation owed to persons who have been exposed or might become exposed to the type of tobacco product,

(b) exposure to the type of tobacco product can cause or contribute to disease, and

(c) during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, was offered for sale in British Columbia.

(2) Subject to subsections (1) and (4), the court must presume that

(a) the population of insured persons who were exposed to a tobacco

product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1) (a), and

(b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

(3) If the presumptions under subsection (2) (a) and (b) apply,

(a) the court must determine the aggregate cost of health care benefits that have been, or will be, provided after the date of the breach referred to in subsection (1) (a) resulting from disease caused or contributed to by exposure to a type of tobacco product, and

(b) each defendant manufacturer to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in that type of tobacco product.

(4) The amount of a defendant manufacturer's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendant manufacturers, to the extent that a defendant manufacturer proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease referred to in subsection (2) (b).

SECTION 14

Population based evidence to establish causation and quantify damages or cost

14 Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as

evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought

(a) by or on behalf of an insured person in the person's own name or as a member of a class of persons under the Class Proceedings Act, or

(b) by the government under section 13.

SECTION 16

Liability based on risk contribution

16 (1) This section does not apply to an action under section 13 for the recovery of the cost of health care benefits on an aggregate basis.

(2) If a plaintiff is unable to establish which defendant manufacturer caused or contributed to the exposure described in paragraph (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendant manufacturers causes or contributes to a risk of disease by exposing persons to a type of tobacco product, and

(b) the plaintiff has been exposed to the type of tobacco product referred to in paragraph (a) and suffers disease as a result of the exposure,

the court may find each defendant manufacturer that caused or contributed to the risk of disease liable for a proportion of the damages or cost of health care benefits incurred equal to the proportion of its contribution to that risk of disease.

(3) The court may consider the following in apportioning liability under subsection (2):

(a) the length of time a defendant manufacturer or the manufacturers related to the defendant manufacturer engaged in the conduct that caused or contributed to the risk of disease;

(b) the market share the defendant manufacturer had in the type of tobacco product that caused or contributed to the risk of disease;

(c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant manufacturer or the manufacturers related to the defendant manufacturer;

(d) the amount spent by a defendant or the manufacturers related to the defendant manufacturer on promoting the type of tobacco product that caused or contributed to the risk of disease;

(e) the degree to which a defendant manufacturer collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;

(f) the extent to which a defendant manufacturer or the manufacturers related to the defendant manufacturer conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;

(g) the extent to which a defendant manufacturer or the manufacturers related to the defendant manufacturer assumed a leadership role in manufacturing or promoting the type of tobacco product;

(h) the efforts a defendant manufacturer or the manufacturers related to the defendant manufacturer made to warn the public about the risk

of disease resulting from exposure to the type of tobacco product;

(i) the extent to which a defendant manufacturer or the manufacturers related to the defendant manufacturer continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;

(j) affirmative steps that a defendant manufacturer or the manufacturers related to the defendant manufacturer took to reduce the risk of disease to the public;

(k) other considerations considered relevant by the court.

SECTION 19

Regulations

19 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations:

(a) designating a health care benefit for the purposes of section 1;

(b) prescribing a form of tobacco for the purposes of paragraph (i) of the definition of "type of tobacco product" in section 1.

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