



NO. S-1510120  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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

AND

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

AND

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

PETITIONERS

**APPLICATION RESPONSE**

**Application response of:** The Petitioners.

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

**Part 1. ORDER CONSENTED TO**

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

**Part 2. ORDERS OPPOSED**

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

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

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

**Part 4. FACTUAL BASIS**

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

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

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

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

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

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

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


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

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

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

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

Date: 6 /June/2017

Per: 

\_\_\_\_\_  
Signature of lawyer for filing party

Patrick Riesterer  
Counsel for the Petitioners

Respondent's address for service is:

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