



This is the 1st Affidavit of  
Vanessa Scelsa in this case and  
was made on July 4, 2019

NO. S-1510120  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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

AND

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

AND

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

PETITIONERS

**AFFIDAVIT**

I, **VANESSA SCELSEA**, Legal Assistant, of the City of Markham, in the Regional Municipality of York, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am a legal assistant to Mary Paterson at Osler, Hoskin & Harcourt LLP ("**Osler**"), counsel to the Petitioners (the "**New Walter Canada Group**") in this CCAA proceeding. As such I have personal knowledge of the facts hereinafter deposed.
2. This Affidavit is made in support of an application by the New Walter Canada Group under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") seeking an Order, among other things, admitting into evidence Affidavit #1 of David Fawcett sworn June 2, 2005 in the Corporate Formalities Application (Docket No. L050703) and Affidavit #1 of David Fawcett sworn January 19, 2007 in the Criminal Interest Application (Docket No. S070436) (collectively, the "**Fawcett Affidavits**") in the proceeding for adjudicating the claim asserted by Kevin James (the "**James Claim**").
3. Attached as Exhibit "**A**" are copies of emails dated May 17 and June 25, 2019 from John Forstrom of Hakemi & Ridgedale LLP (counsel to Mr. Fawcett) to Ms. Paterson of Osler (counsel to the New Walter Canada Group) and Heather Jones of Miller Thomson LLP (counsel to Mr. James) relating

to the potential use of the Fawcett Affidavits and any cross-examination on those affidavits in the James Claim proceeding.

SWORN BEFORE ME at Toronto, in  
the Province of Ontario, on July 4,  
2019

Waleed Malik

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

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Vanessa Scelsa

**VANESSA SCELSA**

This is Exhibit "A" referred to in Affidavit #1 of **Vanessa Scelsa** sworn July 4, 2019 at Toronto, Ontario.

*Waleed Malik*

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

## Malik, Waleed

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**From:** John Forstrom <jforstrom@hakemiridgedale.com>  
**Sent:** Tuesday, June 25, 2019 12:32 PM  
**To:** Paterson, Mary; Jones, Heather  
**Subject:** FW: Walter Energy, Kevin James, et al

**Follow Up Flag:** Flag for follow up  
**Flag Status:** Flagged

Mary & Heather,

Since sending my message below, I have had the opportunity to speak to each of you separately about the questions raised in it. I felt I should provide my comments and a statement of Mr. Fawcett's position to you jointly, to ensure we are all on the same page.

I understand the circumstances giving rise to prospective involvement of Mr. Fawcett in proceedings between your clients to include:

- Kevin James (Heather's client) is advancing a claim against Walter Energy (Mary's client) which involves the interpretation of a Royalty Sharing Agreement ("RSA") made between James, Fawcett, Western Canadian Coal Corp. and others in 2000.
- Mr. Fawcett swore affidavits in some earlier proceedings (*circa* 2005) relating to the RSA; although, those proceedings are now entirely concluded.
- Mr. Fawcett is neither a party to, nor a witness in the current proceeding by Mr. James.
- Nevertheless, Mary plans to adduce Mr. Fawcett's earlier affidavit(s) in the current proceeding between your clients (presumably by appending it to an affidavit sworn by some witness in the present proceeding).
- Heather primarily opposes the introduction of these affidavits, with the fallback position that if Mary is allowed to adduce them, she wants the right to cross-examine Mr. Fawcett on his affidavit(s).
- In that eventuality, Mary asserts the right to re-examine Mr. Fawcett.

In response to a question posed to me by Mary, I observe that the events described in Mr. Fawcett's affidavits occurred roughly 20 years ago. Mr. Fawcett advises me that he has not really thought about the circumstances surrounding the formation of the RSA for many years, and that due to the effluxion of time and the effects of aging, he has no present recollection of those events. He anticipates that his evidence would consist of little more than reviewing his earlier affidavits to confirm that that's what he recalled and swore at the time. He doesn't really recall the subject events any more, and it is unlikely he will have anything to add.

In this context, I think the process you propose is unnecessarily inconvenient and potentially unfair to Mr. Fawcett. In our separate conversations I asked each of you to explain either: (to Mary) how the evidence in Mr. Fawcett's affidavit is relevant to any issue in the present proceeding; or, (to Heather) what further, useful evidence you expect to elicit from Mr. Fawcett through cross-examination. I mean no disrespect in observing that I found your answers a bit vague. In particular, I am left wondering whether the object of requiring Mr. Fawcett to attend to give *viva voce* evidence is to elicit some further evidence to supplement his account of the circumstances in which the RSA was formed, or alternately to challenge the accuracy of some part of his affidavit evidence. Unless it is one or the other, there is no point in requiring him to attend to be examined. I think he's entitled to have a clearer idea of what you want to ask him about before being compelled to give evidence.

Meantime, the procedure you are following appears to me unorthodox. It seems to me doubtful that the court has jurisdiction pursuant to Rule 22-1 (4)(a) to order cross-examination of Mr. Fawcett on his affidavit, since that affidavit

was sworn in relation to a different proceeding and Mr. Fawcett has never given any evidence in the present proceeding. Although the court may have jurisdiction compel Mr. Fawcett to give evidence as a witness in the new proceeding, it seems to me in that case the procedural principles relating to examination of a non-party witness under Rule 7-5 are engaged – particularly subsections (1)(b) and (3)(c).

So, I will try to sum up Mr. Fawcett's position in the following propositions:

1. Mr. Fawcett is mindful of his duty to provide relevant evidence in judicial proceedings, and will cooperate in doing so to the extent reasonably required;
2. The affidavits he swore in earlier proceedings are what they are; Mr. Fawcett he is disinterested in the present proceeding and indifferent as to whatever use either of you may wish to make of his earlier evidence – that's an issue between you and your clients;
3. However, if either of you wishes to obtain additional evidence from Mr. Fawcett's as a witness in the present proceeding, then he requests that you submit written questions with respect to his knowledge of the matters in question, to which he will provide written responses in accordance with Rule 7-5 (3)(c); and,
4. In the event that he may eventually be ordered to be examined at the behest of any party, he will seek reimbursement of his lawyer's costs relating to that examination pursuant to rule 7-5(1)(b).

Let me know how you intend to proceed.

**John Forstrom**  
Associate Counsel

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**From:** John Forstrom <jforstrom@hakemiridgedale.com>  
**Date:** Friday, May 17, 2019 at 12:42 PM  
**To:** "mpaterson@osler.com" <mpaterson@osler.com>, "hjones@millertthomson.com" <hjones@millertthomson.com>  
**Subject:** Walter Energy, Kevin James, et al

Mesdames,  
I have been consulted by David Fawcett regarding the referenced matter.

I understand that each of you may wish to solicit evidence (or "clarification" of earlier evidence) from Mr. Fawcett in relation to proceedings between your clients. However, Dave and I remain a bit uncertain about exactly what evidence either of you wish to solicit from him, when or how.

Any further requests for evidence from Mr. Fawcett should be directed to me. I would appreciate if each of you could clarify exactly what it is you want from him. I look forward to working with you to provide any required evidence as efficiently as possible.

Unfortunately, I am scheduled to be away from the office Monday and Tuesday, but look forward to reviewing this further, later next week.

Regards,

**John Forstrom**

Associate Counsel

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COAL CORP. AND CAMBRIAN ENERGYBUILD  
HOLDINGS ULC

PETITIONERS

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**AFFIDAVIT #1 OF VANESSA SCELISA**

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