

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re)*,
2017 BCSC 1968

Date: 20171101
Docket: S1510120
Registry: Vancouver

**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 and Arrangement of New Walter Energy
Canada Holdings, Inc., New Walter Canadian Coal Corp., New Brule Coal
Corp., New Willow Creek Coal Corp., New Energybuild Holdings ULC**

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	P. Riesterer
Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	T. Jeffries
Counsel for Warrior Met Coal, LLC	M. Nied
Counsel for the United Steelworkers, Local 1-424:	J. Sanders
Counsel for KPMG, Monitor:	V. Tickle P.J. Reardon
Place and Date of Hearing/Judgment:	New Westminster, B.C. October 6, 2017

Written Reasons:

New Westminster, B.C.
November 1, 2017

Introduction

[1] The petitioners, now called the New Walter Canada Group, apply for an order approving a settlement of certain claims. This is a significant development in these *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") proceedings, in that the settlement will pave the way so as to allow all other claims to be settled expeditiously. Importantly, it will also allow the distribution of substantial funds to the creditors arising from the earlier monetization of the majority of the assets.

[2] The petitioners also seek authorization to advance further funds to the U.K. arm of the Walter Energy group of companies, and specifically, Energybuild Group Limited or Energybuild Ltd. ("Energybuild"), on a secured basis and not exceeding an aggregate amount of £900,000. Finally, the petitioners seek an extension of the stay period to December 15, 2017.

[3] For the reasons that follow, I grant the relief sought by the petitioners.

Background

[4] The history of this matter has already been recounted in numerous decisions of this Court: *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1413; 2016 BCSC 2470; 2017 BCSC 53. Essentially, the coal mining assets of the petitioners were sold and the focus of the proceeding then moved to a consideration of the claims advanced by creditors, or alleged creditors.

[5] The amounts available for distribution to the creditors is estimated to be in excess of \$63 million by the end of 2017.

[6] The most significant claim advanced against the petitioners was that of a U.S. entity, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan"). The 1974 Plan asserted its claim pursuant to certain "controlled group" provisions of U.S. legislation, being the *Employee Retirement Income Security Act of 1974*, 29 U.S.C. § 1001, as amended ("*ERISA*"). The significance of the 1974 Plan's claim cannot be understated as it was in excess of \$1.2 billion. If the claim was valid,

it stood to consume the majority of the funds available for distribution to the other creditors, such that the substantial Canadian creditors' claims would have received only a nominal recovery.

[7] The validity of the 1974 Plan's claim was addressed by this Court. On May 1, 2017, I held that the 1974 Plan's claim was governed by Canadian substantive law and not U.S. substantive law: *Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 709 at paras. 177-78, 182. Effectively, this resulted in the rejection of the 1974 Plan's claim against the petitioners.

[8] The 1974 Plan filed an application for leave to appeal from my decision. Leave was granted by the British Columbia Court of Appeal on June 9, 2017. The appeal was scheduled to be heard on August 16, 2017. Eventually, the hearing date was adjourned in light of the ongoing negotiations between the parties which, if successful, would obviate the need to proceed.

[9] In late September 2017, those negotiations were successful and resulted in the preparation of the Settlement Term Sheet Re Plan of Compromise and Arrangement (the "Settlement Term Sheet") which is presented for approval on this application.

[10] There is no opposition to the approval of the Settlement Term Sheet. All stakeholders appearing are in support. The evidence on this application includes the affidavit #15 of William Aziz of BlueTree Advisors Inc., the Chief Restructuring Officer, and the Monitor who has filed its Thirteenth Report dated October 4, 2017.

The Settlement Term Sheet

[11] As described above, the Settlement Term Sheet is the result of lengthy arm's length negotiation between the petitioners, the 1974 Plan and Warrior Met Coal, LLC ("Warrior"). Warrior is another U.S. entity who had advanced claims against some of the petitioners' assets. Warrior's claim was significant because, if the 1974 Plan's claim was not valid, the full amount of the claims against the operating subsidiaries within the New Walter Canada Group would be paid in full, resulting in monies

flowing to the holding companies within the New Walter Canada Group against which Warrior's claim had been filed.

[12] The essential terms of the Settlement Term Sheet are as follows.

a) Settlement of Warrior's Claims

[13] The Settlement Term Sheet provides for a settlement and allowance of two claims asserted by Warrior: (i) a claim in respect of certain shared services provided by the U.S. Walter Energy entities to the Canadian Walter Energy entities (the "Shared Services Claim"); and (ii) a claim in relation to accrued but unpaid interest owing in respect of a promissory note between Walter Energy, Inc. and Walter Energy Canada Holdings, Inc. dated April 1, 2011 and related documents, which claim was compromised pursuant to an order of the Court pronounced December 21, 2016. That compromise was made pursuant to a proposal by the original Canadian Walter Energy entities pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which proposal was approved by the Court on December 21, 2016 (the "Hybrid Debt Claim").

[14] Under the Settlement Term Sheet, Warrior's claims will be an Allowed Claim, as that phrase is defined in a Claims Process Order granted in these proceedings on August 16, 2016. Warrior's claims will be as follows: the Shared Services Claim will be an Allowed Claim in the amount of \$9,892,193.32; and, the Hybrid Debt Claim will be an Allowed Claim to be further compromised such that it is equal to the amount of the Available Net Proceeds (as described below). Further, in the Settlement Term Sheet, Warrior expressly consents to the use of the Available Net Proceeds in the manner described below.

b) Settlement of the 1974 Plan's Claim, Appeal and Related Cost Awards

[15] The Settlement Term Sheet provides that, in consideration of the 1974 Plan abandoning its appeal, the petitioners will pay the first \$13 million of Available Net Proceeds to the 1974 Plan, and Warrior shall receive the remainder (if any) of

Available Net Proceeds (after the payment of certain other amounts described below) in respect of the Hybrid Debt Claim.

[16] Further, the petitioners have agreed that, in consideration of the abandonment of the 1974 Plan's appeal, they will (i) not pursue costs against the 1974 Plan in relation to proceedings arising from the assertion of its claim, both in this Court and in the Court of Appeal; and (ii) pay the costs of the United Steelworkers Local 1-424 ("USW"). The USW had been very much involved in opposing the efforts of the 1974 Plan to assert its claim. The USW's costs are fixed at \$75,000, which is to be paid from the funds available for distribution.

[17] The 1974 Plan's agreement to abandon its appeal is contingent upon the petitioners' payment of \$13 million to the 1974 Plan from the Available Net Proceeds. The uncertainty as to whether this payment can be made arises because it is not yet known exactly what claims might be advanced against the petitioners.

[18] The process under the Claims Process Order has been underway for some time now. Arising from that process, there are Allowed Claims of \$23.8 million and unresolved claims of \$7.5 million. However, more recently, the Monitor has been undertaking the process of flushing out any further restructuring claims pursuant to the Claims Process Amendment Order granted August 15, 2017. No claims have yet been received, however, the claims bar date is at the end of today. As of the hearing, no claims had been received that would potentially result in less than \$13 million being available to be paid to the 1974 Plan from the Available Net Proceeds.

[19] Accordingly, the 1974 Plan will adjourn its appeal so as to conclude the unresolved restructuring claims process towards determining that \$13 million will, in any event, be available to be paid to the 1974 Plan, rather than Warrior, after deducting (i) all payments and taking all reserves required to administer and wind down the estate as contemplated; (ii) payment of the USW costs amount; and (iii) payment in full of all Allowed Claims, including the Shared Services Claim but excluding the Hybrid Debt Claim (the "Available Net Proceeds"). The 1974 Plan will

then abandon its appeal following the petitioners' payment to the 1974 Plan of \$13 million.

[20] In the event that additional claims are filed in the unresolved restructuring claims process and they become Allowed Claims, such that it is determined that the Available Net Proceeds will be insufficient to pay \$13 million to the 1974 Plan, the Settlement Term Sheet provides that (i) the 1974 Plan may bring its appeal at that time; and (ii) the petitioners, the Monitor and the USW may pursue costs against the 1974 Plan in relation to proceedings arising from the assertion of its claim, both in this Court and in the Court of Appeal.

[21] Under the Settlement Term Sheet, the 1974 Plan's claim shall not become an Allowed Claim unless the 1974 Plan brings forward its appeal in the manner permitted by the Settlement Term Sheet and a final order is issued declaring that the 1974 Plan's claim is an Allowed Claim in respect of the petitioners.

[22] The Settlement Term Sheet also provides that the director of the corporations composing the petitioners (who was also the director of the original Canadian Walter Energy petitioner companies) shall be paid an aggregate amount of US\$250,000 from the Available Net Proceeds "in consideration for his commitment to [the petitioners] throughout the CCAA [p]roceedings".

c) Plan of Compromise or Arrangement

[23] Upon the completion of the unresolved restructuring claim process or such earlier date as the petitioners and the Monitor may decide (after consultation with Warrior), the petitioners intend to bring forward a motion seeking the Court's approval of a plan of compromise or arrangement (the "Plan") that contains the principal terms set out in the Settlement Term Sheet. I am advised that the petitioners will bring this motion only if they and the Monitor are satisfied that sufficient funds will be available to address all remaining matters in the CCAA proceedings and the orderly wind-down or other process for the Walter U.K. Group, which includes Energybuild.

[24] The terms that will be included in the proposed Plan are set out in the Settlement Term Sheet and include, among others terms, the following:

- a) Warrior, as the sole claimant with a claim that is to be compromised under the Plan, shall be the sole claimant entitled to vote on the Plan;
- b) the Plan will provide for the payment in full in cash of all claims that become Allowed Claims other than the Hybrid Debt Claim, provided that the petitioners and the Monitor determine that:
 - i. the petitioners have an amount sufficient to pay in full in cash all Allowed Claims and the full amount of all Claims that become Allowed Claims after the date of the Settlement Term Sheet;
 - ii. if there is an interim distribution, the petitioners have an amount sufficient to pay in full in cash any claim that is the subject of an unresolved Notice of Dispute if all such disputed claims were to become Allowed Claims; and
 - iii. the petitioners have retained an amount sufficient to address professional fees and other costs necessary for the effective administration of all remaining matters in connection with these CCAA proceedings, and to address whatever process occurs with respect to the Walter U.K. Group.

[25] The 1974 Plan has agreed to support the petitioners in obtaining Court approval and implementation of the Plan.

- d) Release of Claims against the Walter U.K. Group

[26] Cambrian Energybuild Holdings ULC (“Cambrian”) is one of the petitioners. It is the holding company for the coal mining operating companies in the United Kingdom. Its subsidiaries include Energybuild, the operating entity or entities that own and operate the Aberpergym underground coal mine located at the Neath Valley in Wales. The mine is currently in care and maintenance.

[27] Efforts have been underway for some time on the part of the petitioners and the directors of the Walter U.K. Group in analyzing Energybuild's business and seeking opportunities to sell Energybuild and its affiliates or their assets. An interested party has come forward regarding a potential sale of Energybuild and certain of its affiliates. The interested party remains interested in acquiring these assets, but has requested that certain conditions be satisfied in respect of claims that may be made against Energybuild and any of its affiliates that may be acquired. One of those potential claims is that of the 1974 Plan, who similarly asserts that the Walter U.K. Group entities are liable for its claim under *ERISA*. In addition, there appears to be the potential for Warrior to assert claims directly against the Walter U.K. Group entities in relation to its intercompany claims by the U.S. Walter Energy entities.

[28] Therefore, the petitioners and the Walter U.K. Group have sought, as part of the Settlement Term Sheet, to address any such claims. If not addressed, these lingering issues may result in the interested party disengaging entirely from the negotiations which the stakeholders hoped would lead to a sale of Energybuild and its assets.

[29] The Settlement Term Sheet addresses the principal conditions precedent that relate to the sale of Energybuild and certain of its affiliates. In order to facilitate the sale of the Walter U.K. Group, any entity included within that Group or any of their respective assets, the Settlement Term Sheet provides for releases by both the 1974 Plan and Warrior on certain terms. These releases are effective immediately and are not dependent on whether there is at least Available Net Proceeds of \$13 million available for payment to the 1974 Plan or that the appeal is abandoned. Accordingly, these releases allow the petitioners and the directors of the Walter U.K. Group to proceed immediately to conclude a sale in the U.K., if possible.

[30] The Term Sheet provides that the proceeds from any sale of the U.K. assets are to be applied as follows:

- a) first, to repay amounts advanced to or for the benefit of the Walter U.K. Group on a secured basis, as has already been authorized by orders granted in these CCAA proceedings. To date, £600,000 has been advanced and it is proposed that authorization be given for a further £300,000;
- b) second, to wind up any Walter U.K. Group entity that is not the subject of any sale in a cost effective and tax efficient manner that protects the Walter U.K. Group's directors and officers from liability to the fullest extent possible, at the discretion of the petitioners;
- c) third, if any amounts remain, such amounts shall be distributed to Warrior in respect of Warrior's claim asserted against the Walter U.K. Group, up to the maximum amount of £4,666,779; and
- d) fourth, if any amounts remain, such amounts shall be distributed to Cambrian on account of its equity interest in Energybuild.

Approval of Settlement Term Sheet

[31] The petitioners seek approval of the Settlement Term Sheet pursuant to the CCAA, s. 11, which provides that I may exercise my discretion to make any order that I consider "appropriate in the circumstances".

[32] In *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1773 at para. 16, I concluded that s. 11 provides the necessary jurisdictional basis to consider and approve a settlement agreement even before the presentation of a plan of arrangement.

[33] Regional Senior Justice Morawetz of the Superior Court of Justice has articulated, a number of times, the relevant considerations in approving a settlement in the CCAA context:

- a. is the settlement fair and reasonable?
- b. does the settlement provide substantial benefit to stakeholders? and

- c. is the settlement consistent with the purpose and spirit of the CCAA?

See: *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2013 ONSC 1078 at para. 49, leave to appeal refused 2013 ONCA 456; *1511419 Ontario Inc. (Re)*, 2015 ONSC 7538 at para. 14.

[34] In my view, all three of the above considerations are satisfied here and support that the Settlement Term Sheet should be approved:

- a) the settlement removes a major stumbling block in providing a distribution to creditors, many of whom are former employees of the petitioners who have suffered financial distress as a result of not being paid their wages and other benefits;
- b) if the 1974 Plan's claim were to proceed to a hearing of the appeal, there would be significant delay in resolving the issues. In addition, there would be significant cost to the petitioners, the CRO and the Monitor in participating in those proceedings;
- c) the settlement avoids the risk of the 1974 Plan being successful, a result that would effectively deprive the claimants with Allowed Claims of any meaningful recovery;
- d) the settlement allows the petitioners to proceed to a determination of the remaining claims on their merits which will also facilitate a final distribution to the creditors;
- e) all of the Allowed Claims, many of whom are former employees, will receive their claim amounts in full. Only Warrior will face any compromise of its claim. Effectively, the payment of \$13 million to the 1974 Plan has no effect on the Allowed Claims since it is sourced from the Available Net Proceeds that would otherwise be paid to Warrior; and
- f) the settlement will also facilitate the sale of the Walter U.K. Group assets in terms of the releases from the 1974 Plan and Warrior, which are

effective immediately. A timely resolution of that aspect of the restructuring will be to the benefit of all parties in bringing these proceedings to a close.

[35] There can be no doubt but that this settlement achieves what few CCAA proceedings achieve, namely a somewhat timely but full recovery for the vast majority of claimants. That the parties were able to resolve their differences to avoid the complex and costly legal battles to come is a testament to the ingenuity of the stakeholders and the flexibility that the CCAA affords in these difficult circumstances.

[36] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court confirmed the well-known description of the CCAA as being a remedial statute and that the court has “broad and flexible authority” to facilitate the reorganization of the debtor towards achieving the objectives of the CCAA, including avoiding the social and economic losses arising from restructuring proceedings: paras. 15-19.

[37] These particular comments of the Court in *Century Services* bear repeating in respect of this application:

[70] ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[Emphasis added.]

[38] The Monitor supports the approval of the Settlement Term Sheet as being fair and reasonable, describing it as a “highly favourable outcome” for the petitioners’ creditors who are to be paid in full. The Monitor expects that there will be sufficient funds to pay all of the Allowed Claims such that there is little likelihood of there being insufficient funds with which to pay \$13 million to the 1974 Plan. In the circumstances, this appears to be a reasonable expectation.

[39] The only hesitation I had with respect to the approval of the Settlement Term Sheet arose from the proposal that the director be paid US\$250,000, in light of what was described as his commitment and the risks that he has undertaken in the fulfillment of his duties throughout these proceedings.

[40] A somewhat similar circumstance arose in *Veris Gold Corp. (Re)*, 2015 BCSC 399, where approval of fees was sought in relation to amounts said to have accrued throughout a CCAA proceeding. In that case, the approval of the fees would have affected pre-existing claims after the fact:

[62] The matter of timing requires some discussion. The effect of the relief now sought by the Special Committee is such that their fees would be paid in priority to DB's security. WBox takes no position in respect of the relief sought, no doubt given the higher priority of its security as against DB's secured position.

[63] If such an application had been brought in a more timely manner, then the court would have been in a position to consider the matter based on the circumstances at the time. In addition, the stakeholders, such as DB, would have been able to assess the relief sought in respect of its position at that time. Court-ordered charges to protect persons providing services to the debtor can be sought under the CCAA: see for example, s. 11.4 (critical suppliers); s. 11.52 (fees and expenses of financial, legal and other experts).

[64] This is not unlike a situation where court-ordered charges are sought when services have already been provided and relief is only sought some time later. Inevitably, the argument is that it is only "fair" that the services delivered prior to the date of the charge be included. In addition, this is not unlike the situation where limits of spending have been imposed in respect of such charges, and the limits are exceeded and only later sought to be increased. In all of these circumstances, delay in seeking relief disadvantages the stakeholders in terms of considering the effect of the relief sought in the context of the current situation, and deprives them of a consideration of other options that might be available at the time. In addition, this delay puts the court in the very uncomfortable position of potentially depriving persons who have provided such services in good faith of the normal costs of doing so.

[Emphasis added.]

[41] Having considered the matter, I do not see that any similar issues or disadvantages to the stakeholders arise in relation to the proposed payment to be made to the director. Unlike the situation in *Veris Gold*, this amount to be paid is only sourced from the Available Net Proceeds, which effectively means that Warrior will

fund that amount from funds that would otherwise be paid to it. Warrior agrees to the payment of that amount. Accordingly, no Allowed Claims will be affected.

[42] I conclude that the Settlement Term Sheet is fair and reasonable, that it provides a substantial benefit to the creditors of the petitioners and that it is consistent with the purpose and spirit of the CCAA.

Approval of Further Advances to the Walter U.K. Group

[43] As set out above, the petitioners have already been funding the Walter U.K. Group in respect of its working capital requirements. The advances, which are secured, are currently outstanding in the amount of £600,000.

[44] Mr. Aziz indicates that, with the releases set out in the Settlement Term Sheet now in hand, further time will be needed to hopefully conclude the negotiations with the party who has expressed an interest in purchasing the Walter U.K. Group's assets. The petitioners have been provided with cash flow forecasts for Energybuild that indicate a cash need of approximately £300,000 through to the end of the proposed extended stay period, namely December 15, 2017.

[45] As such, the New Walter Canada Group is seeking this Court's authorization to advance up to an additional £300,000 (for an aggregate maximum of £900,000) on a secured basis to the Walter U.K. Group to fund Energybuild's working capital needs while negotiations regarding a potential sale continue. Mr. Aziz advises that no additional funds will be advanced unless the petitioners determine that such further advance will be in the best interests of Cambrian and the other members of the petitioners. By that statement, I take it to be the case that, if the negotiations do not result fairly quickly in a sale of the assets, other measures will be considered to deal with the Walter U.K. Assets as expeditiously and efficiently as possible.

[46] All of the circumstances here support the conclusion that the further interim financing should be approved based on the factors set out in the CCAA, s. 11.2(4). That financing is approved on the terms sought.

Stay Extension

[47] The current stay period expires today, October 6, 2017.

[48] The petitioners seek an extension of the stay period to December 15, 2017. This extension is being requested to allow them to complete the unresolved restructuring claims process; possibly bring court proceedings to address any disputed claims; sell the Walter U.K. Group assets, if possible; develop the Plan and bring it before the Court for approval to implement the Settlement Term Sheet; and finally, address the distribution of the proceeds.

[49] Both Mr. Aziz and the Monitor confirm what is manifestly apparent; namely, that the petitioners continue to act in good faith and with due diligence in these proceedings. The Monitor supports the extension of the stay period as being a reasonable estimate of the time required to address these final matters.

[50] I have no hesitation in concluding that the requested stay extension is appropriate in the circumstances and that the petitioners are acting in good faith and with due diligence: CCAA, s. 11.02(2) and (3).

Conclusion

[51] The proposed settlement, as contained in the Settlement Term Sheet, is fair and reasonable. The Settlement Term Sheet, between the petitioners, Warrior and the 1974 Plan is approved. I also order that the parties to the Settlement Term Sheet comply with their obligations under the Settlement Term Sheet and that the Monitor assist in that respect by taking all reasonable and necessary steps to do so.

[52] Cambrian Energybuild Holdings ULC is authorized to advance up to a further £300,000 (for an aggregate maximum of £900,000) to Energybuild, on a secured basis.

[53] Finally, the stay of proceedings in respect of the petitioners is extended to December 15, 2017.

“Fitzpatrick J.”