# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2018 BCSC 1135

Date: 20180709
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

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| Counsel for Warrior Met Coal, LLC | Matthew Nied |
| Counsel for the United Steelworkers, Local 1-424: | Stephanie Drake |
| Counsel for KPMG Inc., Monitor: | Peter Reardon<br>Vicki Tickle |

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| Place and Date of Hearing/Judgment with Reasons to Follow: | Vancouver, B.C.<br>July 3, 2018 |
| Place and Date of Written Reasons: | Vancouver, B.C.<br>July 9, 2018 |

## INTRODUCTION

[1] This is the final chapter of these *Companies' Creditors Arrangement Act,* R.S.C. 1985, c C-36, as amended (the “CCAA") proceedings.

[2] These proceedings began approximately two-and-a-half years ago. The realizations from the significant assets of the petitioners, now called the “New Walter Canada Group”, consisted primarily of coal mining assets located in British Columbia and the United Kingdom.

[3] The main issue within the proceedings was the distribution of asset recoveries in light of various claims advanced by the stakeholders. Those stakeholders include the unionized workers in British Columbia, represented by the United Steelworkers, Local 1-424 (the “USW”), the United Mine Workers of America 1974 Pension Plan and Trust (the “1974 Plan”) and Warrior Met Coal, LLC (“Warrior”).

[4] After significant contested proceedings, appeals filed and extensive negotiations between the New Walter Canada Group and all stakeholders, assisted by the CRO and the Monitor, a settlement was reached in September 2017. The provisions of the Settlement Term Sheet, as defined and approved in accordance with my earlier reasons should be read with these reasons: *Walter Energy Canada Holdings, Inc. (Re),* 2017 BCSC 1968 (the “Settlement Reasons”).

[5] After the completion of further procedures in these *CCAA* proceedings, the petitioners now apply for a Sanction Order. In these reasons, I have capitalized certain terms, as set out in various court orders and related documents, including the plan.

## BACKGROUND

[6] On December 7, 2015, this Court granted an Initial Order in favour of the initial corporate group comprising the petitioners, called “Old Walter Canada Group”, pursuant to the *CCCA*. The stay granted in the Initial Order has been extended numerous times in this proceeding and presently expires December 31, 2018.

[7] The realization procedures undertaken and results achieved by Mr. Aziz, the CRO, have been very successful. At present, the Monitor estimates that approximately $61.5 million will be available in December 2018 for distribution to the stakeholders.

[8] On August 16, 2016, this Court granted a Claims Process Order to establish a claims process to be implemented by the Old and New Walter Canada Groups.

[9] As stated above, in September 2017, the New Walter Canada Group, the 1974 Plan and Warrior agreed to a Settlement Term Sheet that resulted in a full and final settlement of most of the outstanding issues among these stakeholders in these *CCAA* proceedings: Settlement Reasons at paras. 11-30. The Settlement Term Sheet is a complex document, but can be generally summarized as providing for:

(a) payment in full of Proven Claims of Affected Creditors;

(b) payment of $13 million to the 1974 Plan in full satisfaction of its claim against the New Walter Canada Group within these proceedings;

(c) payment of $75,000 to the USW in respect of its costs in these proceedings; and

(d) a substantial distribution to Warrior in respect of its Deemed Interest Claim in full satisfaction of that Claim.

[10] On October 6, 2017, the Settlement Term Sheet was approved by this Court, after considering in particular that the Affected Claims (which included those advanced by the USW) were to be paid in full: Settlement Reasons at paras. 31-42.

[11] The implementation of the Settlement Term Sheet was conditional upon the completion of the claims process to identify any further claims. On August 15, 2017, this Court granted a Claims Process Amendment Order to identify remaining Restructuring Claims and Directors/Officers Claims that had not yet been solicited.

[12] That further claims process has now been completed and the New Walter Canada Group and the Monitor have determined that there are sufficient funds to make the distributions contemplated in the Settlement Term Sheet after establishing certain reserves for Disputed Claims and other matters. In particular, it is anticipated that there will be sufficient Available Funds to pay the Affected Creditors in full, pay the 1974 Plan Settlement Amount and pay the USW Settlement Amount with significant sums remaining to pay a large amount to Warrior in respect of its Deemed Interest Claim.

[13] On May 28, 2018, the New Walter Canada Group filed its Original Plan, as developed by it in consultation with the Monitor and certain stakeholders. On May 31, 2018, the New Walter Canada Group obtained a Meeting Order granting leave to file the Original Plan and authorizing certain amendments to the Original Plan, pursuant to s. 4 of the *CCAA*.

[14] A somewhat unusual aspect of the Meeting Order was that the New Walter Canada Group's class of unsecured creditors (including the Affected Creditors and Warrior) would be deemed to hold meetings and deemed vote their Claims in favour of the Original Plan or, if amended, any later filed plan. I considered that this was an expeditious manner to proceed since the Settlement Term Sheet provided for payment in full to the Affected Creditors and in light of Warrior's agreement to the Settlement Term Sheet. On May 21, 2014, such a deeming provision was granted by Justice Spivak in a *CCAA* meeting order where the affected creditors were similarly to be paid in full under the plan filed in those proceedings (*Re Arctic Glacier Income Fund*, The Queen's Bench, Winnipeg Centre, File No. CI 12-01-76323).

[15] The essential terms of the Original Plan were to implement what was contained in the Settlement Term Sheet, including payment in full of Proven Claims owed to Affected Creditors.

[16] The Meeting Order authorized the New Walter Canada Group to call the Creditors Meetings and outlined the notice that was to be provided to creditors regarding the meetings. On June 22, 2018, in advance of the deemed meetings, the

New Walter Canada Group amended the Original Plan, as I will describe in more detail below (the "Amended Plan"). The materials establish that the notice procedures in respect of the Amended Plan have been followed. The notice provisions included specific mailings to the Affected Creditors, specific notice to Warrior, posting of materials on the Monitor's website and newspaper notices.

[17] The notice to Affected Creditors included a request that any person with a concern regarding the Amended Plan should advise the Monitor of such concerns by June 25, 2018. Twelve such Affected Creditors did provide responses, but no person took exception to the substance of the Amended Plan or the meeting and voting process set out in the Meeting Order. For the most part, the responses were to express frustration in the delay of distribution.

[18] On June 27, 2018, the deemed meetings and voting took place:

(a) the consolidated class of creditors, comprised of all of the Affected Creditors, including Warrior with respect to its Shared Services Claim (the "Affected Creditors Class") was established to vote on the Amended Plan. The Affected Creditors Class were deemed to have met and voted unanimously in favour of a resolution to approve the Amended Plan; and

(b) Warrior was the only creditor entitled to vote its Deemed Interest Claim and it was deemed to have voted in favour of a resolution to approve payment of that Claim in accordance with the Amended Plan.

## DISCUSSION

[19] Section 6(1) of the *CCAA* provides this Court with express jurisdiction to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the plan.

[20] The general requirements for court approval of a *CCAA* plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

See *Canadian Airlines Corp.,* 2000 ABQB 442 at para. 60, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9; *Sino-Forest Corp.,* 2012 ONSC 7050 at para. 51, leave to appeal denied, 2013 ONCA 456; *Bul River Mineral Corporation*, 2015 BCSC 113 at para. 40; *TLC The Land Conservancy of British Columbia, Inc.*, 2015 BCSC 656 at para. 47.

**a) Has there been strict compliance with statutory requirements?**

[21] I am satisfied that there has been strict requirements with all provisions of the *CCAA*. This is supported by the evidence of Mr. Aziz, the CRO, including that found in his most recent affidavit #23 sworn June 26, 2018.

[22] In addition, in its Nineteenth Report dated June 27, 2018, the Monitor states that to the best of its knowledge, the petitioners have met all *CCAA* requirements and complied with all court orders granted in this proceeding.

[23] Further, s. 6 of the *CCAA* has been complied with in terms of a sanction order being only available if the plan contains certain specified provisions concerning crown claims, employee claims and pension claims:

a) the Amended Plan satisfies the requirements of s. 6(3) because it provides that the Monitor shall, within six months after the Plan Sanction Date, pay in full, on behalf of the New Walter Canada Group, to Her Majesty in Right of Canada or any province all amounts of any kind that could be subject to a demand under s. 6(3) of the *CCAA* that were outstanding on the Filing Date and which have not been paid by the Plan Implementation Date;

b) the Amended Plan does not provide for payment of any "Employee Priority Claims" or "Pension Priority Claims" pursuant to ss. 6(5) and 6(6) of the *CCAA* because no such claims exist; and

c) the Amended Plan complies with s. 6(8) of the *CCAA* in that the New Walter Canada Group are distributing all their available assets to or on behalf of their creditors. No distribution is to be made on account of equity claims.

**b) Has anything been done that is not authorized by the *CCAA*?**

[24] Again, no issues arise in this respect. No stakeholder has raised any such concerns.

[25] Throughout these proceedings, the Monitor has updated the Court on the progress of the proceedings and its review of the activities of the petitioners, citing no irregularities. Indeed, on each stay extension application, the Monitor has advised that, in its view, the petitioners were acting in good faith and with due diligence throughout the course of these proceedings. See *Canwest Global Communications Corp. Re,* 2010 ONSC 4209 at para. 17.

**c) Is the Amended Plan fair and reasonable?**

[26] In the Settlement Reasons at paras. 31-42, I found the Settlement Term Sheet to be fair and reasonable. As the Amended Plan simply implements the terms of that document, it must necessarily follow, with one minor exception discussed below, that the Amended Plan is also fair and reasonable.

[27] This is not a restructuring plan by which the New Walter Canada Group is to re-emerge. The Amended Plan is simply a means by which the monies realized from the asset dispositions by the petitioners and the CRO will be distributed to the stakeholders. In that circumstance, in addition to the other benefits outlined in the Settlement Reasons:

(a) the Amended Plan will result in full payment of Proven Claims owed to Affected Creditors, which comprise the vast majority of the New Walter Canada Group's creditors. By any measure, such a result in an insolvency proceeding is rarely achieved;

(b) the Amended Plan will also resolve the heavily contested claim advanced by the 1974 Plan. The compromise of that claim at $13 million has been accepted by the 1974 Plan, a sophisticated litigant who no doubt has fully assessed the merits of doing so after receiving legal advice; and

(c) similarly, Warrior, another sophisticated litigant, has agreed to a compromise of its claim as against the Available Net Proceeds, having agreed that the settlement amount for the 1974's Plan's claim is to come from that fund, rather than detract from the full payment to the Affected Creditors.

[28] The only issue that arose in relation to the fairness and reasonableness of the Original Plan related to the releases provided for in Article 9, and specifically Article 9.1 entitled "CCAA Plan Releases".

[29] At the hearing on May 31, 2018, when the Meeting Order was sought, I questioned the New Walter Canada Group's counsel as to the appropriateness of the broad range of releases in the Original Plan and the naming of some of the releasees set out in Article 9.1. For example, the Original Plan provided for a general release in favour of the Financial Advisor, PJT Partners LP, despite that entity having only a limited role in the sales and solicitation process. In addition, there was an amorphous reference to an "auditor, financial advisor …. consultant, and agent" of the primary releasees, being the petitioners, the Monitor, the CRO and Directors and Officers of the petitioners

[30] In *Bul River*, I discussed the court's jurisdiction to approve a plan of arrangement that includes releases and relevant considerations in terms of whether such releases are fair and reasonable:

> [77] The *CCAA* does not contain any express provisions either permitting or prohibiting the granting of releases, including third party releases, as part of a plan of compromise or arrangement. Nevertheless, there is authority to the effect that the court may approve releases found in a plan of arrangement while exercising its statutory jurisdiction under the *CCAA*. The leading decision is *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (CanLII), leave to appeal to S.C.C. refused (2008), 390 N.R. 393 (note). At paras. 40-52 of *Metcalfe*, a plan containing third party releases was sanctioned. At para. 46, the court stated that such jurisdiction may be exercised where the releases are "reasonably related to the proposed restructuring".
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> [78] The approach in *Metcalfe* was adopted in *Canwest* at paras. 28-30. The court in *Canwest* noted that third party releases should be the exception and not requested or granted as a matter of course: para. 29.
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> [79] In *Kitchener Frame Ltd. (Re)*, 2012 ONSC 234 (CanLII), although in the context of a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the court summarized the requirements that would justify third party releases:
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> > [80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify third-party releases are:
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> > a) the parties to be released are necessary and essential to the restructuring of the debtor;
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> > b) the claims to be released are rationally related to the purpose of the Plan … and necessary for it;
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> > c) the Plan ... cannot succeed without the releases;
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> > d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan...; and
> >
> > e) the Plan … will benefit not only the debtor companies but creditors generally.
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> [80] *Metcalfe* has been applied in numerous decisions where third party releases have been approved: see, for example, *Sino-Forest Corp. (Re)*, 2012 ONSC 7050 (CanLII) at paras. 70-77; *SkyLink Aviation Inc. (Re)*, 2013 ONSC 2519 (CanLII) at paras. 30-33. In British Columbia, see *Angiotech Pharmaceuticals, Inc. (Re)*, 2011 BCSC 450 (CanLII) at para. 12, where the court sanctioned a plan that included releases in favour of various persons, including the monitor, financial advisors and the interim lender.
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> [81] It remains the case that any person proposing releases in a plan of arrangement, and any party seeking a court order sanctioning or even supplementing such releases, must ensure, from the outset, that a proper rationale exists for them.

[31] In his affidavit, Mr. Aziz describes that, arising from concerns expressed by the Court, the Original Plan was amended to considerably narrow not only those persons who will be released, but also the scope of some releases. He states that,

broadly speaking, the Amended Plan now provides for full and final releases for three groups of releasees:

(a) The New Walter Canada Group Parties: the New Walter Canada Group, the Directors, the Officers, and all present and former Employees who filed or could have filed indemnity claims against the Old Walter Canada Group or the New Walter Canada Group, and all affiliates and legal counsel thereof;

(b) The Restructuring Support Parties: the Monitor, KPMG Inc., and its affiliates; the CRO; Philip L. Evans Jr., in his capacity as consultant to the Old and New Walter Canada Groups; the Financial Advisor, but only with respect to its activities regarding the sale and investor solicitation process conducted in connection with the SISP Order; and, all affiliates, partners, members and legal counsel thereof; and

(c) The Derivative Released Parties: any person claiming to be liable derivatively through any of the foregoing persons.

[32] The Monitor considers the releases contained in the Amended Plan to be fair and reasonable in the circumstances.

[33] I conclude:

a) the Restructuring Support Parties have made necessary and tangible contributions to this *CCAA* proceeding. As noted by all counsel, courts have routinely sanctioned releases in favour of third parties such as the monitor, legal counsel, financial advisors, and other parties retained to advise the petitioner(s) or the Court throughout the conduct of a *CCAA* proceeding and who, by doing so, contribute to the success of a *CCAA* proceeding;

b) the narrowing of the releases has resulted in a more focussed basis for the releases such that they are more rationally connected to the purposes of the *CCAA* and the Amended Plan given their respective contributions

toward this successful restructuring. For example, the release in favour of the Financial Advisor has been limited to its activities conducted in connection with the SISP Order. In addition, the Amended Plan is consistent with the scope of protections for the Financial Advisor set out in the SISP Order. The releases previously proposed for the "financial advisors, auditor, agents and consultants" were eliminated. The Amended Plan retained a release only for one consultant, Mr. Evans, who assisted the Old and New Walter Canada Groups throughout the sales process. Mr. Evans also assisted the New Walter Canada Group with respect to the Unresolved Claim and will continue to do so; and

c) the releases in favour of the New Walter Canada Group Parties are also typically granted. In addition, the Amended Plan does not release or discharge any petitioner from any Excluded Claim, any Director from any Claim that cannot be compromised pursuant to s. 5.1(2) of the *CCAA*, any releasee other than the petitioners and the Directors and Officers from liability for gross negligence or willful misconduct, or any releasee from any obligation created by or existing under the Amended Plan or any related document.

[34] The final factor raised by the New Walter Canada Group is that no stakeholder registered any objection to the releases in the Amended Plan. In this case, that factor can not be taken too far, where sophisticated parties agreed to those releases in both the Original Plan and Amended Plan and perhaps less sophisticated creditors were not concerned given that they expect full payment.

[35] It remains the case that, when exercising its jurisdiction, the Court must consider the appropriateness of any releases at two different junctures: firstly, whether it is appropriate to approve the filing of a plan, typically when a meeting order is sought (such as happened here); and secondly, when there is an application for a sanction order. In the latter circumstance, the court may determine that

releases are not fair and reasonable despite a plan having been approved by the creditors in accordance with the *CCAA* procedures.

[36] All of this is to say that it is incumbent upon the drafters of any *CCAA* plan to consider, *at the outset of that exercise*, the appropriateness of any releases sought and whether the necessary support is either before the court or can be put before the court at both junctures mentioned above. This will avoid any concerns or issues that may later develop either from a stakeholder or from the court while exercising its jurisdiction under the *CCAA* to provide oversight and safeguard all interests, whether formal objections are raised or not.

[37] I find that the releases in the Amended Plan are appropriate in the circumstances and do not detract from the overall fairness and reasonableness of the Amended Plan.

## CONCLUSION

[38] The Sanction Order is granted on the terms sought, including that:

a) the Amended and Restated Plan of Compromise and Arrangement of the New Walter Canada Group dated June 22, 2018 is sanctioned and approved;

b) the New Walter Canada Group and the Monitor are authorized to take all steps necessary to implement the Amended Plan; and

c) the New Walter Canada Group and the Monitor are authorized to take such steps as may be necessary following the Plan Implementation Date to make distributions and complete such transactions as are contemplated by the Amended Plan, to seek an orderly wind-down or other process acceptable to the New Walter Canada Group for Energybuild, to complete the Claims Process, and to address any other matters that arise in connection with the *CCAA* Proceedings.

"Fitzpatrick J."