IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2017 BCSC 53

Date: 20170112
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 or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

In Chambers

Counsel for the Petitioners:	M.Paterson P. Riesterer L. Williams
Counsel for United Mine Workers of America 1974 Plan and Trust:	C. Dennis, Q.C. J.R. Sandrelli
Counsel for the United States Steel Workers, Local 1-424:	J. Sanders
Counsel for KPMG Inc., Monitor:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. November 28, December 2, 2016
Ruling given to Parties with Written Reasons to Follow:	Vancouver, B.C. December 2, 2016
Place and Date of Written Reasons:	Vancouver, B.C. January 12, 2016

INTRODUCTION

[1] This application concerns another preliminary skirmish between the petitioners and the UMWA 1974 Pension Plan and Trust (the "1974 Plan") in advance of the summary hearing scheduled for January 2017 to determine, if possible, the validity of the 1974 Plan's claim against the estate.

[2] At an earlier application heard on October 26, 2016, I rejected the 1974 Plan's request to conduct extensive discovery of the petitioners in advance of that hearing.

[3] On this application, the 1974 Plan sought relief in two respects: firstly, it renewed its request for certain document discovery and secondly, it sought to strike the expert report of Marc Abrams.

[4] On December 2, 2016, I gave oral reasons for my dismissal of the application to obtain discovery. Similarly, I dismissed the application to strike Mr. Abrams' report with written reasons to follow. Costs were awarded against the 1974 Plan for the entire application in favour of the petitioners and the United States Steel Workers (the "Union"). These are the reasons on the expert report issue.

THE 1974 PLAN and *ERISA*

[5] The 1974 Plan's claim is asserted as a liability of the petitioners based on the provisions of U.S. legislation, being the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. § 1001, as amended ("*ERISA*").

[6] The petitioners, supported by the Union, advance a number of arguments against the claim. For the purposes of this application, the only relevant one is set out in the petitioners' notice of application filed in November 2016:

> … if the 1974 Plan's claim against the Walter Canada Group is governed by United States substantive law [including *ERISA*]**,** as a matter of United States law, controlled group liability for withdrawal liability related to a multi-employer pension plan under *ERISA* does not extend extraterritorially.

[7] Whether *ERISA* applies extraterritorially is a matter of U.S. law. At the summary hearing, the petitioners will be seeking a determination of that issue as an issue of fact. The 1974 Plan argues that *ERISA* does apply to the petitioners even though they were located in and did business solely in Canada.

[8] The 1974 Plan's claim was asserted just after these *CCAA* proceedings were commenced in late 2015. Even before the approval of the sale of the mining assets, there were extensive discussions between counsel for the 1974 Plan and the petitioners regarding the claim. These discussions were no doubt prompted by the significance of the claim and the reality that if the 1974 Plan's claim was valid, it would swamp all other valid claims that were expected to be filed in the estate such that the vast majority of the proceeds from the estate would be paid to the 1974 Plan.

[9] In the summer of 2016, the petitioners informed the 1974 Plan that they had analyzed the claim and formed the view that it was not valid. In addition, by this time, the Monitor had taken steps to review the 1974 Plan's claim. By the terms of the initial order and by *CCAA*, s. 23(1)(k), the Monitor was directed and empowered to report to the Court on matters relevant to this proceeding and if necessary, engage independent legal counsel for that purpose. The validity of the 1974 Plan is a highly relevant issue in these proceedings.

[10] In these circumstances, and not surprisingly, the Monitor hired U.S. counsel to provide advice concerning the validity of the 1974 Plan's claim under U.S. law. That U.S. counsel was Mr. Abrams, a New Jersey attorney practicing in the insolvency field.

[11] On July 20, 2016, the petitioners' counsel advised the 1974 Plan's counsel that their conclusions regarding the claim were supported by the Monitor, stating:

> …The Monitor and its Canadian and U.S. counsel have conducted their own independent review of the merits of the 1974 Plan claim and the Monitor shares Walter Canada's view.

The Monitor's view was arrived at, in part at least, based on advice from Mr. Abrams.

[12] In the Monitor's Fourth Report dated August 11, 2016, the Monitor referred to both it and the petitioners as having done extensive work to evaluate the 1974 Plan's claim. In the report, the Monitor confirmed its conclusion that the claim was "unenforceable in Canada". This report was submitted in support of the application to approve a claims process, which included the petitioners' recommendations for the claims process and specifically, the determination of the 1974 Plan's claim.

[13] I granted a Claims Process Order on August 16, 2016. As discussed in my earlier reasons (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at paras. 86-87), a specific process was put in place to address the 1974 Plan's claim. These provisions are found in paragraphs 30-33 of the Claims Process Order, which defined the claim as the "UMWA 1974 Pension Plan Claim".

[14] Even though this specific process was put in place, the Monitor was required under the Claims Process Order to take certain steps to deal with all defined "Claims", which included the 1974 Plan's claim. In particular, the Claims Process Order provided:

> 35. The Monitor, in consultation with the Walter Canada Group, shall review all Proofs of Claim, Notices of Dispute of Employee Claim and other Claims Process materials received on or before the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, and shall accept, revise of disallow each Pre-Commencement Claim …

[15] The definition of "Pre-Commencement Claim" is very wide and includes any "right or claim of any Person that may be asserted or made in whole or in part against the Walter Canada Group …". There is no dispute that the 1974 Plan's claim comes within this definition. In reality, however, the Monitor has already done extensive work in analyzing the 1974 Plan's claim, as I have described above, even before the Claims Process Order was granted.

[16] In addition, paragraph 31 of the Claims Process Order provided that the Monitor could seek further directions concerning the procedure for adjudicating the

1974 Plan's claim, which it did on October 26, 2016. Later still, the Monitor was involved in the development of the Case Plan Order of that same date, which was prepared by counsel as directed by the Court to encourage agreement on the steps to be completed before the summary hearing and the timing of those steps.

[17] Accordingly, it is common ground that the Monitor was empowered, under both the initial order and the Claims Process Order, to take steps to assess the 1974 Plan's claim, independent of any such review and assessment by the petitioners.

[18] Pursuant to the Claims Process Order, a notice of civil claim was filed by the 1974 Plan on August 26, 2016 and responding pleadings were filed by the petitioners and the Union shortly thereafter. Despite disagreements on pre-hearing procedures prior to a determination of the issue, in November 2016, the petitioners filed an application for a summary hearing to decide certain issues with the hearing to take place in January 2017. One of the issues, as I reproduced above, relates to the extraterritoriality of *ERISA*.

[19] The petitioners retained Mr. Abrams to provide an expert opinion on the issue of the extraterritoriality of *ERISA* in advance of the January 2017 hearing. Mr. Abrams' expert report on the U.S. law or *ERISA* issue was served on the 1974 Plan in mid-November 2016.

[20] As one would expect, in his report, Mr. Abrams disclosed his previous retainer with the Monitor in the summer of 2016. He also attached the instructions he received from the petitioners' counsel which noted the previous retainer but confirmed that the requested report was to be in accordance with the retainer with the petitioners, and not as part of any joint retainer by the petitioners and the Monitor. In addition, the petitioners' counsel advised Mr. Abrams that he was not to disclose to them any privileged material arising from his previous retainer with the Monitor.

[21] At this time, the Monitor maintains its right of privilege in respect of its earlier communications with Mr. Abrams. There is no suggestion that Mr. Abrams' has

disclosed any such communications to the petitioners or to anyone, either in his report or otherwise.

DISCUSSION

[22] The 1974 Plan argues that Mr. Abrams' report should be struck for the following reasons:

a) that Mr. Abrams' duty to the Monitor under the previous retainer prevents him from disclosing everything in his knowledge that may affect his opinion such that the Court is impaired in its ability to evaluate that opinion. Essentially, it is argued that Mr. Abrams is not impartial given that his duty to the Monitor conflicts with his role as an expert witness; and

b) that Mr. Abrams' role as an expert witness compromises the impartiality of the Monitor.

[23] I will address the second question first as it stands as an important backdrop to a discussion of the first question.

[24] The *CCAA*, s. 25 mandates that monitors are to act honestly and in good faith. That provision adopts a Code of Ethics that also requires that a monitor be impartial and that they provide full and accurate information with respect to their engagement.

[25] Canadian courts have consistently described a monitor as an officer of the court, with an obligation to act independently and to consider the interests of all stakeholders, including the petitioners and the creditors: see *United Used Auto & Truck Parts Ltd. (Re)*, 12 C.B.R. (4th) 144 at para. 20. More recently, Justice Topolniski said in *Re Winalta Inc.*, 2011 ABQB 399:

> [67] A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

[26] Various phrases have been attributed to the role of the *CCAA* monitor over the years, including that a monitor is the "eyes and ears of the court" and that it is an "honest broker". In contentious proceedings, such as exist here, both of these roles assume greater relevance. In the adversarial context, the monitor provides welcome information and objectivity for consideration by the court that may be lacking from the competing parties.

[27] No one questions that the Monitor was performing its independent role in relation to the 1974 Plan's claim when it initially hired Mr. Abrams. As I have stated before, this claim is probably the most significant issue remaining in these proceedings and it has the potential to greatly affect the recovery to other creditors. In that event, the Monitor properly performed its mandate under the initial order in independently reviewing the issues in relation to the claim. The Monitor's views, arising in part from Mr. Abrams' advice, no doubt informed its recommendation to the Court as to what issues arose in relation to the 1974 Plan's claim and how this Court should fashion a process to determine that claim. That independent role in relation to the claim continued even after the granting of the Claims Process Order.

[28] In my view, it must be taken that Mr. Abrams' legal advice was sought in the pursuit of the Monitor's impartial review of the validity of the 1974 Plan's claim. The Monitor advises that it provided various materials to Mr. Abrams, including court filings and also correspondence from the 1974 Plan's counsel regarding its claim, all well-known to the petitioners and the 1974 Plan.

[29] In those circumstances, it is not surprising that the petitioners later sought out Mr. Abrams for an expert legal opinion on the *ERISA* issue since they had already formed the same view as Mr. Abrams espoused.

[30] The 1974 Plan's argument that the Monitor is no longer impartial rests upon the assertion that in some way, the Monitor has entered the fray and has an adversarial role in the dispute between the petitioners, the Union and the 1974 Plan. It refers to the decisions in the Pine Valley Mining *CCAA* where the court was addressing the matter as to how to resolve the issue whether a large claim was debt

or equity. In that case, similar to here, the monitor had reviewed the claim outside of any adversarial process. There, the monitor issued a report which indicated its view that the claim should be characterized as debt and allowed against the estate.

[31] In *Pine Valley Mining Corporation (Re)*, 2008 BCSC 356 at para. 15, Justice Garson (as she then was) initially ordered that either party could use the monitor's report as an expert report at the later hearing. Later, this decision was reversed upon further consideration of the issue and the Court ordered that the monitor's conclusions, while admissible, were not admissible as expert evidence. In *Pine Valley Mining Corporation (Re)*, 2008 BCSC 446, Garson J. stated:

> [17] I have concluded that the Monitor's 4th Report (and any supplementary reports concerning the inter-company accounting) is admissible for purposes of the trial, but his conclusion as to the characterization of the payments as debt or equity are not admissible as an expert opinion. In reaching this conclusion I have considered the fact that the Monitor is an officer of the Court. He is the eyes and ears of the Court. His role is to assist the Court. To permit either party to use his conclusions on the very question the Court must decide as opinion evidence offends the principle that he must remain entirely neutral as between competing claims of the various stakeholders. The Monitor must be insulated from the adversarial nature of the contested claim; he should not be fearful that, as a result of stating his opinions, he will become embroiled in the litigation in an adversarial way. I have already decided that the summary trial is a trial *de novo*. It is not an "appeal" from the Monitor's findings. I have already decided that PVM carries the burden of proving its whole claim. In this case, it is convenient, and perhaps necessary, to use the accounting portion of the Monitor's Report, for a fair and summary adjudication of the inter-company claim, but the same argument for convenience cannot be made out for the Monitor's characterization of the payments; and, in any event, to admit the Monitor's conclusions on that issue would be to expose the Monitor unnecessarily to the adversarial process. This issue differs from one in which the Court relies on the business judgment of the Monitor such as the approval of the sale of assets or a liquidation analysis as in the *Canadian Airlines (Re)*, 2001 ABQB 146 case.
>
> [Emphasis added]

[32] In my view, the reasoning found in *Pine Valley Mining* is of little assistance here.

[33] No one, let alone the petitioners, has suggested that the Monitor's Fourth Report be used as expert evidence at the summary hearing. The Monitor is not

asserting that *its* view of the validity of the 1974 Plan's claim be accepted. As in *Pine Valley Mining*, the Monitor remains above the fray in respect of the issue and its review of the 1974 Plan's claim, with Mr. Abrams' assistance, does not mean otherwise: *Slater Steel Inc. (Re)*, [2004] O.J. No. 4545 at para. 4.

[34] Further, I reject the 1974 Plan's submissions that if the Monitor cannot give its opinion on the issue, then neither can its counsel. I fail to see how the petitioners' obtaining an expert opinion from Mr. Abrams affects in any way the approach by the Monitor to this dispute. If nothing else, the use of Mr. Abrams as the petitioners' own expert witness was a cost saving measure since Mr. Abrams had already reviewed certain materials received from the Monitor and considered the matter to some extent already. I also have no doubt that Mr. Abrams' previous involvement was a factor in terms of the timeliness in providing such an opinion, given the tight deadlines that were agreed upon in the Case Plan Order.

[35] In conclusion, I disagree that the impartiality of the Monitor has been compromised by the petitioners later seeking to tender the expert report of Mr. Abrams on the *ERISA* issue.

[36] I turn to the second issue which concerns whether Mr. Abrams has sufficient impartiality in performing his role as an expert witness before this Court. There are no issues raised as to Mr. Abrams' expertise, at least at this stage of the proceeding, in providing the opinion in his report. Rather, the 1974 Plan seeks to exclude his report now on the basis that he is not sufficiently impartial to assist the Court in the determination of the issue.

[37] A useful starting point for the discussion is found in the Supreme Court of Canada's comments in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. At para. 19, the Court referred to the four threshold requirements earlier set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. Of those criteria, only one - whether Mr. Abrams is a "properly qualified expert" - is relevant. Qualification is considered within the context of the duties of an expert to the court, as described in *White Burgess*:

> [32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 Alta. L. Rev. 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[38] Therefore, issues of impartiality and independence are threshold matters that affect the qualifications of an expert and hence, go to the admissibility of the expert report, not just the weight to be given the evidence if admitted: *White Burgess* at para. 45.

[39] An expert's attestation as to his duty will generally be sufficient to establish this threshold requirement: *White Burgess* at para. 47. Here, in accordance with *Supreme Court Civil Rules*, Rule 11-2, Mr. Abrams has provided the necessary certification by which he acknowledges his duty to assist the court and not be an advocate for any party, including the petitioners. Leaving aside any cross-border issues, it is significant that since Mr. Abrams is an attorney, he is aware of his professional obligations to the court in providing such a report, even without such an attestation: *Bier v. Continental Motors, Inc.*, 2016 BCSC 1393 at para. 26. Accordingly, the threshold admissibility of Mr. Abram's evidence has been presumptively met by this certification.

[40] The burden then falls to the 1974 Plan to show that there is a "realistic concern" that Mr. Abrams' evidence should be excluded because he is unable and/or unwilling to comply with his duty to the Court: *White Burgess* at para. 48. The Court's description of this burden is relevant here:

> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the

> particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
>
> [Emphasis added]

[41] The 1974 Plan's first assertion and concern is that Mr. Abrams' "connection" to this claim is substantial and that his legal analysis had a direct role in denying its claim. I would note at this time that the Monitor did not "reject" this claim in any formal sense as everyone knew that the petitioners had already formed the view that the 1974 Plan's claim was invalid. Everyone also knew that it remained to be discussed just how the claim would be determined.

[42] In any event, this is the "two hat" argument in that the 1974 Plan argues that Mr. Abrams previous "hat", as counsel to the Monitor, now precludes him from assuming the incompatible "hat" of being an independent and impartial expert before the Court.

[43] I have been referred to numerous authorities by the 1974 Plan on this point. One case is *Fellowes, McNeil v. Kansa General International Insurance Co.*, (1998) 40 O.R. (3d) 456. That decision is, however, distinguishable since the expert had been earlier retained by one of the parties to consider the very issue before the court. The same conclusion was reached in *Arslan v. Şekerbank T.A.Ş.*, 2016 SKCA 77 at para. 47, where evidence as to Turkish law from Turkish lawyers representing

the parties was rejected as biased. To similar effect, the 1974 Plan refers to *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.) at para. 22.

[44] As I have stated before, the Monitor is not a party or person who is taking a position within the adversarial proceedings as to the validity of the 1974 Plan's claim. Simply put, the Monitor is not an advocate on this issue, or even generally within these proceedings.

[45] In my view, the conclusions of the Court in *White Burgess* support that Mr. Abrams' prior retainer with the Monitor does not indicate any basis upon which he can be said to less than impartial. In *White Burgess*, an accounting firm's office had been retained and had noted certain problems with a previous auditor's work. Later, a partner of that same accounting firm, but from a different office, was retained to provide an expert opinion as to the negligence of that auditor. Objections were made to exclude this later opinion on the basis that the person could not opine in the face of her firm's earlier conclusions.

[46] In *White Burgess* at para. 60, the Court discussed the two different mandates with the accounting firm. Justice Cromwell concluded that the previous retainer was not a basis upon which to disqualify the accounting firm generally; in particular, there was no suggestion that the accounting firm was other than independent and impartial in its initial retainer; nor had it been hired initially to take a position dictated by the plaintiffs.

[47] Similarly, the Monitor asked for Mr. Abrams' views on the U.S. law/*ERISA* issue and there is no suggestion that the Monitor was looking for or asked for anything other than Mr. Abrams' impartial and objective opinion. The fact that his later formal expert report repeats and reinforces that earlier opinion does not detract from his impartiality and independence throughout. In that regard, Mr. Abrams' initial and later opinions were and are complementary in the sense that both were borne from a requirement of impartiality and independence - firstly, as requested by the Monitor who is also impartial and secondly, as directed by the required certification

found in Mr. Abrams' report. In short, while arguably Mr. Abrams has had two "hats" in this matter, they are made of the same cloth.

[48] The second concern raised by the 1974 Plan relates to its ability to review all material considered by Mr. Abrams in forming his opinion. When an expert report is tendered into evidence, the expert may be required to produce all documents in his possession relevant to the issues or his credibility and litigation privilege is waived: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2007 BCSC 909 at para. 7.

[49] The 1974 Plan argues that since the Monitor has maintained privilege over its communications with Mr. Abrams, it is not possible for it and the Court to access all information related to the formation of his opinion. To the contrary, Mr. Abrams has set out in his report the materials upon which he based his opinion. In addition, in the face of these concerns, the Monitor has fully disclosed what materials it provided to Mr. Abrams before he gave his advice to the Monitor. There are some differences as between the two lists, but these differences principally arise from the fact that Mr. Abrams considered further filed court materials not yet in existence at the time of his initial advice to the Monitor.

[50] In the absence of evidence to the contrary, I find that there has been full disclosure in respect of what Mr. Abrams considered in coming to his conclusions, both for the Monitor and now the petitioners. All of this material may be the subject of cross-examination by the 1974 Plan's counsel at the summary hearing.

[51] I do not fault the Monitor for maintaining its privilege in respect of its communications with Mr. Abrams, which I presume includes correspondence between them. Mr. Abrams' retainer with the Monitor related only to the validity of the 1974 Plan's claim from the perspective of U.S. law, including the extraterritoriality of *ERISA*. Further, on the substance of the advice from Mr. Abrams to the Monitor, one might reasonably expect that his views expressed to the Monitor on the validity of the 1974 Plan's claim was the same as what is now contained in

his report. If it were otherwise, I would have expected that the Monitor would have disclosed that information. However, no discrepancy was reported by the Monitor.

[52] Finally, the 1974 Plan argues that since the Monitor has a confidential relationship with Mr. Abrams, he cannot be neutral, impartial and objective in these proceedings. This argument also has no merit, principally for the reasons already discussed. As I said earlier, the impartial opinion sought and obtained by the Monitor in its own impartial role is simply co-extensive with the later opinion sought and now tendered as part of the petitioners' case.

CONCLUSION

[53] I find that the 1974 Plan has failed to meet its burden to show any "realistic concern" that Mr. Abrams' evidence should be excluded because he is unable and/or unwilling to comply with his duty to the Court. This is not a "clear case" as was mentioned in *White Burgess*.

[54] I consider that Mr. Abrams is well able to satisfy his duty to the Court given that his previous advice to the Monitor was tendered in the context of the same mandate, namely not to advocate a particular position, but to provide independent and impartial advice for the benefit of the Court toward a determination of the issue of the validity of the 1974 Plan's claim.

"Fitzpatrick J."