VANCOUVER
MAY 25 2017
COURT OF APPEAL
REGISTRY

FORM 4 (RULES 7 (1) (A) (II) AND 9 (3) (A) (II))

CA44448

Court of Appeal File No. ~~CA44151~~
Supreme Court File No. S1510120
Supreme Court Registry Vancouver

COURT OF APPEAL

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 WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

(APPELLANT)

MOTION BOOK FOR LEAVE TO APPEAL AND FOR A STAY OF PROCEEDINGS OR EXECUTION

To the respondent:	Walter Canada Group
And to its solicitor:	Marc Wasserman, Mary Paterson and Patrick Riesterer Osler, Hoskin & Harcourt LLP
To the respondent:	The Monitor KPMG Inc. Philip J. Reynolds, Jorden Sleeth, and Mike Schwartzentruber
And to its solicitor:	Wael Rostom, Peter Reardon, and Caitlin Fell McMillan LLP
To the respondent:	United Steelworkers, Local 1-424

And to its solicitor:	Craig Bavis Victory Square Law Office

Court of Appeal File No. CA44151
Supreme Court File No. S1510120
Supreme Court Registry Vancouver

COURT OF APPEAL

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 WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

(APPELLANT)

INDEX

TAB	DOCUMENT	DATE
1	*Walter Canada Holdings, Inc. (Re)*, 2017 BCSC 709 at para. 4 ["**Reasons for Judgment**"]	May 1, 2017
2	Final Order (In the Form Agreed to by Counsel)	*
3	*Walter Energy Canada Holdings Inc. (Re),* (7 December 2015) Vancouver (S-1510120) ["**Initial Order**"]	December 7, 2015
4	*Walter Energy Canada Holdings Inc. (Re),* (16 August 2016), Vancouver (S-1510120) (BCSC) ["**Claims Process Order**"]	August 16, 2016

TAB	DOCUMENT	DATE
5	*Walter Energy Canada Holdings Inc. (Re),* (16 August 2016), Vancouver (S-1510120) (BCSC) [“**Approval and Vesting Order**”]	August 16, 2016
6	1st Affidavit of Dale R. Stover, sworn November 22, 2016 (Excluding Exhibits)	November 22, 2016
7	*Walter Energy Canada Holdings Inc. (Re)*, (7 December 2016), Vancouver (S-1510120) [“**New Walter Group Procedure Order**”]	December 7, 2016
8	Written Submissions of the Steelworkers on Summary Trial Application, filed December 19, 2016	December 19, 2016
9	7th Affidavit of Miriam Dominguez, sworn December 20, 2016	December 20, 2016
10	Submissions of the United Mine Workers of America 1974 Plan and Trust (the 1974 Plan”), dated December 30, 2016 (Excluding Appendices)	December 30, 2016
11	Eighth Report of the Monitor, KPMG Inc., dated January 12, 2017	January 12, 2017
12	Ninth Report of the Monitor, KPMG Inc., dated March 10, 2017	March 10, 2017
13	Second Monitor’s Certificate, dated March 17, 2017	March 17, 2017
14	10th Affidavit of William E. Aziz, sworn May 18, 2017	May 18, 2017
15	Memorandum of Argument	May 25, 2017
16	Appendices to Memorandum of Argument (Relevant Statutory Provisions)	May 25, 2017
	A. *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 51.11 and 51.3(1)	
	B. *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13.	
	C. *Partnership Act*, R.S.B.C. 1996, c. 348, s. 57	

TAB 1

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),*
2017 BCSC 709

Date: 20170501
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"

The text of the judgment was corrected on page 2 and in paragraph 5 on May 5, 2017.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners: M. Paterson
M.I.A. Buttery
P. Riesterer
M.A. Rowe
K. Sachar

Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	C. Dennis, Q.C. J. Sandrelli T. Jeffries O. James
Counsel for the United Steelworkers, Local 1-424:	C.D. Bavis J. Sanders
Counsel for KPMG Inc., Monitor:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. January 9-13, 16, 18-20, 2017
Place and Date of Written Reasons:	Vancouver, B.C. May 1, 2017

I INTRODUCTION 3
II PROCEDURAL BACKGROUND 4
III ISSUES........ 6
IV IS A SUMMARY HEARING APPROPRIATE? 6
V BACKGROUND FACTS........ 11
(1) The Walter Energy Group and U.S. Operations 14
(2) Acquisition leading to Creation of Walter Canada Group........ 14
(3) Walter Resources and the 1974 Plan 16
(4) Walter Canada Group Corporate Structure 18
(5) The U.S. Chapter 11 Proceedings........ 19
(6) Estimated Recoveries........ 22
VI *ERISA'S* PROVISIONS 22
VII THE CHOICE OF LAW QUESTION 25
(1) What is the Characterization of the 1974 Plan's Claim? 27
(2) What Choice of Law Rule Applies? 44
VIII THE SECOND AND THIRD QUESTIONS 51
IX CONCLUSION........ 51

I INTRODUCTION

[1] These are proceedings brought by the petitioners pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The petitioner companies are part of what I will describe as the "Walter Canada Group" which includes other entities, as I will discuss below.

[2] This application is brought by the Walter Canada Group to determine the validity of a claim filed in these proceedings by the UMWA 1974 Pension Plan and Trust (the "1974 Plan").

[3] The 1974 Plan's claim is asserted as a liability of the Walter Canada Group based on the provisions of U.S. legislation, namely the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. § 1001, as amended ("*ERISA*"). The amount of the claim arises from certain unfunded pension liabilities owed to former

employees of a U.S. entity within the larger international Walter Energy Group. For context, the Walter Canada Group is the Canadian part of the international “Walter Energy Group”. *ERISA* is sometimes referred to as “long arm” legislation in that the 1974 Plan asserts that this U.S. legislation applies to the Walter Canada Group even though they were all Canadian corporations or entities conducting their mining businesses only in Canada and not in the U.S.

[4] As far as I’m aware, and all counsel agree on this point, this is the first time that a Canadian court will have considered whether *ERISA* applies in Canada and in these circumstances. It also appears to be the case that no U.S. court has yet considered whether *ERISA* applies to entities outside of the U.S.

[5] The 1974 Plan’s claim is extremely large - approximately $1.25 billion. If the 1974 Plan’s claim is valid, it will swamp all other valid claims that have been filed in the estate against the Walter Canada Group. The result would be that the vast majority of the realizations from the estate assets - estimated by mid-2017 to be approximately $63 million - would be paid to the 1974 Plan and not in respect of the claims of other creditors. These other creditors include the Walter Canada Group’s former employees, which in turn include union members represented by the United Steelworkers, Local 1-424 (the “Union”), to whom substantial amounts are owed.

II PROCEDURAL BACKGROUND

[6] The Claims Process Order that was granted on August 16, 2016 (see *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at paras. 86-87) put in place a specific claims process designed to address the 1974 Plan’s claim. Pursuant to the Claims Process Order, and with the objective of clarifying the issues as between the parties, the 1974 Plan filed a notice of civil claim on August 26, 2016 in this action. Responsive pleadings were filed by the Walter Canada Group and the Union shortly thereafter.

[7] Paragraph 30 of the Claims Process Order provided that, upon the filing of the pleadings, the 1974 Plan’s claim was to be adjudicated by the Court “under a procedure to be determined more fully by subsequent Order of this Court”.

[8] There were various disagreements between the Walter Canada Group, the Union and the 1974 Plan as to whether pre-hearing discovery procedures were required or necessary prior to a determination of certain preliminary issues raised by the Walter Canada Group. Since at least the fall of 2016, the 1974 Plan has taken the position that it is inappropriate to determine these preliminary issues on a summary basis without allowing it to conduct discovery of the Walter Canada Group.

[9] This disagreement led the Monitor to apply for directions on the procedure to adjudicate the 1974 Plan's claim, as was expressly directed under paragraph 31 of the Claims Process Order. I denied the oral and document discovery sought by the 1974 Plan arising from two hearings: firstly, on October 26, 2016 (*Walter Energy Canada Holdings, Inc. (Re)* (Unreported; October 26, 2016) and secondly, on November 28/December 2, 2016 (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 2470). Those decisions were made in light of the Walter Canada Group's position that the preliminary issues could be resolved on a summary basis, consistent with the legislative objective under the *CCAA* to determine claims in that manner.

[10] After the October 26, 2016 hearing, the parties agreed to a Case Plan Order which set out various deadlines for the delivery of the applications and responses, evidence and written arguments, all in advance of the January 2017 hearing.

[11] In November 2016, the Walter Canada Group filed their application for a summary hearing to decide these issues. Although described as a "summary hearing", the nature of the hearing can be described as a hybrid one. In addition to the pleadings, applications and responses, the evidence before the Court consisted of various affidavits, the Walter Canada Group's notice to admit and the 1974 Plan's response to the notice to admit. In addition, as the answer to one of the issues - namely, whether *ERISA* applies exterritorialy to the Walter Canada Group - is a matter of U.S. law, the Walter Canada Group and the 1974 Plan both filed expert reports from U.S. attorneys. All three of these experts were cross examined on their reports at this hearing.

III **ISSUES**

[12] The Walter Canada Group seeks the following declaratory relief:

a) under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*);

b) in the alternative, if the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), then as a matter of U.S. law, "controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* does not extend extraterritorially; and

c) in the further alternative, if the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), and *ERISA* applies extraterritorially, that law is unenforceable in Canada because it conflicts with Canadian public policy.

[13] It is common ground that if the Walter Canada Group succeeds on any one of the above arguments, the 1974 Plan's claim is not a valid claim against the estate. While I have referred to the arguments below as that of the Walter Canada Group, I have considered the similar arguments advanced by the Union even if they are not specifically referenced as such.

IV **IS A SUMMARY HEARING APPROPRIATE?**

[14] The 1974 Plan argues that the hearing should not proceed summarily and has brought a cross application to dismiss the Walter Canada Group's application. Consistent with Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Rules*") regarding summary trials, the 1974 Plan argues:

a) the matter is not suitable for a summary hearing: Rule 9-7(11)(b)(i);

b) a summary hearing on the preliminary issues will not assist in the efficient resolution of the validity of its claim: Rule 9-7(11)(b)(ii);

c) the Court will be unable to find the necessary facts to determine the issues: Rule 9-7(15)(a)(i);

d) the Court should find it unjust to determine the preliminary issues in the circumstances: Rule 9-7(15)(a)(ii); and

e) the Walter Canada Group is "litigating in slices" by attempting to obtain a decision on only some of the issues.

[15] The *CCAA* mandates that any dispute about claims will be determined, if possible, in a summary manner. Specifically, the *CCAA* provides for a summary determination of the validity of a disputed unsecured claim, such as that asserted here by the 1974 Plan:

> **Determination of amount of claims**
>
> 20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:
>
> (a) the amount of an unsecured claim is the amount
>
> > …
> >
> > (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor;
> >
> > [Emphasis added]

[16] The requirement for a summary determination of claims in a *CCAA* proceeding is similar to that found in the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3: see *San Juan Resources Inc. (Re)*, 2009 ABQB 55 at para. 30. Both recognize the need to determine claims as quickly as possible to allow for a timely distribution to creditors, as creditors will suffer more prejudice if there is delay in receipt of whatever recovery they can expect from an insolvent estate. In addition, proceeding by summary application respects the need to resolve claims without undue cost, which would exacerbate the already insolvent circumstances and lessen the recovery of the parties.

[17] Other than directing a "summary" determination of the issue, the *CCAA* provides no further guidance as to how a claim is to be determined. In this legislative vacuum, courts across Canada have drawn upon their statutory jurisdiction under the *CCAA* to fashion a process to do just that. This typically takes the form of a claims process order, as was granted in this proceeding on August 16, 2016.

[18] There was agreement that the process typically found in a claims process order, allowing for review by the monitor and a revision/disallowance process, was not appropriate in these circumstances. The 1974 Plan's claim raised unique issues and it was recognized early in these proceedings that a resolution of that claim would likely require a more complex procedure.

[19] There are examples where the courts in *CCAA* proceedings have fashioned a process that was "summary" in the sense of not requiring full pre-trial and trial procedures, but still allowed for certain appropriate pre-hearing steps.

[20] A similar issue was before the Court in the *CCAA* proceedings in *Pine Valley Mining Corporation (Re)*, 2008 BCSC 356. A substantial claim had been advanced and the Court addressed how the claim should be resolved and the format of the summary trial. Justice Garson (as she then was) said:

> [16] The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the *CCAA* [now s. 20] requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See *Algoma Steel Corporation v. Royal Bank of Canada* (1992), 8 O.R. (3d) 449 (C.A.). I do not understand Mr. McLean to object in principle to an order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view that s.12 [now s. 20] of the *CCAA* informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

> [17] … Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.
>
> [Emphasis added]

[21] Similarly, in *Jameson House Properties Ltd. (Re)*, 2011 BCSC 965 at paras. 13-14, Justice Adair departed from the strict terms of a claims process order and ordered the filing of pleadings and oral discovery after the filing of affidavits. An agreed statement of facts was also later filed although some facts remained in dispute. At para. 15, the Court stated that it was approaching the summary hearing as in a conventional trial; in other words, if the party bearing the onus of proof failed to establish the necessary facts, that party's case would fail.

[22] In *Coast Capital Savings Credit Union v. The Symphony Development Corp.*, 2011 BCSC 333 at paras. 23-27, the Court referred to a "principled" approach to the determination of claims, albeit in a receivership context, which respected the summary claims process while also ensuring that the claim was adjudicated in a just manner.

[23] Accordingly, although the *CCAA* requires that, presumptively, claims be determined on a summary basis, the court has the discretion to order another procedure where it is appropriate. That other procedure may, but will not usually, involve a full trial procedure. One possible approach is to conduct a hybrid hearing, such as occurred here.

[24] Needless to say, the exercise of the court's discretion will be guided by the statutory objectives of the *CCAA* toward a timely and inexpensive resolution of claims and distribution to creditors, while also ensuring that the determination of claims is made in a manner that is just and fair to all the stakeholders, including the debtor company, the claimant and other creditors: *0487826 B.C. Ltd. (Re)*, 2012 BCSC 1501 at para. 38. These objectives are consistent with Rule 1-3(1) which states that the object of the *Rules* is to secure the "just, speedy and inexpensive determination of every proceeding on its merits". These objectives are also

consistent with the Supreme Court of Canada's recent exhortation to the legal profession and the courts to embrace more summary forms of adjudication where appropriate, as found in *Hryniak v. Mauldin*, 2014 SCC 7.

[25] In exercising the court's discretion to move beyond a pure summary determination in accordance with s. 20 of the *CCAA*, factors to be considered by the court will vary from case to case depending on the circumstances, but may include: the nature and complexity of the claim or issues arising; the amount in issue; the nature of the evidence (including whether credibility is in issue); the importance of the claim to the creditor and the estate; the cost and delay of further procedures; and what prejudice, if any, may arise from a summary hearing.

[26] There is no "one size fits all" solution as to how any claim can be determined; ideally, the answer will no doubt be driven by the willingness of the parties to streamline the process and the creativity of the parties, and their counsel, in fashioning an efficient and expeditious means of obtaining the necessary evidence to put before the court. If agreement can't be reached, then it will fall to the court to consider the issue.

[27] Procedural issues that may be considered include:

a) whether pre-trial oral or document discovery is truly necessary and if so, whether limits can be put on such discovery;

b) whether affidavits should be filed as opposed to *viva voce* evidence at a full trial;

c) whether cross-examinations on affidavits or expert reports are necessary and whether that can be done ahead of the hearing or at the hearing itself;

d) whether timelines for delivery of materials, such as affidavits, or any pre-hearing procedures, can be fixed so to expedite the determination of the issues;

e) whether other means of establishing the evidentiary record can be ordered, such as through notices to admit, agreed statement of facts and common documents so as to minimize or eliminate any conflict as to the facts; and

f) whether written arguments can be exchanged in advance of the hearing.

[28] The 1974 Plan continues to take the position that the issues raised in the Walter Canada Group's application cannot and should not be determined at this hearing without providing it the opportunity to undertake the discovery that it earlier sought. It specifically seeks to examine William G. Harvey, the former executive vice-president and chief financial officer of the Canadian holding company within the Walter Canada Group, who was also the person who gave evidence in support of the initial *CCAA* filing. That evidence was accepted by this Court and various orders were made based on that evidence.

[29] In substance, the 1974 Plan advocated for a reversal of what I consider to be the proper approach (and onus) here, as discussed above. The 1974 Plan submits that a full trial is required, unless the Walter Canada Group can successfully argue in favour of abbreviated procedures. Consistent with its goal of embarking upon a full scale litigation process, the 1974 Plan prepared its list of documents dated December 23, 2016. The Walter Canada Group has not yet provided any discovery, either oral or documentary.

[30] I intend to address the 1974 Plan's objection to the lack of discovery from the Walter Canada Group in the context of the individual issues discussed below. It will suffice at this point to note that I reject the approach advocated by the 1974 Plan, although I will consider its arguments in the context of the relevant and material evidence needed to decide the issues raised on this application.

V BACKGROUND FACTS

[31] In support of its overall position that this summary hearing is inappropriate, the 1974 Plan has steadfastly refused to admit to most facts as proposed by the

Walter Canada Group. It insists on what it calls “trial quality” evidence on all issues and says that there remain “disputed facts” which are relevant to the determination of these issues, principally relating to the degree of integration between the Walter Canada Group and the entities within the U.S. arm of the Walter Energy Group.

[32] The stridency of this position is particularly puzzling given the 1974 Plan’s refusal to acknowledge even its own “facts” and documents, as found in its evidence filed in the course of this proceeding.

[33] The 1974 Plan has shown absolutely no willingness to consider and co-operate 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. The more extreme examples of this obdurate position are found in the 1974 Plan’s refusal to admit that: the Canadian mine operations and assets in this jurisdiction were governed by Canadian and British Columbian environment and mining legislation; and, that the Walter Canada Group’s relationship with its Canadian employees (both unionized and non-unionized) were governed by Canadian and British Columbian labour and employment laws. To suggest otherwise is a confounding proposition and needless to say, the 1974 Plan never did explain how it could not be so. The 1974 Plan would only admit that the mines were located in British Columbia and that the Walter Canada Group employed persons working in British Columbia, matters that were in evidence at the beginning of this proceeding and as I said, uncontroversial.

[34] 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 full-scale litigation process with corresponding discovery. In my view, the objections of the 1974 Plan can more accurately be described as angling for a “fishing expedition” so as to search for facts that may conceivably provide some basis for their claim.

[35] I would also note that the 1974 Plan appears to have made no effort to obtain what it describes as relevant evidence from various U.S. sources, including speaking

to Mr. Harvey and also obtaining documentation in the hands of the U.S. debtors within the Walter Energy Group: see *Tassone v. Cardinal*, 2014 BCCA 149 at paras. 38-39. As such, the 1974 Plan has not provided any foundation upon which to argue that further relevant facts may exist in order to prove its claim.

[36] I have concluded that the approach advocated by the 1974 Plan is neither warranted nor appropriate in the circumstances and I am exercising my discretion to proceed otherwise.

[37] Accordingly, I have taken the facts from various sources: the facts asserted by the 1974 Plan which are admitted or which are not contested by the Walter Canada Group or the Union for the purpose of this application; evidence filed by the 1974 Plan in these proceedings generally or in direct response to this application; and, what I consider to be the uncontroverted facts introduced by the Walter Canada Group in its evidence in this proceeding which have been the foundation for numerous orders granted by me. I also rely on the findings in my earlier reasons for judgment in these proceedings (including *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107; 2016 BCSC 1413; 2016 BCSC 1746); and, evidence introduced in other proceedings before this court and filed in this action. See *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at paras. 36-37; *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 at paras. 46-48.

[38] In my view, there is little, if any, controversy about the following facts which are more accurately described as simply background facts.

[39] Below are my findings of fact. It will become clear from the analysis below that most of the following background facts only provide context for the specific determination of the issues raised by the Walter Canada Group. I will also address any further facts relevant to the analysis in the separate discussion of the issues.

(1) The Walter Energy Group and U.S. Operations

[40] The Walter Energy Group operated its international coal production and export business in two distinct segments: (a) the U.S. operations, and (b) the Canadian and United Kingdom (U.K.) operations.

[41] The parent corporation of all of entities within the Walter Energy Group is Walter Energy, Inc. (“Walter Energy U.S.”), which is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama. The U.S. coal mining operations of the Walter Energy Group were conducted in Alabama and West Virginia through a variety of U.S. corporations.

[42] The Walter Energy Group’s U.S. entities included a wholly owned subsidiary of Walter Energy U.S., Jim Walter Resources, Inc. (“Walter Resources”). Walter Resources was incorporated in Alabama and conducted its coal production business in Alabama.

(2) Acquisition leading to Creation of Walter Canada Group

[43] Before 2011, Walter Energy U.S. did not have any operations or subsidiaries in Canada or the U.K.

[44] In October 2010, Walter Energy U.S. and Western Coal Corp. (“Western”) began negotiating the acquisition of Western’s coal mining operations in British Columbia, the U.K. and the U.S. (the “Western Acquisition”).

[45] Walter Energy U.S. publicly announced the Western Acquisition in November 2010, when Walter Energy U.S. issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly available EDGAR system. The press release referred to Walter Energy U.S.’s intention to complete a “business combination” with Western.

[46] In December 2010, Walter Energy U.S. announced that (admitted for the purpose of these statements having only been made, and not for the truth of the contents):

a) it had entered into an arrangement agreement with Western whereby Walter Energy U.S. would acquire all of the outstanding common shares of Western;

b) the "transaction will be implemented by way of a court-approved plan of arrangement under British Columbia law"; and

c) in connection with the arrangement, Walter Energy U.S. intended to borrow $2.725 million of senior secured credit facilities, "the proceeds of which will be used (i) to fund the cash consideration for the transaction, (ii) to pay certain fees and expenses in connection with the transaction, (iii) to refinance all existing indebtedness of the Company and Western Coal and their respective subsidiaries and (iv) to provide for the ongoing working capital of [Walter Energy U.S.] and its subsidiaries".

[47] On March 9, 2011, Walter Energy U.S. incorporated Walter Energy Canada Holdings, Inc. ("Canada Holdings") and became its sole shareholder. Canada Holdings was incorporated specifically to hold the shares of Western and therefore, indirectly, its subsidiaries.

[48] On March 10, 2011, Justice McEwan of this Court approved the proposed plan of arrangement through which the Western Acquisition was accomplished.

[49] On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western for an estimated total consideration of approximately US$3.7 billion.

[50] After completing the Western Acquisition, the Walter Energy Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Energy Group into geographical business segments: the Walter U.S. group, the Walter Canada Group and the Walter U.K. Group. As a result, the U.S. assets previously held by Western were transferred from Canada Holdings to Walter Energy U.S. and no longer formed part of the Canadian assets.

(3) Walter Resources and the 1974 Plan

[51] The 1974 Plan is a pension plan and irrevocable trust established in 1974 in accordance with section 302(c)(5) of the *Labour Management Relations Act of 1947*, 29 U.S.C. § 186(c)(5). It is a multiemployer, defined benefit pension plan under section 3(2), (3), (35), (37)(A) of *ERISA*.

[52] The 1974 Plan is resident in Washington, D.C. and administered there. The trustees are resident in the U.S. and all participating employers in the 1974 Plan are resident in the U.S.

[53] The 1974 Plan was established pursuant to a collectively bargained National Bituminous Coal Wage Agreement of 1974 negotiated between the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc., a multiemployer bargaining association. This agreement has been amended from time to time since 1974.

[54] *ERISA* requires that the 1974 Plan be administered in accordance with the most recently negotiated collective bargained agreement and other related documentation, such as the pension plan document and pension trust document. These documents set out, among other things, the contribution obligations of contributing employers to the 1974 Plan, which include:

a) monthly pension contributions for as long as there were operations covered by the 1974 Plan; and

b) a "withdrawal liability" accruing upon a partial or complete withdrawal from participation in the 1974 Plan.

[55] The participants and beneficiaries in the 1974 Plan are retired or disabled former hourly coal production employees and their eligible surviving spouses. There are approximately 88,000 such participants and beneficiaries.

[56] All signatories to the collective bargaining agreements are "participating employers". All such "participating employers" are resident in the U.S.

[57] Only one of the U.S. entities, namely Walter Resources (or a predecessor entity), was a signatory to various National Bituminous Coal Wage Agreements from 1978 forward and was therefore, a “participating employer” in the 1974 Plan. The last of such agreements signed by Walter Resources was the one negotiated in 2011 (the “2011 CBA”).

[58] No member of the Walter Canada Group is or ever was a signatory to any National Bituminous Coal Wage Agreement, including the 2011 CBA. The 1974 Plan does not suggest that the Walter Canada Group ever contributed to the 1974 Plan; nor does the 1974 Plan suggest that the Walter Canada Group entities had any obligation to contribute to the 1974 Plan.

[59] At the time of the Western Acquisition in 2011, the 1974 Plan had an unfunded liability of more than US$4 billion. Its status at that time was said to be “Seriously Endangered Status”, meaning that the 1974 Plan’s funded percentage was less than 80%. If Walter Resources had withdrawn from the 1974 Plan around that time, the estimated withdrawal liability was approximately US$426 million. There is no indication that the 1974 Plan took any position in this court in respect of the Western Acquisition.

[60] Walter Resources and the 1974 Plan entered into the 2011 CBA after the Walter Acquisition was completed.

[61] As with many pension plans, the fortunes of the 1974 Plan (and hence its beneficiaries) have not escaped the brunt of global market forces over the last decade or so. The global financial crisis in 2008/2009 resulted in declining assets held by such plans. In addition, the demographics of an aging population combined with declining coal mining operations (and hence fewer participating employers) have resulted in added financial pressures on less resources. As of September 2015, the 1974 Plan was certified as being in “Critical and Declining Status”, meaning that it is expected to become insolvent by 2025/2026. The 1974 Plan now asserts that the insolvency is expected to occur in six to seven years.

[62] Beyond benefits available to the beneficiaries of the 1974 Plan under these private contractual arrangements, there is some governmental support. A U.S. government sponsored entity, the Pension Benefits Guaranty Corporation, guarantees payment of a portion of the 1974 Plan’s benefits, but at a reduced level.

(4) Walter Canada Group Corporate Structure

[63] All of the Walter Canada Group entities are organized in Canada and for the most part, in British Columbia. The Canadian business operations principally consisted of the operation of three coal mines in British Columbia, being the Brule, Willow Creek and Wolverine mines. These mining properties have since been sold to a purchaser, as approved in these proceedings last year: *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at para. 80.

[64] In particular, the petitioner companies, being Walter Canadian Coal ULC and Canada Holdings, with the latter’s wholly owned subsidiary corporations, being Wolverine Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Cambrian Energybuild Holdings ULC (which in turn owns the Walter Energy Group’s U.K. assets) and 0541237 BC Ltd., are all incorporated under the laws of British Columbia. The lone exception is Pine Valley Coal Ltd., a company incorporated under the laws of Alberta.

[65] Similarly, the partnerships in the Walter Canada Group, which are wholly owned by Canada Holdings, being Walter Canadian Coal Partnership, Wolverine Coal Partnership, Brule Coal Partnership, and Willow Creek Coal Partnership, are all organized under the laws of British Columbia.

[66] As I earlier noted in my reasons (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at para. 4), “[t]he timing of the Canadian acquisition could not have been worse”. In 2011, the market for metallurgical coal fell dramatically, affecting operations of the entire Walter Energy Group in the U.S., Canada and the U.K. One can only assume that other coal producers in those jurisdictions, including signatories to the 1974 Plan in the U.S., similarly suffered the same fate and are struggling or have struggled with this economic downturn in the coal industry.

(5) The U.S. Chapter 11 Proceedings

[67] On July 15, 2015, Walter Energy U.S. and some or all of its U.S. subsidiaries, including Walter Resources, commenced proceedings under Chapter 11 of Title 11 of the U.S. *Bankruptcy Code* in the U.S. Bankruptcy Court for the Northern District of Alabama (the “Chapter 11 Proceedings”).

[68] On October 8, 2015, the 1974 Plan filed proofs of claim in the Chapter 11 Proceedings against all of the U.S. debtors, including Walter Resources and Walter Energy U.S., claiming what was anticipated to be the withdrawal liability of Walter Resources if it withdrew from the 1974 Plan. It appears to be the case that everyone anticipated that Walter Resources would seek to withdraw from the 1974 Plan through the Chapter 11 Proceedings. The unsecured claim was for not less than approximately US$904 million.

[69] The Proofs of Claim filed by the 1974 Plan do not refer to any entity within the Walter Canada Group as having any potential liability for this claim.

[70] The U.S. insolvency filing in turn sparked the need for the corporations within the Walter Canada Group to seek creditor protection in Canada.

[71] On December 7, 2015, this Court granted an Initial Order in this proceeding in favour of the petitioners. Protection was also granted in favour of the partnerships (see *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at para. 3). The Walter Canada Group did not seek recognition of the *CCAA* Proceedings in the U.S.; similarly, the Walter Energy Group’s U.S. debtors did not seek recognition of the Chapter 11 Proceedings in Canada.

[72] At the time of the Canadian *CCAA* filing, Mr. Harvey indicated that efforts were underway in the Chapter 11 Proceedings to implement a sales process to sell all of Walter Energy U.S.’s Alabama assets. A stalking horse agreement was part of that sales process, as is typical in those proceedings.

[73] It quickly became apparent to the U.S. stakeholders that the stalking horse purchaser in the Chapter 11 Proceedings had no interest in assuming what the U.S. Bankruptcy Court would later describe as Walter Resources' "legacy and current labour costs", including that owing under the 2011 CBA. The asset purchase agreement later signed by the U.S. debtors and the purchaser expressly provided that the sale was subject to the U.S. Bankruptcy Court issuing an order allowing the U.S. debtors to reject the 2011 CBA, in accordance with the U.S. *Bankruptcy Code* provisions. It is common ground that upon such rejection, the withdrawal liability under the 1974 Plan would arise.

[74] Arising from opposition to the stalking horse process from some factions, including the unsecured creditors committee (the "UCC"), a settlement was reached. On December 22, 2015, the U.S. Bankruptcy Court entered an order approving a Settlement Term Sheet between the Walter Energy group's U.S. debtors, a steering committee, the stalking horse purchaser and the UCC. The Settlement Term Sheet entitles unsecured creditors, which includes the 1974 Plan, to receive 1% of the common equity issued in the stalking horse purchaser on closing, as well as the right to participate in any exit financing. Later documentation filed in March 2016 by the Walter Energy Group's U.S. debtors and the UCC in the Chapter 11 Proceedings confirms that this settlement was intended to establish the extent of any recovery by unsecured creditors, such as the 1974 Plan, from the Chapter 11 estates.

[75] The Walter Canada Group entities were not involved in the Chapter 11 Proceedings and were not parties to the Settlement Term Sheet.

[76] On December 28, 2015, the U.S. Bankruptcy Court granted an order allowing Walter Resources to reject the 2011 CBA, over the objections of labour related stakeholders, including the 1974 Plan. The order (the "1113/1114 Order") authorized Walter Energy U.S. and its U.S. affiliates to reject the 2011 CBA and declared that any sale to the stalking horse purchaser was free and clear or any encumbrance or liabilities under the 2011 CBA. The U.S. Bankruptcy Court also declared that upon

such sale, Walter Resources had no further contribution obligations under the 2011 CBA.

[77] The Walter Canada Group did not participate in the hearing which gave rise to the 1113/1114 Order. The reasons of the U.S. Bankruptcy Court which led to the granting of the 1113/1114 Order do not refer at all to the Walter Canada Group entities or any assets or operations in Canada held by those entities.

[78] The 1974 Plan appealed the 1113/1114 Order, although that appeal was later withdrawn in February 2016. At that time, the 1113/1114 Order became final.

[79] By early January 2016, the 1974 Plan clearly anticipated that Walter Resources' withdrawal from the 2011 CBA was imminent. Around that time, the 1974 Plan began filing materials in these *CCAA* proceedings asserting that the Walter Canada Group entities were jointly and severally liable for the withdrawal liability under the 1974 Plan.

[80] The sale of the U.S. assets, as approved by the U.S. Bankruptcy Court, closed on April 1, 2016. Accordingly, immediately before that date, all contributions by Walter Resources to the 1974 Plan ceased and the withdrawal liability arose. The 1974 Plan now estimates that the withdrawal liability is in excess of US$933 million.

[81] The 1974 Plan introduced the evidence of Dale Stover, the Director of Finance and General Services employed with the 1974 Plan. He indicates that by reason of Walter Resources' withdrawal, the status of the 1974 Plan has been further jeopardized even beyond that recognized in September 2015. He indicates that the other employers in the 1974 Plan will be further burdened by this loss.

[82] Despite the extensive proceedings before the U.S. Bankruptcy Court, at no time has that Court expressed any opinion on the validity of the 1974 Plan's claim as asserted in the Chapter 11 Proceedings. In addition, at no time did the U.S. Bankruptcy Court address the ability of the 1974 Plan to assert joint and several liability for the withdrawal liability against the other U.S. debtors. Certainly, that court did not address the core (and second) issue before me on this application; namely,

whether the entities within the Walter Canada Group are liable under *ERISA's* provisions.

(6) Estimated Recoveries

[83] In my view, the evidence and submissions on this point are substantially irrelevant, and completely irrelevant to the determination of some issues. I understand that the parties all agree as to this irrelevancy although they also all saw fit to ensure that I knew the consequences of a win/loss to each side. Accordingly, to round out the narrative, the consequences arising from this application are as follows.

[84] If the 1974 Plan's claim is found to be invalid as against the Walter Canada Group entities, it is anticipated that all other unsecured claims filed against the Canadian estates will be paid in full, including in relation to substantial amounts (approximately $12.8 million) owed to the Canadian unionized employees who worked in the British Columbia coal mines. In that event, it is also expected that the remaining funds will likely flow to Walter Energy U.S. arising from intercompany claims that have been filed.

[85] I am advised by the 1974 Plan that, if this happens, no funds will be paid to it in respect of its unsecured claim. This appears to arise from the Settlement Term Sheet, discussed above, and which appears to limit recovery for the U.S. unsecured creditors (including the 1974 Plan) to equity in the stalking horse purchaser and participation in exit financing, which I gather provided little or no recovery in the U.S. Accordingly, the 1974 Plan asserts that without recovery from the Walter Canada Group's assets, it will fail to have achieved any recovery, either here in Canada or in the U.S.

VI ***ERISA's* PROVISIONS**

[86] A review of the legislative provisions found in *ERISA* is helpful at this point. It is certainly required in order to consider and decide the second question, namely whether the Walter Canada Group is liable under *ERISA* as a matter of U.S. law.

However, an understanding of those provisions is also necessary in order to answer the first question, namely being whether U.S. law (i.e. *ERISA*) even applies here.

[87] The following, which I have largely adopted from the expert report of one of the Walter Canada Group's expert on U.S. law, Marc Abrams, summarizes the relevant legislative provisions under *ERISA* (or Title 29). Some of these provisions have already been generally described above:

a) a "multiemployer plan" is a collectively bargained pension plan maintained and funded by more than one unrelated employer, typically within the same or related industries: 29 U.S.C. § 1301(a)(3). As stated above, the 1974 Plan is a multiemployer defined benefit pension plan: see 29 U.S.C. § 1002(2), (3), (35) and (37)(A);

b) if one of the contributing employers withdraws from a multiemployer plan, either partially or completely, *ERISA* requires the "employer" to pay to the plan its share of any unfunded vested benefits, generally determined as of the end of the plan year preceding the plan year in which the withdrawal occurs: 29 U.S.C. § 1386 and § 1391. The withdrawing employer's liability is referred to as the "withdrawal liability": 29 U.S.C. § 1381; and

c) the plan sponsor has a statutory duty to calculate and collect the withdrawal liability from the withdrawing employer: 29 U.S.C. § 1382. *ERISA* appears to contemplate that payments may be made over time in accordance with a schedule; however, if the withdrawing employer defaults in paying the withdrawal liability, the entire amount of the withdrawal liability becomes subject to collection: 29 U.S.C. § 1399(c)(5).

[88] The key *ERISA* provisions which are said by the 1974 Plan to give rise to its claim against the Walter Canada Group entities are:

a) withdrawal liability is the joint and several obligation of not only the withdrawing "employer" (as a contributing employer) but also each member of the employer's "controlled group": 29 U.S.C. § 1301(a)(2)(B);

b) a contributing sponsor's "controlled group" consists of the contributing employer and others who are under "common control" (29 U.S.C. § 1301(a)(14)(A) and 29 U.S.C. § 1002(40)(B));

c) for a determination as to whether two persons are under "common control" where there is a single-employer plan, *ERISA* then refers to regulations "consistent and coextensive" with regulations under section 414 of Title 26 (also known as the *Internal Revenue Code*): 29 U.S.C. § 1301(a)(14)(B);

d) with respect to multiemployer plans, two or more trades or businesses are deemed to be a single employer if they are within the same "control group" and "control group" means a group of trades or businesses under "common control" with the employer: 29 U.S.C. § 1002(40)(B); and

e) for the purposes of *ERISA*, the three principal types of "controlled groups" are found in *Internal Revenue Code* regulations: (i) parent-subsidiary controlled groups; (ii) brother-sister controlled groups; and (iii) combined groups: 26 C.F.R. § 1.1563-1(a)(1)(i).

[89] The 1974 Plan asserts that the corporations within the Walter Canada Group are part of Walter Resources' parent-subsidiary "controlled group". Under *ERISA*, a parent-subsidiary "controlled group" is a group consisting of entities connected through a controlling interest with a common parent where stock ownership of at least 80% of the voting power or value (other than the parent) is owned by one or more corporations and the common parent corporation owns stock with at least 80% of the voting power of at least one of the corporations: 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 414(b); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c).

[90] The 1974 Plan also relies on other provisions of the *Internal Revenue Code* and its regulations which refers to treating partnerships which are under common control as a single employer: 26 U.S.C. § 414(c); 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c)-2.

[91] For purposes of this application, the Walter Canada Group and the Union agree that it can be assumed that under the above provisions, the Walter Canada Group entities were under common control and within the “controlled group” of the Walter Energy Group given the level of stock ownership held by Walter Energy U.S. in Canada Holdings and Walter Canadian Coal ULC. Further, as stated above, 100% ownership of all of the Canadian operating entities is held through Canada Holdings. All of the expert witnesses were similarly asked to make this assumption.

[92] Accordingly, *prima facie*, *ERISA* purports to impose joint and several absolute liability on the entities within the Walter Canada Group based on the 1974 Plan having met the numerical (80%) test for stock ownership or voting control with respect to a “controlled group” under *ERISA*. In addition, no issue arises given that some of the entities are partnerships.

VII THE CHOICE OF LAW QUESTION

[93] The first issue posed by the Walter Canada Group is:

> Under Canadian conflict of laws rules, is the 1974 Plan’s claim as against the Walter Canada Group governed by Canadian substantive law or U.S. substantive law (including *ERISA*)?

[94] Accordingly, the question for this Court to consider is what choice of law - Canada or the U.S. (ie. *ERISA*) - governs the 1974 Plan’s claim. Since the 1974 Plan has chosen to assert its claim in these Canadian proceedings, it is common ground that Canadian choice of law principles govern the analysis of what law applies to the 1974 Plan’s claim: Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, (Toronto, LexisNexis, 2005) (loose-leaf, 6th ed.) ch. 1 at 1-2.

[95] The overall aim or purpose of the choice of law exercise is to identify the most appropriate law to govern a particular issue: A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London, Sweet & Maxwell, 2012) at 51.

[96] The authorities are clear that determining choice of law is a two-step process: firstly, the Court characterizes the claim to determine which choice of law rule

applies; and secondly, the Court applies the proper choice of law rule to the claim. This process was described in *Castel & Walker* at 3-1 as follows:

> In an action involving legally relevant foreign elements, a court may be asked to apply foreign law. To decide whether to do so, the court must ascertain the legal nature of the questions or issues that require adjudication and then apply its appropriate conflict of laws rules to them. For instance, do the facts raise a question of succession or of matrimonial property, or a question of capacity or of form? This analytical process is called the characterization or classification. Its purpose is to enable the court to find legal categories with which the forum is familiar. In other words, the court must allocate each question or issue to the appropriate legal category. The application of the forum's conflict of laws rule to each legal question or issue will indicate which legal system governs that question or issue. That legal system is called the *lex causae*.
>
> Once the court has characterized the issue, it will consider the connecting factor – a fact or element connecting a legal question or issue with a particular legal system. Finally, the court will apply the law identified as the governing law. In doing so it must separate the rules of substance from the rules of procedure of the legal systems involved, because questions of procedure are governed by the *lex fori*.

[97] The first step therefore requires that the court ascertain or characterize the "legal nature of the questions or issues". Typical legal categories used for characterization include: property law, the law of obligations, family law, the law of corporations and insolvency. Other categories, or sub-categories, include the law of contract (an "obligation"), tort and equitable remedies, such as unjust enrichment.

[98] In Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law Inc., 2016) at 223-226, the authors discuss the somewhat perplexing question as to just what is to be characterized. They conclude that facts are not to be characterized, but the courts have variously referred to both "issues" and "causes of action" as being characterized. At 224, the authors highlight, citing *Macmillan Inc. v. Bishopsgate Investment Trust and Others (No. 3)*, [1996] 1 W.L.R. 387 (C.A.), the possible differences that may arise in that respect and that claimants may attempt to characterize their claims to support their choice of law.

[99] In this case, I see no material difference whether one characterizes the 1974 Plan's claim in terms of a "cause of action" or "issue". Fundamentally, the claim arises from the express legislative provisions of *ERISA*. As noted by the Walter

Canada Group, there is no equivalent provision of *ERISA* here in Canada or British Columbia. In that event, the claim is to be characterized "as its closest functional equivalent under that [forum's] law", namely Canada and British Columbia: Pitel and Rafferty at 227.

[100] The Walter Canada Group and the Union, on one hand, and the 1974 Plan, on the other, present starkly different approaches to the characterization of the 1974 Plan's claim. As I will describe below, the answer to this first step or question in turn leads to a distinct path or set of considerations as to the choice of law issue. The answers to each of the analytical steps also lead to different considerations in relation to most, if not all, of the evidentiary issues and objections raised by the 1974 Plan.

[101] Accordingly, the statement found in Pitel and Rafferty at 222 that the characterization of the issue is "central to the choice of law process" is particularly apt here.

[102] This two-step process is illustrated by this Court's decision in *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102, aff'd 2007 BCCA 319, upon which both parties rely. At paras. 160-181, this Court addressed the characterization issue, which arose from the competing positions of the parties. The defendant asserted that the claim related to a foreign immovable (in which case Argentina law applied) and the plaintiff asserted that the claim was an *in personam* claim for appropriation through a breach of confidence (in which case British Columbia law applied).

[103] This Court in *Minera* determined that the claim was more appropriately characterized as an equitable claim for unjust enrichment arising from a breach of confidence, with the consequence that the relevant choice of law rule was the "proper law of the obligation" (see paras. 181-184).

(1) What is the Characterization of the 1974 Plan's Claim?

[104] Turning to the first step, there is no disagreement that the 1974 Plan's claim does not arise as a result of the Walter Canada Group's conduct. The Walter

Canada Group entities did not employ any beneficiaries of the 1974 Plan or have any direct relationship, contractual or otherwise, with the 1974 Plan. Nor did the Walter Canada Group contribute to or have any obligation to contribute to the 1974 Plan. No other conduct that may be relevant to the Walter Canada Group's liability in that regard has been raised. Simply put, the Walter Canada Group had nothing to do with either the 1974 Plan or Walter Resources' participation in it.

[105] The Walter Canada Group contends that the 1974 Plan's claim is properly characterized as an issue under the law of corporations or as an issue of legal corporate or partnership status or personality. They say that the basis for the claim simply arises under *ERISA* and as a result of Walter Resources' withdrawal from the 1974 Plan. Further, they say that the *only* basis for the claim against the Walter Canada Group arises from *ERISA*'s "common control" provisions, discussed above, and are said to apply solely from the fact that the Walter Canada Group entities and Walter Resources are both owned directly or indirectly by Walter Energy U.S.

[106] It is clear that Walter Resources was the only signatory to the 2011 CBA and that Walter Resources' corporate relationship, *albeit* indirectly, to the Walter Canada Group, is the sole basis upon which the 1974 Plan seeks to apply the "controlled group" concept under *ERISA*.

[107] The 1974 Plan contends that its claim concerns the law of obligations and in particular, contract, such that U.S. law is the "proper law of the obligation". The 1974 Plan asserts that its claim is one based not only on *ERISA*, but also the documents by which the 1974 Plan administers itself: namely, the pension plan document, the pension trust document and the 2011 CBA.

[108] I will first address the arguments of the 1974 Plan.

[109] The arguments of the 1974 Plan rest on the central proposition that where a statute confers a right of action in favour of an entity which is not a party to a contract to which the claim relates, the "essential nature" of the claim is to enforce the terms of that contract, such that the claim is properly characterized as one in

contract. The 1974 Plan describes its claim as seeking to enforce the contractual obligations of Walter Resources against the Walter Canada Group. Three English insurance cases are cited in support.

[110] The court in *Youell v. Kara Mara Shipping Company Ltd.,* [2000] EWHC 220 was addressing the consequences of a collision at sea between two ships. The owners of the "innocent" vessel commenced proceedings in Louisiana. In that jurisdiction, such a party was allowed, by statute, to claim directly against the "at fault" vessel owner's insurers. The insurers ultimately applied in England to restrain these proceedings on the basis that the "direct action" statutory claim was pursuant to insurance policies which required any litigation to be brought in England. The English court agreed, stating:

> 58. The position in the present case is that World Tanker has asserted a claim on the H&M Policies by virtue of the *Direct Action Statute* in the Direct Action Claim. It is true that World Tanker have not become a party to the policies by a mechanism of statutory novation or of statutory assignment. But in my view, the nature of the rights that the *Direct Action Statute* confers to World Tanker is contractual; it confers a statutory right to make a claim on a contract to which World Tanker was not originally a party. … the rights are confined to the "*terms and limits of the policy*".
>
> …
>
> 61. Therefore, I conclude that the nature of the claim by World Tanker against YM Insurers in the Direct Action Claim is contractual and the terms of that contract would include the English proper law clause and the [exclusive jurisdiction clause].

[111] In *Through Transport Mutual Assurance Association (Eurasia) Limited v. New India Assurance Association Company Limited*, [2004] EWCA Civ 1598, the court was considering Finnish legislation that gave a person a direct right to sue the defendants' insurer for losses caused by the defendant. At para. 56, the court agreed with the trial judge's approach to consider the "substance" of the claim being advanced. At para. 57, the court adopted the trial judge's comments on the characterization issue for choice of law purposes:

> … If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterized as one of statutory entitlement to which there may be no direct equivalent in

> English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterized as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law.

[112] The Court of Appeal in *Through Transport* agreed with the lower court's conclusions that the claim was, in substance, to enforce the insurance contract between the responsible party and its insurer:

> 58. … In short, the title to section 67 [of the Finnish Act] is the "*insured person's entitlement to compensation under general liability insurance*" and the right is defined as a right "to claim compensation in accordance with the insurance contract direct from the insurer" in certain defined circumstances. <u>The claim under the Act is not therefore in any sense independent of the contract of insurance but under or in accordance with it</u>. In these circumstances it seems to us that the judge was correct to hold that the issue under the Act is one of obligation under the contract. The judge noted in passing … that the Finnish court itself described the Act as giving the injured party the right to claim compensation "according to the insurance policy".
>
> [Emphasis added]

The Court of Appeal also noted at para. 59 that, although the Finnish Act gave the claimant a right of action directly against the insurer without the need of a formal assignment, what he obtained was "essentially a right to enforce the contract in accordance with its terms". Therefore, pursuant to the terms of the insurance contract, that stated English law applied, English law was the proper law of the claim.

[113] The third and final case cited by the 1974 Plan is *The London Steam-Ship Owners' Mutual Insurance Association Ltd. v. The Kingdom of Spain, The French State*, [2013] EWHC 3188 (Comm). There, the court followed the analysis in both *Youell* and *Through Transport,* stating that in deciding whether or not a direct action right under a statute is "in substance" a claim to enforce the contract or a claim to enforce an independent right of recovery, what matters most is the content of the right, rather than the derivation of its content (paras. 82-88). The Court held that the essential content of the right was provided by the insurance contract, despite the Spanish law which also created further liability for an event that would not normally

be insurable. The direct action right conferred by Spanish law against the liability insurers was found to be, in substance, a right to enforce the contract rather than an independent right of recovery.

[114] The 1974 Plan argues that, for choice of law purposes, its claim arises under the law of obligations - namely it is one of contract. It argues that the three English cases above all involve: (a) a plaintiff advancing a claim against another party for a liability arising under a contract where there was no privity of contract; (b) a plaintiff claiming that the defendant's liability arose under a statute from a law other than the *lex fori*; and (c) a court characterizing the claim as a right to enforce a contract which only existed by reference to that contract.

[115] The 1974 Plan contends that its claim is the same because, although Walter Resources was the only signatory to the 2011 CBA, *ERISA* (namely the foreign law) provides that the Walter Canada Group is liable in relation to Walter Resources' rejection of 2011 CBA and the withdrawal liability that arose under that contract.

[116] Despite the 1974 Plan's fervent submissions on this issue, I am not convinced that the three English cases are analogous to the situation here. In my view, they are distinguishable.

[117] Firstly, the foreign statutes in the English cases simply authorized a direct action against a *party* to the contract in question, being the insurance policy. In essence, the plaintiffs were made parties to the insurance contract between the insurer and the insured. In contrast here, *ERISA* does not authorize the 1974 Plan to sue the Walter Canada Group as a party to the 2011 CBA, the pension plan and trust documents. The 1974 Plan relies solely on the provisions in *ERISA* which only references the contractual liability as the basis upon which to monetarily determine the amount of the liability.

[118] Secondly, the reasoning of and results in the English courts was substantially influenced by the fact that even though the plaintiffs were essentially to step into the insurance contracts, the terms of the contract were, by the statutory provisions, still

to govern. This meant that the plaintiffs took the insurance contracts as they found them and were subject to not only the benefits under the contracts, but also other provisions (or burdens) that might, for example, deny or limit coverage and therefore, recovery. As shown in the results found in those cases, that meant that the plaintiffs were subject to exclusive jurisdiction clauses and provisions requiring arbitration, which was the bargain struck in the insurance contracts.

[119] In *Through Transport*, the court stated at para. 58 that the claim was not “independent of the contract of insurance but under or in accordance with it.”

[120] Here, *ERISA*’s provisions are entirely devoid of any mention of the underlying contractual obligations of Walter Resources. Those provisions simply provide that if there is a “withdrawal liability”, the other members of the “controlled group” are liable for that amount. I see no basis upon which one could say that, in substance, the Walter Canada Group became a party to the 2011 CBA and the other pension documents by reason of *ERISA*’s provisions.

[121] For example, there is no suggestion that the other “controlled group” members could contest the amount of the withdrawal liability or advance any other substantive issues that Walter Resources might have raised under the terms of the 2011 CBA and the related documents. The evidence shows that the Walter Canada Group was not even notified of, let alone allowed to participate, in the contractual process by which the 1974 Plan determined the “withdrawal liability” under the 2011 CBA. The discussion of “absolute liability” of “controlled group” liability under *ERISA*, cited by the Union, found in *Connors v. Peles*, 724 F. Supp. 1538 (W.D. Pa. 1989) at 1577-8, is instructive on this point:

> … Under certain circumstances, one member of a controlled group may be responsible for the withdrawal liability of another member of the controlled group. These principles apply only when there are two or more separate businesses that are banded or associated together in a "controlled group". Participation in the controlled group, by itself, imposes equal responsibility upon all members of the controlled group for the withdrawal liability of an "employer" member of the controlled group, i.e., even though the "employer" member of a group of trades or businesses is the only one with a pension plan. Once notice to the "employer" is given, as required by 29 U.S.C. § 1399, it is totally irrelevant as to whether actual or even constructive notice is

> given or imputed to the "non-employer" members of a controlled group. The liability of the "non-employer" members of a controlled group does not rest on any notice safeguards under ERISA. The "non-employer" members of the controlled group do not even have to be engaged in the same business enterprise, or even in a similar business. A striking example is provided in *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 11-13 (1st Cir.1980), where one member of a controlled group (the "non-employer") did not even have any employees!
>
> Congress built the equivalent of withdrawal liability "guaranty's" into ERISA, at the time of the enactment of the multiemployer amendments. The "guaranty's", commonly known and referred to as the "controlled group" statutes, 29 U.S.C. § 1301(b)(1), and the regulations adopted thereunder, 29 C.F.R. Part 2612, and consider the entire group as but one "employer", 29 U.S.C. § 1002(5), and impose *absolute* liability upon all members of a control group for the withdrawal liability of any member of a statutory group of enterprises, even though the "employer" member of a group of trades or business is the only one with a pension plan, and regardless of whether their groups have employees. *Pension Benefit Guaranty Corp. v. Ouimet Corporation*, 630 F.2d 4 (1st Cir.1980). Under "controlled group" statutory liability, an inquiry as to the interrelationship of the members of the control group, with the employees of all members of the control group, as required under the "single employer" test, is totally unnecessary and irrelevant.
>
> [Emphasis added in underlining]

[122] During the hearing, the 1974 Plan's counsel referred to the 1974 Plan as having certain "contractual expectations". While this may have been true in relation to Walter Resources, in my view, the 1974 Plan could only have had "statutory expectations" in relation to other "controlled group" members in the Walter Energy Group arising from *ERISA*. Certainly, the Walter Canada Group had no "contractual expectations" in these circumstances; this is in contradistinction to the fact that the insurers in the English cases most certainly would have had "contractual expectations" arising from the insurance contracts they issued.

[123] I turn to consider the argument advanced by the Walter Canada Group that the appropriate choice of law characterization of the 1974 Plan's claim is one of the law of corporations and more specifically, one of separate legal existence or personality.

[124] The 1974 Plan argues that the choice of law rule advocated by the Walter Canada Group is intended only for matters related to corporate existence, such as

whether an entity has the capacity to sue or be sued. The 1974 Plan concedes that it may also apply to issues of corporate governance, such as shareholder rights, the authority of directors, the power to make contracts or rights to issue or transfer shares.

[125] I do not agree that such a narrow approach as advocated by the 1974 Plan is appropriate in characterizing the issue. The references in the cases to looking at the "substance" of the claim support a more far-ranging and holistic analysis. Indeed, although in support of its own argument, the 1974 Plan itself asserted that the characterization exercise is to be done in accordance with the rules and in a "flexible manner".

[126] In *Macmillan*, the English court of appeal was called upon to settle a dispute about shares that were wrongly offered as security in England, when in fact they were owned by an American company. In the choice of law analysis, Auld L.J., at 407, discussed the need to look beyond the strict or narrow formulation of the claim:

> …classification is governed by the *lex fori*. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other system: see *Cheshire & North's Private International Law*, 12th ed., pp. 45-46, and *Dicey & Morris*, vol. 1, pp. 38-43, 45-48.

Here, the "true issues" that are raised by the claim go well beyond the narrow formulation advanced by the 1974 Plan.

[127] Further, the text authority cited by the 1974 Plan on this issue in fact supports the position of the Walter Canada Group. In *Castel & Walker*, the authors also adopt a wider view of the "law of corporations" as including questions of status, separate

legal personality and the limited liability that flows from that personality. At 30-1, the authors state:

> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state, province or territory of incorporation or organization and it cannot be changed during the corporation's existence even if the corporation carries on business elsewhere.
>
> …
>
> While the state, province or territory in which the foreign corporation intends to carry on business has the right to prescribe the extent to which the corporation may exercise its corporate powers and capacity, this does not mean that proceedings may be taken in this jurisdiction to affect its status as a corporation. …
>
> There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced.
>
> [Emphasis added]

[128] The 1974 Plan also argues that this Court should consider the rationale of the choice of law rule it is applying and also the purposes of the substantive law to be characterized and then determine if the conflict rule covers the substantive law at issue (ie. the effect of a certain characterization): Dicey at 51 citing *Raiffeisen Zentralbank Osterreich AG v. An Feng Steel Co. Ltd.*, [2001] EWCA Civ 68 at para. 27. The 1974 Plan then says that the purpose of the substantive law (ie. *ERISA*) is to ensure that employees who are promised retirement benefits actually receive those benefits, citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 US 211, 214 (1986). The 1974 Plan then asserts that this purpose is entirely different than that behind the corporate choice of law rule whose purpose is the determination of corporate matters or more specifically, corporate capacity or governance. After analyzing the underlying policy purposes of the conflicts rule, that corporations are governed by the substantive law of the country of incorporation, the 1974 Plan argues that this substantive law issue is not engaged here since its claim is about employees' pension entitlements, in which case U.S. law should apply.

[129] This argument is entirely without merit in that it confuses the intent or purpose behind the “controlled group” provisions found in *ERISA* with the effect of those provisions. I agree that *ERISA* has been employed by the U.S. Congress with the *intention* and *purpose* of seeking to ensure that U.S. retirees receive contracted for benefits; however, the *effect* of the “controlled group” provisions is to collapse the corporate structure to ensure that as many entities within a corporate group are liable for retirement plan withdrawal and that their assets are available to meet obligations to those retirees.

[130] Seen in that vein, the purpose of the choice of law rule proposed by the Walter Canada Group intersects with the substantive law under *ERISA*, in that both address the corporate status or the separate legal existence or personality of other persons, including the Walter Canada Group entities. *ERISA* ascribes liability based solely on corporate and other legal relationships.

[131] As the Walter Canada Group argues, it is trite law in British Columbia and Canada that corporations have separate legal personalities from that of its shareholders and that shareholders are not *prima facie* liable for the debts of the corporation: *Salomon v. Salomon & Co*, [1897] A.C. 22 (H.L.). A corporation has the capacity and the rights, powers and privileges of an individual of full capacity: *Business Corporations Act*, S.B.C. 2002, c. 57, s. 30.

[132] The well-known decision in *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258 (C.A.) at 266-268 affirmed the sanctity of a corporation’s existence per *Salomon* and discussed that the corporate veil may be pierced only in certain and exceptional circumstances. To similar effect, see *Edgington v. Mulek Estate*, 2008 BCCA 505 at paras. 20-25 where, following *B.G. Preeco*, the court stated at para. 21 that the “separate legal personality of the corporation will not be lightly disregarded”. These and other cases were recently discussed in *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2011 BCSC 1072 beginning at para. 97 to similar effect.

[133] The intention behind, purpose and effect of *ERISA*'s "common control" or "controlled group" provisions are aided by interpretations of those provisions by the U.S. courts. In that respect, Mr. Abrams' expert report is again of assistance. He states at pp. 6-7 of his report:

> Courts have described the operation of ERISA's "controlled group" liability provisions as a "veil-piercing" statute that disregards formal business structures in order to impose liability on related businesses.
>
> …
>
> As the U.S. Supreme Court has recognized, in place of the "subjective, case-by-case analysis that had previously prevailed," Congress purposefully adopted an "objective test" for determining whether a controlled group exists, based on a "mechanical formula" that establishes "a sharp dividing line that is crossed by incremental changes in ownership." [citing *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982)] Thus, the applicable regulations for withdrawal liability of "controlled groups" establish a "brightline test based purely on stock ownership," and affiliates are not required to have actually exercised control over the employer (or vice versa) or engaged in any wrongdoing or misconduct in order to be liable as a member of the "controlled group."

[134] The citations provided by Mr. Abrams for these comments amply support his summary of the U.S. courts' characterization of *ERISA*'s "controlled group" provisions. Other comments found in the U.S. cases cited by him are equally instructive:

a) the *ERISA* provisions were aimed at "curbing abuses of multiple incorporation": *United States v. Vogel Fertilizer Co.*, 455 U.S.16 (1982) at 36;

b) in *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. – Pension Fund v. Gotham Fuel Corp.*, 860 F. Supp. 1044 at 1050, the court stated that members of the controlled group are "deemed, by law" to constitute a single entity. At 1050-1051, the court adopted an earlier statement of the legislative intent underlying *ERISA*:

> The legislative background of ERISA … makes it abundantly clear that, for the purpose of [ERISA], Congress was unconcerned with the actual corporate form of a business. …Congress instructed … the

> courts to disregard the corporate form and treat several inter-related corporations are one entity, the ERISA "employer" ...

and also stated:

> Controlled group members are statutorily determined to be 'single entities,' without the necessity of a finding of improper motive or wrongdoing.

c) in *PBGC v. Smith-Morris Corp.*, C.A. No. 94-cv-60042-AA, 1995 US Lexis 22510 at 8 (E.D. Mich. Sept. 13, 1995), the court stated that *ERISA*'s concern is not whether a stockholder who has a controlling share actually exercised control over corporate affairs but simply whether it had "the ability to control," as evidenced through stock ownership;

d) in *Sun Cap. Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 at 138, the court stated that:

> … [ERISA's] broad definition of "employer" extends beyond the business entity withdrawing from the pension fund, thus imposing liability on related entities within the definition, which, in effect, pierces the corporate veil and disregards formal business structures. …

e) finally, in *Cent. States, S.E. & S.W. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874 (7th Cir. 2013), at 877-878, the court stated:

> When an employer participates in a multiemployer pension plan and then withdraws from the plan with unpaid liabilities, federal law can pierce corporate veils and impose liability on owners and related businesses. …
>
> …
>
> The [joint and several withdrawal liability] provision's purpose is to "prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities…" (Citing: *Central States, Southeast and Southwest Areas Pension Fund v. White*, 258 F.3d 636, 644 (7th Cir.2001)

[135] The 1974 Plan's expert witness as to U.S. law and specifically, *ERISA*, Judith Mazo, agrees. She describes at paragraph 37 of her report that the "arithmetic rules" or "bright lines" under *ERISA* apply to determine common control. She further states there is no other relevant consideration as to whether *ERISA* applies:

> 44. … Because the law uses mechanical tests and looks at highly concentrated levels of ownership, it does not matter whether the decision-makers actually exercised their control since they had the power to do so if they chose.

[136] Simply put, the 1974 Plan's claim arises solely by reason of Walter Energy U.S. owning more than an 80% stake in both Walter Resources and the Walter Canada Group entities. Arising from that "arithmetic" rule, *ERISA* dictates that the Walter Canada Group is liable for any withdrawal liability of a signatory (ie. Walter Resources) under the 1974 Plan.

[137] Accordingly, I agree with the Walter Canada Group that *ERISA*'s "controlled group" provisions impose liability by ignoring separate corporate personalities and effectively amalgamating, consolidating or collapsing "common control" entities into a single "employer" liable for any withdrawal liability of any other entity within that group. There can be no dispute that, but for *ERISA*'s provisions, the Walter Canada Group would not be liable for any obligations owing by Walter Resources under the 2011 CBA. It is only by reason of the Walter Canada Group's relationship with Walter Resources, through the indirect corporate ownership of Walter Energy U.S., that such liability arises.

[138] As the U.S. cases note, this is the essence of "lifting the corporate veil" so as to look beyond the corporate personality of Walter Resources and impose liability on other entities within the corporate group through common shareholdings.

[139] My conclusions are consistent with the comments found in *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 6 (1st Cir.1983) where the Court of Appeals, First Circuit allocated a termination liability to certain solvent members of the Ouimet Group:

> On the surface this result may appear to disregard unduly the legal separateness of the corporate entities. There is precedent, however, for piercing the corporate veil in bankruptcy situations. Under its general equitable powers a bankruptcy court may "substantially consolidate" the assets and liabilities of various entities. Substantial consolidation will usually, but not always, involve only debtors and be granted if absolutely necessary for achieving reorganization or protecting creditors' economic interests. … Some of the facts a court will look for in deciding whether to grant a

> substantive consolidation include the parent owning a majority of the subsidiary's stock, the entities having common officers or directors, the subsidiary being grossly undercapitalized, the subsidiary transacting business solely with the parent, and both entities disregarding the legal requirements of the subsidiary as a separate corporation. …
>
> There is no need to show that any or all of these factors are present to justify holding the solvent members of the Ouimet Group responsible for the entire liability in this case. Avon's corporate veil was, in effect, pierced by Congress when it enacted the termination liability provisions of ERISA. The corporate form is a creation of state law and states may impose stringent limitations on attempts to disregard it; the factors courts consider in deciding whether to grant substantive consolidations reflect such limitations. These limitations, however, do not constrict a federal statute regulating interstate commerce for the purpose of effectuating certain social policies … *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir.1956) (existence of separate corporate entity may be disregarded when necessary to further the purpose of a federal regulatory statute). Thus, concerns for corporate separateness are secondary to what we view as the mandate of ERISA in this case.
>
> [Emphasis added]

[140] Since *ERISA* is a creature of the U.S. Congress, there is no similar legislation in Canada that might be considered in this characterization exercise. There is no case authority from Canada that addresses *ERISA*, nor any case authority involving the type of characterization exercise involved here. Nevertheless, the Walter Canada Group argues that characterizing the 1974 Plan's claim as one implicating legal personality is consistent with at least one British Columbia authority.

[141] In *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312, this court considered the constitutionality of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997, c. 41 (the "*Tobacco Act*"). The *Tobacco Act* created a cause of action permitting the government to directly recoup medical costs from the tobacco industry. The *Tobacco Act* defined "manufacturer" broadly and, coupled with the group liability provisions, extended liability to affiliated (perhaps also foreign) companies (see paras. 156-158). Similar to *ERISA*, the *Tobacco Act* "imposed liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act." (para. 233).

[142] I agree with the 1974 Plan that the result in *JTI-Macdonald Corp.* is limited since it arose in the context of a constitutional challenge which is not involved here. Nevertheless, many of the comments of Justice Holmes in respect of the *Tobacco Act* strike a similar chord in terms of what *ERISA* seeks to accomplish as against the Walter Canada Group. I have included lengthy quotes of Holmes J. here, particularly given the degree of reliance placed on this case by the Walter Canada Group:

> [172] The combined effect of [provisions of the *Act*] purport to affect the status, structure and corporate personality of foreign corporations and the rights of their shareholders.
>
> [173] The *Act* has the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia.
>
> [174] A company's registered office establishes its domicile. [*Gasque v. Inland Revenue Commissioners*, [1940], 2 K.B. 80; Fraser & Stewart, op. cit. at p.144; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.,* [1954], 3 D.L.R. 326 (Ont.H.C.); *Voyage Co. Industries v. Craster*, [1998] B.C.J. No. 1884 (Unreported) (B.C.S.C.)].
>
> [175] A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., Canadian Conflict of Laws 4th ed., (Toronto: Butterworths, 1997) pp.574-575; *Voyage Co. Industries v. Craster*, *supra*; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, *supra*; Fraser & Stewart, op. cit. p.144; Palmer's Company Law (looseleaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp.2105-2106]:
>
>> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders.
>>
>> [Castel, *supra,* at p.574-575].
>
> [176] It is a fundamental principle of company law that a corporation is a legal entity distinct from its shareholders. [*Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (H.C.); Palmer's Company Law 24th ed.*,* Schmitthoff, C.M. Ed., (London: Stevens & Sons, 1987) pp.200-201; Fraser & Stewart Company Law of Canada 6th ed.*,* (Carswell, 1993) at p.17; *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, S.15(1)].

[177] This distinction is operative in a parent and subsidiary relationship and applies to related corporations owned by a common shareholder. [Fraser & Stewart, op. cit. at p.21, Davies, P.L., Gower's Principles of Modern Company Law 6th ed. (London: Sweet & Maxwell, 1997) at pp.80, 159-163; *BG Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C.C.A.)].

[178] There is a distinction in Canadian constitutional law between the power to incorporate and the power to regulate the activities of a company. The power to incorporate a company is the ability to bestow legal personality on an association of persons, regulate a corporate structure and define the rights of shareholders.

[179] A company once incorporated however will be responsible to the laws of jurisdictions in which it operates. A federally incorporated company is, for example, accountable under provincial security laws.

….

[189] The *Act* therefore attempts to alter and derogate from what are clearly domiciliary rights under the law of foreign jurisdictions, …

…

[205] The *Act* overrides the substantive laws of extra-territorial Canadian or foreign jurisdictions in four major areas:

> (a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;
>
> …. and
>
> (d) in respect of shareholder's rights and liabilities regarding shares of federal or foreign corporations.

….

[213] Sections [of the *Tobacco Act*], when they purport to govern the status, structure and corporate personality of a federally-incorporated company under the *Canada Business Corporations Act* are not only extra-territorial in effect they trench upon the exclusive jurisdiction of the Parliament of Canada.

[214] There is much force to the argument that a practical cumulative effect of these provisions of the *Act* is to "amalgamate" or "merge" defendant tobacco companies such that those "amalgamated" by the operation of the provisions of the *Act* incur liability for civil claims against others in the involuntary merger. That is a fundamental interference with a federal jurisdiction reserved under Part XV of the *Canada Business Corporations Act*.

[215] The combined effect of Sections…of the *Act* ignores the separate identities of federally-incorporated companies for the purpose of establishing a tobacco related wrong committed by a related company and for the purpose of calculating amounts assessed against them.

[216] The separate legal personality conferred under s.15(1) of the *Canada Business Corporations Act* is removed and the corporation loses its legal status as distinct from its shareholders.

…

> [218] The provisions of the *Act* appear not so much designed to "pierce the corporate veil" as they are to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the *Act* is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence.
>
> [Emphasis added]

[143] Applying these same comments to *ERISA*, it is clear that the “controlled group” provisions simply disregard the separate corporate personalities of other companies within the Walter Energy Group (including those within the Walter Canada Group) by lifting their corporate veils. It does this by ignoring the separate legal existence and personality of the Walter Canada Group entities (and limited liability per *Salomon*), effectively amalgamating or consolidating those entities, in deeming them to be one “employer” along with Walter Resources.

[144] I agree that *JTI-Macdonald* provides substantial support that a claim which purports to impose liability arising purely as a result of corporate relationships, such as *ERISA* does, are properly classified as claims concerning the status and legal personality of corporations. To use the words of Holmes J., the application of *ERISA* to the Walter Canada Group results in those entities’ “separate legal personality” being removed or “stripped away” such that they lose their legal status as distinct from their shareholders.

[145] I agree that the 1974 Plan’s claim against the Walter Canada Group, being founded on *ERISA*’s “controlled group” liability provisions, should be characterized as concerning the status and legal personality of corporations and partnerships within the Walter Canada Group.

[146] In conclusion, in my view, the legal nature of the 1974 Plan’s claim is appropriately characterized as one of corporate or partnership law and specifically, a claim which results in a challenge to the status and separate legal personalities of the entities within the Walter Canada Group.

(2) What Choice of Law Rule Applies?

[147] Having characterized the claim, I now turn to the second step in the choice of law analysis. This involves a consideration of relevant “connecting factors”.

[148] At page 221, Pitel and Rafferty state:

> As we will see, the selection of the connecting factor is critical in formulating the choice of law rule. There are many possible connecting factors. Some are relatively certain and predictable. These include the person's domicile or habitual residence and the place where a specific act occurs, such as the commission of a tort or the making of the contract. These sorts of connecting factors have a relatively narrow focus. They are quite specific and can therefore be described as rigid connecting factors. Other connecting factors have a broader focus and are thought to be more flexible. These include the “proper law” of a contract, ascertained by weighing several factual connections to various legal systems. One of the core debates in choice of law is how rigid or how flexible the connecting factor should be for a particular rule.

[149] It is worthwhile being reminded at this time of Castel & Walker’s comment at 3-1, quoted above, that a “connecting factor” is a “fact or element connecting a legal question or issue with a particular legal system” which is then identified as the governing law.

[150] What then are the “connecting factors” to be considered after having characterized the 1974 Plan’s claim as I have?

[151] Under Canadian choice of law rules, issues concerning a person’s legal personality are governed by the law of the person’s domicile: *Castel & Walker* at 30-1, quoted above. Similarly, Pitel and Rafferty state that the “status of non-natural persons is governed by the law of the person’s ‘home’ jurisdiction” (at 245) and that there is a “well-established principle that a corporation’s domicile is the country in which it was incorporated” (at 26-27).

[152] To similar effect, Dicey states at 1532-1533:

> Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed. That law will determine whether the entity has a separate legal existence. The law of that country will determine the legal nature of the entity so create, e.g. whether the entity is a

> corporation or partnership, and, if the latter, the legal incidents which attach to it.

[153] Domicile was addressed in *National Trust Co. v. Ebro Irrigation and Power Co. Ltd.* [1954] O.R. 463 (S.C.), where the court stated at 476:

> It is well established that the domicile of a corporation is in the country in which it was incorporated. In *Cheshire on Private International Law*, 4th ed. 1952, at pp. 193-4, it is stated that: "Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, *i.e.* by the law of the domicil. … In the case of the natural person it is the domicil of his father, in the case of the juristic person it is the country in which it is born, *i.e.* in which it is incorporated." …

[154] The Walter Canada Group also refers to *Singer Sewing Machine Co. of Canada Ltd (Re)*, 2000 ABQB 116, a decision of the colourful Registrar Funduk. There, the Alberta court was considering whether to recognize an order from the U.S. Bankruptcy Court. It appears that the U.S. court has assumed jurisdiction not only over the Singer Sewing Machine entities in the U.S., but also over the Canadian subsidiary who only conducted business in Canada and whose assets were held in Canada. The intention of the U.S. court seemed to be toward assuming overall jurisdiction over the entire corporate group in terms of administering assets and presumably, claims against those assets.

[155] This case was decided before amendments to Part IV of the *CCAA* which provides for a robust degree of comity in terms of addressing cross-border insolvencies. Nevertheless, the comments of the Registrar in terms of rejecting what he considered was a collapsing of the Canadian entity and its assets within the broader international group have, in my view, some relevance here:

> 11. Canadian law says that a corporation is a person in law. Canadian law says that a corporation has an existence separate from its shareholders. Canadian law says that a shareholder is not liable for the corporation's debts. Canadian law says that a shareholder does not own the corporation's assets. Canadian law says that a corporation's business activities are not the shareholder's business activities.

[156] Similarly, amalgamation of corporations, characterized as a change of status, is governed by the law of the place of incorporation: *Castel & Walker*, vol. 2, at 30-5. If the merged or amalgamated corporations were incorporated in different jurisdictions, the merger must be valid under the laws of both jurisdictions: *Dicey* 1534. See also *Concept Oil Services Ltd. v. En-Gin Group LLP*, [2013] EWHC 1897 (Comm) at paras. 70-72.

[157] I agree with the Walter Canada Group that the 1974 Plan's claim depends entirely on *ERISA*'s provisions which allow the 1974 Plan to disregard the separate legal personalities of the Walter Canada Group entities as being distinct from that of Walter Resources. The 1974 Plan has not advanced any other theory of liability for its claim under British Columbia law or any other law; rather, it relies exclusively on *ERISA*'s "controlled group" provisions as the basis for its claim against the Walter Canada Group. Further, as I have already stated, the 1974 Plan's claim against the Walter Canada Group does not stem from any conduct by or contract with the Walter Canada Group.

[158] During its submissions, the 1974 Plan did not draw any particular distinction between its claims against the corporations within the Walter Canada Group (who are the only *CCAA* petitioners) and the partnerships, who are not petitioners, but who were granted certain protections under the Initial Order. The claim of the 1974 Plan advanced in its pleading is only as against the "petitioners". The Walter Canada Group suggests that since the 1974 Plan chose to assert its claim only against the "petitioners", any claim against the partnerships is barred pursuant to the claims bar date set under the Claims Procedure Order. I am not sure as to the effect of such a distinction in terms of the recovery under the claims.

[159] This "claims bar date" argument may have some merit, but I do not propose to base my decision as regards the partnerships solely on this basis. The simple answer is that the same analysis set out above in relation to the corporations applies equally to the partnerships, as was noted in Dicey at 1532-33, quoted above, which refers to the law of the country in which an "entity" was formed.

[160] The issue as to whether the Walter Canada Group's separate legal personalities can be ignored is subject to the Canadian choice of law rule that the status and legal personality of a corporation is governed by the law of the place in which it was incorporated, namely British Columbia and Alberta. Here, as with the corporations within the Walter Canada Group, both with limited liability and unlimited liability, it is admitted that all of the partnerships were organized under British Columbia law. Accordingly, the choice of law analysis leads to the same result in relation to the partnerships, namely British Columbia law, including under the *Partnership Act*, R.S.B.C. 1996, c. 348.

[161] The place of incorporation or organization is a matter of public record and all persons who would do business with or otherwise deal with the Walter Canada Group entities would or should be well aware of that fact.

[162] I agree that, under Canadian choice of law rules, the place of incorporation or organization of the Walter Canada Group entities is the appropriate "connecting factor" in relation to the issue arising from the 1974 Plan's claim. As a result, British Columbia and Alberta law determine whether the separate legal personalities of the Walter Canada Group entities can be ignored.

[163] The 1974 Plan also made substantial submissions concerning the choice of law rule applicable to its claim. Relying on this Court's analysis in *Minera* at paras. 184-207, the 1974 Plan asserts that one must consider which law has the "closest and most real connection" to the issue. Its further submissions are that the court must examine a non-exhaustive list of factors in that context (*Minera* at para. 200). This, of course led to the 1974 Plan's objection to this summary hearing and its positon that, since it has been denied any discovery from the Walter Energy Group, it has been hampered in its ability to put into evidence all relevant factors at this summary hearing.

[164] However, the analysis in *Minera* was made in the context of the Court's conclusion that the choice of law rule that applied to the unjust enrichment claim was the "proper law of the obligation". In addition, contrary to the two-step approach

illustrated in *Minera*, at the end of its submissions, the 1974 Plan's argument essentially conflated that process by suggesting that the Court should consider connecting factors (most of which it says have yet to be disclosed through discovery from the Walter Canada Group) in the characterization exercise in the first step.

[165] Rejecting the 1974 Plan's contention that its claim should be characterized as one of contract inevitably leads to the further conclusion that the appropriate choice of law rule is not the "proper law of the obligation".

[166] Accordingly, I do not intend to address the 1974 Plan's detailed submissions on the second step within the choice of law issue other than to briefly comment on certain aspects.

[167] The 1974 Plan argued that even if I accepted the characterization of the claim advanced by the Walter Canada Group, the Court would still need to address facts other than the place of incorporation. These facts were said to include the degree to which the Walter Canada Group was managed out of the U.S. and an understanding of the Walter Energy Group's global business. I reject these submissions on the basis of the above authorities. There is no need to look beyond the clear facts that when these Canadian entities were incorporated or organized, they were expressly created within these Canadian jurisdictions with the intention that their legal status and personality would be governed by Canadian laws. The same comment could presumably be made concerning the U.S. and English entities.

[168] The 1974 Plan argued that the "proper law of the obligation" approach would allow this court to consider the connecting factors that exist between the 1974 Plan's claim and the Walter Canada Group, including the degree to which the U.S. and Canadian operations were integrated, citing *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443 at 448 and *Minera*.

[169] However, my conclusions above have the effect of rendering moot the 1974 Plan's objections arising from the lack of discovery. In addition, it is clear enough that even if there was no degree of integration or management between the U.S.

and Canadian entities, the 1974 Plan's position is that all "contract" factors point to the U.S. - including the contractual documents, the location of and management of the 1974 Plan, the location of Walter Resources (the only counterparty to the 2011 CBA), that the benefits under the 2011 CBA are for Walter Resources' U.S. employees and that the withdrawal by Walter Resources from the 1974 Plan arose in the U.S. As I have emphasized, as regards the choice of law analysis, there is absolutely no contractual connecting factor between the 1974 Plan and the Canadian entities.

[170] In that regard, it is difficult to conceive (although I need not decide the issue) that any Canadian court would conclude that these "contractual" connecting factors pointed to anything other than the U.S. Any degree of integration or joint management could only add to such arguments; conversely, it is difficult to see that any lack of integration or joint management would detract from them.

[171] On this last point (ie. the degree of integration), what emerges as crystal clear from the 1974 Plan's position, supported by Ms. Mazo's opinion, is that *ERISA* expressly makes such a factual enquiry entirely irrelevant. The "bright line" or "arithmetic" test under *ERISA* entirely disregards anything other than the level of stock ownership: see *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 470 F.Supp 945 (1975).

[172] Other so-called "connecting factors" suggested by the 1974 Plan are bizarre to say the least. The 1974 Plan suggests that Walter Energy U.S. will be "enriched" given the potential payment of estate funds to that corporate level after payment to the Canadian creditors. This is hardly a relevant consideration. Further, any recovery available to the 1974 Plan against the U.S. entities is entirely driven by U.S. law, including *ERISA*, the Chapter 11 Proceedings and its participation in the Settlement Term Sheet. If the 1974 Plan obtains no recovery from the U.S. entities within the Walter Energy Group, that is of no moment as regards its claim against the Canadian entities.

[173] The other "connecting factor" said to arise by the 1974 Plan is that the application of Canadian law works an injustice on the 1974 Plan "because of the removal of assets out of reach of *ERISA*". This proposition begs the very question as to whether *ERISA* applies to the Walter Canada Group at all. If *ERISA* does not apply to the Walter Canada Group in these circumstances, the Canadian assets were never within reach of the 1974 Plan.

[174] The 1974 Plan further argues that accepting the Walter Canada Group's argument on choice of law would result in a "blanket denial" of all *ERISA* claims against Canadian entities in Canadian courts. In my view, this is an exaggeration. Canadian law allows for the imposition of liability on persons in a variety of ways - including tort and fraud (see *B.G. Preeco*). This decision is only intended to address whether these Canadian entities are subject to *ERISA* which seeks to impose liability on them, not by reason of any conduct or contract, but simply by reason of a corporate relationship.

[175] The 1974 Plan also suggests that a decision that *ERISA* does not apply to the Walter Canada Group would threaten principles of international comity in that a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability under *ERISA*. This other "chicken little" argument is entirely speculative. Firstly, this case does not involve any judgment obtained against the Walter Canada Group. Further, in my view, my decision does not detract from the well-entrenched and long standing comity that has existed between Canada and the U.S. courts, particularly in the field of insolvency.

[176] As described above, the only facts and connecting factors relevant here given my characterization of the 1974 Plan's claim are uncontroversial and have been admitted. In these circumstances, I see no difficulty in proceeding to determine this matter in a summary fashion, based on the considerations discussed earlier in these reasons.

[177] In conclusion, I find that the 1974 Plan's claim is characterized as one of corporate or partnership law and specifically, one relating to the status, legal

existence and personality of corporations and partnerships. The appropriate choice of law rule is one of domicile or place of incorporation or organization. In the case of the entities within the Walter Canada Group, that is British Columbia or Alberta.

[178] *ERISA* is not part of British Columbia or Alberta law. Accordingly, the 1974 Plan's claim must fail for that reason.

VIII THE SECOND AND THIRD QUESTIONS

[179] The second and third issues posed by the Walter Canada Group are:

> If the 1974 Plan's claim against the Walter Canada Group is governed by United States substantive law (including *ERISA*), then as a matter of U.S. law, does "controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* extend extraterritorially?
>
> If the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), and *ERISA* applies extraterritorially, is that law unenforceable in Canada because it conflicts with Canadian public policy?

[180] As I noted above, the Walter Canada Group only needed to succeed on one of the questions raised in this application in order to defeat the 1974 Plan's claim.

[181] Accordingly, having found in favour of the Walter Canada Group on the first issue, it is not necessary to decide the other two questions. While they pose interesting issues, I see no need to delay these proceedings further in order to consider and decide those issues. A timely resolution is in the interests of justice and furthers the purposes of the *CCAA*.

IX CONCLUSION

[182] In conclusion, I grant a declaration that, under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*).

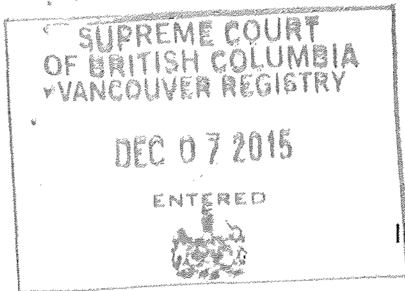
[183] Costs are awarded against the 1974 Plan in favour of both the Walter Canada Group and the Union on the usual scale. If any party should wish to seek a different order of costs, such an application must be filed within 30 days of the release of

these reasons and the hearing to determine the matter should be set as soon as possible. Failing such application(s) being filed, my costs award shall stand.

“Fitzpatrick J.”

TAB 2

TAB 3


SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
DEC 07 2015
ENTERED

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 WALTER ENERGY CANADA HOLDINGS, INC., AND THOSE PARTIES
LISTED ON SCHEDULE "A"

PETITIONERS

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE	)	MONDAY, THE 7TH DAY OF
MADAM JUSTICE FITZPATRICK	)	DECEMBER, 2015

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 7th day of December, 2015 (the "**Order Date**"); AND ON HEARING Mary I.A. Buttery, Tijana Gavric, Marc Wasserman and Patrick Riesterer, counsel for the Petitioners, Wael Rostom and Jamieson Virgin, counsel for KPMG Inc. and those other counsel listed on **Schedule "B"** hereto; AND UPON READING the material filed, including the First Affidavit of William G. Harvey sworn December 4, 2015 (the "**First Affidavit**") and the consent of KPMG Inc. to act as Monitor; AND UPON BEING ADVISED that the secured creditors who are likely to be affected by the charges created herein were given notice; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES THAT:

JURISDICTION

1. The Petitioners are entities to which the CCAA applies. Although not Petitioners, the partnerships listed on **Schedule "C"** hereto (collectively with the Petitioners, the "**Walter Canada**

Group") shall enjoy the benefits of the protections provided herein and shall be subject to the same restrictions hereunder.

SUBSEQUENT HEARING DATE

2. The hearing of the Petitioners' application for an extension of the Stay Period (as defined in paragraph 18 of this Order) and for any ancillary relief shall be held at the Courthouse at 800 Smithe Street, Vancouver, British Columbia, on ~~Wednesday~~ Tuesday, January ~~6~~ 5, 2015, at 9:00 am, or such other date as this Court may order.

PLAN OF ARRANGEMENT

3. The Petitioners shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement, which may include any one or more of the members of the Walter Canada Group (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY, OPERATIONS AND CASH MANAGEMENT SYSTEM

4. Subject to this Order and any further Order of this Court, the members of the Walter Canada Group shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"), and continue to carry on their business (the "**Business**") in the ordinary course and in a manner consistent with the preservation of the Business and the Property. The Walter Canada Group shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for carrying out the terms of this Order.

5. The Walter Canada Group shall be entitled to continue to use the Cash Management System currently in place as defined and described in the First Affidavit or replace it with another substantially similar central cash management system and any present or future bank providing the Cash Management System:

(a) shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Walter Canada Group of

funds transferred, paid, collected or otherwise dealt with in the Cash Management System;

(b) shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Walter Canada Group, pursuant to the terms of the documentation applicable to the Cash Management System; and

(c) shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. The Walter Canada Group is authorized but not directed to continue, on and after the date hereof, to receive the Shared Services (as defined in the First Affidavit) on terms substantially consistent with past practices. If the Walter Canada Group elects to receive such Shared Services after the date hereof, the Walter Canada Group and Walter Energy, Inc. and its affiliates, with the consent of the Monitor, may agree on terms and pricing of such Shared Services or to receive the Shared Services on such other terms or such other pricing as may be agreed among the Walter Canada Group and Walter Energy, Inc. and its affiliates, with the consent of the Monitor. The Walter Canada Group is authorized and directed to pay US$600,000 in cash in full and final settlement of the outstanding amounts owing in respect of the Shared Services provided in the period from November 1, 2015 to November 30, 2015.

7. The Walter Canada Group shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:

(a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay, and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred (collectively "**Wages**");

(b) the fees and disbursements of any Assistants retained or employed by the Walter Canada Group which are related to the Walter Canada Group's restructuring, at their standard rates and charges, including payment of the fees and disbursements of legal counsel retained by the Walter Canada Group, whenever and wherever incurred, in respect of:

(i) these proceedings or any other similar proceedings in other jurisdictions in which the Walter Canada Group or any subsidiaries or affiliated companies of the Walter Canada Group is domiciled;

(ii) any litigation in which any member of the Walter Canada Group is named as a party or is otherwise involved, whether commenced before or after the Order Date; and

(iii) any related corporate matters.

8. Except as otherwise provided herein, the Walter Canada Group shall be entitled to pay all expenses reasonably incurred by the Walter Canada Group in carrying on the Business in the ordinary course following the Order Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably incurred and which are necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services, provided that any capital expenditure exceeding $250,000 shall be approved by the Monitor;

(b) all obligations incurred by the Walter Canada Group after the Order Date, including without limitation, with respect to goods and services actually supplied to the Walter Canada Group following the Order Date (including those under purchase orders outstanding at the Order Date but excluding any interest on the Walter Canada Group's obligations incurred prior to the Order Date unless otherwise provided herein); and

(c) fees and disbursements of the kind referred to in paragraph 7(b) which may be incurred after the Order Date.

9. The Walter Canada Group is authorized to remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from Wages, including, without limitation, amounts in respect of (i)

employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes or any such claims which are to be paid pursuant to Section 6(3) of the CCAA;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Walter Canada Group in connection with the sale of goods and services by the Walter Canada Group, but only where such Sales Taxes accrue or are collected after the Order Date, or where such Sales Taxes accrued or were collected prior to the Order Date but not required to be remitted until on or after the Order Date;

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal property taxes, municipal business taxes or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors; and

(d) any mineral taxes that are required to be remitted by the members of the Walter Canada Group.

10. Until such time as a real property lease is disclaimed in accordance with the CCAA, the Walter Canada Group shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated between the Walter Canada Group and the landlord from time to time ("**Rent**"), for the period commencing from and including the Order Date, twice-monthly in equal payments on the first and fifteenth day of the month in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including Order Date shall also be paid.

11. Except as specifically permitted herein, the Walter Canada Group is hereby directed, until further Order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Walter Canada Group to any of their creditors as of the Order Date except as authorized by this Order;

(b) to make no payments in respect of any financing leases which create security interests;

(c) to grant no security interests, trust, mortgages, liens, charges or encumbrances upon or in respect of any of its Property, nor become a guarantor or surety, nor otherwise become liable in any manner with respect to any other person or entity except as authorized by this Order;

(d) to not grant credit except in the ordinary course of the Business only to its customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Walter Canada Group to such customers as of the Order Date; and

(e) to not incur liabilities except in the ordinary course of Business.

12. Notwithstanding paragraph 11, with the consent of the Monitor, the Walter Canada Group is authorized to pay amounts owing to creditors who hold valid and enforceable possessory or statutory liens against any asset of the Walter Canada Group where the value of such asset exceeds the amount of the possessory or statutory lien or where the asset is deemed critical by the Walter Canada Group to the Business and the Walter Canada Group is also authorized but not directed to:

(i) pay the entire amount of their obligations to any creditor if the amount of such obligations, as agreed between the Walter Canada Group and the creditor, is $1,000 or less as of the Order Date; and

(ii) pay an amount agreed to by the Walter Canada Group and any other creditor where the amount of such obligations exceeds $1,000, provided that such creditor agrees to accept that amount in full satisfaction of all obligations to such creditor as of the Order Date,

provided that the total amount paid pursuant to the terms of subparagraphs 12(i) and (ii) does not exceed $200,000.

13. The Walter Canada Group is authorized and directed to fully cash collateralize to the Administrative Agent under the 2011 Credit Agreement (as defined in the First Affidavit) all undrawn letters of credit issued in respect of the Canadian Revolver (as defined in the First Affidavit) in

accordance with the 2011 Credit Agreement within 15 business days of the date a demand is received by the Walter Canada Group for such cash collateralization from the Administrative Agent under the 2011 Credit Agreement (a "**Demand**").

RESTRUCTURING

14. Subject to such requirements as are imposed by the CCAA, the Walter Canada Group shall have the right to:

(a) permanently or temporarily cease, downsize or shut down all or any part of their Business or operations and commence marketing efforts in respect of any of their redundant or non-material assets and to dispose of redundant or non-material assets not exceeding $1,000,000 in any one transaction or $5,000,000 in the aggregate (provided however that the marketing and sale of the Purchased Equipment (defined below) pursuant to this Order is hereby excluded from this subparagraph 14(a));

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate; and

(c) pursue all avenues of refinancing and recapitalization of the Business or Property, in whole or part,

all of the foregoing to permit the Walter Canada Group to proceed with an orderly restructuring of the Business (the "**Restructuring**").

15. The Walter Canada Group shall provide each of the relevant landlords with notice of the Walter Canada Group's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Walter Canada Group's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors who claim a security interest in the fixtures, such landlord and the Walter Canada Group, or by further Order of this Court upon application by the Walter Canada Group, the landlord or the applicable secured creditors on at least two (2) clear days' notice to the other parties. If the Walter Canada Group disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any dispute concerning such fixtures (other than Rent payable for the notice period provided for in

Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Walter Canada Group's claim to the fixtures in dispute.

16. If a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then: (a) during the period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours on giving the Walter Canada Group and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer, the landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims the landlord may have against the Walter Canada Group, or any other rights the landlord might have, in respect of such lease or leased premises and the landlord shall be entitled to notify the Walter Canada Group of the basis on which it is taking possession and gain possession of and re-lease such leased premises to any third party or parties on such terms as the landlord considers advisable, provided that nothing herein shall relieve the landlord of its obligation to mitigate any damages claimed in connection therewith.

17. Pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 and Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, and any regulations promulgated under authority of either Act, as applicable (the "**Relevant Enactment**"), the Walter Canada Group, in the course of these proceedings, is permitted to, and hereby shall, disclose personal information of identifiable individuals in its possession or control to stakeholders, its advisors, prospective investors, financiers, buyers or strategic partners (collectively, "**Third Parties**"), but only to the extent desirable or required to negotiate and complete the Restructuring, or to prepare and implement the Plan or transactions for that purpose; provided that the Third Parties to whom such personal information is disclosed enter into confidentiality agreements with the members of the Walter Canada Group binding them in the same manner and to the same extent with respect to the collection, use and disclosure of that information as if they were an organization as defined under the Relevant Enactment, and limiting the use of such information to the extent desirable or required to negotiate or complete the Restructuring, or to prepare and implement the Plan or transactions for that purpose, and attorning to the jurisdiction of this Court for the purposes of that agreement. Upon the completion of the use of personal information for the limited purposes set out herein, the Third Parties shall return the personal information to the Walter Canada Group or destroy it. If the Third Parties acquire personal information as part of the Restructuring, or the preparation and implementation of the Plan or transactions in furtherance thereof, such Third Parties may, subject to this paragraph and any Relevant Enactment, continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Walter Canada Group.

STAY OF PROCEEDINGS, RIGHTS AND REMEDIES

18. Until and including January 6, 2016, or such later date as this Court may order (the "**Stay Period**"), no action, suit or proceeding in any court or tribunal (each, a "**Proceeding**") against or in respect of the Walter Canada Group or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of the Walter Canada Group and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Walter Canada Group or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

19. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other Group (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Walter Canada Group or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Walter Canada Group and the Monitor or leave of this Court.

20. During the Stay Period, all rights and remedies of any Person against or in respect of the Walter Canada Group, Belcourt Saxon Coal Ltd. or Belcourt Saxon Coal Limited Partnership in relation to the Belcourt Saxon Limited Partnership Agreement dated March 2, 2005 as amended, restated or modified from time to time between Belcourt Saxon Coal Ltd. as general partner (the "**GP**"), Western Canadian Coal Corp., and Nemi Northern Energy & Mining Inc. and the other persons party thereto from time to time (the "**BS LP Agreement**") including any rights in respect of the removal of the GP or the triggering of a sale, assignment or transfer of any rights under the BS LP Agreement are hereby stayed and suspended except with the written consent of the Walter Canada Group and the Monitor or leave of this Court.

21. Nothing in this Order, including paragraphs 18 and 19, shall: (i) empower the Walter Canada Group to carry on any business which the Walter Canada Group is not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a mortgage, charge or security interest (subject to the provisions of Section 39 of the CCAA relating to the priority of statutory Crown securities); (iv) prevent the registration or filing of a lien or claim for lien or the commencement of a Proceeding to protect lien or other rights that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such lien, claim for lien or Proceeding except for service of the initiating documentation on the Walter Canada Group; or (v) prevent or prohibit the Administrative Agent under the 2011 Credit Agreement from making a Demand pursuant to paragraph 13 hereof.

NO INTERFERENCE WITH RIGHTS

22. During the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Walter Canada Group, except with the written consent of the Walter Canada Group and the Monitor or leave of this Court.

CONTINUATION OF SERVICES

23. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Walter Canada Group or mandates under an enactment for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Walter Canada Group, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Walter Canada Group, and that the Walter Canada Group shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Order Date are paid by the Walter Canada Group in accordance with normal payment practices of the Walter Canada Group or such other practices as may be agreed upon by the supplier or service provider and the Walter Canada Group and the Monitor, or as may be ordered by this Court, provided further that no stay shall apply with respect to the termination of the Shared Services and no such Shared Services shall be required to be provided to the Walter Canada Group, upon consummation of any sale of assets pursuant to the asset sale motion filed in the Chapter 11 Cases (as defined in the First Affidavit) on November 5, 2015.

NON-DEROGATION OF RIGHTS

24. Notwithstanding any provision in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the Order Date, nor shall any Person be under any obligation to advance or re-advance any monies or otherwise extend any credit to the Walter Canada Group on or after the Order Date. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

APPROVAL OF SURPLUS EQUIPMENT TRANSACTION

25. Willow Creek Coal Partnership and Brule Coal Partnership (collectively, the "**Vendors**") are authorized to enter into the Bill of Sale between the Vendors and Jim Walter Resources, Inc. (the "**Purchaser**") (the "**Bill of Sale**"), substantially in the form attached as Exhibit **"I"** to the First Affidavit, and the transaction contemplated therein (the "**Surplus Equipment Transaction**") is commercially reasonable and is hereby approved and the execution of the Bill of Sale by the Vendor is hereby approved. The Vendor is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Surplus Equipment Transaction.

26. Provided that a superior offer for the Purchased Equipment is not received within a reasonable period of time as determined by the Monitor, or any such superior offer is met or exceeded by the Purchaser, the Monitor shall deliver to the Purchaser a certificate substantially in the form attached hereto as **Schedule "D"** (the "**Monitor's First Certificate**") and, upon the delivery by the Monitor to the Purchaser of the Monitor's First Certificate (a copy of which Monitor's First Certificate shall be filed with the Court forthwith after the delivery thereof), all of the Vendor's right, title and interest in and to the property that is the subject of the Surplus Equipment Transaction (the "**Purchased Equipment**") shall vest absolutely in the Purchaser in fee simple, subject to the Equipment Charge (as defined below) and free and clear of and from any and all other security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims , whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by this Order (other than the Equipment Charge) and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* of British Columbia or any other personal property registry system (the "**Surplus Equipment Encumbrances**").

27. The Vendors shall be entitled to the benefit of and are hereby granted a first-ranking charge (the "**Equipment Charge**") on the Purchased Equipment, which charge shall not exceed ~~an aggregate amount of USD $1,200,000~~ plus applicable taxes (the "**Purchase Price**") as security for the payment of the Purchase Price by the Purchaser to the Vendors, which Equipment Charge shall attach and shall be deemed to have attached immediately upon the vesting of the Purchased Equipment in the Purchaser upon delivery of the Monitor's First Certificate.

the amount that the Purchaser ultimately pays for the Purchased Equipment, [initials]

28. Following the payment of the Purchase Price from the Purchaser to the Vendors, the Equipment Charge shall be extinguished automatically upon delivery by the Monitor to the Purchaser of a certificate substantially in the form attached hereto as **Schedule "E"** (the "**Monitor's Second Certificate**"), a copy of which Monitor's Second Certificate shall be filed with the Court forthwith after the delivery thereof, certifying that payment has been made.

29. For the purposes of determining the nature and priority of any claims in respect of the Purchased Equipment, (i) prior to the payment of the Purchase Price for the Purchased Equipment, the Equipment Charge shall, and, (ii) after the payment of the Purchaser Price, the net proceeds from the Surplus Equipment Transaction shall, stand in the place and stead of the Purchased Equipment, and from and after the delivery of the Monitor's Certificate all claims shall attach to the net proceeds from the Surplus Equipment Transaction with the same priority as they had with respect to the Purchased Equipment immediately prior to the sale, as if the Purchased Equipment had not been sold and remained in the possession or control of the person having had possession or control immediately prior to the sale.

30. In the event that the Vendors are not in receipt of the Purchase Price on the day that is 90 days following the date of Bill of Sale: (i) ownership of the Purchased Equipment shall be deemed to have reverted back to the Vendors and all of the Surplus Equipment Encumbrances relating thereto shall be deemed to attach to the Purchased Equipment as if the Surplus Equipment Transaction had not occurred; (ii) the Purchase Price shall no longer be owing from the Purchaser to the Vendors; and (iii) Equipment Charge shall be automatically extinguished.

31. Notwithstanding:

(a) these proceedings;

(b) any applications for a bankruptcy order in respect of the Vendor now or hereafter made pursuant to the BIA and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made by or in respect of the Vendor,

the vesting of the Purchased Equipment in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Vendor and shall not be void or voidable by creditors of the Vendor, nor shall it constitute or be deemed to be a transfer at undervalue, fraudulent preference, assignment, fraudulent conveyance or other reviewable

transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

32. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of the Walter Canada Group with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Walter Canada Group whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Walter Canada Group, if one is filed, is sanctioned by this Court and implemented by the Walter Canada Group or is refused by the creditors of the Walter Canada Group or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of the Walter Canada Group that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

DIRECTORS AND OFFICERS INDEMNIFICATION AND CHARGE

33. The Walter Canada Group shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Walter Canada Group after the commencement of the within proceedings, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

34. The directors and officers of the Walter Canada Group shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,500,000, as security for the indemnity provided in paragraph 33 of this Order. The Directors' Charge shall have the priority set out in paragraphs 46 and 47 hereof.

35. Notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Walter Canada Group's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance

policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 33 of this Order.

APPOINTMENT OF MONITOR

36. KPMG Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Walter Canada Group with the powers and obligations set out in the CCAA or set forth herein, and that the Walter Canada Group and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Walter Canada Group pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

37. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor and approve the Walter Canada Group's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business and such other matters as may be relevant to the proceedings herein;

(c) assist the Walter Canada Group in preparing and advise the Walter Canada Group in their preparation of the Walter Canada Group's cash flow statements and any other reporting to the Court or otherwise;

(d) advise the Walter Canada Group in their development of the Plan and any amendments to the Plan;

(e) assist the Walter Canada Group, to the extent required by the Walter Canada Group, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(f) have full and complete access to the Property, including the premises, books, Records, data, including data in electronic form, and other financial documents of the Walter Canada Group, and any person in possession or control thereof, including any entity that is not a Petitioner in these proceedings, is hereby directed to grant to

the Monitor unfettered access thereto to the extent that is necessary to adequately assess the Walter Canada Group's business and financial affairs or to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) review and monitor the provision of and payment for all Shared Services, assist the Walter Canada Group in negotiations with Walter Energy, Inc. and its affiliates regarding changes to existing Shared Services arrangements and assist the Walter Canada Group in developing alternatives to the Shared Services, including with respect to sourcing new service providers with respect to any or all services that are currently Shared Services, in each case in such manner as the Walter Canada Group in consultation with the Monitor, consider appropriate;

(i) conduct such further or other marketing of the Purchased Equipment as the Monitor deems appropriate; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

38. The Monitor, in addition to the above, is hereby empowered and authorized, but not required to:

(a) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to transactions, intercompany funding and other processes and services as between and amongst the Walter Canada Group and as between the Walter Canada Group and any members of the Walter Group (as defined in the First Affidavit) (the "**Intercompany Transactions**")

(b) develop, in consultation with the Walter Canada Group, such principles and policies and procedures as are satisfactory to the Monitor to govern the Intercompany Transactions and to address any matters arising therefrom; and

(c) participate in any discussions with the Walter Canada Group's various stakeholders, including any unions, governmental authorities or other stakeholders, regarding all

matters relating to the Property, the Business, the Plan and/or these CCAA proceeding.

39. The Monitor shall not take possession or control of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of its powers or performance of its duties under this Order, be deemed to have occupied or taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall be construed as resulting in the Monitor being an employer, successor employer, a responsible person, operator or person with apparent authority within the meaning of any statute, regulation or rule of law, or equity, for any purpose whatsoever.

40. Nothing herein contained shall require or allow the Monitor to occupy, operate or to take control, care, charge, possession, or management (separately and/or collectively, "**Possession**") of any of the Property that might now be or might otherwise become environmentally contaminated, might be a pollutant or a contaminant (including, without limitation, Possession of any pollutant, waste, contaminant or substance that may be present in, on or under the Property), or might cause, permit, authorize, contribute to, or result in, or increase the likelihood or risk of, a spill, discharge, release or deposit of any pollutant, waste, contaminant or substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal, management or handling of waste, substances or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Fisheries Act*, the *Species at Risk Act*, the British Columbia *Environmental Management Act*, the British Columbia *Water Act*, ~~the British Columbia *Fish Protection Act*~~, the British Columbia *Water Protection Act*, the British Columbia *Forest Act*, the British Columbia *Fish Protection Act*, the British Columbia *Mines Act*, the *Health, Safety and Reclamation Code for Mines in British Columbia* or any similar legislation, and regulations, policies, guidelines or codes of practice thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty of the Monitor to report or make disclosure imposed by section 11.8(4) of the CCAA. For greater certainty, the Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

41. The Monitor shall provide any creditor of the Walter Canada Group and counsel to the Steering Committee (as defined in the First Affidavit) with information provided by the Walter Canada

Group in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Walter Canada Group is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Walter Canada Group may agree.

42. In addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the rights and protections afforded to the Monitor by the CCAA or any applicable legislation.

ADMINISTRATION CHARGE

43. The Monitor, counsel to the Monitor, and counsel to the Walter Canada Group shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Walter Canada Group as part of the cost of these proceedings. The Walter Canada Group is hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, and the Walter Canada Group's counsel, on a periodic basis and, in addition, the Walter Canada Group is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Walter Canada Group, retainers in the aggregate amount of up to $800,000 to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

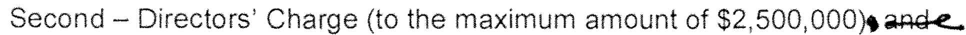
44. The Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the British Columbia Supreme Court who may determine the manner in which such accounts are to be passed, including by hearing the matter on a summary basis or referring the matter to a Registrar of this Court.

45. The Monitor, counsel to the Monitor and counsel to the Walter Canada Group shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,500,000, as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel or such person, both before and after the making of this Order which are related to the Walter Canada Group's restructuring. The Administration Charge shall have the priority set out in paragraphs 46 and 47 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

46. The priorities of the Administration Charge and the Directors' Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $2,500,000); and



Second – Directors' Charge (to the maximum amount of $2,500,000)~~, and~~.

47. Any security documentation evidencing, or the filing, registration or perfection of, the Administration Charge, the Directors' Charge or the Equipment Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be effective as against the Property (or the Purchased Equipment) and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

48. Each of the Charges shall constitute a mortgage, security interest, assignment by way of security and charge on the Property (or the Purchased Equipment) and such Charges shall rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any Person, other than (a) any person with a properly perfected purchase money security interest under the British Columbia Personal Property Registry or such other applicable provincial legislation; and (b) statutory super-priority deemed trusts and liens for unpaid employee source deductions.

49. Except as otherwise expressly provided herein, or as may be approved by this Court, the Walter Canada Group shall not grant or suffer to exist any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Walter Canada Group obtains the prior written consent of the Monitor and the beneficiaries of the Charges.

50. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan

documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Walter Canada Group; and notwithstanding any provision to the contrary in any Agreement:

(a) the Charges shall not create or be deemed to constitute a breach by the Walter Canada Group of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Walter Canada Group pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

51. Any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Walter Canada Group's interest in such real property leases.

SERVICE AND NOTICE

52. The Monitor shall (i) without delay, publish in the Vancouver Sun, the Globe and Mail (National Edition) and the Tumbler Ridge News a notice containing the information prescribed under the CCAA, (ii) within five days after Order Date, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Walter Canada Group of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

53. The Walter Canada Group and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Walter Canada Group's creditors or other interested parties at their respective addresses as last shown on the records of the Walter Canada Group and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business

day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

54. Any Person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to a service list (the "**Service List**") to be maintained by the Monitor. The Monitor shall post and maintain an up to date form of the Service List on its website at: www.kpmg.com/walterenergycanada.

55. Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on its website at: www.kpmg.com/walterenergycanada.

56. Notwithstanding paragraphs 54 and 55 of this Order, service of the Petition, the Notice of Hearing of Petition, any affidavits filed in support of the Petition and this Order shall be made on the Federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and regulations thereto, in respect of the Federal Crown, and the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, in respect of the British Columbia Crown.

GENERAL

57. The Walter Canada Group or the Monitor may from time to time apply to this Court for directions in the discharge of its powers and duties hereunder.

58. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of any member of the Walter Canada Group, the Business or the Property.

59. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Walter Canada Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative

status to the Monitor in any foreign proceeding, or to assist the Walter Canada Group and the Monitor and their respective agents in carrying out the terms of this Order.

60. Each of the Walter Canada Group and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as a foreign representative of the Walter Canada Group to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended.

61. Any member of the Walter Canada Group may (subject to the provisions of the CCAA and the BIA) at any time file a voluntary assignment in bankruptcy or a proposal pursuant to the commercial reorganization provisions of the BIA if and when the Walter Canada Group determine that such a filing is appropriate and the Monitor is authorized but not directed, on behalf of any member of the Walter Canada Group, (subject to the provisions of the CCAA and the BIA) file a voluntary assignment in bankruptcy or a proposal pursuant to the commercial reorganization provisions of the BIA if such member of the Walter Canada Group cannot do so on its own account and the Monitor determines that such a filing is appropriate.

62. The Walter Canada Group is hereby at liberty to apply for such further interim or interlocutory relief as it deems advisable within the time limited for Persons to file and serve Responses to the Petition.

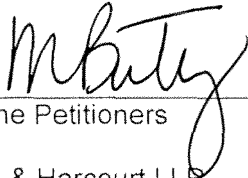
63. Leave is hereby granted to hear any application in these proceedings on two (2) clear days' notice after delivery to all parties on the Service List of such Notice of Application and all affidavits in support, subject to the Court in its discretion further abridging or extending the time for service.

64. Any interested party (including the Walter Canada Group and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to all parties on the Service List and to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

65. Endorsement of this Order by counsel appearing, other than counsel for the Petitioners, is hereby dispensed with.

66. This Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the Order Date.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



Lawyers for the Petitioners

Osler, Hoskin & Harcourt LLP
(Marc Wasserman and Patrick Riesterer)

and

DLA Piper (Canada) LLP
(Mary I.A. Buttery and Tijana Gavric)

BY THE COURT

REGISTRAR

AS TO FORM
TL

SCHEDULE "A"

Petitioners

1. Walter Canadian Coal ULC
2. Wolverine Coal ULC
3. Brule Coal ULC
4. Cambrian Energybuild Holdings ULC
5. Willow Creek Coal ULC
6. Pine Valley Coal, Ltd.
7. 0541237 B.C. Ltd.

SCHEDULE "B"

COUNSEL LIST	
NAME	PARTY REPRESENTED
Steve Dvorak (in person), Ryan Jacobs (by phone) Matthew Nied (in person)	Steering Committee of First Lien Creditors of Walter Energy Inc.
Caitlin Fell (by phone)	KPMG Inc., Proposed Monitor

SCHEDULE "C"

Partnerships

1. Walter Canadian Coal Partnership

2. Wolverine Coal Partnership

3. Brule Coal Partnership

4. Willow Creek Coal Partnership

SCHEDULE "D"

Monitor's Certificate

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

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

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THOSE PARTIES LISTED ON
SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

MONITOR'S FIRST CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable ______________ of the British Columbia Supreme Court (the "**Court**") dated December 7, 2015 (the "**Initial Order**"), KPMG Inc. was appointed as the monitor (the "**Monitor**") in connection with the CCAA proceedings of the Petitioners.

B. Pursuant to the Initial Order, the Court approved the Bill of Sale and the Surplus Equipment Transaction contemplated therein and provided for the vesting in the Purchaser of the Purchased Equipment.

C. The Monitor stated an intention in its Pre-Filing Report dated December 4, 2015 that it would expand upon the marketing process for the Purchased Equipment.

D. All capitalized terms used but not defined herein shall have the meaning given in the Initial Order.

THE MONITOR CERTIFIES the following:

1. The Monitor has expanded upon the marketing process for the Purchased Equipment and confirms that no superior offer for the Purchased Equipment has been received, or that the Purchaser has agreed to meet or exceed any such superior offer.

2. The conditions precedent to the application of paragraphs 26 and 27 of the Initial Order have been satisfied to the satisfaction of the Monitor.

This Certificate was delivered by the Monitor at ________ on _______, 2015.

KPMG Inc., in its capacity as Monitor of Walter Energy Canada Holdings, Inc., and not in its personal capacity

Per: ________________________________

Name:

Title:

SCHEDULE "E"

Monitor's Certificate

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

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

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THOSE PARTIES LISTED ON
SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

MONITOR'S SECOND CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable _______________ of the British Columbia Supreme Court (the "**Court**") dated December 7, 2015 (the "**Initial Order**"), KPMG Inc. was appointed as the monitor (the "**Monitor**") in connection with the CCAA proceedings of the Petitioners.

B. Pursuant to the Initial Order, the Court approved the Bill of Sale and the Surplus Equipment Transaction contemplated therein and provided for the vesting in the Purchaser of the Purchased Equipment.

C. The Monitor has delivered to the Purchaser and has filed with the Court the Monitor's First Certificate, pursuant to which the Purchased Assets vested in the Purchaser free and clear of any Surplus Equipment Encumbrances other than the Equipment Charge and subject to the terms of the Initial Order.

D. The Vendors have provided evidence to the Monitor that they have received the Purchase Price for the Purchased Equipment.

E. All capitalized terms used but not defined herein shall have the meaning given in the Initial Order.

THE MONITOR CERTIFIES the following:

1. The Purchaser has paid and the Monitor confirms that the Vendors have received the Purchase Price for the Purchased Equipment.

2. The Surplus Equipment Transaction has been completed to the satisfaction of the Monitor and the condition precedent to the discharge of the Equipment Charge has been satisfied.

This Certificate was delivered by the Monitor at ________ on _______, 2016.

KPMG Inc., in its capacity as Monitor of Walter Energy Canada Holdings, Inc., and not in its personal capacity

Per: ______________________________

Name:

Title:

NO.
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 WALTER ENERGY CANADA HOLDINGS, INC., AND THOSE PARTIES LISTED ON SCHEDULE "A"

PETITIONERS

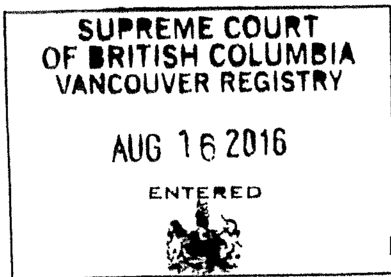
ORDER MADE AFTER APPLICATION

DLA PIPER (CANADA) LLP
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver BC V6C 2Z7

Tel. No. 604.687.9444
Fax No. 604.687.1612

Client Matter No. 15375-00001 TAG/mlf

TAB 4



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 WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED ON SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

ORDER MADE AFTER APPLICATION
(CLAIMS PROCESS ORDER)

BEFORE THE HONOURABLE	)	TUESDAY, THE 16TH DAY OF
MADAM JUSTICE FITZPATRICK	)	AUGUST, 2016
	)	

ON THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 15th and 16th day of August, 2016; AND ON HEARING Mary I.A. Buttery, H. Lance Williams, Marc S. Wasserman and Patrick Riesterer, counsel for the Petitioners and the Partnerships listed on Schedule "A" and Schedule "C" of the Initial Order (collectively, the "**Walter Canada Group**"), Peter Reardon and Wael Rostom, counsel for KPMG Inc. and those other counsel listed on Schedule "A" hereto; AND UPON READING the material filed, including the Third Affidavit of William E. Aziz sworn August 9, 2016 and the Fourth Report of the Monitor dated August 11, 2016;

THIS COURT ORDERS AND DECLARES THAT:

DEFINITIONS AND INTERPRETATION

1. All capitalised terms not otherwise defined in this Claims Process Order shall have the definitions set out in Schedule "B" hereto.

2. All references herein to time shall mean local time in Vancouver, British Columbia, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein and any event that occurs on a day that is not a Business Day shall be deemed to occur on the next Business Day.

3. All references to the word "including" shall mean "including, without limitation."

4. All references to the singular herein include the plural, the plural include the singular and any gender includes all genders.

GENERAL PROVISIONS

5. The Claims Process, including the Claims Bar Date and the Restructuring Claims Bar Date is hereby approved.

6. The Monitor, in consultation with the Walter Canada Group, is hereby authorised to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed and the time in which they are submitted and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Claims Process Order, including in respect of the completion, execution and time of delivery of such forms, and may request any further documentation from a Claimant that the Monitor, in consultation with the Walter Canada Group, may determine is necessary or desirable in order to enable it to determine the validity of a Claim.

7. If any Claim arose in a currency other than Canadian dollars, then the Person making the Claim shall complete its Proof of Claim, indicating the amount of the Claim in such currency, rather than in Canadian dollars or any other currency. Where no currency is indicated, the Claim shall be presumed to be in Canadian dollars. The Monitor shall subsequently calculate the amount of such Claim in Canadian Dollars, using the Reuters closing rate on the Commencement Date (as found at http://www.reuters.com/finance/currencies).

8. Copies of all forms delivered by or to a Claimant hereunder, as applicable, and determinations of Claims by the Monitor or the Court, as the case may be, shall be maintained by the Monitor and, subject to further order of the Court, such Claimant will be entitled to have access in relation to their respective Claim by appointment during normal business hours on written request to the Monitor.

MONITOR'S ROLE

9. The Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, the Initial Order and any other Orders of the Court in the CCAA Proceeding, is hereby directed and empowered to implement the Claims Process set out herein, including the determination of Claims of Claimants and the referral of any Claim to the Court and to take such other actions and fulfill such other roles as are authorized by this Claims Process Order or incidental thereto.

10. The Monitor shall: (i) have all of the protections given to it by the CCAA, the Initial Order, any other Orders of the Court in the CCAA Proceeding, and this Claims Process Order, and as an officer of the Court, including the stay of proceedings in its favour; (ii) incur no liability or obligation as a result of

the carrying out of the provisions of this Claims Process Order; (iii) be entitled to rely on the books and records of the Walter Canada Group and any information provided by the Walter Canada Group and the CRO (as defined herein), all without independent investigation; and (iv) not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

11. Consultation with the Court-appointed Chief Restructuring Officer of the Walter Canada Group, William E. Aziz of BlueTree Advisors Inc. (the "**CRO**"), shall satisfy any obligation of the Monitor in this Claims Process Order to consult with the Walter Canada Group.

12. [Intentionally Deleted.]

13. The Monitor, exercising its reasonable judgement may schedule a motion with the Court on notice to the Service List to seek approval of a process for the resolution of any dispute in connection with the Intercompany Claims and any other disputes of Claimants and related motions, including a process regarding requests for the production of documents or any oral examinations.

14. The Monitor shall file a report with the Court as soon as practicable following the Claims Bar Date (and serve such report on the Service List) detailing the nature and quantum of all Claims filed or determined in accordance with this Order and the status thereof, including the nature and quantum of any Intercompany Claims.

NOTICE OF CLAIMS

15. Forthwith after this Claims Process Order, and in any event within seven (7) Business Days following the date of this Claims Process Order, the Monitor shall cause a Claims Package to be sent to:

(a) Each known Claimant with a Claim as evidenced in the books and records of the Walter Canada Group as of the Commencement Date in accordance with paragraph **42** of this Claims Process Order; and

(b) Each party having provided contact information to the Service List.

16. The Claims Package sent by the Monitor to each Employee Claimant shall include (i) a Notice of Employee Claim that sets out the amount of such Employee Claimant's Employee Claim as determined by the Monitor (in consultation with the Walter Canada Group) and as evidenced by the books and records of the Walter Canada Group and the identity of the Walter Canada Group entity liable for such Employee Claim and (ii) a blank Notice of Dispute of Employee Claim. Where an Employee Claimant is represented by the United Steelworkers, a copy of the Notice of Employee Claim will be provided to the United Steelworkers.

17. Forthwith after this Claims Process Order, and in any event within ten (10) Business Days following the date of this Claims Process Order, the Monitor shall cause the Newspaper Notice to be

published for one (1) Business Day in the Globe and Mail (National Edition), the Vancouver Sun, the Chetwynd Echo and the Tumbler Ridge News.

18. Forthwith after the date of this Claims Process Order and in any event within five (5) Business Days following the date of this Claims Process Order, the Monitor shall post on the Monitor's Website a copy of this Claims Process Order, a blank Proof of Claim form, the Instruction Letter and a blank Notice of Dispute form.

19. To the extent that any Claimant requests documents relating to the Claims Process prior to the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, or the Monitor becomes aware of any further Claimants, the Monitor shall forthwith cause a Claims Package to be sent to the Claimant, direct the Claimant to the documents posted on the Monitor's Website, and otherwise respond to the request relating to the Claims Process as may be appropriate in the circumstances.

20. Subject to further order of the Court, any Notice of Disclaimer or Resiliation issued by a member of the Walter Canada Group must be issued by such Walter Canada Group entity at least fifteen (15) days prior to a scheduled Meeting Date, if any, or any adjournment thereof. Any Notice of Disclaimer or Resiliation delivered to a Person after the date of this Claims Process Order shall be accompanied by a Claims Package.

NOTICE SUFFICIENT

21. The forms of Instruction Letter, Employee Claim Amount Notice, Proof of Claim, Notice of Dispute of Employee Claim, Notice of Revision or Disallowance, Notice of Dispute and Newspaper Notice substantially in the forms attached to this Claims Process Order as Schedules "C", "D", "E", "F", "G", "H" and "I", respectively, are hereby approved. Schedule "J", Walter Canada Claims Process Key Dates, is also approved. Despite the forgoing, the Monitor, in consultation with the Walter Canada Group, may, from time to time, make minor changes to such forms as the Monitor, in consultation with the Walter Canada Group, may consider necessary or desirable and may make such changes to the key dates as are permitted pursuant to the terms hereof.

22. Publication of the Newspaper Notice, the mailing to the known Claimants of a Claims Package in accordance with this Claims Process Order, the mailing to Employee Claimants of the Employee Claim Amount Notices and completion of the other requirements of this Claims Process Order shall constitute good and sufficient service and delivery of notice of this Claims Process Order, the Claims Bar Date and the Restructuring Claims Bar Date on all Persons who may be entitled to receive notice and who may wish to assert a Claim, and no other notice or service need be given or made and no other document or material need be sent to or served upon any Person in respect of this Claims Process Order.

FILING PROOFS OF CLAIM FOR CLAIMS OTHER THAN RESTRUCTURING CLAIMS

23. Subject to paragraphs **25** and **28** hereof, any Claimant who wishes to assert a Claim (other than a Restructuring Claim) against any of the members of the Walter Canada Group and/or any Director and/or Officer shall file a Proof of Claim with the Monitor in the manner set out in paragraph **43** hereof so that the Proof of Claim is received by the Monitor by no later than the Claims Bar Date.

24. Subject to paragraphs **25** and **28** hereof, any Person who does not file a Proof of Claim as provided for in paragraph **23** hereof so that such Proof of Claim is received by the Monitor on or before the Claims Bar Date, or such later date as the Monitor, in consultation with the Walter Canada Group, may agree in writing or the Court may otherwise direct, shall:

(a) be and is hereby forever barred, estopped and enjoined from asserting or enforcing any Claim against any of the Walter Canada Group entities and/or any of the Directors and/or Officers and all such Claims shall forever be extinguished;

(b) not be permitted to vote on any Plan on account of such Claim;

(c) not be permitted to participate in any distribution under the Plan, from the proceeds of any sale of the Walter Canada Group's assets or otherwise on account of such Claim(s); and

(d) not be entitled to receive further notice in respect of the Claims Process, these CCAA Proceedings or the Meeting Dates.

25. Notwithstanding paragraphs **23** and **24** hereof, any Employee Claimant who receives an Employee Claim Amount Notice and who does not dispute the Employee Claim as set forth in the Employee Claim Amount Notice is not required to file a Proof of Claim by the Claims Bar Date. If an Employee Claimant who receives an Employee Claim Amount Notice does not file a Notice of Dispute of Employee Claim by the Claims Bar Date, then the Employee Claim as set out in such Employee Claimant's Employee Claim Amount Notice shall be such Employee's Allowed Claim for voting and distribution purposes. For the purposes of their Employee Claim, if the Monitor determines, in its discretion, that the Claims Process would be furthered thereby, all unionized Employees who have not yet been terminated as of the date of this Order shall be deemed to have been terminated as of the date of this Order solely for the purpose of calculating the value of their Employee Claim; provided, however, that nothing in this Order affects the rights of those unionized employees under their collective agreement or the operation of s. 35 of the *Labour Relations Code*.

26. Any Employee Claimant who receives an Employee Claim Amount Notice and wishes to dispute the amount set out therein shall file a Notice of Dispute of Employee Claim with the Monitor in the manner

set out in paragraph **43** hereof so that the Notice of Dispute of Employee Claim is received by the Monitor by no later than the Claims Bar Date.

27. Notwithstanding anything contained in this Claims Process Order, Unaffected Claims shall not be extinguished or affected by this Claims Process Order and, for greater certainty, paragraph **24** shall not apply to the Unaffected Claims.

FILING PROOFS OF CLAIM FOR RESTRUCTURING CLAIMS

28. Notwithstanding paragraphs **23** and **24** hereof, any Claimant who wishes to assert a Restructuring Claim against any member of the Walter Canada Group and/or any Director and/or Officer shall file a Proof of Claim with the Monitor in the manner set out in paragraph **43** hereof so that the Proof of Claim is received by the Monitor no later than the Restructuring Claims Bar Date. All other dates contained herein (other than the Claims Bar Date), shall apply equally to any Restructuring Claims.

29. Any Person that does not file a Proof of Claim in respect of a Restructuring Claim as provided for in paragraph **28** hereof, so that the Proof of Claim is received by the Monitor on or before the Restructuring Claims Bar Date, or such later date as the Monitor, in consultation with the Walter Canada Group, may agree in writing or the Court may otherwise direct, shall:

(a) be and is hereby forever barred, estopped and enjoined from asserting or enforcing any Restructuring Claim against any of the Walter Canada Group entities and/or any of the Directors and/or Officers and all such Restructuring Claims shall be forever extinguished;

(b) not be permitted to vote on the Plan on account of such Restructuring Claim(s);

(c) not be permitted to participate in any distribution under any Plan, from the proceeds of any sale of the Walter Canada Group's assets or otherwise on account of such Restructuring Claim(s); and,

(d) not be entitled to receive further notice in respect of the Claims Process, these CCAA Proceedings or the Meeting Dates (unless such Person is also a Claimant with a Claim other than such Restructuring Claim entitling such Person to further notice in these proceedings).

UMWA 1974 PENSION PLAN CLAIMS

30. Notwithstanding any other provision of this Claims Process Order, the UMWA 1974 Pension Plan Claim shall be adjudicated by this Court under a procedure to be determined more fully by subsequent Order of this Court after completion of the following steps, which hereby are ordered to be taken:

(a) On or before August 26, 2016, the UMWA 1974 Pension Plan is authorized but not directed to file and deliver to the Service List a notice of claim substantially in Form 1 of the *Supreme Court Civil Rules*; and

(b) On or before September 26, 2016 any person on the Service List who contests the UMWA 1974 Pension Plan Claim filed pursuant to sub-paragraph **(a)** of this paragraph **30** is authorized but not directed to file and deliver to the Service List a response to notice of claim substantially in Form 2 of the *Supreme Court Civil Rules*; and

(c) On or before the Claims Bar Date, the UMWA 1974 Pension Plan may file and deliver to the Service List a reply substantially in Form 7 of the *Supreme Court Civil Rules*.

31. Promptly upon completion of sub-paragraphs **(a)**, **(b)** and **(c)** of paragraph **30** of this Claims Process Order, the Monitor shall, in consultation with counsel for the UMWA 1974 Pension Plan, seek a scheduling appointment before the Court, on notice to the Service List, to seek further directions concerning the procedure for adjudicating the UMWA 1974 Pension Plan Claim.

32. Pending the determination of the UMWA 1974 Pension Plan Claim, the UMWA 1974 Pension Plan Claim shall not be accepted or determined as Allowed Claims pursuant to this Claims Process without approval of this Court, but the UMWA 1974 Pension Plan shall have the same rights and entitlements in respect of the Claims Process as Claimants who file Proofs of Claim in accordance with paragraphs **23** or **28** hereof.

33. If the UMWA 1974 Pension Plan does not a notice of claim pursuant to sub-paragraph **(a)** of paragraph **30**, paragraph **24** hereof shall apply and the UMWA 1974 Pension Plan Claim shall be forever barred.

ADJUDICATION OF CLAIMS

34. The Monitor shall provide the Walter Canada Group's counsel with copies of all Proofs of Claim, Employee Claim Amount Notices, Notices of Dispute of Employee Claims, Notices of Dispute and any other materials delivered by or filed with the Monitor pursuant to the Claims Process. The Monitor shall grant the Walter Canada Group and its legal counsel access to a database to be created by the Monitor, which includes, among other things:

(a) a regularly updated claims register;

(b) electronic copies of all Proofs of Claim filed with the Monitor;

(c) electronic copies of all Employee Claim Amount Notices delivered by the Monitor;

(d) electronic copies of all Notices of Dispute of Employee Claims filed with the Monitor;

(e) electronic copies of all Notices of Revision or Disallowance issued by the Monitor; and,

(f) electronic copies of all Notices of Dispute filed with the Monitor.

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 or disallow each Pre-Commencement Claim, Restructuring Claim or Employee Claim, as applicable, as set out therein. If the Monitor, in consultation with the Walter Canada Group, wishes to revise or disallow a Pre-Commencement Claim, a Restructuring Claim or an Employee Claim, the Monitor shall, by no later than November 7, 2016 or thirty (30) Business Days after the Restructuring Claims Bar Date, as applicable, send such Claimant a Notice of Revision or Disallowance advising that the Claimant's Claim as set out in its Proof of Claim has been revised or disallowed and the reasons therefore. Where an Employee Claimant is represented by the United Steelworkers, a copy of the Notice of Revision of Disallowance will be provided to the United Steelworkers. If the Monitor does not send a Notice of Revision or Disallowance to a Claimant by such date or such other date as may be determined by the Monitor, in consultation with the Walter Canada Group, and on notice to the Claimant, the Claim set out in the applicable Proof of Claim shall be an Allowed Claim for voting and/or distribution purposes. Unless otherwise agreed to by the Monitor, in consultation with the Walter Canada Group, or ordered by the Court, all Claims set out in Proofs of Claim that are filed after the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, are deemed to be disallowed and the Monitor need not deliver a Notice of Revision or Disallowance in respect of such Claim.

36. Any Claimant who is sent a Notice of Revision or Disallowance pursuant to paragraph **35** hereof and wishes to dispute such Notice of Revision or Disallowance shall deliver a completed Notice of Dispute to the Monitor by no later than 5:00 p.m. on the later of December 6, 2016 or the day which is twenty (20) Business Days after the date of the applicable Notice of Revision or Disallowance or such other date as may be agreed to by the Monitor. If a Claimant fails to deliver a Notice of Dispute by such date, the Claim set out in the applicable Notice of Revision or Disallowance, if any, shall be deemed to be an Allowed Claim for voting and/or distribution purposes. Where an Employee Claimant is represented by the United Steelworkers, a Notice of Dispute may be filed by the United Steelworkers and may represent the employee in the resolution of the disputed Claim.

37. Upon receipt of a Notice of Dispute, the Monitor, in consultation with the Walter Canada Group, may attempt to consensually resolve the disputed Claim.

38. If the Monitor, in consultation with the Walter Canada Group, and the Claimant consensually resolve the disputed Claim, such Claim (as resolved) shall be an Allowed Claim.

39. If the disputed Claim cannot be consensually resolved the disputing party may bring a motion on a de novo basis before the Court in these proceedings to resolve the disputed Claim by the later of January 9, 2016 and the day that is twenty (20) Business Days after the date of delivery of a Notice of Dispute, or such time as may be extended by agreement between the Claimant and the Monitor.

40. Notwithstanding any other provision of this Order, the Monitor may refer any Claim to the Court for adjudication by sending written notice to the Claimant at any time, including, for greater certainty, in lieu of sending a Notice of Revision or Disallowance to any Claimant.

NOTICE OF TRANSFEREES

41. Subject to the terms of the order fixing a Meetings Date and the Plan if, after the Commencement Date, the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor the Walter Canada Group shall be obligated to give notice or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until actual written notice of such transfer or assignment, together with satisfactory evidence of such transfer or assignment shall have been received and acknowledged by the relevant member of the Walter Canada Group and the Monitor in writing and the Monitor has acknowledged such transfer through written notice to the transferor and thereafter such transferee or assignee shall for the purposes hereof constitute the "Claimant" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with the Claims Process prior to the receipt and acknowledgement by the relevant member of the Walter Canada Group and the Monitor of the delivery of satisfactory evidence of such transfer or assignment. A transferee or assignee of a Claim takes the Claim subject to any rights of set-off to which a member of the Walter Canada Group may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to any of the Walter Canada Group entities. Reference to a transfer in this Claims Process Order includes a transfer or assignment whether absolute or intended as security.

SERVICES AND NOTICES

42. The Monitor may, unless otherwise specified by this Claims Process Order, serve and deliver the Claims Package, any Notices of Revision or Disallowance, any letters, notices or other documents to a Claimant or any other interested Person by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, or electronic transmission to such Persons at their respective addresses or contact information as last shown on the records of the Walter Canada Group entities or set out in such Claimant's Proof of Claim. Any such service and delivery shall be deemed to have been received:

(a) If sent by ordinary mail, on the third Business Day after mailing within British Columbia, the fifth Business Day after mailing within Canada (other than British Columbia) and the seventh Business Day after mailing outside of Canada;

(b) If sent by courier or personal delivery, on the next Business Day following dispatch;

(c) If delivered by electronic transmission, by 5:00 p.m. on a Business Day on such Business Day and if delivered after 5:00 p.m. or other than a Business Day, on the following Business Day.

43. Any Proofs of Claim, Notice of Dispute of Employee Claim, Notice of Dispute or other notice or communication to be provided or delivered by a Claimant to the Monitor under this Claims Process Order, shall be in writing in substantially the form, if any, provided for in this Claims Process Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery, or email addressed to:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al*
777 Dunsmuir St
Vancouver, BC V7Y 1K3

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

Any such notice or communication delivered by a Claimant shall be deemed to be received upon actual receipt thereof by the Monitor before 5:00 p.m. (Vancouver Time) on a Business Day or, if delivered after 5:00 p.m. (Vancouver Time), on the next Business Day.

44. If during any period which notice or other communications are being given pursuant to this Claims Process Order, a postal strike or postage work stoppage of general application should occur, such notice or other communications sent by ordinary mail and then not received shall not, absent further Order of this Court, be effective, and notices and other communications given hereunder during the course of any such postage strike or work stoppage of general application shall only be effective if given by courier, personal delivery, email or posting on the Monitor's Website.

45. In the event this Claims Process Order is later amended by further Order of the Court, the Monitor may post such further Order on the Monitor's Website and serve such further Order on the Service List, and such posting and service shall constitute adequate notice to Claimants of such amended claims procedure.

MISCELLANEOUS

46. Notwithstanding any other provisions of this Claims Process Order, the solicitation by the Monitor of Proofs of Claim, and the filing by any Claimant of any Proof of Claim shall not, for that reason only, grant any Person standing in these CCAA Proceedings or rights under any proposed Plan.

47. Nothing in this Claims Process Order shall constitute or be deemed to constitute an allocation or assignment of Claims or Unaffected Claims by the Walter Canada Group into particular affected or unaffected classes for the purpose of a Plan.

48. Nothing in this Order shall prejudice the rights and remedies of any Directors, Officers, the Chief Restructuring Officer or other Persons under the Directors' Charge, any other Charge or any applicable insurance policy or prevent or bar any Person from seeking recourse against or payment from the Walter Canada Group's insurance and any Director's or Officer's liability insurance policy or policies that exist to protect or indemnify the Directors, Officers, or other Persons, whether such recourse or payment is sought directly by the Person asserting a Claim or a Directors/Officers Claim from the insurer or derivatively through the Director, Officer or any other Person, including any member of the Walter Canada Group; provided, however, that nothing in this Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Order limit, remove, modify or alter any defence to such claim available to the insurer pursuant to the provisions of any insurance policy or at law; and further provided that any Claim or Directors/Officers Claim or portion thereof for which the Person receives payment directly from, or confirmation that she is covered by, the Walter Canada Group's insurance or any Director's or Officer's liability insurance or other liability insurance policy or policies that exist to protect or indemnify the Directors, Officers or other Persons shall not be recoverable as against the Walter Canada Group or a Director, Officer, or other Person, as applicable.

49. The Claims Bar Date and the Restructuring Claims Bar Date, and the amount and status of every Allowed Claim, as determined under the Claims Process, including any determination as to the nature, amount, value, priority or validity of any Claim, including any secured claim, shall continue in full force and effect and be final for all purposes (except as expressly stated in any Notice of Disallowance or Revision or settlement or order of the Court), including in respect of any Plan and voting thereon (unless provided for otherwise in any Order of Court), and, including for any distribution made to Claimants of any of the Walter Canada Group entities, whether in these CCAA Proceedings or in any of the proceedings authorised by this Court or permitted by statute, including a receivership proceeding or bankruptcy affecting any member of the Walter Canada Group.

50. In carrying out the terms of this Claims Process Order and aiding the Monitor in accordance with the terms of this Claims Process Order, the CRO shall:

(a) be entitled to rely on all of the protections granted to it in the SISP Order;

(b) be entitled to rely on the books and records of the Walter Canada Group entities and any information provided by the Walter Canada Group entities, all without independent investigations; and

(c) shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

51. Notwithstanding the terms of this Claims Process Order, the Walter Canada Group and the Monitor may apply to this Court from time to time for advice and directions from this Court with respect to this Claims Process Order, including the Claims Process and the schedules to this Claims Process Order, or for such further Order or Orders as either of them may consider necessary or desirable to amend, supplement or replace this Order, including any schedule to this Order.

APPROVAL

52. Endorsement of this Order by counsel appearing on this application is hereby dispensed with.

THIS COURT REQUESTS the aid, recognition and assistance of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any Federal or State Court or administrative body in the United States of America, to act in aid of and be complementary to this Court in carrying out the terms of this Claims Process Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to:

(a) make such orders and to provide such assistance to the Walter Canada Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Claims Process Order;

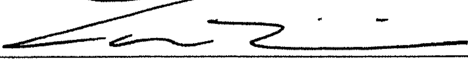
(b) grant representative status to any of the Walter Canada Group entities and the Monitor to act on behalf of any or all of the Walter Canada Group entities in any foreign proceeding; and,

(c) assist the Walter Canada Group, the Monitor and the respective agents of each of the forgoing in carrying out the terms of this Claims Process Order.

In addition, each of the Walter Canada Group entities and the Monitor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other courts and judicial regulatory and administrative bodies, and take such other steps, in Canada, the United States of America or elsewhere, as may be necessary or advisable to give effect to this Claims

Process Order and any other Order granted by this Court.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



Lawyers for the Petitioners

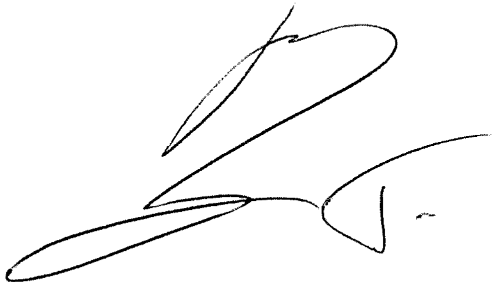
DLA Piper (Canada) LLP
(Mary I.A. Buttery and H. Lance Williams)

and

Osler, Hoskin & Harcourt LLP
(Marc Wasserman and Patrick Riesterer)

BY THE COURT

REGISTRAR



Schedule "A"

Counsel List	
Name	**Party Represented**
Kathryn Esaw Angela Crimeni	Canadian Counsel for Morgan Stanley Senior Funding, Inc., as Administrative Agent and Collateral Agent under the First Lien Credit Facility
John Sandrelli Tevia Jeffries	UMWA 1974 Pension Plan and Trust
Heather L. Jones	Kevin James
Aaron Welch	Her Majesty the Queen in right of British Columbia
Craig Bavis Stephanie Drake	USW, Local 1-424
Kieran Siddall	Pine Valley Mining Corporation
David Wachowich Leanne Krawchuck (by phone)	Conuma Coal Resources Limited

Schedule "B"
Definitions

"**Allowed Claim**" means the amount, status and/or validity of the Claim of a Claimant finally determined in accordance with the Claims Process, which shall be final and binding for voting and/or distribution purposes under the Plan or otherwise. A Claim will be "finally determined" and become an Allowed Claim in accordance with the Claims Process if:

i. An Employee Claimant was sent an Employee Claim Amount Notice by the Monitor and the Employee Claimant does not file a Notice of Dispute of Employee Claim by the Claims Bar Date;
ii. A Claimant filed a Proof of Claim by the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, and the Monitor has not sent a Notice of Revision or Disallowance by the deadline set out in paragraph **35** of the Claims Process Order;
iii. The Monitor has sent the Claimant a Notice of Revision or Disallowance in accordance with the Claims Process and the Claimant has not sent a Notice of Dispute in response by the deadline set out in paragraph **36** of the Claims Process Order;
iv. The Claimant sent a Notice of Dispute by the deadline set out in paragraph **36** and the Monitor and the Claimant have consensually resolved the disputed Claim; or
v. The Court has made a determination with respect to the Claim and no appeal or application for appeal therefrom has been taken or served on either party, or if any appeal(s) or applications for leave to appeal or further appeal have been taken therefrom or served on either party, any (and all) such appeal(s) or application(s) have been dismissed, determined or withdrawn;

"**Business Day**" means any day, other than a Saturday, Sunday or holiday, on which banks in Vancouver, British Columbia are generally open for business;

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

"**CCAA Charge**" means any of the charges granted by the Court in the CCAA Proceedings pursuant to the Initial Order, the SISP Order and any further Orders of the Court;

"**CCAA Proceedings**" means the CCAA proceedings commenced by the Walter Canada Group, being Supreme Court of British Columbia Action No. S-1510120, on the Commencement Date pursuant to the Initial Order;

"**Claim**" means (i) any Pre-Commencement Claim, (ii) any Restructuring Claim; (iii) any Employee Claim (iv) any Intercompany Claim, (v) any Directors/Officers Claim, or (vi) the UMWA 1974 Pension Plan Claims;

"**Claims Bar Date**" means October 5, 2016 at 5:00 p.m. (Vancouver Time) or such other date as may be ordered by the Court;

"**Claims Package**" means the document package which includes a copy of (i) this Claims Process Order; (ii) the Instruction Letter, (iii) a blank Proof of Claim, and (v) such other materials as the Monitor, in consultation with the Walter Canada Group, considers necessary or appropriate;

"**Claims Process**" means the call for claims to be administered by the Monitor, in consultation with the Walter Canada Group, pursuant to the terms of this Claims Process Order;

"**Claims Process Order**" means this Order establishing a claims process;

"**Commencement Date**" means December 7, 2015;

"**Court**" means the Supreme Court of British Columbia;

"**Claimant**" means any Person asserting a Claim, whether such Person is located in Canada, the United States or elsewhere, and includes, without limitation, the transferee or assignee of a transferred Claim that is recognised in accordance with paragraph **41** hereof, or a trustee, liquidator, receiver, manager or other Person acting on behalf of such Person;

"**CRO**" has the meaning attributed to it in paragraph **11** of the Claims Process Order;

"**Director**" means any Person who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director of any one or more members of the Walter Canada Group;

"**Directors/Officers Claim**" means any right or claim of any Person against one or more of the Directors and/or Officers that relates to a Pre-Commencement Claim or a Restructuring Claim, however arising, for which the Directors and/or Officers are by statute or otherwise by law liable to pay in their capacity as Directors and/or Officers;

"**Dispute Package**" means, with respect to any Claim, a copy of the related Proof of Claim, Notice of Revision or Disallowance and Notice of Dispute;

"**Employees**" means all employees of the Walter Canada Group as at the Commencement Date (including inactive employee of a Walter Canada Group entity as of the Commencement Date and including any employees of the Wolverine mine who were terminated after the Commencement Date due to the expiration of any recall or other rights under the applicable collective bargaining agreement), and "Employee" means any one of them. For the avoidance of doubt, Employee does not include individuals whose employment was terminated for any reason, without regard to any period of notice, prior to the Commencement Date;

"**Employee Claim**" means a Claim held by an Employee against a Walter Canada Group entity in respect of Wages and Benefits and, for greater certainty, does not include any other Claim of an Employee;

"**Employee Claimant**" means an Employee with an Employee Claim;

"**Employee Claim Amount Notice**" means a form of notice in which the Monitor may include in an Employee's Claims Package setting out the Monitor's determination of such Claimant Employee's Claim, which shall be in substantially the form set out in **Schedule "D"**;

"**Financial Advisor**" means PJT Partners LP as financial advisor to the Walter Canada Group;

"**Initial Order**" means the Order of this Honourable Court granted on December 7, 2015 in these CCAA Proceedings, as amended;

"**Instruction Letter**" means the letter regarding completion of a Proof of Claim, which letter shall be substantially in the form attached hereto as **Schedule "C"**;

"**Intercompany Claim**" means: (i) any Claim of a member of the Walter Canada Group against another member of the Walter Canada Group (including for greater certainty any amount secured by one of the CCAA Charges) and (ii) any Claim by Walter Energy, Inc. or any of its non-Canadian affiliates against the Walter Canada Group in respect of the Hybrid Debt Structure (as defined in the First Affidavit of William E. Harvey sworn December 5, 2015 in these proceedings), but excluding any other Claims of Walter Energy, Inc. or any of its non-Canadian affiliates against the Walter Canada Group and any Claims that Warrior Met Coal, LLC acquired from Walter Energy, Inc. or any of its U.S. affiliates against the Walter Canada Group;

"**Lien**" means any valid and enforceable mortgage, charge, pledge, assignment by way of security, lien, hypothec, security interest, deemed trust or other encumbrance granted or arising pursuant to a written agreement or statute or otherwise created by law;

"**Meeting Date**" means the date set for the meeting of the Walter Canada Group's Claimants, to be set by further Order of the Court;

"**Monitor**" means KPMG Inc., in its capacity as Court-appointed Monitor pursuant to the Initial Order;

"**Monitor's Website**" means the Monitor's website located at http://www.kpmg.com/ca/walterenergycanada;

"**Newspaper Notice**" means the notice of Claims Process to be published in the newspapers listed in paragraph **17** of this Claims Process Order, calling for any and all Claims of Claimants against the Walter Canada Group in substantially the form attached hereto as **Schedule "I"**;

"**Notice of Disclaimer or Resiliation**" means a written notice in any form issued on or after the Commencement Date by a member of the Walter Canada Group, with the prior consent of the Monitor, advising a Person of the restructuring, disclaimer, resiliation, termination or breach of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of this Claims Process Order;

"**Notice of Dispute**" means the notice that may be delivered by a Claimant who has received a Notice of Revision or Disallowance disputing such Notice of Revision or Disallowance, which notice shall be in substantially the form attached hereto as **Schedule "H"**;

"**Notice of Dispute of Employee Claim**" means the notice that may be delivered by an Employee Claimant who has received an Employee Claim Amount Notice and disputes the amount of the Employee Claim set out therein, which notice shall be in substantially the form attached hereto as **Schedule "E"**;

"**Notice of Revision or Disallowance**" means the notice that may be delivered by the Monitor to a Claimant advising that the Monitor has revised or disallowed in whole or in part such Claimant's Claim as set out in its Proof of Claim, which notice shall be substantially in the form attached hereto as **Schedule "G"**;

"**Officer**" means any Person who was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer of any one or more members of the Walter Canada Group;

"**Person**" means any individual, firm, partnership, joint venture, venture capital fund, association, trust, trustee, executor, administrator, legal personal representative, estate, group, body corporate (including a

limited liability company and an unlimited liability company), corporation, unincorporated association or organisation, governmental authority, syndicate or other entity, whether or not having legal status;

"**Plan**" means any plan of compromise or arrangement of the Walter Canada Group pursuant to the CCAA, or any scheme of distribution by a trustee in bankruptcy of the Walter Canada Group under the *Bankruptcy and Insolvency Act*.

"**Pre-Commencement Claim**" means any right or claim of any Person that may be asserted or made in whole or in part against the Walter Canada Group (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an agreement, event, fact, act or omission or other matter which occurred, was entered into or relates in whole or in part prior to the Commencement Date, at law or in equity by reason of the commission of a tort (intentional or unintentional), any breach of contract or other agreement (oral or written), any breach of duty (including without limitation, any legal, statutory, equitable or fiduciary duty), any right of ownership or title to property or assets, any other claim on property or assets (including a royalty right or intellectual property right), or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any members of the Walter Canada Group or any of their property or assets, any whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, un-liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not any right or claim is executive or anticipatory in nature including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable in bankruptcy had the Walter Canada Group (or any of them) become bankrupt on the Commencement Date and, for greater certainty, includes any Tax Claim; provided, however, that "Pre-Commencement Claim" shall not include an Employee Claim or an Unaffected Claim;

"**Proof of Claim**" means the form to be completed and filed by a Claimant setting forth its proposed Claim, which shall be substantially in the form attached hereto as **Schedule "E"**;

"**Restructuring Claim**" means any right or claim of any Person against the Walter Canada Group (or any of them) in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Walter Canada Group (or any of them) to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach on or after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of this Claims Process Order; provided, however, that "Restructuring Claim" shall not include an Employee Claim, an UMWA 1974 Pension Plan Claim or an Unaffected Claim;

"**Restructuring Claims Bar Date**" means the later of (i) the Claims Bar Date; and (ii) 5:00 p.m. (Vancouver Time) on the day that is twenty (20) Business Days after the date of the applicable Notice of Disclaimer or Resiliation or such other date as may be ordered by the Court;

"**SISP Order**" means the Order of this Honourable Court granted on January 5, 2016 in these CCAA Proceedings approving, among other things, a sale and investment solicitation process with respect to the Walter Canada Group's assets.

"**Tax**" or "**Taxes**" means any and all taxes, duties, fees, premiums, assessments, imposts, levies and other charges of any kind whatsoever, including all interest, penalties, fines, additions to tax or other

additional amounts in respect thereof, and including those levied on, or measured by, or referred to as, income, gross receipts, profits, capital, transfer, land transfer, sales, goods and services, harmonized sales, use, value-added, excise, stamp, withholding, business, franchising, property, development, occupancy, employer health, payroll, employment, health, social services, education and social security taxes, all surtaxes, all customs duties and import and export taxes, countervail and anti-dumping, all licence, franchise and registration fees and all employment insurance, health insurance and Canada, Quebec and other government pension plan premiums or contributions.

"**Tax Claim**" means any Claim against the Walter Canada Group (or any of them) for any Taxes in respect of any taxation year or period ending on or prior to the Commencement Date, and in any case where a taxation year or period commences on or prior to the Commencement Date, for any Taxes in respect of or attributable to the portion of that taxation period commencing prior to the Commencement Date and up to and including the Commencement Date. For greater certainty, a Tax Claim shall include, without limitation, any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto;

"**Taxing Authorities**" means Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of each and every province or territory of Canada and any political subdivision thereof, the Internal Revenue Service and any similar revenue or taxing authority of the federal or state governments of the United States of America and any Canadian or foreign governmental authority and "Taxing Authority" means any one of the Taxing Authorities;

"**UMWA 1974 Pension Plan Claim**" means any claim alleged by or on behalf of the United Mine Workers of America 1974 Pension Plan and Trust against any member of the Walter Canada Group;

"**United Steelworkers**" means the United Steelworkers, Local 1-424;

"**Unaffected Claim**" means, subject to further Order of this Court,

i. Any right or claim of any Person that may be asserted or made in whole or in part against the Walter Canada Group (or any of them) in connection with any indebtedness, liability or obligation of any kind which arose in respect of obligations first incurred on or after the Commencement Date (other than Restructuring Claims and Directors/Officers Claims) and any interest thereon, including any obligation of the Walter Canada Group toward Claimants who have supplied or shall supply services, utilities, goods or materials or who have or shall have advanced funds to the Walter Canada Group on or after the Commencement Date, but only to the extent of their claims in respect of the supply of such services, utilities, goods, materials or funds on or after the Commencement Date;
ii. Any claim of any bank in respect of the Cash Management System as described in the Initial Order;
iii. Any claim secured by any CCAA Charge;
iv. Any Intercompany Claim;
v. That portion of the Claim arising from a cause of action for which the Walter Canada Group entities are covered by insurance, but only to the extent of such coverage;
vi. Any claim referred to in sections 6(3), 6(5) and 6(6) of the CCAA;

vii. Any claims with respect to reasonable fees and disbursements of the CRO, the Financial Advisor, counsel of the Walter Canada Group and the Monitor or any Assistant (as defined in paragraph 4 of the Initial Order);

"**Wages and Benefits**" means all outstanding wages, salaries, benefits (including, but not limited to, medical, dental, disability, life insurance, post-retirement and pension benefits and any other similar benefits, plans or arrangements, employee assistance programs, and any contributions in respect of such benefits, plans, arrangements or programs) vacation pay, holiday pay, overtime pay, expense reimbursements, commissions, bonuses and other incentive compensation, payments under employment agreements or arrangements, collective bargaining agreements, stock options, profit sharing or other equity compensation, pay in lieu of notice, severance pay and termination pay, any amounts payable under the *Employment Standards Act*, any monies payable under the *Labour Relations Code* or due to order of the Labour Relations Board, in all cases whether owing under common law, contract, statute or otherwise.

Schedule "C"

FORM OF INSTRUCTION LETTER

INSTRUCTION LETTER
FOR THE CLAIMS PROCESS FOR THE CLAIMANTS OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

1. Claims Procedure

By order of the Supreme Court of British Columbia (the "**Court**") dated ●, 2016 (as may be amended, restated or supplemented from time to time, (the "**Claims Process Order**"), in the proceeding commenced by Walter Energy Canada Holdings, Inc. and the other Petitioners listed on Schedule "A" to the Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "**CCAA**"), KPMG Inc., in its capacity as the Court-appointed Monitor of the Walter Canada Group (the "**Monitor**"), has been authorised to conduct a claims process with respect to claims against the Walter Canada Group entities (the "**Claims Process**"). A copy of the Claims Process, with all schedules, may be found on the Monitor's Website at: http://www.kpmg.com/ca/walterenergycanada. Capitalised terms used in this letter which are not defined in this letter shall have the meaning ascribed to them in the Claims Process Order.

This letter provides instructions for completing the Proof of Claim. A blank Proof of Claim is included with this letter.

The Claims Process is intended for any Person asserting a Claim (other than an Unaffected Claim) of any kind or nature whatsoever against any of the Walter Canada Group entities and/or any of their Directors and/or Officers arising before the Commencement Date, and/or any Restructuring Claim arising on or after the Commencement Date as a result of a restructuring, disclaimer, resiliation, termination or breach by any of the Walter Canada Group entities on or after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of Claims Process Order.

Current employees are **not** required to submit a Proof of Claim in respect of any Employee Claim pertaining to wages, including vacation pay and banked time due to them.

In the event that you are an Employee Claimant, a notice setting out the amount which the Monitor has determined to be the amount of your Employee Claim (an "**Employee Claim Amount Notice**") is enclosed with this letter, and if you do **not** dispute the nature or amount of such Employee Claim as set out in the Employee Claim Amount Notice, you are **not** required to file a Proof of Claim, a Notice of Dispute of Employee Claim or any other materials with the Monitor unless you are requested to do so. If an Employee Claim Amount Notice is enclosed and you dispute the nature or amount of your Employee Claim as set out in the Employee Claim Amount Notice, you must file a Notice of Dispute of Employee Claim (as referenced in paragraph 2 below) to avoid the barring and extinguishment of that portion of your Employee Claim that exceeds the amount set out in the Employee Claim Amount Notice. Any Employee Claimant who receives an Employee Claim Amount Notice and who does not file a Notice of Dispute of Employee Claim by the Claims Bar Date in accordance with paragraph 2 below is deemed to have accepted the nature and amount of such Employee Claim as set out in the applicable Employee Claim Amount Notice.

If an Employee Claim Amount Notice is not enclosed with this letter and you wish to file a Claim, you must file a Proof of Claim (as referenced in paragraph 2 below) to avoid the barring and extinguishment of any Claim which you may have against any of the Walter Canada Group entities and/or any of their Directors and/or Officers.

If you have any questions regarding the Claims Process, please contact the Court-appointed Monitor at the address below.

All enquiries with respect of the Claims Process should be addressed to:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

2. **For Claimants Submitting a Proof of Claim or Notice of Dispute of Employee Claim**

If you have not received an Employee Claim Amount Notice you are required to file a Proof of Claim, in the form enclosed herewith, and **ensure that it is received by the Monitor by 5:00 p.m. (Vancouver Time) on October 5, 2016** (the "**Claims Bar Date**") to avoid the barring and extinguishment of any Claim (other than a Restructuring Claim) that you may have against any of the Walter Canada Group entities and/or any of their Directors and/or Officers.

To avoid the barring and extinguishment of any Restructuring Claim you may have against any of the Walter Canada Group entities and/or any of their Directors and/or Officers, you are required to file a Proof of Claim, in the form enclosed herewith, and ensure **that it is received by the Monitor by the later of: (a) the Claims Bar Date; and (b) 5:00 p.m. (Vancouver Time) on the day which is twenty (20) Business Days after the date of the Notice of Disclaimer or Resiliation** sent to you (the "**Restructuring Claims Bar Date**").

If you have received an Employee Claim Amount Notice and you dispute the nature or amount of the Employee Claim as set out in such Employee Claim Amount Notice, you are required to file a Notice of Dispute of Employee Claim, in the form enclosed herewith, and ensure that it is received by the Monitor by the Claims Bar Date or such further date as stipulated by the Monitor.

For the avoidance of doubt, any Claim or Restructuring Claim you may have against the Walter Canada Group must be filed in accordance with the procedures set forth herein. Proofs of Claim filed solely with the United States Bankruptcy Court, Northern District of Alabama in Walter Energy, Inc.'s Chapter 11 proceedings, are invalid, and failure to file an additional Proof of Claim with the Monitor pursuant to these procedures will lead to the consequences detailed below. Please note, however, that if you received an Employee Claim Amount Notice with this letter and you fail to file an additional Proof of Claim with the Monitor pursuant to these procedures, your Employee Claim shall be deemed to be the amount set forth in the Employee Claim Amount Notice.

Additional Proof of Claim forms can be found on the Monitor's website at http://www.kpmg.com/ca/walterenergycanada or obtained by contacting the Monitor at the address indicated above and providing particulars as to your name, address, facsimile number and email address. Once the Monitor has this information, you will receive, as soon as practicable, additional Proof of Claim forms.

If you are submitting your Proof of Claim electronically, please submit it in PDF form and ensure that the name of the file is **[legal name of Claimant]**poc.pdf. If you submit your claim electronically and you do **not** receive an email confirming receipt of your Proof of Claim within one (1) business day of submitting the Proof of Claim, your Proof of Claim has **not** been successfully received by the Monitor and you should submit your Proof of Claim using an alternate method.

UNLESS YOU ARE THE HOLDER OF AN EMPLOYEE CLAIM FOR WHICH YOU HAVE RECEIVED AN EMPLOYEE CLAIM AMOUNT NOTICE THAT YOU DO NOT DISPUTE, **IF A PROOF OF CLAIM IN**

RESPECT OF YOUR CLAIM IS NOT RECEIVED BY THE MONITOR BY THE CLAIMS BAR DATE OR THE RESTRUCTURING CLAIMS BAR DATE, AS APPLICABLE:

A. YOUR CLAIM SHALL BE FOREVER BARRED AND EXTINGUISHED AND YOU WILL BE PROHIBITED FROM MAKING OR ENFORCING ANY CLAIM AGAINST ANY MEMBER OF THE WALTER CANADA GROUP AND/OR ANY OF THEIR DIRECTORS AND/OR OFFICERS;

B. YOU SHALL NOT BE PERMITTED TO VOTE ON THE PLAN OR ENTITLED TO ANY FURTHER NOTICE OR DISTRIBUTION UNDER THE PLAN, IF ANY;

C. YOU SHALL NOT BE ENTITLED TO ANY PROCEEDS OF SALE OF ANY MEMBER OF THE WALTER CANADA GROUP'S ASSETS; AND,

D. YOU SHALL NOT BE ENTITLED TO PARTICIPATE AS A CLAIMANT IN THE CCAA PROCEEDINGS OF ANY MEMBER OF THE WALTER CANADA GROUP.

Schedule "D"

FORM OF EMPLOYEE CLAIM AMOUNT NOTICE

EMPLOYEE CLAIM AMOUNT NOTICE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER
(collectively, the "Walter Canada Group")

Full Legal Name of Claimant: ______________________________.

Pursuant to the order of the Supreme Court of British Columbia dated ●, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), KPMG Inc., in its capacity as the Court-appointed Monitor of the Walter Canada Group, hereby gives you notice that the Walter Canada Group, in consultation with the Monitor, have determined your Employee Claim to be as follows:

	Walter Entity	**Unsecured ($CDN)**
Contractual Severance Pay (per **[collective bargaining / employment]** agreement)		
Group Termination Pay		
Northern Working Allowance		
Section 54 Claim		
Section 54 Claim Mitigation		
Other (specify): ____________________		
Total Claim		

If you do not agree with this Employee Claim Amount Notice, please take note of the following:

If you intend to dispute this Employee Claim Amount Notice, you must deliver a Notice of Dispute of Employee Claim, in the form attached hereto, by prepaid registered mail, personal delivery, email (in PDF format), or courier to the following address:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

so that such Notice of Dispute of Employee Claim is received by the Monitor by 5:00 p.m. (Vancouver time) on October 5, 2016, being the Claims Bar Date, or such other date as may be agreed by the Monitor. The form of Notice of Dispute of Employee Claim is attached to this Notice.

If you do not deliver a Notice of Dispute of Employee Claim by the time specified, the nature and amount of your Employee Claim, shall be as set out in this Employee Claim Amount Notice for voting and/or distribution purposes.

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS EMPLOYEE CLAIM AMOUNT NOTICE WILL BE BINDING UPON YOU.

DATED at ________________________, ____________________, ____________________, this ________ day of ____________________________, 2016

KPMG INC.

In its capacity as Court-appointed Monitor
of Walter Energy Canada Holdings, Inc., *et al.* and not in its personal or corporate capacity

Per: ____________________________________

Name: ____________________________________

Title: ____________________________________

Schedule "E"

FORM OF PROOF OF CLAIM

PROOF OF CLAIM
AGAINST WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

Please read the enclosed Instruction Letter carefully prior to completing this Proof of Claim. Defined terms not defined within this Proof of Claim form shall have the meaning ascribed thereto in the Claims Process Order dated ●, 2016, as may be amended, restated or supplemented from time to time.

1. **Particulars of Claimant**

a. Please complete the following (Full legal name should be the name of the original Claimant, regardless of whether an assignment of a Claim, or a portion thereof, has occurred prior to or following the Commencement Date) and Full Mailing Address of the Claimant (the Original Claimant, not the Assignee.)

Full Legal Name:	
Full Mailing Address:	
Telephone Number:	
Facsimile Number:	
Email Address:	
Attention (Contact Person):	

b. Has the Claim been sold, transferred or assigned by the Claimant to another party (an Assignee")

Yes: [______]

No: [______]

2. **Particulars of Assignee (if any)**

a. Please complete the following if all or a portion of the Claim has been assigned, insert full legal name of assignee(s) of the Claim. If there is more than one assignee, please attach a separate sheet with the required information:

Full Legal Name of Assignee:	
Full Mailing Address of Assignee:	
Telephone Number of Assignee:	
Facsimile Number of Assignee:	

Email Address of Assignee:	
Attention (Contact Person):	

Proof of Claim

I, ________________________________ ,(*name of individual Claimant or Representative of corporate Claimant*), of ____________________________________(*City, Province or State*) do hereby certify: that I [__] am a Claimant; OR

that I [______] am a Claimant; OR

[______] am __________________________________ (*state position or title*) of ______ __________________________(*name of corporate Claimant*) which is a Claimant;

that I have knowledge of all the circumstances connected with the Claim referred to below;

that ____(*name of applicable Walter Canada Group entity and/or Directors and/or Officers*) was and still is indebted to the Claimant as follows;

CLAIM (other than a Restructuring Claim):

$ ____ (*insert value of Claim*)

RESTRUCTURING CLAIM

$ ____ (*insert value of Claim arising after the Commencement Date resulting from the restructuring, disclaimer, resiliation, termination or breach after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral)*;

that the Claimant's Claim and the Claimant's invoices, statements and/or supporting documents attached are denominated in:

[ ] Canadian Dollars

[ ] U.S. Dollars

[ ] Other ____________________ (*stipulate other currency referenced*)

A. TOTAL CLAIM(S): $ ____________________________

Nature of Claim:

(*Check and complete appropriate category*)

[______] A. UNSECURED CLAIM OF$ ___________________________. That in respect of this debt, no assets of any of the Walter Canada Group entities are pledged as security.

[______] B. SECURED CLAIM OF$ _____________________________. That in respect of this debt, assets of ______________________________________ (*insert name of applicable Walter*

Canada Group entity) valued at $ ________________________________are pledged to me as security, particulars of which are as follows.

(*Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents.*)

Particulars of Claims:

Other than as already set out herein, the particulars of the undersigned's total Claim and/or Restructuring Claim are attached.

(Provide all particulars of the claims and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the claims, name of any guarantor which has guaranteed the claims, and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the Walter Canada Group entities to the Claimant and estimated value of such security. Where a claim is advanced against any Directors or Officers, please provide either a reference to a statutory authority for your claim or enclose a draft Notice of Civil Claim.)

Filing of Claims:

This Proof of Claim **must be received by the Monitor by no later than 5:00 p.m. (Vancouver Time) on October 5, 2016** (the "**Claims Bar Date**") unless your claim is a Restructuring Claim.

Proofs of Claim for Restructuring Claims arising after the Commencement Date resulting from a restructuring, disclaimer, resiliation, termination or breach after the Commencement Date of any contract, employment agreement, lease or other agreement, or arrangement of any nature whatsoever, whether written or oral, **must be received by the Monitor by the later of (a) the Claims Bar Date, and (b) by 5:00 p.m. (Vancouver Time) on the day which is twenty (20) Business Days after the date of the applicable Notice of Disclaimer or Resiliation** (the "**Restructuring Claims Bar Date**")

Failure to file your proof of claim as directed by the Claims Bar Date or Restructuring Claims Bar Date, as applicable, will result in your claim being forever barred and extinguished and you will be prohibited from making or enforcing a claim against any of the Walter Canada Group entities and/or any of their Directors and/or Officers.

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

DATED this __________ day of ____________________, 2016.

______________________________	Per: ______________________________
Witness:	Print name of Claimant:
	If Claimant is not an individual, print name and title of authorised signatory.
	Name: ____________________
	Title: ____________________

CAN: 22451188.1

Schedule "F"

FORM OF NOTICE OF DISPUTE OF EMPLOYEE CLAIM

NOTICE OF DISPUTE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

Pursuant to the order of the Supreme Court of British Columbia dated ●, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), I/we hereby give you notice of my/our intention to dispute the Notice of Employee Claim Amount bearing Reference Number _________________ and dated __________________, 2016 issued by KPMG Inc., in its capacity as Monitor of the Walter Canada Group in respect of my/our Claim.

Full Legal Name of Claimant: ____________________________________

	Employee Claim Amount per Notice of Employee Claim Amount ($CDN)	**Employee Claim Amount Asserted ($CDN)**
Contractual Severance Pay (per **[collective bargaining / employment]** agreement)		
Group Termination Pay		
Northern Working Allowance		
Section 54 Claim		
Section 54 Claim Mitigation		
Other (specify): ________________		
TOTAL CLAIM		

Reasons for Dispute (attach additional sheet and copies of supporting documentation if necessary):

____

____

____

____

____

____

Signature of Individual: ____________________________

Date: ____________________________

(Print name): ____________________________

Telephone number: ____________________________

Facsimile number: ____________________________

Email address: ____________________________

Mailing Address: ____________________________

____

____

____

This form and supporting documentation is to be returned by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein and is to be received by the Monitor by 5:00 p.m. (Vancouver time) on October 5, 2016 (the Claims Bar Date) or such other date as may be agreed to by the Monitor. If this Notice of Dispute is not received by the Monitor on or before the Claims Bar Date, your Employee Claim will be the amount set out in your Notice of Employee Claim Amount.

Where this Notice of Dispute of Employee Claim is being submitted electronically, please submit one PDF file with the file name as follows: **[legal name of Claimant]**pocdispute.pdf. If you submit your Notice of Dispute electronically and you do **not** receive an email confirming receipt of your Notice of Dispute within one (1) business day of submitting the Notice of Dispute of Employee Claim, your Notice of Dispute of Employee Claim has **not** been successfully received by the Monitor and you should submit your Notice of Dispute of Employee Claim using an alternative method.

Address for service of Notices of Dispute of Employee Claim:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

Schedule "G"

FORM OF NOTICE OF REVISION OR DISALLOWANCE

NOTICE OF REVISION OR DISALLOWANCE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

Full Legal Name of Claimant: ______________________________

Reference Number: ______________________________

Pursuant to the order of the Supreme Court of British Columbia dated ●, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), KPMG Inc., in its capacity as Monitor of the Walter Canada Group, hereby gives you notice that the Walter Canada Group, in consultation with the Monitor, have reviewed your Proof of Claim and have revised or disallowed your Claim as follows:

	Proof of Claim as Submitted **($CDN)**	**Revised Claim as accepted** **($CDN)**	**Secured** **($CDN)**	**Unsecured** **($CDN)**
Total Claim				

Reason for the Revision or Disallowance

____

____

____

____

____

____

If you do not agree with this Notice of Revision or Disallowance, please take note of the following:

If you intend to dispute a Notice of Revision or Disallowance, you must deliver a Notice of Dispute, in the form attached hereto, by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein so that such Notice of Dispute is received by the Monitor by the later of November 7, 2016 and the day that is twenty (20) Business Days after the date of this Notice of Revision or Disallowance, or such other date as may be agreed by the Monitor. The form of Notice of Dispute is attached to this Notice.

Where a Notice of Dispute is being submitted electronically, please submit one PDF file with the file named as follows: ***[legal name of Claimant]****pocdispute.pdf.*

If you do not deliver a Notice of Dispute by the time specified, the nature and amount of your Claim, if any, shall be as set out in this Notice of Revision or Disallowance for voting and/or distribution purposes.

Address for service of Notices of Dispute:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED at ________________________, ____________________, ____________________, this ________ day of ______________________________, 2016

KPMG INC.

In its capacity as Court-appointed Monitor
of Walter Energy Canada Holdings, Inc. *et al.* and not in its personal or corporate capacity

Per: ____

Name: ____

Title: ____

Schedule "H"

FORM OF NOTICE OF DISPUTE

NOTICE OF DISPUTE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

Pursuant to the order of the Supreme Court of British Columbia dated ●, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), I/we hereby give you notice of my/our intention to dispute the Notice of Revision or Disallowance bearing Reference Number __________ _______ and dated __________________ , 2016 issued by KPMG Inc., in its capacity as Monitor of the Walter Canada Group in respect of my/our Claim.

Full Legal Name of Claimant: ______________________________________

	Proof of Claim as Submitted **($CDN)**	**Revised Claim as accepted** **($CDN)**	**Secured** **($CDN)**	**Unsecured** **($CDN)**
Total Claim				

Reasons for Dispute (attach additional sheet and copies of supporting documentation if necessary):

____

____

____

____

____

____

Signature of Individual: ______________________________

Date: ______________________________

(Print name): ______________________________

Telephone number: ______________________________

Facsimile number: ______________________

Email address: ______________________

Mailing Address: ______________________

____

____

____

This form and supporting documentation is to be returned by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein and is to be received by the Monitor by the later of December 6, 2016 and the day that is twenty (20) Business Days after the date of the Notice of Revision or Disallowance or such other date as may be agreed to by the Monitor.

Where this Notice of Dispute is being submitted electronically, please submit one PDF file with the file name as follows: **[legal name of Claimant]**pocdispute.pdf. If you submit your Notice of Dispute electronically and you do **not** receive an email confirming receipt of your Notice of Dispute within one (1) business day of submitting the Notice of Dispute, your Notice of Dispute has **not** been successfully received by the Monitor and you should submit your Notice of Dispute using an alternative method.

Address for service of Notices of Dispute:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

Schedule "I"

FORM OF NEWSPAPER NOTICE

NOTICE TO THE CREDITORS OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

RE: NOTICE OF THE CLAIMS PROCESS FOR THE WALTER CANADA GROUP PURSUANT TO THE COMPANIES' CREDITORS ARRANGEMENT ACT ("CCAA")

This notice is being published pursuant to an order of the Supreme Court of British Columbia dated ●, 2016 (the "**Claims Process Order**") which approved a claims process for the determination of certain claims against the Walter Canada Group and/or their Directors and/or Officers. Any capitalized terms used but not defined herein have the meanings ascribed to them in the Claims Process Order.

The claims procedure only applies to the Claims or Claimants described in the Claims Process Order. A copy of the Claims Process Order and other public information concerning the CCAA proceedings can be obtained on the website of KPMG Inc., the Court-Appointed Monitor of the Walter Canada Group (the "**Monitor**") at http://www.kpmg.com/ca/walterenergycanada. Any person who may have a claim against any of the Walter Canada Group entities and/or any of their Directors and/or Officers should carefully review and comply with the Claims Process Order.

Any person having a Claim against any of the Walter Canada Group entities and/or any of their Directors and/or Officers arising or relating to the period prior to December 7, 2015 (the "**Commencement Date**"), which would have been a claim provable in bankruptcy had the Walter Canada Group become bankrupt on the Commencement Date and who does not receive an Employee Claim Amount Notice with their Claims Package, or who receives an Employee Claim Amount Notice with their Claims Packages, but disputes the amount or nature of their Employee Claim as listed in their Employee Claim Amount Notice, must send a Proof of Claim to the Monitor, **to be received by the Monitor by no later than 5:00 p.m. (Vancouver Time) on October 5, 2016** (the "**Claims Bar Date**").

Proofs of Claim for claims arising as a result of a restructuring, disclaimer, resiliation, termination or breach by any of the Walter Canada Group entities on or after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, **must be received by the Monitor by no later than (a) the Claims Bar Date, and (b) 5:00 p.m. (Vancouver Time) on which is twenty (20) Business Days after the date of the notice of disclaimer or resiliation sent by the Monitor to such Claimant.**

For the avoidance of doubt, any claim a Claimant may have against any of the Walter Canada Group entities must be filed in accordance with the procedures set forth in the Claims Process Order. Proofs of Claim filed solely with the United States Bankruptcy Court, Northern District of Alabama in respect of Walter Energy, Inc.'s Chapter 11 proceedings are invalid.

Claimants requiring more information or who have not received a Proof of Claim form or Claims Package should contact the Monitor by phone at ● or email at ● or visit the Monitor's website at http://www.kpmg.com/ca/walterenergycanada.

UNLESS EXPRESSLY PROVIDED IN THE CLAIMS PROCESS ORDER, HOLDERS OF CLAIMS THAT DO NOT FILE PROOFS OF CLAIM WITH THE MONITOR BY THE APPLICABLE DEADLINE SPECIFIED ABOVE SHALL NOT BE ENTITLED TO ANY FURTHER NOTICE OR DISTRIBUTION UNDER A PLAN, IF ANY, OR OF ANY PROCEEDS OF SALE OF ANY OF THE WALTER CANADA GROUP'S ASSETS, OR TO PARTICIPATE AS A CLAIMANT IN THE CCAA PROCEEDINGS OF THE WALTER CANADA GROUP, AND SHALL BE PROHIBITED FROM MAKING OR ENFORCING ANY CLAIM AGAINST ANY OF THE WALTER CANADA GROUP ENTITIES AND/OR ANY OF THEIR DIRECTORS AND/OR OFFICERS. ADDITIONALLY, ANY CLAIMS SUCH CLAIMANT MAY HAVE

AGAINST ANY OF THE WALTER CANADA GROUP ENTITIES AND/OR ANY OF THEIR DIRECTORS AND/OR OFFICERS SHALL BE FOREVER BARRED AND EXTINGUISHED.

Schedule "J"

WALTER CANADA CLAIMS PROCESS KEY DATES

Event	Date
Issuance of the Claims Process Order	August 15, 2016
Monitor to post on its Website a copy of the Claims Process Order, a blank Proof of Claim form, the Instruction Letter and a blank Notice of Dispute form.	August 22, 2016
Monitor to send Claims Packages to known Claimants	August 24, 2016
Deadline for UMWA Pension Plan to serve Notice of Claim	August 26, 2016
Monitor to have Newspaper Notice published for one Business Day in the Globe and Mail (National Edition), the Vancouver Sun, the Tumbler Ridge News and the Chetwynd Echo	August 29, 2016
Deadline for Petitioners and other stakeholders to serve Response to Notice of Claim of UMWA 1974 Pension Plan	September 26, 2016
Claims Bar Date	October 5, 2016
~~Filing of the Intercompany Claims Report~~	~~October 5, 2016~~
Deadline for UMWA Pension Plan to serve reply	October 5, 2016
Monitor to seek a scheduling appointment before the Court for a hearing of a motion to determine the validity of the UMWA 1974 Pension Plan Claim, if applicable	Following service by UMWA 1974 Pension Plan to prove the enforceability of its Claim
Monitor to send Notices of Revision or Disallowance in respect of Pre-Commencement Claims or Employee Claims	November 7, 2016
Claimants to send Notices of Dispute to the Monitor in respect of Pre-Commencement Claims or Employee Claims	December 6, 2016
Disputing party to bring a motion to the Court to resolve a disputed Claim in respect of Pre-Commencement Claims or Employee Claims	January 9, 2017

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 WALTER ENERGY CANADA HOLDINGS, INC., AND THOSE PARTIES LISTED ON SCHEDULE "A"

PETITIONERS

ORDER MADE AFTER APPLICATION
(CLAIM PROCESS ORDER)

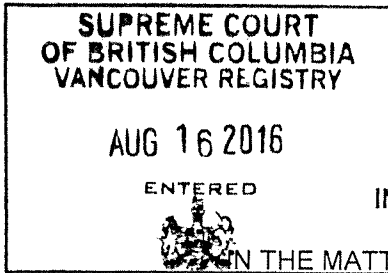
DLA PIPER (CANADA) LLP
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver, BC V6C 2Z7

Tel. No. 604.687.9444
Fax No. 604.687.1612

Client Matter No. 15375-00001 TAG/mlf

D+D

TAB 5



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 WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

ORDER MADE AFTER APPLICATION
(APPROVAL AND VESTING ORDER)

BEFORE THE HONOURABLE	)	TUESDAY, THE 16TH DAY OF
MADAM JUSTICE FITZPATRICK	)	AUGUST, 2016

ON THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 15th and 16th day of August, 2016; AND ON HEARING Mary I.A. Buttery, H. Lance Williams, Marc Wasserman and Patrick Riesterer, counsel for the Petitioners and the Partnerships listed on **Schedule "A"** hereto (collectively, the "**Walter Canada Group**"), Peter Reardon and Wael Rostom, counsel for KPMG Inc. in its capacity as the court-appointed monitor of the Walter Canada Group (the "**Monitor**") and those other counsel listed on **Schedule "B"** hereto; AND UPON READING the material filed, including the Third Affidavit of William E. Aziz sworn August 9, 2016 (the "**3rd Affidavit**"), the Confidential Fourth Affidavit of William E. Aziz sworn August 9, 2016 (the "**Confidential Affidavit**"), the Fourth Report of the Monitor dated August 11, 2016 (the "**4th Report**") and the Confidential Supplemental Report of the Monitor dated August 11, 2016 (the "**Confidential Report**" and, collectively with the Confidential Affidavit, the "**Confidential SISP Materials**"); AND UPON BEING ADVISED that the secured creditors who are likely to be affected by this Order were given notice;

THIS COURT ORDERS AND DECLARES THAT:

DEFINITIONS

1. Capitalized terms used and not defined herein shall have the meaning ascribed thereto in the Initial Order in these proceedings dated December 7, 2015 (the "**Initial Order**") or the Sale Agreement (defined below), as applicable.

APPROVAL OF THE SALE AGREEMENT

2. The sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement dated August 8, 2016 (the "**Sale Agreement**") between Walter Energy Canada Holdings, Inc., and the other entities listed in Schedule A thereto (collectively, the "**Seller**"), Conuma Coal Resources Limited (the "**Purchaser**") and the Guarantors party thereto (collectively, the "**Parties**"), a copy of which is attached as Exhibit "A" to the Confidential Affidavit, is hereby approved, and the Sale Agreement is commercially reasonable. The execution of the Sale Agreement by the Seller is hereby authorized and approved, and the Seller is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance to the Purchaser of the Assets described in the Sale Agreement (the "**Purchased Assets**"), including the execution of ancillary documents.

3. Upon delivery by the Monitor to the Purchaser of a certificate substantially in the form attached as **Schedule "C"** hereto (the "**Monitor's Certificate**"), all of the Seller's right, title and interest in and to the Purchased Assets (other than the Cash Collateral under the Cash Collateral Agreement in circumstances where the Financial Assurances (defined below) have not been returned to the LOC Issuer marked cancelled prior to the Closing Date) described in the Sale Agreement shall vest absolutely in the Purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, other than the Indemnification Security Interest Charge (as defined below) (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) the Administration Charge, the Directors' Charge, the KERP Charge, the Success Fee Charge, and the Intercompany Charge (each as defined in the Initial Order or the Order of this Court dated January 5, 2016, as applicable); (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* of British Columbia or any other personal property registry system; and (iii) those Claims listed on **Schedule "D"** hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the Permitted Encumbrances (as defined in the Sale Agreement), the permitted encumbrances, easements and restrictive covenants listed on **Schedule "E"** hereto or the Indemnification Security Interest Charge as set out herein), and, for greater certainty, this

Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets (other than the Cash Collateral under the Cash Collateral Agreement in circumstances where the Financial Assurances have not been returned to the LOC Issuer marked cancelled prior to the Closing Date).

4. Upon the delivery of the Monitor's Certificate to the Purchaser, the Seller is hereby granted a charge on the Real Property Assets (including any coal leases) and the Mineral Tenures (including all accretions, substitutions, replacements, additions and accessions to any of them and all proceeds of any of the foregoing) (collectively the "**Indemnification Assets**") in the amount of $100,000,000 to secure the Purchaser's indemnification obligations to the Seller under the Sale Agreement and the Contract Mining Agreement (the "**Indemnification Security Interest Charge**"). The Indemnification Security Interest Charge shall constitute a mortgage, security interest, assignment by way of security and charge on the Indemnification Assets and shall rank in priority to all other security interests, trusts, liens, mortgages, charges, and encumbrances. Any security documentation evidencing, or the filing, registration or perfection of, the Indemnification Security Interest Charge shall not be required, and the Indemnification Security Interest Charge shall be effective as against the Indemnification Assets and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Indemnification Security Interest Charge coming into existence, notwithstanding any failure to file, register or perfect the Indemnification Security Interest Charge.

5. Upon the Seller's and the Monitor's receipt from the Purchaser of a certificate certifying that (i) all Transfer Approvals and Permits contemplated under the Sale Agreement and any Ancillary Agreements have been transferred or issued, as applicable, to the Purchaser, and (ii) there have been no incidents, violations or occurrences during the term of the Contract Mining Agreement that may give rise to a claim by the Purchaser against the Seller (the "**Purchaser's Certificate**"), the Monitor shall thereafter, and following satisfaction by the Monitor that there have been no incidents, violations or occurrences during the term of the Contract Mining Agreement that may give rise to a claim by the Seller against the Purchaser, deliver a second Monitor's certificate to the Purchaser substantially in the form attached as **Schedule "F"** hereto (the "**Second Monitor's Certificate**") certifying that it has received the Purchaser's Certificate. Upon the delivery of the Second Monitor's Certificate, the Indemnification Security Interest Charge shall be extinguished.

6. Upon presentation for registration in the Land Title Office for the Land Title District of Prince George of a certified copy of this Order and the Monitor's Certificate, the British Columbia Registrar of Land Titles (the "**BC Registrar**") is hereby directed to:

   (a) enter the Purchaser as the owner of the Owned Real Property, as identified in **Schedule "G"** hereto, together with all buildings and other structures, facilities and improvements

located thereon and fixtures, systems, interests, licenses, rights, covenants, restrictive covenants, commons, ways, profits, privileges, rights, easements and appurtenances to the said hereditaments belonging, or with the same or any part thereof, held or enjoyed or appurtenant thereto, in fee simple in respect of the Owned Real Property, and this Court declares that it has been proved to the satisfaction of the Court on investigation that the title of the Purchaser in and to the Owned Real Property is a good, safe holding and marketable title and directs the BC Registrar to register indefeasible title in favour of the Purchaser as aforesaid; and

(b) having considered the interest of third parties, to discharge, release, delete and expunge from title to the Owned Real Property all of the registered Encumbrances except for those listed in **Schedule "E"**.

7. Upon presentation of a certified copy of this Order and the Monitor's Certificate, the relevant mining recorders of British Columbia are directed to enter the Purchaser as the owner of the relevant Purchased Assets and enter a notation that all Encumbrances (excluding for greater certainty the Permitted Encumbrances and the Indemnification Security Interest Charge) are expunged and discharged from the Purchased Assets as at the date of the Monitor's Certificate.

8. For the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and from and after the delivery of the Monitor's Certificate, all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having had possession or control immediately prior to the sale.

9. The Monitor is to file with the Court a copy of the Monitor's Certificate and the Monitor's Second Certificate forthwith after the respective delivery thereof.

10. Pursuant to Section 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* or Section 18(10)(o) of the *Personal Information Protection Act* of British Columbia, the Seller and the Monitor are hereby authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Seller's records pertaining to the Seller's past and current employees, including personal information of those employees listed in Schedule 5.9.1 to the Sale Agreement, and all previous such disclosure is hereby ratified and approved. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Seller.

11. Subject to the terms of the Sale Agreement, vacant possession of the Purchased Assets (other than the Cash Collateral under the Cash Collateral Agreement in circumstances where the Financial Assurances have not been returned to the LOC Issuer marked cancelled prior to the Closing Date), including any Real Property, shall be delivered by the Seller to the Purchaser at 12:00 noon on the Closing Date (as defined in the Sale Agreement), subject to the Permitted Encumbrances as set out in the Sale Agreement and listed on **Schedule "E"**.

12. The Seller, with the consent of the Purchaser, shall be at liberty to extend the Closing Date to such later date as those parties may agree without the necessity of a further Order of this Court.

13. Notwithstanding:

    (a) these proceedings;

    (b) any applications for a bankruptcy order in respect of any member of the Walter Canada Group now or hereafter made pursuant to the *Bankruptcy and Insolvency Act* and any bankruptcy order issued pursuant to any such applications; and

    (c) any assignment in bankruptcy made by or in respect of any member of the Walter Canada Group,

    the vesting of the Purchased Assets in the Purchaser pursuant to this Order (which, for greater certainty, shall be subject to the Indemnification Security Interest Charge) shall be binding on any trustee in bankruptcy that may be appointed in respect of any member of the Walter Canada Group and shall not be void or voidable by creditors of the Walter Canada Group, nor shall it constitute or be deemed to be a transfer at undervalue, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

14. Nothing in this Order exempts or relieves the Seller or the Purchaser from obtaining any consents, approvals or giving any notices required under any of the Permits, water rights, Mineral Tenures, Consents, coal leases or licences or any Leases from a Government Entity (collectively, the "**Authorizations**") or any enactment of the Province of British Columbia in connection with any transfer or assignment of any of the Authorizations or the issuance of any new Authorization as contemplated in the Sale Agreement or this Order or makes any of the Authorizations transferable or assignable if any of the Authorizations or new Authorizations are not, by virtue of an enactment of the Province of British Columbia or the Authorization itself, transferable, assignable or issuable, as the case may be. Notwithstanding any other provision of this Order, the transfer or assignment of any of the Authorizations or issuance of any new Authorization that

requires any such consent or approval is not effective unless and until such consent or approval is obtained.

LETTERS OF CREDIT AND CASH COLLATERAL

15. The letters of credit issued by the LOC Issuers to various Government Entities on behalf of members of the Walter Canada Group (as more fully described in the Sale Agreement, the "**Financial Assurances**") and the Cash Collateral in respect of such Financial Assurances shall be dealt with as follows:

    (a) If the Purchaser has not, on or prior to the Closing Date, replaced all of the existing Financial Assurances provided to the applicable Government Entity with appropriate financial assurances in respect of the Authorizations that is satisfactory to the applicable Government Entity (which, for greater certainty, if so agreed among the Seller, the Purchaser, the applicable Government Entity and the LOC Issuer, may be satisfied by the delivery of the Cash Collateral to the applicable Government Entity), then the following steps shall occur in the following order:

        (i) On Closing, the LOC Issuer and the Agent (as defined in the Order of this Court dated January 5, 2016) shall be granted a first-priority charge on the Cash Collateral ranking in priority to all other security interests, trusts, liens, mortgages, charges, and encumbrances and the Charges (as defined in the Order of this Court dated January 5, 2016) to secure the obligations of the Walter Canada Group to the LOC Issuer, the Agent and the other lenders in respect of the Financial Assurances (the "**LOC Charge**");

        (ii) on the Business Day following the Closing Date, the Monitor shall pay a portion of the Cash Purchase Price equal to the amount of the Cash Collateral, less the amount of any Financial Assurance that has been replaced on or prior to the Closing Date, to the applicable Government Entity to replace the existing Financial Assurance and such amount shall be and become financial assurances in respect of the Authorizations and shall stand in the place and stead of such Financial Assurances in all respects (the "**New Financial Assurances**") and the New Financial Assurances shall be free and clear from any and all security interests (whether contractual, statutory or otherwise), hypothecs, mortgages, trusts, or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing:

(i) the Administration Charge, the Directors' Charge, the KERP Charge, the Success Fee Charge, the Intercompany Charge, the Indemnification Security Interest Charge and the liens, security, charges and security interests in favour of the Agent; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* of British Columbia or any other personal property registry system. The applicable Government Entity shall pay such portion of New Financial Assurances to the Purchaser upon delivery to the applicable Government Entity of financial assurances in respect of the applicable Authorizations that is satisfactory to the applicable Government Entity;

(iii) the Financial Assurances issued by the LOC Issuers to various Government Entities on behalf of members of the Walter Canada Group shall be and are hereby deemed to be cancelled, released, terminated and extinguished without any further act by any Person;

(iv) the applicable Government Entity shall surrender and return to the LOC Issuer, with a copy to the Seller and to the Monitor, each outstanding Financial Assurance marked as cancelled (such delivery to occur as soon as reasonably practicable after receipt of the New Financial Assurance and in any event no later than 3 Business Days following the receipt of the New Financial Assurance);

(v) No later than one Business Day following the receipt of such Financial Assurances by the LOC Issuer in accordance with paragraph 15(a)(iv), and upon payment of all outstanding fees owing to the LOC Issuer and the Agent in respect of the Financial Assurances under the Cash Collateral Agreement, the LOC Charge shall be discharged and shall cease to be effective, the LOC Issuer shall give and shall be deemed to have given any consent required in respect of withdrawals of Cash Collateral under the Cash Collateral Agreement; the LOC Issuers shall release and shall be deemed to have released the Cash Collateral to the Monitor on behalf of the Seller; paragraph 19 of the Order of this Court dated January 5, 2016 and paragraph 13 of the Initial Order shall cease to be effective; and the Administration Charge, the Directors' Charge, the KERP Charge, the Success Fee Charge and the Intercompany Charge shall apply and shall have the priority set out in paragraph 21 of Order of this Court dated January 5, 2016.

(b) If the Purchaser has, on or prior to the Closing Date, replaced all of the existing Financial Assurances provided to the applicable Government Entity with appropriate financial assurances in respect of the Authorizations that is satisfactory to the applicable

Government Entity and the Cash Collateral has not yet been transferred, then the following steps shall occur in the following order:

(i) the Financial Assurances issued by the LOC Issuers to various Government Entities on behalf of members of the Walter Canada Group shall be and are hereby deemed to be cancelled, released, terminated and extinguished without any further act by any Person;

(ii) if each of the Financial Assurances issued by the LOC Issuers have not already been returned to the LOC Issuers, the applicable Government Entity shall surrender and return to the LOC Issuer, with a copy to the Seller and to the Monitor, each outstanding Financial Assurance marked as cancelled (such delivery to occur on Closing or as soon as reasonably practicable after Closing and in any event no later than 3 Business Days following the Closing Date);

(iii) No later than one Business Day following the receipt of such Financial Assurances by the LOC Issuer in accordance with paragraph 15(b)(ii), and upon payment of all outstanding fees owing to the LOC Issuer and the Agent in respect of the Financial Assurances under the Cash Collateral Agreement, the LOC Issuer shall give and shall be deemed to have given any consent required in respect of withdrawals of Cash Collateral under the Cash Collateral Agreement; the Cash Collateral held by the LOC Issuers and posted by members of the Walter Canada Group shall be transferred and delivered by the LOC Issuers to the Purchaser or as the Purchaser shall direct; and paragraph 19 of the Order of this Court dated January 5, 2016 and paragraph 13 of the Initial Order shall cease to be effective.

(c) Until the surrender and return to the LOC Issuer of each original Financial Assurance, the provisions of the Cash Collateral Agreement shall apply, including without limitation, the right of the LOC Issuer to apply the Cash Collateral to reimburse itself for any drawing.

(d) The provisions of this paragraph 15 shall (i) satisfy the Seller's obligation in section 5.3.7 of the Sale Agreement to cause the Financial Assurances to remain in place; (ii) be the Court Order contemplated by section 5.3.8 of the Sale Agreement; and (iii) shall stand in the place and stead of any Cash Collateral Transfer Agreement contemplated by the Sale Agreement. To the extent there is a conflict between the APA and this Order, this Order shall govern.

GENERAL

16. Endorsement of this Order by counsel appearing, other than counsel for the Walter Canada Group, is hereby dispensed with.

THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunals, regulatory or administrative bodies, including any Court or administrative tribunal of any federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Walter Canada Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Walter Canada Group and the Monitor and their respective agents in carrying out the terms of this Order.

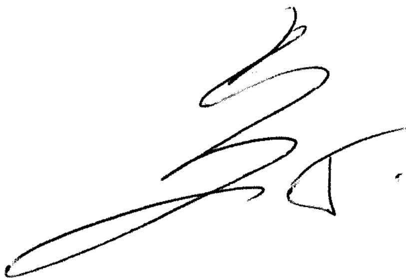
THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Lawyers for the Petitioners

DLA Piper (Canada) LLP
(Mary I.A. Buttery and H. Lance Williams)

and

Osler, Hoskin & Harcourt LLP
(Marc Wasserman and Patrick Riesterer)



BY THE COURT

REGISTRAR

SCHEDULE "A"

Petitioners

1. Walter Energy Canada Holdings, Inc.
2. Walter Canadian Coal ULC
3. Brule Coal ULC
4. Willow Creek Coal ULC
5. Wolverine Coal ULC
6. Cambrian Energybuild Holdings ULC
7. Pine Valley Coal Ltd.
8. 0541237 B.C. Ltd.

Partnerships

9. Walter Canadian Coal Partnership
10. Brule Coal Partnership
11. Willow Creek Coal Partnership
12. Wolverine Coal Partnership

SCHEDULE "B"

Counsel List	
Name	**Party Represented**
Kathryn Esaw Angela Crimeni	Canadian Counsel for Morgan Stanley Senior Funding, Inc., as Administrative Agent and Collateral Agent under the First Lien Credit Facility
John Sandrelli Tevia Jeffries	UMWA 1974 Pension Plan and Trust
Heather L. Jones	Kevin James
Aaron Welch	Her Majesty the Queen in right of British Columbia
Craig Bavis Stephanie Drake	USW, Local 1-424
Kieran Siddall	Pine Valley Mining Corporation
David Wachowich Leanne Krawchuck (by phone)	Conuma Coal Resources Limited

SCHEDULE "C"

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 WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED ON SCHEDULE "A"

PETITIONERS

MONITOR'S CERTIFICATE

1. Pursuant to an Order of the Court dated ●, 2016 (the "**Approval and Vesting Order**"), the Court approved the Asset Purchase Agreement dated ●, 2016 (the "**Sale Agreement**") between Walter Energy Canada Holdings, Inc., and the other entities listed in Schedule A thereto (collectively, the "**Seller**"), Conuma Coal Resources Limited (the "**Purchaser**") and the Guarantors party thereto (collectively, the "**Parties**"), and ordered that all of the Seller's right, title and interest in and to the Assets, vest in the Purchaser (subject to the Indemnification Security Interest Charge) effective upon the delivery by KPMG Inc., in its capacity as the Court-appointed Monitor of the Walter Canada Group (the "**Monitor**") of this certificate to the Purchaser confirming: (i) payment by the Purchaser and receipt by the Monitor of the Cash Purchase Price in relation to the purchase by the Purchaser of the Assets; (ii) that the conditions to be complied with at or prior to the Closing as set out in **[Article 5 and Article 7]**, respectively, of the Sale Agreement have been satisfied or waived by the Seller or the Purchaser, as applicable; and (iii) the purchase and sale of the Assets has been completed pursuant to the Sale Agreement.

2. Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Sale Agreement.

THE MONITOR HEREBY CERTIFIES as follows:

(a) The Purchaser has paid and the Monitor has received the Cash Purchase Price in relation to the purchase by the Purchaser of the Assets;

(b) The conditions to be complied with at or prior to the Closing as set out in **[Article 5 and Article 7]**, respectively, of the Sale Agreement have been satisfied or waived by the Seller or the Purchaser, as applicable; and

(c) The purchase and sale of the Assets has been completed pursuant to the Sale Agreement.

DATED at the City of Vancouver, in the Province of British Columbia, this ______ day of _________, **[2016.]**

KPMG INC., in its capacity as the Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.* and not in its personal or corporate capacity

By:

____

Name:
Title:

SCHEDULE "D"

ENCUMBRANCES TO BE DISCHARGED

None

SCHEDULE "E"

PERMITTED ENCUMBRANCES

WALTER CANADA GROUP OWNER	Wolverine Coal ULC	Willow Creek Coal ULC
PARCEL IDENTIFIER	026-373-840	024-621-552
LEGAL DESCRIPTION	LOT 1 EXCEPT: PART DEDICATED FOREST SERVICE ROAD ON PLAN BCP19871; DISTRICT LOTS 305 AND 306 PEACE RIVER DISTRICT PLAN BCP19069	LOT 1 DISTRICT LOT 1149 PEACE RIVER DISTRICT PLAN PGP44780
PERMITTED ENCUMBRANCES	#1: Nature: OPTION TO PURCHASE Registration Number: BX195552 Registration Date and Time: 2005-09-21 14:48 Registered Owner: MARY ANN EYBEN ARDITH NADINE BOOI EXECUTORS OF THE WILL OF JOHN WESLEY TERRY DECEASED SEE PS8845 #2 Nature: CLAIM OF BUILDERS LIEN Registration Number: CA3563886 Registration Date and Time: 2014-01-24 15:41 Registered Owner: CORDY CONSTRUCTION INC.	#1: Nature: U. AND E & R Registration Number: W32996 Registration Date and Time: 1985-11-07 09:07 Registered Owner: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA Remarks: INTER ALIA SEE W32994 SECTION 47 LAND ACT #2: Nature: COVENANT Registration Number: PN40827 Registration Date and Time:

	INCORPORATION NO. BC0989644 Remarks: INTER ALIA	1999-10-28 09:41 Registered Owner: THE CROWN IN RIGHT OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTRY OF ENVIRONMENT LANDS AND PARKS PEACE RIVER REGIONAL DISTRICT Remarks: INTER ALIA #3: Nature: COVENANT Registration Number: PN40828 Registration Date and Time: 1999-10-28 09:41 Registered Owner: PEACE RIVER REGIONAL DISTRICT Remarks: INTER ALIA

SCHEDULE "F"

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 WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED ON SCHEDULE "A"

PETITIONERS

SECOND MONITOR'S CERTIFICATE

1. Pursuant to an Order of the Court dated ●, 2016 (the "**Approval and Vesting Order**"), the Court approved the Asset Purchase Agreement dated ●, 2016 (the "**Sale Agreement**") between Walter Energy Canada Holdings, Inc., and the other entities listed in Schedule A thereto (collectively, the "**Seller**"), Conuma Coal Resources Limited (the "**Purchaser**") and the Guarantors party thereto (collectively, the "**Parties**"), and ordered that upon the Seller's and the Monitor's receipt from the Purchaser of a certificate certifying that (i) all Transfer Approvals and Permits contemplated under the Sale Agreement and any Ancillary Agreements have been transferred or issued, as applicable, to the Purchaser, and (ii) there have been no incidents, violations or occurrences during the term of the Contract Mining Agreement that may give rise to a Claim against the Seller (the "**Purchaser's Certificate**"), the Monitor shall thereafter, and following satisfaction by the Monitor that there have been no incidents, violations or occurrences during the term of the Contract Mining Agreement that may give rise to a claim by the Seller against the Purchaser, deliver this second Monitor's certificate to the Purchaser certifying that it received the Purchaser's Certificate and the Indemnification Security Interest Charge shall be extinguished.

2. Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Sale Agreement.

THE MONITOR HEREBY CERTIFIES as follows:

(a) The Monitor has received the Purchaser's Certificate;

(b) The Monitor is not aware of any incidents, violations or occurrences during the term of the Contract Mining Agreement that may give rise to a claim by the Seller against the Purchaser; and

(c) The Indemnification Security Interest Charge shall be extinguished.

DATED at the City of Vancouver, in the Province of British Columbia, this ______ day of _________, **[2016.]**

KPMG INC., in its capacity as the Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.* and not in its personal or corporate capacity

By: ___________________________________
Name:
Title:

SCHEDULE "G"

OWNED REAL PROPERTY

WALTER CANADA GROUP OWNER	PARCEL IDENTIFIER	LEGAL DESCRIPTION
Wolverine Coal ULC	026-373-840	LOT 1 EXCEPT: PART DEDICATED FOREST SERVICE ROAD ON PLAN BCP19871; DISTRICT LOTS 305 AND 306 PEACE RIVER DISTRICT PLAN BCP19069
Wolverine Coal ULC	005-329-949	LOT 92 DISTRICT LOT 3164 PEACE RIVER DISTRICT PLAN 30292
Wolverine Coal ULC	006-033-571	LOT 56 DISTRICT LOT 3164 PEACE RIVER DISTRICT PLAN 28295
Wolverine Coal ULC	006-035-191	LOT 129 DISTRICT LOT 3164 PEACE RIVER DISTRICT PLAN 28289
Wolverine Coal ULC	006-001-319	LOT 12 DISTRICT LOT 3164 PEACE RIVER DISTRICT PLAN 28295
Wolverine Coal ULC	006-028-233	LOT 49 DISTRICT LOT 3164 PEACE RIVER DISTRICT PLAN 28289
Wolverine Coal ULC	005-624-568	LOT 72 DISTRICT LOT 3164 PEACE RIVER DISTRICT PLAN 29399
Willow Creek Coal ULC	024-621-552	LOT 1 DISTRICT LOT 1149 PEACE RIVER DISTRICT PLAN PGP44780
Willow Creek Coal ULC	006-200-605	LOT A DISTRICT LOT 1807 PEACE RIVER DISTRICT PLAN 27989

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 WALTER ENERGY CANADA HOLDINGS, INC., AND THOSE PARTIES LISTED ON SCHEDULE "A"

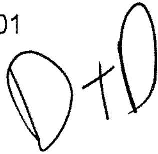
PETITIONERS

ORDER MADE AFTER APPLICATION

DLA PIPER (CANADA) LLP
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver BC V6C 2Z7

Tel. No. 604.687.9444
Fax No. 604.687.1612

Client Matter No. 15375-00001 TAG/mlf



TAB 6

This is the 1ST affidavit of
Dale Stover in this case
and was made on 29 /November /2016

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 WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER
PETITIONERS LISTED ON SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

AFFIDAVIT

I, Dale R. Stover, accountant, of 2121 K Street N.W., in the City of Washington, D.C., in the United States of America, AFFIRM THAT:

1. I am Director of Finance and General Services of the United Mine Workers of America Health & Retirement Funds (the "**Funds**"), a group of multiemployer pension and health care employee benefit plans that share administrative services and that are established by collective bargaining between the United Mine Workers of America ("**UMWA**") and employers in the coal industry and by United States federal statutes.

2. One of these plans, the UMWA 1974 Pension Plan and Trust (the "**1974 Plan**"), is a claimant in this proceeding, and as such I have personal knowledge of the facts and matters deposed to in this Affidavit.

3. I have been employed by the Funds for 36 years.

4. For the last 13 years, I have been the director of the Funds' accounting, financial reporting, income, disbursements and administrative budget functions.

5. In this capacity, I served as Comptroller from 2003 until 2007, and with an expansion of my responsibilities, as Director of Finance and General Services from 2007 to the present.

6. Prior to that time I served in several different capacities in the Comptroller's Office, including Auditor, Audit Supervisor and Audit Manager in the Field Audit Staff, and Senior Manager, Income and Litigation Support.

7. Among the staff functions I have participated in or now directly supervise are:

(a) the auditing, monitoring and reporting of employer contributions to the different trust funds within the Funds, including the 1974 Plan; and

(b) the calculation and assessment of the amount of withdrawal liability required under the *Employee Retirement Income Security Act of 1974*, as amended ("**ERISA**") whenever an employer withdraws from participation in the 1974 Plan,

using information and documents provided to me in the usual course of my work prepared by members of my staff who are responsible for preparing and providing the information and documents.

8. I am a Certified Public Accountant, and I also hold certifications in Internal Auditing, Management Accounting and Fraud Examining.

9. I received a B.A. degree in Business Administration from Glenville State College of West Virginia in 1979 and the degree of Master of Accountancy from George Washington University in Washington, D.C. in 2010.

10. I have served as an Adjunct Professor of Accounting at Concord University in Athens, West Virginia and at Shepherd University in Shepherdstown, West Virginia.

<u>The 1974 Plan</u>

11. The 1974 Plan is a multiemployer, defined-benefit pension plan and irrevocable trust.

12. The 1974 Plan is resident in Washington, DC, and is administered there.

13. The trustees of the 1974 Plan are resident in the United States.

Plan Governing Documents

14. The 1974 Plan was established pursuant to a collectively bargained National Bituminous Coal Wage Agreement of 1974 (the "**1974 NBCWA**", and each such agreement, as approved from time to time, an **"NBCWA"**) between the United Mine Workers of America (the "**UMWA**") and the Bituminous Coal Operators' Association, Inc. (the "**BCOA**"), a multiemployer bargaining association.

15. My office receives copies of NBCWAs from the UMWA whenever they are newly signed.

16. I am familiar with the NBCWAs providing for contribution obligations to the Funds, including the 1974 Plan, that have been in effect throughout my tenure at the Funds.

17. The most recent NBCWA was signed by the UMWA and BCOA in 2016.

18. The most recent NBCWA that was adopted by and incorporated in the agreements between Jim Walter Resources, Inc. ("**Walter Resources**") and the UMWA is the NBCWA of 2011.

19. Attached hereto and marked **Exhibit "A"** is a true copy of Article XX of the NBCWA of 2011.

20. The 1974 Plan operates according to the requirements of ERISA.

21. ERISA requires that the Plan be administered in accordance with (a) the most recent NBCWA, (b) the United Mine Workers of America 1974 Pension Plan Document (the "**Pension Plan Document**") and (c) the United Mine Workers of America 1974 Pension Trust Document (the "**Trust Document**").

22. The Pension Plan Document and the Trust Document are each effective December 6, 1974, and have been amended from time to time since then.

23. I am familiar with the Pension Plan Document and the Trust Document in the course of my work with the Funds.

24. The most recent amendment and restatement of the Pension Plan Document and the Trust Document were effective July 1, 2011.

25. Attached hereto and marked **Exhibit "B"** is a true copy of the 2011 amended and restated Pension Plan Document.

26. Attached hereto and marked **Exhibit "C"** is a true copy of the 2011 amended and restated Trust Document.

27. The Pension Plan Document and the Trust Document set out, among other things, the contribution obligations of contributing employers to the 1974 Plan, benefit levels owed to the 1974 Plan's beneficiaries and participants, and eligibility requirements.

Participants and Beneficiaries of the Plan

28. The participants and beneficiaries in the 1974 Plan are retired or disabled former hourly coal production employees and their eligible surviving spouses.

29. The 1974 Plan provides pension benefits to approximately 88,000 eligible participants and beneficiaries.

30. Although the 1974 Plan's aggregate benefit payments are large, the individual pensions are modest.

31. The majority of beneficiaries receive less than US$500 per month.

32. Almost 80% of beneficiaries receive a monthly pension of less than US$800 a month.

33. The average monthly pension for a regular retiree is US$674; the average monthly pension for a disabled retiree is US$568; and the average monthly pension for a surviving spouse is US$340.

Walter Resources and the 1974 Plan

34. Jim Walter Resources Inc. ("**Walter Resources**") signed a collective bargaining agreement (the "**2011 CBA**") with the UMWA that adopted each and every term of the NBCWA of 2011 that affected the 1974 Plan.

35. It is common practice in the coal industry for coal operators to enter into collective bargaining agreements that adopt the terms of the NBCWA in effect at the time. Such agreements are commonly referred to in the coal industry as "me too" agreements.

36. A true copy of the 2011 CBA is attached and marked as **Exhibit "D"**.

37. Walter Resources (or a predecessor corporate entity) was also a signatory to "me too" collective bargaining agreements with the UMWA that adopted the 1978, 1981, 1984, 1988, 1993, 2002, and 2007 NBCWAs.

38. As a signatory to these "me too" agreements, Walter Resources was a "participating employer" (as such term is used in the NBCWA) in the 1974 Plan until on or about March 31, 2016.

39. All "participating employers" in the 1974 Plan are resident in the United States.

40. As a participating employer, Walter Resources was obligated to pay:

(a) monthly pension contributions for as long as Walter Resources had operations covered by the 1974 Plan; and

(b) "withdrawal liability" accruing upon a partial or complete withdrawal by Walter Resources from participation in the 1974 Plan.

41. In 2014, Walter Resources' contributions represented approximately 18% of the total contributions received by the 1974 Plan from all contributing employers.

42. As of March 31, 2016, Walter Resources was the second largest contributor to the 1974 Plan.

43. Walter Resources made contributions to the 1974 Plan over its last four plan years in approximately the following amounts: US$21.1 million in 2012, US$20.3 million in 2013, US$18.9 million in 2014, and US$15.4 million in 2015.

44. When employers withdraw from participation in the 1974 Plan, my office calculates and assesses the amount of withdrawal liability required under ERISA, using information provided by the 1974 Plan's enrolled actuary in the actuary's annual Valuation Report and other information from the 1974 Plan's financial records.

45. On December 9, 2010, I sent a letter to Walter Resources' Assistant Controller providing an estimate of the withdrawal liability of Walter Resources if the company were to withdraw from the 1974 Plan at that time.

46. I prepared the letter, pursuant to a request from Walter Resources, based on information provided by the 1974 Plan's enrolled actuary and my staff.

47. The 1974 Plan's enrolled actuary and my staff prepared this information at the time in accordance with their regular duties.

48. My letter included the fact that, for the plan year beginning July 1, 2010, the 1974 Plan had unfunded vested benefits of more than $4 billion.

49. A true copy of my letter of December 9, 2010, is attached and marked as **Exhibit "E"**.

Financial Status of the 1974 Plan

50. According to actuarial reports and financial records regularly maintained by the 1974 Plan, the 1974 Plan is expected to become insolvent in six to seven years.

51. The 1974 Plan's investments are managed by investment professionals and are well diversified, but the sharp market declines during 2008-09 caused a precipitous drop in the 1974 Plan's assets at precisely the same time as the demographics of its beneficiary population required the 1974 Plan to pay out benefits at approximately $650 million per year, near its projected peak rate of payments.

52. The 1974 Plan employs an actuary who has satisfied the qualifications in the regulations of the Joint Board for the Enrollment of Actuaries and who has been approved by the Joint Board to perform actuarial services under ERISA, known as an "enrolled actuary". The enrolled actuary is a member of the American Academy of Actuaries who meets the Academy's qualification standards to render his actuarial opinion.

53. The 1974 Plan's enrolled actuary is responsible in the ordinary course of his or her duties for preparing an annual certification setting out the 1974 Plan's funding status.

54. The 1974 Plan's enrolled actuary typically provides this annual certification each September for the plan year that began July 1.

55. I review these certifications in the ordinary course of my duties as Director of Finance and General Services and am familiar with their preparation.

56. Each annual certification is made in the ordinary course of business.

57. It is usual for each annual certification to record plan conditions such as (a) the financial status of the 1974 Plan, (b) any current or expected funding deficiency, (c) the ratio of active to inactive participants in the 1974 Plan, and (d) whether the 1974 Plan is anticipated to become insolvent in the coming years, as such conditions exist at the time the annual certification is made.

58. On September 27, 2010, the 1974 Plan's enrolled actuary certified the 1974 Plan to be in "Seriously Endangered Status" (as defined in ERISA and the United States

Internal Revenue Code of 1986, as amended), for the plan year beginning July 1, 2010 and ending June 30, 2011.

59. "Seriously Endangered Status" means that a pension plan's funded percentage for such plan year is less than 80 percent, and the pension plan has an accumulated funding deficiency for that plan year, or is projected to have such an accumulated funding deficiency for any of the next six plan years.

60. In September 2010, the 1974 Plan's enrolled actuary found that the 1974 Plan had a funded percentage at that time of 75.7%.

61. Attached hereto and marked as **Exhibit "F"** is a true copy of the enrolled actuary's certification of September 2010.

62. The 1974 Plan remained seriously underfunded after 2011, and continued to be certified as "Seriously Endangered" in 2011 to 2013.

63. The 1974 Plan's enrolled actuary certified the 1974 Plan to be in "Critical Status" for the plan year beginning July 1, 2014.

64. The certification was based on the following:

(a) contributions to the 1974 Plan were less than current year costs plus interest on unfunded past liabilities;

(b) the value of vested benefits for non-active participants was greater than that for active participants; and

(c) a projected funding deficiency was expected to occur within the current or next four plan years.

65. On September 28, 2015, the 1974 Plan was certified as being in "Critical and Declining Status" for the plan year beginning July 1, 2015.

66. A certification of "Critical and Declining Status" means that a pension plan is insolvent or is expected to become insolvent within the next 14 to 19 years, depending on the ratio of inactive participants (which includes both retirees and eligible surviving spouses) to active participants (i.e., current UMWA-represented employees of contributing employers).

67. Attached hereto and marked **Exhibit "G"** is a true copy of the 2015 Actuarial Certification.

68. As of July 1, 2015, the 1974 Plan had an estimated funded percentage of 68.5%, and an expected accumulated funding deficiency by June 30, 2019.

69. As of July 1, 2015, the enrolled actuary certified that 1974 Plan had a ratio of inactive participants to active participants of 10.57 and was expected to become insolvent and unable to pay benefits during the 2025-2026 plan year.

70. By the time the enrolled actuary issued its July 1, 2016 certification, the ratio had increased to 13.22 and the 1974 Plan's expected insolvency date was projected to be during the 2022-2023 plan year.

71. Due to a severe decline in active miners in the industry, the actuary's preliminary valuation results for the plan year beginning July 1, 2016, now show that, as of September 30, 2016, for every active employee on whose behalf contributions are being made to the 1974 Plan, there are 36 individuals who are receiving benefits.

72. The 1974 Plan is unlikely to have sufficient time to recoup its losses from the 2008/09 financial crisis through prudent investment, because it needs to liquidate some of its assets on an ongoing basis to have sufficient cash to pay benefits.

73. Moreover, the 1974 Plan cannot recover its funding status through increased contributions, because the number of retirees receiving benefits is so far out of proportion to the number of active employees whose hours worked in the industry are the basis for employer contributions to the 1974 Pension Plan.

Calculation of the 1974 Plan's Claim

74. As a result of Walter Resources' withdrawal from the 1974 Plan on December 28, 2015, the 1974 Plan has a claim for withdrawal liability against Walter Resources and each member of the Walter Resources "controlled group" (which includes each entity that was at least 80% owned by Walter Energy Inc. ("**Walter Energy**"), either directly or indirectly, as of the date of the withdrawal from the 1974 Plan).

75. On July 15, 2015, Walter Resources, its parent company, Walter Energy, and 21 affiliates and subsidiaries (collectively, the "**US Debtors**") filed for creditor protection under Chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the Northern District of Alabama (the "**US Bankruptcy Court**", and the proceedings, the "**Chapter 11 Proceedings**").

76. On October 8, 2015, the 1974 Plan filed a proof of claim against each of the 23 US Debtors in the Chapter 11 Proceedings (collectively, the "**Proofs of Claim**").

77. Each of the Proofs of Claim stated the contingent estimated withdrawal liability of Walter Resources and members of its "controlled group" (as determined by ERISA) of US$904,367,132, which assumed that Walter Resources would withdraw from participation in the 1974 Plan during that plan year beginning July 1, 2015.

78. The withdrawal liability calculation set out in the Proofs of Claim was based on estimates because the final figure for withdrawal liability could not be calculated until the date of withdrawal was known and until the enrolled actuary has completed the annual plan valuation with a final calculation of the 1974 Plan's unfunded vested benefits.

79. In the Amended Notice of Civil Claim filed in these proceedings, the 1974 Plan's estimate of withdrawal liability from the Proofs of Claim was used, setting out a claim of US$904,367,132.00 (the "**1974 Plan Claim**").

80. Attached hereto and marked **Exhibit "H"** is a worksheet, prepared under my supervision, calculating the 1974 Plan Claim, based on information from the 1974 Plan's enrolled actuary and other financial information provided by those on my staff responsible for providing such information (the "**Claim Worksheet**").

81. Funds staff members acting under my supervision have calculated Walter Resource's withdrawal liability to the 1974 Plan based on the withdrawal liability provisions of Article XIV of the Plan Document.

82. This withdrawal liability represents the share of the 1974 Plan's unfunded vested benefits that is allocable to Walter Resources.

Withdrawal from the 1974 Plan

83. On December 28, 2015, the US Bankruptcy Court entered an order authorizing the US Debtors to reject the 2011 CBA and decreeing that the 2011 CBA was rejected (the "**Rejection Order**").

84. On March 28, 2016, Walter Energy sent a letter to the President of the UMWA notifying of the US Debtors' rejection of the 2011 CBA and of the termination of payments under that agreement as of March 31, 2016.

85. I received this letter in the ordinary course of my duties.

86. Attached hereto and marked as **Exhibit "I"** is a true copy of the Walter Energy letter to the UMWA.

87. As of the effective date of the Rejection Order (and in any event no later than the formal rejection and termination on March 31, 2016), Walter Resources effected a withdrawal from the 1974 Plan.

88. The precise date of Walter Resource's withdrawal is irrelevant to the amount of its withdrawal liability, since both December 28, 2015 and March 31, 2016 fall within the same Plan year.

89. After the last plan year ended, my staff recalculated Walter Resource's withdrawal liability under my supervision using actual, rather than estimated, values. The result of this calculation is a withdrawal liability of US$933,942,409.74.

90. The 1974 Plan did not amend the Proofs of Claim filed against the US Debtors to reflect the recalculated withdrawal liability claim.

91. In my dealings with Walter Resources, Walter Energy and their affiliates, I was guided by US law, which is the legal system with which I am most familiar.

92. In my 36 years of employment with the Funds, and in particular during the last 13 years when I have been part of the senior management of the Funds, including the 1974 Plan, I do not recall ever hearing any statement by anyone involved in management of the 1974 Plan which would suggest that any legal system other than United States law governs the 1974 Plan or the liability of employers to the 1974 Plan, including for withdrawal liability.

93. Likewise, I am not aware of any communication from Walter Resources, or any related entity, to the 1974 Plan expressing a view that United States law does not govern its obligations to the 1974 Plan, or that of entities within its "controlled group," including obligations in relation to withdrawal liability.

Impact of Walter Resource's Withdrawal on the 1974 Plan

94. If the US Debtors are unable to satisfy their withdrawal liability obligation, this will result in a significant loss of funding to the 1974 Plan.

95. As a result of the loss of funding caused by Walter Resource's withdrawal and failure to pay the withdrawal liability, the share of the 1974 Plan's unfunded liabilities attributable to each of the remaining employers that contribute to the 1974 Plan will be proportionally increased. I do not expect the remaining employers to be able to make up the difference.

96. The loss of funding to the 1974 Plan due to the US Debtors' inability to satisfy their obligations has exacerbated the 1974 Plan's Critical and Declining Status and projected insolvency, which will affect the benefit levels of current and future retirees.

97. If the loss of funding causes the 1974 Plan to become insolvent, such insolvency would reduce (or render the 1974 Plan unable to pay) the pension benefits provided to the 1974 Plan's approximately 88,000 eligible beneficiaries.

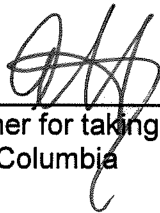
98. The Pension Benefit Guaranty Corporation ("**PBGC**") guarantees payment of a portion of the 1974 Plan's benefits, but at a reduced level.

99. The PBGC's maximum guarantee is $35.75 per month times a participant's years of credited service. A review of the 1974 Plan's records in 2013 showed that, under the PBGC's guarantee, the monthly benefits of an estimated 85% of the 1974 Plan's beneficiaries would be reduced.

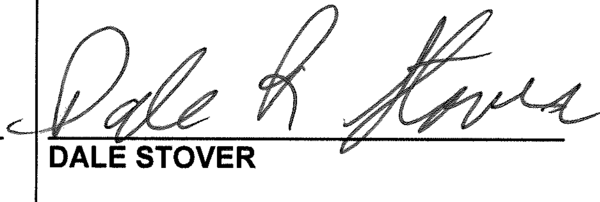
100. Even with financial assistance from the PBGC, the 1974 Plan will have to reduce the already modest pensions of the vast majority of beneficiaries.

101. The PBGC's multiemployer insurance program is also currently in financial difficulty and is projected to be insolvent within the next ten years.

AFFIRMED BEFORE ME at Washington, DC, on 29 / Nov / 2016.



A Commissioner for taking Affidavits within the District of Columbia

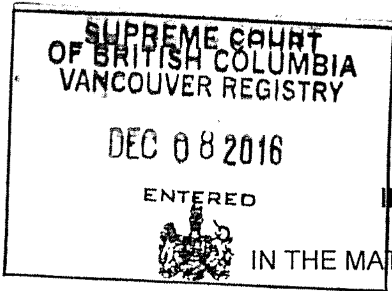


DALE STOVER

District of Columbia: SS
Subscribed and sworn to before me, in my presence, this 29th day of November, 2016

Annette Hargis, Notary Public, D.C.
My commission expires October 14, 2017.

TAB 7



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 WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED ON SCHEDULE "A"

PETITIONERS

ORDER MADE AFTER APPLICATION
(New Walter Group Procedure Order)

BEFORE THE HONOURABLE	)	WEDNESDAY, THE 7TH DAY OF
MADAM JUSTICE FITZPATRICK	)	DECEMBER, 2016

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 7th day of December, 2016; AND ON HEARING Mary I.A. Buttery, H. Lance Williams and Patrick Riesterer, counsel for the Petitioners and the Partnerships listed on **Schedule "A"** hereto (collectively, the "**Walter Canada Group**"), Peter Reardon and Wael Rostom, counsel for KPMG Inc. and those other counsel listed on **Schedule "B"** hereto; AND UPON READING the material filed, including the 5th Affidavit of William E. Aziz sworn December 2, 2016 (the "**Fifth Affidavit**"), the 6th Affidavit of William E. Aziz (the "**Sixth Affidavit**") sworn December 2, 2016, the Sixth Report of the Monitor dated December 5, 2016 and the Confidential Supplemental Report to the Sixth Report of the Monitor dated December 5, 2016;

THIS COURT ORDERS AND DECLARES THAT:

SERVICE AND DEFINITIONS

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

2. Any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Order of this Honourable Court granted on December 7, 2015 pursuant to *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "**CCAA**") in respect of the Walter Canada Group (the "**Initial Order**") or in the Fifth Affidavit.

TRANSACTION APPROVAL

3. The sale transaction (the "**Transaction**") contemplated by the Term Sheet among Walter Canada Group, as subject, and 1098138 B.C. Ltd., as purchaser (the "**Purchaser**") and Amacon Land Corporation, as guarantor, made November 28, 2016 (the "**Term Sheet**"), a copy of which is attached as Exhibit "A" to the Sixth Affidavit of William Aziz is hereby approved, and the Term Sheet is commercially reasonable. The execution of the Term Sheet by Walter Canada Group is hereby authorized and approved, and the Walter Canada Group is hereby authorized to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction contemplated by the Term Sheet, including the execution of ancillary documents.

TRANSACTION STEPS AND PROCEDURAL MATTERS

4. Each of the members of the Walter Canada Group are authorized but not directed to make an assignment in bankruptcy at such time as the Walter Canada Group determines, in its sole discretion, that it is necessary or advisable to do so.

NEW WALTER ENTITIES

5. The formation of corporations under the British Columbia *Business Corporations Act* to consist of New Walter, New WCCP, New Brule, New Willow Creek and New Wolverine (collectively, the "**New Walter Group**") as provided for by the Term Sheet is hereby authorized and:

   (a) upon formation, New Walter shall issue shares to New WEI, Inc., formerly known as Walter Energy, Inc., such that New Walter will be wholly-owned by New WEI, Inc.;

   (b) upon formation, New WCCP shall issue shares to New Walter, such that New WCCP will be wholly-owned by New Walter; and

   (c) upon formation, each of New Brule, New Willow Creek and New Wolverine shall issue shares to New WCCP, such that each of New Brule, New Willow Creek and New Wolverine will be wholly-owned by New WCCP.

6. The Monitor, on behalf of the New Walter Group and the Walter Canada Group, is authorized to contribute $5 from the Deposit (as defined in the Term Sheet) as payment by the Purchaser, as agent for Walter Energy Inc., of the subscription price for the shares of New Walter and to invest such portion of the $5 on behalf of New Walter in the other members of the New Walter Group as required.

7. The adoption, execution, delivery, implementation and consummation of any matters required to form the members of the New Walter Group involving any corporate action shall be deemed to

have been authorized and approved in all respects and for all purposes without any requirement of any further action by any shareholders and all necessary approvals to take any actions shall be deemed to have been obtained from the shareholders of each member of the New Walter Group, and no vote of or action by any shareholder shall be required to complete the steps contemplated hereby or by the Term Sheet.

8. From and after the date of the formation of the members of the New Walter Group, each member of the New Walter Group shall be and is hereby deemed, upon formation:

   (a) to be a debtor company (as defined in the CCAA); and

   (b) to be added as a Petitioner in these CCAA proceedings.

9. From and after the date of the formation of the members of the New Walter Group, the provisions of the Initial Order (as amended and extended) shall apply to the each member of the New Walter Group and the Monitor shall be appointed as Monitor of the New Walter Group, with all of the powers, responsibilities and duties set out in the Initial Order and shall be granted and shall continue to have all of the applicable rights and protections. All charges over the Property of the Petitioners granted in these proceedings shall apply equally and with the same respective priority to the Property of each of the members of the New Walter Group (including, for greater certainty, any after acquired property of the New Walter Group and any property transferred to the New Walter Group pursuant to the Term Sheet and the Transaction). For greater certainty, and without limiting the generality of the foregoing, the Administration Charge, the Director Charge and the Success Fee Charge, each as defined and described in the Initial Order and the order of the Court pronounced January 5, 2016 (the "**SISP Order**") (each as amended by any subsequent Order of the Court), shall attach to all Property of the New Walter Group.

10. The Monitor is hereby authorized and directed to file with the Court a certificate substantially in the form attached hereto as **Schedule "C"** indicating the names of each member of the New Walter Group and, following the delivery of such certificate, the style of cause in these CCAA proceedings shall be amended to include the names of the members of the New Walter Group as Petitioners.

11. The Monitor is hereby granted all of the enhanced powers set out in the Order of the Court pronounced August 16, 2016 (the "**Enhanced Powers Order**") with respect to the New Walter Group and is also hereby authorized and directed to:

   (a) open such bank accounts or brokerage accounts with such financial institutions as the Monitor, in its sole discretion, deems are necessary or advisable in connection with the exercise of the Monitor's powers, the Transaction, the claims process underway with respect to the Walter Canada Group and any other matter in these CCAA proceedings,

including accounts in the name of the Monitor in trust for any member of the New Walter Group and any accounts in the name of any member of the Walter Canada Group;

(b) change the signing authority of any of the foregoing bank accounts or brokerage accounts, including as deemed necessary by the Monitor to facilitate the completion of the Transaction, at such times as the Monitor may determine; and

(c) receive, collect and take possession of all monies, securities or other negotiable instruments of the Walter Canada Group or the New Walter Group.

CHIEF RESTRUCTURING OFFICER

12. BlueTree Advisors Inc. ("**BlueTree**") shall be and shall be deemed to have been engaged to provide the services of William E. Aziz to act as chief restructuring officer ("**CRO**") of the New Walter Group; the CRO Engagement Letter, including any indemnification obligations set out therein, shall apply to the members of the New Walter Group and the New Walter Group shall be "Walter Canada" or the "Company" as defined in the CRO Engagement Letter; and BlueTree and the CRO shall be granted and shall continue to have all continue to have all of the powers, responsibilities and duties set out in the SISP Order and shall be granted and shall continue to have all of the applicable rights and protections set out in the SISP Order, in each case as amended by any subsequent Order of the Court, including the benefit of the Administration Charge and the Success Fee Charge.

13. At the last moment in time before the assignment in bankruptcy of any member of the Walter Canada Group, the appointment of BlueTree and the CRO in respect of such member of the Walter Canada Group shall be and is hereby terminated and deemed terminated and BlueTree and the CRO be and are hereby discharged as of such time and relieved from any further obligations, responsibilities or duties in the capacity of CRO of such member of the Walter Canada Group pursuant to the SISP Order, any other Order of this Court in the CCAA proceedings or otherwise and, notwithstanding any provision of this Order, nothing contained in this Order shall affect, vary, derogate from or amend any of the rights, approvals and protections in favour of the CRO in the SISP Order, any other Order of this Court in the CCAA proceedings or otherwise.

GENERAL

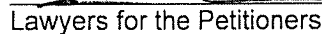
14. Each of the Walter Canada Group and New Walter Group and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a

jurisdiction outside Canada, including acting as a foreign representative of the Walter Canada Group and New Walter Group to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended.

15. Endorsement of this Order by counsel appearing, other than counsel for the Petitioners, is hereby dispensed with.

THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunals, regulatory or administrative bodies, including any Court or administrative tribunal of any federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Walter Canada Group and New Walter Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Walter Canada Group and New Walter Group and the Monitor and their respective agents in carrying out the terms of this Order.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



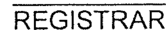
Lawyers for the Petitioners

DLA Piper (Canada) LLP
(Mary I.A. Buttery and H. Lance Williams)

and

Osler, Hoskin & Harcourt LLP
(Marc Wasserman and Patrick Riesterer)

BY THE COURT



REGISTRAR

SCHEDULE "A"

Petitioners

1. Walter Canadian Coal ULC
2. Wolverine Coal ULC
3. Brule Coal ULC
4. Cambrian Energybuild Holdings ULC
5. Willow Creek Coal ULC
6. Pine Valley Coal, Ltd.
7. 0541237 B.C. Ltd.

Partnerships

1. Walter Canadian Coal Partnership
2. Wolverine Coal Partnership
3. Brule Coal Partnership
4. Willow Creek Coal Partnership

SCHEDULE "B"

COUNSEL LIST	
NAME	**PARTY REPRESENTED**
Marc Wasserman and Emmanuel Pressman (by phone)	Ontario Counsel to Petitioners
John Sandrelli and Tevia Jeffries	Canadian Counsel to the United Mine Workers of America 1974 Pension Plan and Trust
JEFF SAUNDERS	US Counsel to the United Mine Workers of America 1974 Pension Plan and Trust
Kendall Andersen	Purchaser and Amacon Land Corporation
Neva Beckie	Her Majesty the Queen in right of Canada
SHAWN POISSON	NORTHLAND PROPERTY CORP. / NPL ACQUISITION CORP.
CAITLIN FELL	MONITOR (BY PHONE)

SCHEDULE "C"

Monitor's Certificate

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

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

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THOSE PARTIES LISTED ON
SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

MONITOR'S CERTIFICATE: NEW WALTER GROUP

RECITALS

A. Pursuant to an Order of the Honourable Justice Fitzpatrick of the British Columbia Supreme Court (the "**Court**") pronounced December 7, 2015 (the "**Initial Order**"), KPMG Inc. was appointed as the monitor (the "**Monitor**") in connection with the CCAA proceedings of the Petitioners.

B. Pursuant to the Order of the Court pronounced December 7, 2016 (the "**New Walter Group Procedure Order**"), the Court authorized the formation of New Walter, New WCCP, New Brule, New Willow Creek and New Wolverine (the "**New Walter Group**") and that the New Walter Group be and be deemed to be Petitioners in the *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings initiated by the Initial Order.

C. The Monitor was directed to file this certificate upon the formation of the entities comprising the New Walter Group.

D. All capitalized terms used but not defined herein shall have the meaning given in the New Walter Group Procedure Order.

THE MONITOR CERTIFIES the following:

1. The New Walter Group, consisting of New Walter, New WCCP, New Brule, New Willow Creek and New Wolverine have been formed and:

    a. "**New Walter**" means __________________.

    b. "**New WCCP**" means __________________.

    c. "**New Brule**" means __________________.

    d. "**New Willow Creek**" means __________________.

e. "**New Wolverine**" means ________________.

2. Pursuant to the terms of the New Walter Group Procedure Order, each of New Walter, New WCCP, New Brule, New Willow Creek and New Wolverine are Petitioners in the CCAA proceedings and are subject to the Initial Order and the style of cause is to be amended to be as follows:

   [STYLE OF CAUSE TO BE INSERTED].

This Certificate was delivered by the Monitor at ________ on _______, 2016.

KPMG Inc., in its capacity as Monitor of Walter Energy Canada Holdings, Inc., the other members of the Walter Canada Group and the members of the New Walter Group and not in its personal capacity

Per: ______________________________

Name:

Title:

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 WALTER ENERGY CANADA HOLDINGS, INC., AND THOSE PARTIES LISTED ON SCHEDULE "A"

PETITIONERS

ORDER MADE AFTER APPLICATION

DLA PIPER (CANADA) LLP
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver BC V6C 2Z7

Tel. No. 604.687.9444
Fax No. 604.687.1612

Client Matter No. 15375-00001 LZW/sd

TAB 8

NO. S1510120
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. c. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED IN SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

Written Submissions of the Respondent Steelworkers
on Summary Trial Application

Victory Square Law Office LLP
#710 - 777 Hornby Street
Vancouver, BC, V6Z 1S4
P: 604-684-8421
F: 604-684-8427

Craig Bavis & Jeff Sanders
Counsel for the Respondent Steelworkers

Table of Contents

PART I - INTRODUCTION. 1

PART 2 - ADDITIONAL FACTS. . . . . -4-

The 1974 Plan Claim . . . . -4-

Steelworkers. . . . . -5-

PART III - ISSUES. . . . . -7-

Summary Trial Application. . . . . -7-

Summary Trial Dismissal Application. . . . . -7-

PART IV - SUBMISSIONS. . . . . -8-

ISSUE 1: Under Canadian conflict of laws rules, is the 1974 Plan Claim against Walter Canada governed by Canadian substantive law or US substantive law (including *ERISA*)? . . . . -8-

BC Supreme Court has territorial competence. . . . . -9-

The nature of the 1974 Plan Claim is legal personality. . . . . -9-

Application of US Substantive Law demonstrates that the nature of the 1974 Plan Claim is legal status. . . . . -10-

Application of BC Substantive Law results in no recognition of US Order against Walter Canada. . . . . -12-

There is no reasonable test other than domicile to determine choice of substantive law for the 1974 Plan Claim. . . . . -15-

ISSUE 2: If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including *ERISA*), as a matter of US law does Controlled Group Liability under *ERISA* extend extra-territorially? . . . . -16-

ISSUE 3: If the 1974 Plan's claim against Walter Canada is governed by US substantive law (including *ERISA*), and *ERISA* applies extraterritorially, is that law unenforceable because it conflicts with Canadian public policy? . . . . -22-

The procedural concern with Controlled Group Liability. . . . . -22-

The substantive concern with Controlled Group Liability.. . . . . -23-

ISSUE 4: Is Summary Trial is appropriate on the Threshold Legal Issues. . . . . -26-

The Threshold Legal Issues are suitable for summary determination. . . . . -27-

Significant proceedings if the 1974 Plan Claim is not determined by Summary Trial . . . . -28-

More discovery sought by the 1974 Plan.. . . . . -28-

Issues raised the Steelworkers. . . . . -30-

PART V - CONCLUSION. . . . . -32-

PART VI - AUTHORITIES.. . . . . -34-

PART I - INTRODUCTION

1. This Summary Trial is an important case for the parties and for the legal system which raises an significant legal issue of first instance: can a Canadian court apply American legislation which makes related corporations absolutely liable for the unfunded pension liabilities of American corporations to a Canadian subsidiary that has no involvement with the American pension plan and no presence in the United States?

2. If so, such a development will have a significant consequence as this Court will have transferred the pension liabilities of an insolvent American corporation to Canada with the result that hundreds of terminated Canadian workers will be effectively deprived of their collectively bargained termination pay and statutory severance pay that was intended to provide financial support when they lost their employment.

3. The Respondent United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 (the "Steelworkers") supports the relief sought in paragraphs 1, 2, and 4 in the Notice of Application filed by the Petitioners ("Walter Canada")[1] on November 16, 2016 (the "Summary Trial Application"). The Steelworkers do not take a position regarding the relief sought in paragraph 3.

4. The Steelworkers oppose the relief sought in the corresponding Notice of Application filed by the Respondent United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") on December 2, 2016 (the "Summary Trial Dismissal Application").

5. The 1974 Plan is named as a creditor in a March 24, 2016 Order of the US Bankruptcy Court for the Northern District of Alabama (the "US Order") against the debtor Walter Energy Inc.

---

[1] Walter Canada as used in this submission includes the related Canadian corporations and partnerships that are the Petitioners in the CCAA proceedings.

("Walter US"),[2] a United States incorporated company.

6. The 1974 Plan claims the US Order applies to Walter Canada, a related foreign subsidiary, as a debtor by operation of US substantive law, specifically the *Employee Retirement Income Security Act* of 1974 (Pub.L. 93-406, 88 Stat. 829, codified in part at 29 U.S.C. ch. 18 ("*ERISA*")).

7. The 1974 Plan filed a claim within the *Companies Creditors Arrangement Act,* R.S.C., 1985, c. C-36, ("*CCAA*") Proceedings against Walter Canada based on the US Order (the "1974 Plan Claim").

8. The Monitor disallowed the 1974 Plan Claim and this Court has established a specific claim process within these *CCAA* proceedings for the 1974 Plan Claim.

9. The Summary Trial Application brought by Walter Canada addresses the legal issues of what substantive law governs the1974 Plan Claim, whether the US Order applies to Walter Canada as a matter of US substantive law if said law applies, and whether this Court should exercise its discretion to allow the 1974 Plan Claim due to public policy concerns.

10. The Summary Trial Dismissal Application brought by the 1974 Plan disputes the appropriateness of the above issues for summary trial, in particular because the 1974 Plan seeks additional disclosure from Walter Canada regarding the direction and control between Walter Canada and Walter US.

11. The Steelworkers support the Summary Trial Application and takes the position that the US Order does not apply to Walter Canada.

12. The basis for the Steelworker's position is:

---

[2] Walter US as used in this submission includes the related American corporations such as Walter Resources named in the US Order.

a) Canadian substantive law applies and does not confer absolute liability on Canadian corporations for the debts of related foreign corporations;

b) US substantive law (*ERISA*) does not confer absolute liability for debt owed by American corporations on related foreign corporations extra-territorially; and

c) as a matter of public policy, this Court should not allow the US Order to apply to Walter Canada based on absolute liability.

13. The Steelworkers take the position that the above issues are appropriate and just for disposition by Summary Trial and that the Summary Trial Application should be allowed.

14. The Steelworkers take the position that the Summary Trial Dismissal Application should be dismissed as the Court has sufficient information and facts to decide these issues, given that the 1974 Plan Claim alleges absolute liability test and has brought the 1974 Plan Claim in a forum where Canadian substantive law applies.

PART 2 - ADDITIONAL FACTS

15. The Steelworkers agree with the facts set out in the Statement of Uncontested Facts ("SUF") and refer to the following facts set out in the SUF and Walter Canada' Book of Evidence.

The 1974 Plan Claim

16. As of \April 2011, the 1974 Plan had a total unfunded liability of greater than $4 billion USD. (1974 Plan, Am. NOCC, para 56)

17. During the US bankruptcy proceedings, Walter US sought and obtained a judgment from the US Bankruptcy Court authorizing Walter US to terminate its collective agreements and to cease making pension contributions to the 1974 Plan, triggering its withdrawal liability to the 1974 Plan. Walter US's debt to the 1974 Plan was confirmed in the US Order. (1974 Plan, Am. NOCC, para 63)

18. The US Bankruptcy Court did not consider or name Walter Canada as a debtor.

19. The US Order sets the debt to the 1974 Plan at to address Walter US's portion of the unfunded liabilities at approximately $904 million USD, including approximately $180 million in liquidated damages. (1974 Plan, NOA, para 19)

20. There has been no determination by any court that the US Order applies to Walter Canada.

21. The 1974 Plan alleges that United States law, and in particular the law in effect in the District of Columbia and the State of Alabama, has the closest and most real connection to the 1974 Plan Claim. (1974 Plan NOA Resp, para 7)

22. The 1974 Plan Claim, if allowed, will eliminate almost any recovery for the members of the Steelworkers' Claims, including those arising under the Collective Agreement. (1974 Plan NOA,

para 60)

Steelworkers

23. The Steelworkers were the certified bargaining agent for approximately 308 production employees at the Wolverine Mine near Tumbler Ridge BC, operated by Walter Energy Inc. and Wolverine Coal Ltd. as Wolverine Coal Partnership ("Wolverine"), part of Walter Canada. (USW 2nd Am. Resp., para. 11; SUF, para. 71; 2016 BCSC 107, para 6)

24. The Steelworkers and Wolverine were parties to a collective agreement, with a term August 1, 2011to July 31, 2015, (the "Collective Agreement"), which continues to bind Conuma Coal Resources Lt, the successor employer that purchased the Wolverine Mine during the *CCAA* proceedings. (USW 2nd Am. Resp., para. 12; 2016 BCSC 1746, para 19)

25. Disputes about the Collective Agreement and the employment relationship were addressed through grievance arbitration, under the *Labour Relations Code*, RSCB 1996 c. 244, the BC Labour Relations Board, and subject to judicial review in British Columbia Supreme Court. (2016 BCSC 107, para 72)

26. On April 15, 2014, Wolverine shut down its mine operations without advance notice to the Steelworkers or Wolverine's employees, contrary to s. 54 of the *Labour Relations Code.* After two years, these were not recalled and terminated when those recall rights expired, entitling them to Collective Agreement Severance pay and termination payments under s. 64 of the *Employment Standards Act*, RSBC 1996, c. 113. (2016 BCSC 1413, para 15)

27. The approved claims of the Steelworkers in the CCAA process (collectively the "Steelworkers' Claims") are approximately $12,800,000 and include:

i. damages for violation of section 54 of the *Labour Relations Code*, in failing to provide notice of shut down and layoff of the Wolverine Mine in April 2014 (the "S.

54 Damage Claim");

ii. severance pay pursuant to Collective Agreement payable when approximately 294 employees laid off in April 2014 were not recalled within 2 years (the "Severance Claim"); and

iii. group termination pay pursuant to section 64 of the *Employment Standards Act* because laid off employees were not provided any working notice of termination (the "Group Termination Claim").

(USW 2nd Am. Resp., paras. 20-22; SUF at para. 77; 2016 BCSC 1413 at para 16; and 2016 BCSC 107 at para 72)

PART III - ISSUES

28. This submission addresses the following issues raised by the Applications:

Summary Trial Application

Issue 1: Under Canadian conflict of laws rules, is the 1974 Plan Claim against Walter Canada governed by Canadian substantive law or US substantive law (including *ERISA*)?

Issue 2: If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including *ERISA*), as a matter of US law does Controlled Group Liability under *ERISA* extend extra-territorially?

ISSUE 3: If the 1974 Plan's claim against Walter Canada is governed by US substantive law (including *ERISA*), and *ERISA* applies extraterritorially, is that law unenforceable because it conflicts with Canadian public policy?

Summary Trial Dismissal Application

ISSUE 4: Is Summary Trial appropriate on the Threshold Legal Issues?

PART IV - SUBMISSIONS

ISSUE 1: Under Canadian conflict of laws rules, is the 1974 Plan Claim against Walter Canada governed by Canadian substantive law or US substantive law (including *ERISA*)?

29. The nature of 1974 Plan Claim requires this Court to answer the simple question: *Does the US Order apply to Walter Canada?* If the Court applies Canadian substantive law, as the Steelworkers urge, then the answer is NO because Walter Canada is not named in the US Order. Since the US Order does not apply to Walter Canada, the 1974 Plan Claim must immediately fail.

30. If the question: *Does the US Order apply to Walter Canada?* is addressed pursuant to US substantive law, including *ERISA*, then the answer is still NO, but the Court must consider the additional legal issues rased in the Summary Trial Application, including whether *ERISA* applies extra-territorially, and whether portions of *ERISA* conflict with Canadian public policy.

31. British Columbia substantive law applies in this proceeding because the 1974 Plan Claim is brought against Walter Canada in British Columbia, where Walter Canada is ordinarily resident. British Columbia substantive law does not recognize the absolute liability of Canadian corporations for the debt of related foreign corporations as an exception to the principle of legal personality. The US Order does not apply to Walter Canada on its face or by operation of British Columbia substantive law and therefore the 1974 Plan Claim must fail.

32. It is important to note that the 1974 Plan Claim does not seek to have this Court recognize a foreign judgment naming a Canadian debtor; there is no order naming Walter Canada. The fundamental legal issue in the 1974 Plan Claim is whether substantive law requires this Court to apply the US Order to Walter Canada as a matter of absolute liability. The 1974 Plan bears the onus of persuading this Court that it must apply the US Order to Walter Canada for the 1974 Plan Claim to succeed, which it can only do if US substantive law applies and the criteria in issues 2 and 3 are met.

33. British Columbia substantive law does not permit this Court to apply the US Order to Walter

Canada due to separate legal personality. US substantive law may permit the a court to find that the US Order applies to Walter Canada, but not as a matter of absolute liability, and only if the 1974 Plan can demonstrate the extra-territorial intent of the underlying legislation, and if the court applying *ERISA* has jurisdiction. The choice of which substantive law to apply, US or Canadian, is critical.

BC Supreme Court has territorial competence

34. As a starting point, it is useful to determine how this Court has jurisdiction over the 1974 Plan Claim. This Court's jurisdiction extends to applying the established substantive and procedural laws of British Columbia, referred to as territorial competence, if there is a connection between BC and a party to the proceeding.

35. A person can establish the territorial competence of this Court through a number of ways, as set out in the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c.28 ("*CJPTA*"). Pursuant to section 3(d) of the *CJPTA,* this Court has the territorial competence to determine the 1974 Plan Claim because Walter Canada, the person against whom a claim is brought, is ordinally resident in British Columbia, pursuant to section 7 of the *CJPTA.*

36. While the Court can have territorial competence when "there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based", as per section 3(e) of the *CJPTA*, there is no suggestion that this arises here. There is no connection between British Columbia and the issuance of the US Order, which occurred based on facts in Alabama and the US Bankruptcy Court proceedings. Territorial competence only comes from Walter Canada's domicile.

37. The reason this Court has territorial competence, based on identity of the parties or some other factor, is an important, though not necessarily determinative element in looking at the nature of the claim, which informs choice of law.

The nature of the 1974 Plan Claim is legal personality

38. Having established this court has territorial competence because of the residence of Walter Canada, the Court must determine whether to apply US or Canadian substantive law to deal with the assertion that the US Order applies to Walter Canada. The legal nature of the claim raised in the proceeding dictates the choice of law principle pursuant to which the Court selects the applicable substantive law.

> The usual rule in conflict of law situations is that the forum court characterizes the claim according to its own laws. ...
>
> *Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102, para 16

39. The 1974 Plan Claim turns on the legal status of Walter Canada and whether the US Order naming Walter US can attach to another entity. As set out in the 1974 Plan's Amended Notice of Civil Claim, the legal basis for the 1974 Plan Claim is the 1974 Plan and the US Collective Agreement that Walter US was a party to in Alabama.

40. The Steelworkers agree with Walter Canada that the 1974 Plan Claim turns on whether the separate legal personalities of Walter Canada and Walter US can be ignored.This determination is subject to the conflict of law rule that the status and legal personality of a corporation is governed by the law of the place that Walter Canada was incorporated, resides and operates: British Columbia. (Walter Canada submission, para 66).

Application of US Substantive Law demonstrates that the nature of the 1974 Plan Claim is legal status

41. The 1974 Plan relies upon *ERISA* as the US substantive law which makes Walter Canada liable under the US Order for Walter US's debt. *ERISA* includes sections which holds corporations connected as either parent, child or siblings by certain numeric shareholder thresholds absolutely liable for debt if one member withdraws from a multi-employer pension plan and owes money to the

plan ("Controlled Group Liability")[3]. Controlled Group Liability was adopted in the United States in order to provide greater protection to employee retirement benefits delivered through multi-employer Pension Plans in 1980. (Mazo Expert Report, para 7)

42. The absolute liability of Controlled Group Liability was explained by a US Court as follows:

> Under certain circumstances, one member of a controlled group may be responsible for the withdrawal liability of another member of the controlled group. These principles apply only when there are two or more separate businesses that are banded or associated together in a "controlled group". Participation in the controlled group, by itself, imposes equal responsibility upon all members of the controlled group for the withdrawal liability of an "employer" member of the controlled group, i.e., even though the "employer" member of a group of trades or businesses is the only one with a pension plan. Once notice to the "employer" is given, as required by 29 U.S.C. ? 1399, it is totally irrelevant as to whether actual or even constructive notice is given or imputed to the "non-employer" members of a controlled group. The liability of the "non-employer" members of a controlled group does not rest on any notice safeguards under ERISA. The "non-employer" members of the controlled group do not even have to be engaged in the same business enterprise, or even in a similar business. A striking example is provided in Pension Benefit Guaranty Corp. v. Ouimet Corp., 630 F.2d 4, 11-13 (1st Cir.1980), where one member of a controlled group (the "non-employer") did not even have any employees!
>
> Congress built the equivalent of withdrawal liability "guaranty's" into ERISA, at the time of the enactment of the multiemployer amendments. The "guaranty's", commonly known and referred to as the "controlled group" statutes, 29 U.S.C. ? 1301(b) (1), and the regulations adopted thereunder, 29 C.F.R. Part 2612, and consider the entire group as but one "employer", 29 U.S.C. ? 1002(5), and impose absolute liability upon all members of a control group for the withdrawal liability of any member of a statutory group of enterprises, *1578 even though the "employer" member of a group of trades or business is the only one with a pension plan, and regardless of whether their groups have employees. Pension Benefit Guaranty Corp. v. Ouimet Corporation, 630 F.2d 4 (1st Cir.1980). Under "controlled group" statutory liability, an inquiry as to the interrelationship of the members of the control group, with the employees of all members of the control group, as required under the "single employer" test, is totally unnecessary and irrelevant.
>
> *Connors v. Peles*, 724 F. Supp. 1538 (W.D. Pa. 1989) at 1577-9

43. The domestic application of *ERISA*'s Controlled Group Liability is entirely focussed on the identify of the parties and its relationship in terms of shares. Factors such as the intent, knowledge, direction, operations, purpose, domestic location, and activities of the corporations are irrelevant to

---

[3] Found in 29 U.S.C. ss 1381

the application of Controlled Group Liability.

44. The1974 Plan asserts that Walter Canada is part of Walter US's Parent-Subsidiary Controlled Group. Under *ERISA*, a Parent-Subsidiary Controlled Group is a group consisting of entities connected through a controlling interest with a common parent where stock with at least 80% of the voting power or value (other than the parent) is owned by one or more corporations (Walter US) and the common parent corporation owns stock with at least 80% of the voting power of at least one of the corporations (Walter Canada).

45. If *ERISA*'s Controlled Group Liability were applied by a competent US Court with jurisdiction and Walter US and Walter Canada were related corporations incorporated and ordinarily resident in the same American jurisdiction, the Steelworkers expect that the US Order would be recognized as against Walter Canada as a matter of absolute liability. However, as set out below in the discussion on Issue 2, *ERISA* does not apply extra-territorially and a US Court could not apply the Controlled Group Liability to a Canadian subsidiary without first finding personal jurisdiction, and then rebutting the presumption against extra-territoriality.

46. The nature of the 1974 Plan Claim is the attachment of the US Order to Walter Canada, which necessarily involves questions about the legal personality of the parties. The nature of the 1974 Plan Claim is not Walter US's liability for pension debts, that has been determined by the US Order.

Application of BC Substantive Law results in no recognition of US Order against Walter Canada

47. US and Canadian insolvency proceedings operate under similar frameworks, but differ significantly on their approach to dealing with multi-employer pension plan funding liabilities. The US government has adopted Controlled Group Liability to address post-insolvency funding liabilities rather than placing tighter restrictions on plans to reduce the likelihood of funding liabilities or by providing greater priority for pension liabilities during insolvency proceedind. Canadian insolvency

law continues the principles of corporate law identity, US insolvency law creates an exception.

48. Under Canadian substantive law, a corporation's domicile determines its legal status and legal personality:

> A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., *Canadian Conflict of Laws 4th ed.*, (Toronto: Butterworths, 1997) pp. 574-575; *Voyage Co. Industries v. Craster*, supra; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, supra; Fraser & Stewart, op. cit. p. 144; *Palmer's Company Law* (looseleaf ed.) *Vol. I*, (London: Sweet & Maxwell, 1997) pp. 2105-2106]:
>
>> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders. [Castel, supra, at p. 574-575].
>
> *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312, 184 D.L.R. (4th) 335, para 175

49. The 1974 Plan's Claim is governed by Canadian substantive law and must be dismissed because there is no basis in Canadian law to extend absolute liability for foreign debt to related Canadian corporations in a manner which ignores separate legal personality.

50. Canadian bankruptcy and insolvency law does not recognize absolute liability such as that created by the Controlled Group Liability of *ERISA*. Canadian courts are loathe to pierce the corporate veil absent critical circumstances. In *Shoppers Drug Mart v. 6470360 Canada Inc.*, 2014 ONCA 85, at para 43, the Court said that "only exceptional cases that result in flagrant injustice warrant going behind the corporate veil. It can be pierced if those in control expressly direct a wrongful act to be done."

51. Laskin J.A. said in *Gregorio v. Intrans-Corp.*, [1994] O.J. No. 1063 ("*Intrans-Corp*") , at

para 28:

> … Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights. ...

52. Judges in BC have followed the above approach. In *Harrington v. Dow Corning Corp.*, [1998] B.C.J. No. 831, Mackenzie J. cited *Intrans-Corp* with approval when referring to the alter ego test, at para 5:

> The test for an alter ego or agency relationship sufficient to impose liability on a parent company is a stringent one. The subsidiary must be under the complete control of the parent to an extent that it has no independent functions of its own. It exercises no discretion independently of the parent: *Aluminum Company of Canada v. The Corporation of the City of Toronto*, [1944] 3 D.L.R. 609 (S.C.C.); *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.); *Hunt v. T & N PLC.* [1989] B.C.J. No. 2173, November 29, 1989, B.C.C.A., Vancouver Registry CA011399.

53. In *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2011 BCSC 1072, at para 128, this Court described the power to pierce the corporate veil as follows:

> The circumstances in which the Court will lift the veil and impose the contractual liability of a subsidiary on a parent require more than the exercise of total control by the parent over the subsidiary. The corporate veil will not be pierced absent conduct akin to fraud.

54. The distinct legal personalities of subsidiaries, particularly those operating exclusively in Canada separate from their US parent corporations, have been recognized and respected by Canadian courts. The 1974 Plan Claim therefore asks this Court to ignore the separate legal personality of Walter Canada and therefore the nature of the claim itself conflicts with the governing BC law. As a matter of Canadian substantive law, there is simply no basis alleged to attach the US Order to Walter Canada and the 1974 Plan Claim fails.

There is no reasonable test other than domicile to determine choice of substantive law for the 1974 Plan Claim

55. Canadian courts have the ability to apply foreign substantive law to resolve a dispute, only when there is a real and substantial connection between the jurisdiction and the facts on which the proceeding against the person is based. That is not the case in these circumstances. Here, the foreign claim is the attachment of the US Order to Walter Canada due to Controlled Group Liability, unrelated to the conduct of Walter Canada or the location of liability, that holds no real and substantial connection to British Columbia.

56. In *Beals v. Saldanha*, [2003] 3 SCR 416, 2003 SCC 72, at para 32, the Court discussed how the "real and substantial connection" test requires that a significant connection between the cause of action and the foreign law:

> ... a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

57. Under Controlled Group Liability, the domicile of the related companies (according to the 1974 Plan), their participation in events giving rise to the debt, even their knowledge of events is irrelevant to an absolute liability application such that inquiring into these factors will not assist the court in a fair choice of law analysis. The arbitrary nature of Controlled Group Liability, absolute liability for another's debt conferred solely by share ownership of a corporation, demands that its application be determined by the substantive law of the domicile of company against which the debt is asserted.

58. Due to the mechanical nature of Controlled Group Liability, it is contrary to the nature of the 1974 Plan Claim to apply the "real and substantial connection" test in this instance. The overriding factual issue is that Walter Canada had no involvement in Walter US's obligations to the 1974 Plan which resulted in the US Order. Regardless of the mechanics of Controlled Group Liability which

the 1974 Plan asserts must be applied in British Columbia, there is no substantial connection between Walter Canada and the foreign jurisdiction issuing he US Order which would dictate US substantive law must apply.

59. The Court must therefore accept that the nature of the claim dictates that Walter Canada's domicile determines that British Columbia substantive law applies and thus the 1974 Plan Claim cannot succeed.

ISSUE 2: If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including *ERISA*), as a matter of US law does Controlled Group Liability under *ERISA* extend extra-territorially?

60. Walter Canada and the 1974 Plan have provided expert reports on this issue and the Steelworkers submit that the reports of Messrs. Abrams and Gropper should be preferred and this Court should find that as a matter of US substantive law, *ERISA* does not apply extra-territorially. These reports demonstrate that there is insufficient judicial authority and evidence of Congressional intent to rebut the presumption that *ERISA* does not apply extra-territorially.

61. On the issue of extra-territoriality, Mr. Abrams offered the following opinion, based on a thorough review of the case law:

> When faced with two plausible but competing interpretations of a statute—one supporting an extraterritorial application and the other not—the presumption against extraterritoriality obviates the need for a court to choose one over the other. As the U.S. Supreme Court counseled in *Arabian Oil*, "[w]e need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application . . . . Each is plausible, but no more persuasive than that. In short, ERISA's "controlled group" liability provisions do not reflect a "clearly expressed congressional intent" that "affirmatively and unmistakably" authorizes extraterritorial application.
>
> Abrams Expert Report, page 14

62. In response to the Abrams Report, the 1974 Plan filed an export report by Judy Mazo, which came to a different opinion. Ms Mazo's report was based on her personal experience working for the Pension Benefit Guarantee Corporation and one of its internal opinions on *ERISA*, on not on a review

of the relevant case law.

> PBGC's Opinion Letter 97-1 (May 1997)27, addresses a question very similar to the one before us. The agency's examination of the issues comports with the Supreme Court's analytical framework. Unlike Mr. Abrams, I find its reasoning persuasive. I believe a U.S. court would reach the same conclusion, particularly as the statement is from the expert agency charged by Congress with interpreting the law.
>
> Mazo Expert Report, para 51

63. However, Ms. Mazo does not cite any case law in support of her opinion, as noted by the reply export report filed by the 1974 Plan.

> If the imposition of controlled group liability domestically was unusual, there is no reason to assume that Congress intended to extend that liability beyond the borders of the United States in the absence of a clear affirmative indication. The Mazo Report does not cite any case in which a U.S. court has imposed withdrawal liability on a foreign affiliate of a U.S. company, or for that matter, where such liability has been imposed in a foreign proceeding.
>
> Gropper Export Report, page 4

64. Based on the expert reports and the authorities supporting the opinions, the Steelworkers submit that this Court must find that the 1974 Plan has not discharged the presumption that *ERISA* does not apply extra-territorially. It is only if this Court finds that the expert opinions conflict that it should interpret the law itself.

> It is well settled that a court faced with conflicting opinions about foreign law is bound to make its own decision about what that law requires: *Sarabia v. Oceanic Mindoro*, at para. 11. The general rule with respect to foreign statutes is that the court must consider the evidence of the experts and not the text itself unless the experts cannot agree on the statute's meaning. Faced with contradictory interpretations, the court has no choice but to weigh the expert opinion along with its own examination of the text: *Rouyer Guillet et cie. v. Rouyer Guillet & Co.*, [1949] All E.R. 244 at 244 (C.A.); *Allen v. Hay* (1922), 1922 CanLII 25 (SCC), 64 S.C.R. 76.
>
> *Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102, para 229

65. If this Court believes that the opinions conflict, then it should examine the text of *ERISA* and its interpretations by US Courts to reach its own conclusion. In cases where an order against a non-

US subsidiary corporation has been sought, the US Courts have declined to apply the Controlled Group Liability provision to attach multi-pension plan withdrawal liability. These cases have almost uniformly found that *ERISA* does not apply extraterritorially, with respect to Controlled Group Liability, to foreign subsidiaries without a substantial connection to the US jurisdiction.

66. The US Courts have not dealt with the extra-territorial application of *ERISA*'s Controlled Group Liability because foreign corporations do not meet the threshold for the Court's to take jurisdiction. This is significant factor because the rulings of the US Courts are consistent with the opinion of Mr. Abrams but in direct contrast to the opinion of Ms. Mazo, who opines that Controlled Group Liability automatically applies without the need for a court to apply the nuanced tests of control and connection to the jurisdiction.

67. Indeed, Ms. Mazo is critical of Mr. Abrams for raising the issue of jurisdiction, assuming that Controlled Group Liability attaches pension liability debt to related corporations without any judicial intervention, including the most basic step: determining whether the court at issue has jurisdiction to enforce or apply the US Order.

> Mr. Abrams also errs when he brings in principles of personal jurisdiction to determine whether ERISA is being applied extraterritorially, see Abrams Report, 17-19. But that is not relevant to what is happening here. The UMWA 1974 Plan has come to a Canadian court to collect on the statutory debt of a Canadian company. Since is not asking a U.S. court to exercise jurisdiction over that Canadian collection action, there is no reason to consider the points Mr. Abrams raises regarding personal jurisdiction.
>
> Mazo Expert Report, para 56

68. Ms. Mazo's opinion is, respectfully, based on an unsupported assumption that the US Order attaches to Walter Canada in the United States the moment it is ordered despite there being no reference to Walter Canada in the US Order. In fact, the US Order is the statutory debt of a US Company that a court needs to apply to a Canadian Company before it can be enforced. A review of the cases in which US Courts were asked to apply Controlled Group Liability demonstrates that, contrary to Ms. Mazo's opinion, the US Courts are concerned about their jurisdiction to apply *ERISA*

to foreign corporations and consistently decline to apply it on that basis. They do not even get to the question of presumption against extra-territorial application.

69. *GCIU-Employer Retirement Fund v. Goldfarb Corp.*, 565 F.3d 1018 (7th Cir. 2009) ("*Goldfarb*"), is a case that demonstrates that if a foreign defendant does not have sufficient personal jurisdiction of the US court, the claim will be dismissed. In *Goldfarb*, a multi-employer pension plan brought a claim for withdrawal liability against the Canadian indirect-parent company of the contributing employer, Fleming. Goldfarb did not maintain a place of business, employ individuals, serve customers, nor have an agent for service of process inside the US. Goldfarb did not direct Fleming's daily affairs, and the parties had separate payroll departments, bank accounts and filed separate tax returns. The Seventh Circuit affirmed the district court's dismissal of the claim due to a lack of personal jurisdiction. The Court found that, despite *ERISA*'s Controlled Group Liability arising out of corporate affiliation, Goldfarb's ownership of 60% of the equity interest in Fleming, and limited contact with Fleming's lenders, was "too attenuated to support specific personal jurisdiction" (at 1025). This case establishes that when an affiliated corporation is foreign, a parent-subsidiary relationship is not, in and of itself, sufficient to establish personal jurisdiction to apply Controlled Group Liability, contrary to Ms. Mazo's opinion.

70. In a related case, *GCIU-Employer Retirement Fund v. Coleridge Fine Arts.*, 154. F3d 1190 (7th Cir. 2009) ("*Coleridge*"), again the US Court found that a foreign affiliate is not automatically liable under *ERISA* absent sufficient minimum contacts with the US. In *Coleridge*, the Court found that ownership by Irish corporations of a Kansas-based subsidiary subject to withdrawal liability under *ERISA* was insufficient to ground the personal jurisdiction of the Irish corporations. The Court found insufficient evidence of control by the Irish corporations, supported by the fact that the parties had separate budgets, payroll and business records and, in particular, because the Irish corporations never had direct control over the day-to-day affairs of the subsidiary. Again, the Controlled Group Liability did not operate as Ms. Mazo opined.

71. Similarly, in *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000) a pension fund, and its trustee appealed the dismissal of

their claim against two Canadian related companies. The Seventh Circuit court affirmed that personal jurisdiction over the defendants was lacking. The Court held that "personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary". The Court found that the parties maintained separate books, records, financial statements and tax returns, and that the Canadian corporations did not exercise day-to-day management control over the company to which liability attached. This case is illustrative of the reluctance, and perhaps uncertainty of their ability, of US Courts to apply Controlled Group Liability extra-territorially.

72. These cases demonstrate that, at a minimum, US substantive law requires that the personal jurisdiction of a foreign subsidiary must be established before the Controlled Group Liability provisions of *ERISA* apply, such that *ERISA* has not be found to apply extraterritorially. These cases contradict Ms. Mazo's opinion that *ERISA* operates in such a way that liability automatically flows to foreign subsidiaries.

73. Accordingly, if this Court undertakes its own analysis of whether the Controlled Group Liability provisions of *ERISA* applies, the Steelworkers submit that this Court must find that the 1974 Plan has not discharged the presumption that *ERISA* does not apply extra-territorially. The presumption against extra-territorial effect which applies to *ERISA* under US substantive law is consistent with Canadian substantive law.

> The legislative jurisdiction of the provinces is limited to matters "[i]n each Province" by the wording of s. 92 of the Constitution Act, 1867. Unless otherwise explicitly or implicitly provided, legislatures are presumed to respect the territorial limits of their legislative powers: Côté, at pp. 200-203. If possible, legislation should be construed in a manner consistent with this presumed intent. Similarly, it is now accepted that where legislation is

open to more than one meaning, it should be interpreted so as to make it consistent with the Constitution: McKay v. The Queen, 1965 CanLII 3 (SCC), [1965] S.C.R. 798, at p. 803; Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at p. 1078.

Castillo v. Castillo, [2005] 3 S.C.R. 870, 2005, para 30

ISSUE 3: If the 1974 Plan's claim against Walter Canada is governed by US substantive law (including *ERISA*), and *ERISA* applies extraterritorially, is that law unenforceable because it conflicts with Canadian public policy?

74. If this Court determines that it should apply US substantive law to decide the issue of whether the US Order applies to Walter Canada based on Controlled Group Liability and that the presumption against extra-territoriality is overcome, this Court should decline to enforce that provision of *ERISA* due to a compelling public policy concern: the automatic transfer of American unfunded pension plan liabilities to Canadian corporations and Canadian workers.

The procedural concern with Controlled Group Liability

75. The Steelworkers do not suggest that Canadian Courts should never consider claims against Canadian corporations for pension liabilities under *ERISA* from related American companies. Rather, Canadian Courts should not apply Controlled Group Liability to Canadian Corporations as a matter of absolute liability in the manner that the 1974 Plan and Ms. Mazo suggest with regard to only the shareholder interest of the corporation. Indeed, it is clear that the US Courts do not apply Controlled Group Liability in an automatic matter without scrutinizing the circumstances of the corporations and their claims, albeit in the name of establishing personal jurisdiction.

76. From a Canadian policy perspective, accepting that *ERISA* Controlled Group Liability requires a Canadian court to apply a US judgment asserted by a US creditor against a Canadian corporation which is not named in the judgment would deprive Canadian courts of their inherent discretion to control their procedure and jurisdiction and the discretion to apply equitable considerations.

77. The automatic application of Controlled Group Liability in a manner suggested by the 1974 Plan and Ms. Mazo would prevent a Canadian Court from considering:

i. the circumstances leading to the debt and the calculation of the debt;

ii. the connection between the Canadian company and the facts of giving rise to the debt, including the meaningful and substantial connection test; and

iii. the impact of allowing the debt on other parties, particularly relevant in insolvency actions such as CCAA.

The substantive concern with Controlled Group Liability

78. While the application of a foreign absolute liability law on its own may be cause for Canadian courts to have concern, it is the subject matter of the Controlled Group Liability that offends public policy. The *ERISA* Controlled Group Liability arises when an employer withdraws from a multi-employer pension plan and cannot satisfy its withdrawal liability. In that case, particularly in insolvency, it can have the effect of transferring American labour legacy costs to Canadian corporations and thus Canadian workers.

79. In this case, Walter US exited the 1974 Plan through insolvency proceedings, thus triggering withdrawal liability which is presently unfunded. This places the 1974 Plan in position of seeking to satisfy that debt, including bringing the 1974 Plan Claim. The 1974 Plan claims that it was underfunded by approximately $4 billion USD at least 5 years prior to the 1974 Plan Claim. (1974 Plan Am NOCC, para 56)

80. As a matter of public policy, Canadian courts should be concerned about adopting an absolute liability rule that Canadian corporations are responsible for the unfunded pension liabilities of their related US corporations. The facts underlying the US Order are unfortunately common in the United States:

- mutli-employer pension plans are not sufficiently funded;
- an employer encounters financial challenges and enters insolvency proceedings;
- a bankruptcy court allow the employer to relieved of its collective agreement obligations;
- the court allows the employer to withdraw from the multi-employer pension plan to avoid the legacy labour costs; and

- the pension plan is further underfunded and must seek to recover the debt.

81. The Walter US scenario was described as a common occurrence in the United States.

> A common form of complete withdrawal, as seen in Sun Capital, occurs when bankruptcy forces a business's closure. It is widely accepted, and indeed the PBGC advocates, that filing a Chapter 11 bankruptcy petition is not itself a complete withdrawal. 80 However, the bankruptcy court's confirmation of the company's reorganization plan, which effectively revokes the collective bargaining agreement, generally does trigger a complete withdrawal under §1385(a). 81 In most cases, the portion of the withdrawal liability accruing before the bankruptcy filing will be treated as general unsecured debt, leaving the union little chance of success in recouping much, if any, of the payment.
> ...
> Realistically, though, how the bankruptcy court classifies the withdrawal liability debts makes little practical difference; either way, the union stands to receive little from the bankruptcy proceedings. Indeed, one industry expert states that in most cases, a bankrupt employer's withdrawal liability payment is only cents on the dollar.
>
> *Where do we go now? The uncertain future for 29 u.s.c. § 1301(b)(1), private Equity funds, and multi-employer pension plans after Sun Capital*, 49 Ga. L. Rev. 209 2014-2015 at 222-23

82. Numerous academics have observed that the above scenario repeats itself often in the United States and is not adequately addressed by *ERISA.* The pattern of employers seeking withdrawal from labour legacy costs such as multi-employer pension plans during insolvency proceedings, leaving unions and retirees without benefits, is a public policy concern for the United States. See in particular:

> *Fueling the Death Spiral for Workers' Pensions: The Bankruptcy Process and Multiemployer Pension Plans*, 58 Vill. L. Rev. Tolle Lege 57 (2015)
>
> *Why the Bankruptcy Reform Act Left Labor Legacy Costs Alone*, 71 Mo. L. Rev. 985 2006
>
> *At the Crossroads of Three Codes: How Employers Are Using ERISA, the Tax Code, and Bankruptcy to Evade Their Pension Obligations*, 65 Ohio St. L.J. 1577 2004

83. Canada, in contrast, has strengthened the protections for collective agreements and pension funds in insolvency proceedings. Section 33 of the *CCAA* requires that collective agreements must be observed, subject to the ability of the court to allow a company to serve notice to commence

collective bargaining during insolvency. Section 6(6) of the *CCAA* requires that pension plan contributions must be made, including any amount required be paid to fund prescribed pension plans.

84. However, while the structure of American insolvency may trouble Canadians in that it leaves multi-employer pension plans underfunded and retirees without benefits, it is the Controlled Group Liability provision which can transfers these debts to Canada that the Steelworkers submits would offend the basic morality of Canadians. Here, the 1974 Plan is asking that this Court to find that the labour legacy costs of Walter US are to be born by the workers of Wolverine Mine by reducing their Severance and Termination Pay to almost nothing.

85. From a public policy perspective, Canadians workers should be able to depend on remedies provided by statutes without the concern of foreign claims compromising the statutory obligations of their employers including the *Labour Relations Code* and the group termination provisions in section 64 of the *Employment Standards Act*. Further, unionized Canadians workers should be able to collect their earned Collective Agreement benefits without the concern of foreign claims compromising these benefits.

86. The1974 Plan's Claim would have the result of undercutting the public policy objectives of *Employment Standards Act* and the *Labour Relations Code* and Collective Bargaining by diminishing the ability of former Wolverine employees to receive the wages and benefits they should have earned by expropriate funds that are meant to satisfy these claims.

87. As a matter of public policy, the courts should not apply ERISA's Controlled Group Liability to the US Order, even if US substantive law applies. The 1974 Plan Claim should not be recognized because it effectively undermines the public policy objectives of provincial legislation from which two of three claims of the Steelworkers members' derive. The basic morality of Canadians should seek to ensure that the purposes of remedial legislation is being served and not subverted by unfunded American pension debt.

ISSUE 4: Is Summary Trial is appropriate on the Threshold Legal Issues?

88. The Steelworkers support determining the three questions posed in Walter Canada's Summary Hearing Notice of Application (the "Threshold Legal Issues") in a summary manner. The Supreme Court of Canada recently discussed the importance of resolving matters summarily and stated that a "culture shift" is required to allow judges to actively manage the legal process in line with the principle of proportionality.

> *Hryniak v. Mauldin* 2014 SCC 7, applied in *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502 at para. 16

89. The most compelling reason to determine the Threshold Legal Issues is the issue of judicial economy. In *Bramwell v. Greater Vancouver Transportation Authority*, 2008 BCSC 1180, at para 12, Madam Justice Allan cited "a real likelihood of a significant savings in time and expense" as a compelling reason to order severance.

90. In the circumstances before this Court, severing the Threshold Legal Issues creates a real likelihood of saving time and expenses. If this Court finds that the 1974 Plan Claim is governed by Canadian substantive law, the claim must fail. Alternatively, if the Court finds that the 1974 Plan Claim is governed by United States substantive law, but that the Controlled Group Liability provisions of *ERISA* do not extend extra-territorially due to intent or lack of jurisdiction, the 1974 Plan Claim must fail.

91. Additionally if this Court finds that the 1974 Plan Claim is governed by United States substantive law and that the Controlled Group Liability provisions of *ERISA* may apply extra-territorially, but that provision should not be enforced as a matter of absolute liability due to conflict with Canadian public policies, the 1974 Plan Claim must fail.

92. Since a determination on any three of the Threshold Legal Issues may dispose of the entirely of the 1974 Plan Claim, there exists a real likelihood of significant savings in time and expense.

Hearing the Summary Trial Application furthers the goals of efficiency and judicial economy.

The Threshold Legal Issues are suitable for summary determination

93. Severed issues can be determined summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law, provided that the judge does not find it is unjust to do so.

> *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.)

94. Authorities indicate that, in considering whether it would be unjust to proceed summarily, BC courts have typically considered the complexity of the matter, any urgency and prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices.

95. The Steelworkers disagree with the 1974 Plan that Walter Canada is seeking to "litigate in slices". Rather, there are preliminary issues of law that should be determined in the interests of judicial economy. The administration of justice, as it affects the parties and the orderly use of court time, will be enhanced by dealing with these issues on a summary trial.

96. There is a significant urgency to these proceedings. The Steelworkers members have already suffered significant delay in having the Steelworkers' Claims processed. If the 1974 Plan Claim can reasonably be disposed of by a preliminary Summary Trial and resolve the distribution of the Steelworkers' Claim, and the claims of other creditors, it should proceed on that basis.

97. The Court should also consider the significant cost of an expansive conventional trial against the fact that the Summary Issues can proceed based on affidavit evidence. This Court has already

determined that further discovery from Walter Canada is not required for the fair adjudication of the Summary Issues. The facts required to determine the Threshold Legal Issues are already before this Court.

Significant proceedings if the 1974 Plan Claim is not determined by Summary Trial

98. In weighing whether a Summary Trial is appropriate, the Court must consider judicial resources and the length of proceedings. The 1974 Plan has stated it seeks additional discovery related to the degree of integration between Walter Canada and Walter US. The Court must consider that if the Summary Trial Application is not allowed, the Steelworkers as a Respondent to the 1974 Plan Claim, will be forced to address these issues, adduce additional evidence and that the Steelworkers will have the right to raise the additional legal issues as set out in the Steelworkers' pleadings.

More discovery sought by the 1974 Plan and the Steelworkers

99. The primary basis of the 1974's Plan Summary Trial Dismissal Application is that it claims it requires a full trial in order to seek discovery to try to discover more facts related to the integration between Walter Canada and Walter US. The 1974 Plan has asserted that "An understanding of the Walter Group's operations and the relationships between the entities in the Walter Group is central to resolving the1974 Plan Claim". (1974 NOA, para 8)

100. The 1974 Plan has sought to have the US Order apply to Walter Canada in a Canadian Court and attorned to this Court's jurisdiction. As such, they have made the identity of Walter Canada and its legal personality the central legal issue. In selecting Canada as the forum to apply the US Order, they have elected Canadian substantive law, knowing that Controlled Group Liability is not recognized as a matter of Canadian substantive law.

101. The additional discovery appears to be to establish a meaningful and substantial connection between the US Order and Walter Canada, however, that is not the test for determining choice of

law. If the 1974 Plan pursues additional discovery around the degree of integration between Walter Canada and Walter US, the Steelworkers will adduce evidence of the day to day operations of Walter Canada in its mining operations. However, the Steelworkers submit that this evidence is not necessary to decide the Summary Trial Application.

102. However, if the 1974 Plan is permitted additional discovery to adduce evidence relating to integration between Walter US and Walter Canada, the Steelworkers will adduce evidence in support of its experience that Walter Canada operated the Wolverine Mine as an independent Canadian operation, based on British Columbia laws, unrelated to Walter US The Steelworkers have pled, but not yet adduced evidence, of the following facts.

> The Steelworkers bargained the Collective Agreement with the management of Wolverine, who executed the Collective Agreement on its behalf: Hugh Kingwell, John Moberg and Michael Milner.
>
> At all times during collective bargaining, the management of Wolverine represented that they had the authority to negotiate and conclude the Collective Agreement, not Walter Energy's US affiliates.
>
> At no point did the management Wolverine represent that the Wolverine Mine operations or collective bargaining was controlled or directed by Walter Energy's US affiliates.
>
> Collective bargaining was conducted based on Canadian market conditions, economics expectations and the comparable Canadian operations.
>
> The Steelworkers has dealt with Wolverine management, primarily Hugh Kingwell, formerly Human Resources Director of Wolverine (now Human Resources Director of Walter Canadian Coal Partnership) in administering the Collective Agreement and dealing with grievances**,** not Walter Energy's US affiliates.
>
> Administrative services at the Wolverine Mine which involve the Steelworkers including payroll, human resources, health and safety, benefits, and the environment were provided by Wolverine, or Walter Canadian Coal Partnership, not Walter Energy's US affiliates. Mining operations and production at the Wolverine Mine were directed through Wolverine, not Walter Energy's US affiliates.

USW, 2nd Am Resp to NOCC, para 13-19

103. The Steelworkers may also seek discovery to adduce evidence regarding similar factors at Walter Canada's Brule and Willow Creek Mines in British Columbia.

Issues raised the Steelworkers

104. Aside from the discovery issues raised by the 1974 Plan, if this matter is not determined by Summary Trial, the Steelworkers will adduce evidence and make submissions relevant to the issues set out in its Response to the Notice of Claim, including whether recognizing the 1974 Plan Claim is reasonable and equitable in CCAA proceeding and whether it is appropriate to include the 1974 Plan Claim in a separate class than the Employee Claims with a lesser priority.

> Allowing the1974 Plan Claim will effectively eliminate the Employee Claims for the Steelworkers and is therefore not a reasonable or equitable plan.
>
> (USW 2nd Amended Response to NOCC, para 3)
>
> In the alternative, if the 1974 Plan Claim is allowed, it must be in a separate class than the Employee Claims and only paid out after the Employee Claims are satisfied in full.
>
> (USW 2nd Amended Response to NOCC, para 26)

105. These issues will necessarily involve significant arguments and evidence of the role of CCAA proceedings and the different nature of the claims, including the significance of the Employee Claims as statutory claims and the policy reasons to grant these a higher priority than American pension plan unfunded liability.

106. Canadian Courts applying the *CCAA* have recognized broad discretion to apply fairness and reasonableness, which includes considering the impact of the 1974 Plan Claim if allowed in full to effectively eliminate Employee Claims.

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. "Fairness" is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.
>
> *Olympia & York Developments Ltd. (Re)* [1993] O.J. No. 545 (Gen. Div.) at para. 28

107. Finally, and most significantly, the Steelworkers will present evidence and argument dealing with the *Charter of Rights and Freedoms* and the increased recognition of the constitutional protection of collective bargaining. One of the significant Employee Claims, at approximately $5 million, is the Severance Pay Claim. As set out by the Steelworkers:

> The Steelworkers' Severance Pay Claim is payable pursuant to the Collective Agreement, negotiated through the collective bargaining process, recognized as an activity protected by the freedom of association guarantee in section 2(d) of the *Charter of Rights and Freedoms*
>
> Canadian Courts must interpret and apply the *Companies Creditor's Arrangement Act* consistent with *Charter* values, which include recognizing and prioritizing Collective Agreement claims above foreign judgements, such as the 1974 Plan Claim.
>
> (USW 2nd Am. Resp. to NOCC, paras 32-33.)

108. The Supreme Court of Canada has recently expanded the scope of section 2(d) to include protection for collective bargaining. The Steelworkers will make extensive submissions on the development of the recognition of the freedom of association under the *Charter* and the Court's requirement in implementing the *CCAA* to apply it consistent with the *Charter*. Under the discretionary powers given to the Court under the *CCAA*, it is critical that any distribution order reflect *Charter* values and appreciate that the Severance Pay claim is as a result of the collective bargaining process. The *CCAA* process interferes with the Steelworkers' meaningful pursuit of workplace goals, as recognized the the Supreme Court of Canada:

> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2 (d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.
>
> *Mounted Police Association v. Canada*, 2015 SCC 1, para 72.

109. If the Summary Trial Application is allowed and the Steelworkers Employee Claims are allowed in full, then these additional issues do not need to be addressed. If the Summary Trial Application is dismissed and the 1974 Plan Claim continues, these additional issues become more significant to the Steelworkers who will be faced with the prospect of the loss of their Severance and Termination Pay.

PART V - CONCLUSION

110. The novel 1974 Plan Claim, which while raising interesting legal issues, should be dismissed based on the following conclusions to the Threshold Legal Issues:

i. The 1974 Plan Claim is governed by Canadian substantive law;
ii. however, if the 1974 Plan Claim is governed by US substantive law, the 1974 Plan Claim fails because the strict Controlled Group Liability provisions of ERISA do not apply extraterritorially; and
iii. even if Controlled Group Liability applies extraterritorially, that law is unenforceable as it conflicts with Canadian public policy.

111. The Steelworkers supports Walter Canada's request for an Order from the court declaring the above and submit that the Threshold Legal Issues are appropriate for summary determination, in line with the principles of proportionality.

112. The importance of this Summary Trial should not be understated, as it may set a precedent for related corporations liability for unfunded pension plans of related American corporations. Fundamentally, the Steelworkers say that it is not in the interest of Canadians to allow for the pension liabilities of an insolvent American corporation to take precedent over the bargained termination pay and statutory severance pay of Canadian workers.

All of which is respectfully submitted this 19th day of December 2016.

Craig Bavis and Jeff Sanders,
Counsel for the Steelworkers

PART VI - AUTHORITIES

[* indicates a duplication and can be found in Walter Energy's Authorities]

Cases:

*	*Beals v. Saldanha*, [2003] 3 SCR 416, 2003 SCC 72
1	*Bramwell v. Greater Vancouver Transportation Authority (c.o.b. Translink)*, 2008 BCSC 1180, [2008] B.C.J. No. 1651
2	*Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870
3	*Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2011 BCSC 1072, [2011] B.C.J. No. 1512
4	*Gregorio v. Intrans-Corp.*, [1994] O.J. No. 1063, 115 D.L.R. (4th) 200
5	*Harrington v. Dow Corning Corp.*, [1998] B.C.J. No. 831, 55 B.C.L.R. (3d) 316
*	*Hryniak v. Mauldin* 2014 SCC 7
6	*Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (B.C.C.A.)*, [1989] B.C.J. No. 1003, 36 B.C.L.R. (2d) 202
*	*JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312, 184 D.L.R. (4th) 335
*	*Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102
7	*Mounted Police Association v. Canada*, 2015 SCC 1
8	*Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502, [2015] B.C.J. No. 2667
9	*Olympia & York Developments Ltd. (Re)* [1993] O.J. No. 545 (Gen. Div.)
10	*Shoppers Drug Mart Inc. v. 6470360 Canada Inc. (c.o.b. Energyshop Consulting Inc./Powerhouse Energy Management Inc.)*, 2014 ONCA 85, [2014] O.J. No. 476

US Law:

*	*Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000)

11	*Connors v. Peles*, 724 F. Supp. 1538 (W.D. Pa. 1989)
*	*GCIU-Employer Retirement Fund v. Goldfarb Corp.*, 565 F.3d 1018 (7th Cir. 2009) ("*Goldfarb*")
*	*GCIU-Employer Retirement Fund v. Coleridge Fine Arts.*, 154. F3d 1190 (7th Cir. 2009) ("*Coleridge*")

Statutes:

12	*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (Sections 6 and 33)
13	*Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (Sections 3 and 7)
*	*Employee Retirement Income Security Act* of 1974 (Pub.L. 93-406, 88 Stat. 829, codified in part at 29 U.S.C. ch. 18
14	*Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 64
15	*Labour Relations Code*, RSBC 1996, c. 244 (Section 54)

Other Sources:

16	*At the Crossroads of Three Codes: How Employers Are Using ERISA, the Tax Code, and Bankruptcy to Evade Their Pension Obligations*, 65 Ohio St. L.J. 1577 2004
17	Colleen Ray, *Fueling the Death Spiral for Workers' Pensions: The Bankruptcy Process and Multiemployer Pension Plans*, 58 Vill. L. Rev. Tolle Lege 57 (2015). Available at: http://digitalcommons.law.villanova.edu/vlr/vol58/iss6/4
18	*Where Do We Go Now? The Uncertain Future for 29 U.S.C. § 1301(b)(1), Private Equity Funds, and Multi Employer Pension Plans after Sun Capital*, 49 Ga. L. Rev. 209 2014-2015
*	*Why the Bankruptcy Reform Act Left Labor Legacy Costs Alone*, 71 Mo. L. Rev. 985 2006

TAB 9

This is the 7th affidavit of
Miriam Domínguez in this case
and was made on 20/December /2016

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 WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

AFFIDAVIT

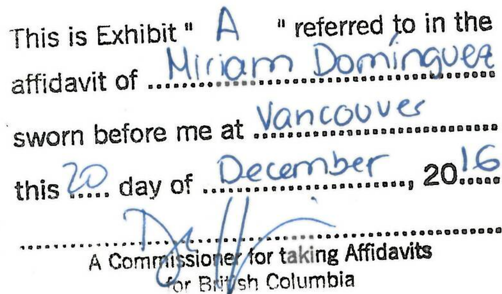
I, MIRIAM DOMINGUEZ, legal assistant, of 20th Floor – 250 Howe Street, in the City of Vancouver, in the Province of British Columbia, AFFIRM THAT:

1. I am a legal assistant at Dentons Canada LLP, Canadian solicitors for the United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**"), a claimant in this proceeding, and as such I have personal knowledge of the facts and matters deposed to in this Affidavit except where I depose to a matter based on the information from an informant I identify, in which case, I believe that both the information from the informant and the resulting statement are true.

2. Attached hereto and marked as **Exhibit "A"** is a copy of a Joint Proposal filed by KPMG in its capacity as trustee in bankruptcy of the Walter Canada Group, in the Bankruptcy proceedings under Court File No. B-160976 and dated for reference December 19, 2016.

AFFIRMED BEFORE ME at Vancouver, BC, on 20 / December / 2016. A Commissioner for taking Affidavits within British Columbia	 **MIRIAM DOMINGUEZ**

TEVIA JEFFRIES
Barrister & Solicitor
DENTONS CANADA LLP
20th Floor, 250 Howe Street
Vancouver, B.C. V6C 3R8
Telephone (604) 687-4460



Estates Nos.: 11-2199860, 11-2199859,
11-2199857, 11-2199861, 11-2199858,
11-2199862, 11-2199813, 11-254026,
11-254024, 11-254025, 11-254023
Court File No.: B-160976
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF

**THE JOINT PROPOSAL OF
WALTER ENERGY CANADA HOLDINGS, INC. WALTER CANADIAN COAL ULC, BRULE COAL ULC, WILLOW CREEK COAL ULC, PINE VALLEY COAL LTD., WOLVERINE COAL ULC, 0541237 B.C. LTD., WALTER CANADIAN COAL PARTNERSHIP, BRULE COAL PARTNERSHIP, WILLOW CREEK COAL PARTNERSHIP AND WOLVERINE COAL PARTNERSHIP**

JOINT PROPOSAL

KPMG Inc., in its capacity as trustee in bankruptcy of the Walter Canada Group, hereby submits this Proposal pursuant to Section 50 of the BIA and pursuant to the CCAA Procedure Order pronounced in respect of the Walter Canada Group and the New Walter Canada Group.

ARTICLE 1
INTERPRETATION

1.1 Definitions

For the purposes of this Proposal, all capitalized terms used but not defined herein shall have the meanings given in the CCAA Procedure Order and the following terms shall have the following meanings:

(a) "**Affected Claimant**" means any Claimant other than any Claimant with respect to a Priority Claim or any Claimant with a Claim under the Promissory Note;

(b) "**Allowed Claim**" has the meaning given in the Claims Process Order;

(c) "**Annulment Time**" means the time that is the first instant on the Proposal Completion Date, at which time the bankruptcy of the members of the Walter Canada Group is annulled;

(d) "**Bankruptcy Date**" means the date on which the members of the Walter Canada Group made an assignment in bankruptcy pursuant to the BIA;

(e) "**Bankruptcy Trustee**" means KPMG Inc., in its capacity as bankruptcy trustee in respect of the bankruptcy proceedings of the Walter Canada Group under the BIA;

(f) "**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended;

(g) "**BIA Proceedings**" means the consolidated bankruptcy proceedings of the Walter Canada Group under the BIA, having Court File No. B-160976;

(h) "**BIA Procedure Order**" means the Order of the Court pronounced December 16, 2016 in the BIA Proceedings abridging certain time periods and dispensing with certain requirements under the BIA;

(i) "**BIA Proposal Approval Order**" means an Order of the Court, in form and substance satisfactory to the Walter Canada Group, the Purchaser, the New Walter Canada Group and the Proposal Trustee, approving this Proposal;

(j) "**Business Day**" means any day other than a Saturday, a Sunday, or a statutory holiday in the Province of British Columbia;

(k) "**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

(l) "**CCAA Charge**" has the meaning given in the Claims Process Order;

(m) "**CCAA Procedure Order**" means the Order of the Court pronounced December 7, 2016 in the CCAA Proceedings approving the transaction contemplated by the Term Sheet and authorizing the formation of the New Walter Canada Group;

(n) "**CCAA Proceedings**" means the CCAA Proceedings commenced in respect of the Walter Canada Group pursuant to the Initial Order and having File No. S-1510120;

(o) "**Chair**" means the chair of the Creditors' Meeting as designated by the Official Receiver or nominee thereof;

(p) "**Claim**" has the meaning given in subsection 2(1) of the CCAA and, for greater certainty, shall include all "Claims" as defined in the Claims Process Order but shall exclude any Claim that has already been barred pursuant to the terms of the Claims Process Order;

(q) "**Claimant**" means any Person with a Claim and, for greater certainty, shall include all "Claimants" as defined in the Claims Process Order;

(r) "**Claims Process Order**" means the Order of the Court establishing a claims procedure in the CCAA Proceedings in respect of the Walter Canada Group pronounced on August 16, 2016, as amended from time to time;

(s) "**Conuma APA**" means the Asset Purchase Agreement dated August 8, 2016 among Conuma Coal Resources Limited and the Walter Canada Group, as amended;

(t) "**Court**" means the Supreme Court of British Columbia or the Supreme Court of British Columbia in bankruptcy and insolvency, as applicable;

(u) "**Creditors' Meeting**" means the meeting of Affected Claimants holding Claims for the purposes of, among other things, considering and, if deemed appropriate, passing the Resolution and includes any adjournment, postponement or other rescheduling of such meeting;

(v) "**Creditors' Meeting Date**" means December 19, 2016, subject to any adjournment, postponement or further Order;

(w) "**CRO**" means BlueTree Advisors, Inc., in its capacity as Chief Restructuring Officer of the New Walter Canada Group and former Chief Restructuring Officer of the Walter Canada Group;

(x) "**Crown Claims**" means Claims of Her Majesty in right of Canada or any province, for all amounts that were outstanding on the Proposal Commencement Date and are of a kind that could be subject to a demand under:

(i) subsection 224(1.2) of the *Income Tax Act*;

(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum:

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*; or

(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection;

(y) "**Deemed Claims**" means all Claims, other than the Residual Liabilities and the Priority Claims, and for greater certainty includes the Insolvency Claims and the Intercompany Claims, and provided, for greater certainty, that any Priority Claim that is not an Allowed Claim and that has not been barred pursuant to the terms of the Claims Process Order shall be a Deemed Claim against the applicable member

of the New Walter Canada Group for further determination pursuant to the Claims Process Order;

(z) "**Deemed Interest Amount**" means an amount equal to the amount of accrued but unpaid interest owing by WECH in respect of the Promissory Note for the period from the issuance of the Promissory Note and ending on the Proposal Commencement Date, up to a maximum amount equal to the amount by which (i) the value of the Transferred Assets transferred to New Walter pursuant to Section 4.1(g) hereof exceeds (ii) the amount of all Claims that are Deemed Claims against New Walter pursuant to Section 4.1(f) hereof, provided however that, for the purpose of the calculation of such maximum amount, the amount of such Deemed Claims shall not include the UMWA 1974 Pension Plan Claim;

(aa) "**Directors/Officers Claim**" means any right or claim of any Person against one or more of the directors and/or officers of the Walter Canada Group that relates to a Claim (including for greater certainty, a "Restructuring Claim" as defined in the Claims Process Order), however arising, for which the directors and/or officers are by statute or otherwise by law liable to pay in their capacity as directors and/or officers;

(bb) "**Governmental Entity**" means any: (i) multinational, federal, provincial, territorial, state, regional, municipal, local or other government, governmental or public department, central bank, court, tribunal, arbitral body, commission, board, bureau or agency, domestic or foreign; (ii) subdivision, agent, commission, board, or authority of any of the foregoing; or (iii) quasi-governmental or private body exercising any regulatory, expropriation or taxing authority under or, for the account of, any of the foregoing;

(cc) "**Initial Order**" means the Order of the Court issued on December 7, 2015 in respect of the CCAA Proceedings, as amended;

(dd) "**Insolvency Claim**" means:

(i) the reasonable fees and expenses incurred by the CRO, legal counsel to the Walter Canada Group and the New Walter Canada Group, the Monitor and its legal counsel;

(ii) Claims of the Bankruptcy Trustee, the Proposal Trustee and their legal counsel; and

(iii) All other Claims secured by the CCAA Charges;

(ee) "**Inspector**" has the meaning set out in Section 3.9;

(ff) "**Intercompany Claims**" means any Claim of a member of the Walter Canada Group against any other member of the Walter Canada Group;

(gg) "**Monitor**" means KPMG Inc. in its capacity as CCAA monitor of the New Walter Canada Group and former CCAA monitor of the Walter Canada Group;

(hh) "**New Brule**" means New Brule Coal Corp.;

(ii) "**New Walter**" means New Walter Energy Canada Holdings, Inc.;

(jj) "**New Walter Canada Group**" means New Walter, New WCCP, New Brule, New Willow Creek and New Wolverine;

(kk) "**New WCCP**" means New Walter Canadian Coal Corp.;

(ll) "**New Willow Creek**" means New Willow Creek Coal Corp.;

(mm) "**New Wolverine**" means New Wolverine Coal Corp.;

(nn) "**Obligations**" has the meaning set out in Section 4.3(a);

(oo) "**Official Receiver**" means the officer appointed pursuant to section 12(2) of the BIA in the City of Vancouver, British Columbia.

(pp) "**Operative Time**" means the time on the Proposal Commencement Date at which all liabilities of and Claims (other than the Residual Liabilities) against any member of the Walter Canada Group shall be released, discharged and extinguished as set out in Section 4.1(j) of this Proposal;

(qq) "**Order**" means any order of the Court in the CCAA Proceedings, in the BIA Proceedings or in respect of this Proposal;

(rr) "**Partnerships**" has the meaning given in Section 5.3(c);

(ss) "**Person**" means any person, including any individual, partnership, joint venture, venture capital fund, association, corporation, limited liability company, limited liability partnership, unlimited liability company, trust, trustee, executor, administrator, legal personal representative, estate, group, unincorporated association or organization, Governmental Entity, syndicate, the Proposal Trustee, or other entity, whether or not having legal status;

(tt) "**Priority Claims**" means all Crown Claims and all Priority Employee Claims that are Allowed Claims and all Claims against any member of the Walter Canada Group or the Bankruptcy Trustee for obligations incurred after the Bankruptcy Date and which were authorized and approved by the Bankruptcy Trustee prior to the Annulment Time and not otherwise addressed in this Proposal;

(uu) "**Priority Employee Claims**" means Claims of employees of the Walter Canada Group (if any) required to be paid under subsection 60(1.3) of the BIA;

(vv) "**Promissory Note**" means the Secured Promissory Note dated April 1, 2011 issued by WECH to WEI;

(ww) "**Proposal**" means this Proposal as varied, amended, modified or supplemented in accordance with the provisions hereof and the BIA;

(xx) "**Proposal Commencement Date**" has the meaning ascribed to it under Section 5.5;

(yy) "**Proposal Commencement Time**" means 5:00 p.m. on the Proposal Commencement Date;

(zz) "**Proposal Completion Date**" means the date immediately after the Proposal Commencement Date on which this Proposal is completed and the Annulment Time occurs.

(aaa) "**Proposal Trustee**" means KPMG Inc., in its capacity as trustee in respect of this Proposal;

(bbb) "**Purchase Price**" means $17,350,000 plus the cost of the Retained Business Assets;

(ccc) "**Purchaser**" means 1098138 B.C. Ltd.;

(ddd) "**Purchaser Guarantor**" means Amacon Land Corporation;

(eee) "**Released Claims**" has the meaning ascribed to such term in Section 4.3(b);

(fff) "**Released Parties**" has the meaning ascribed to such term in Section 4.3(b);

(ggg) "**Required Majority**" means the affirmative vote of (i) a majority in number of the Affected Claimants (other than Affected Claimants with Insolvency Claims) voting on the Resolution (in person or by proxy) at the Creditors' Meeting; and (ii) Affected Claimants (other than Affected Claimants with Insolvency Claims) representing not less than 66⅔% in value of the Claims of the Affected Claimants voting on the Resolution (in person or by proxy) at the Creditors' Meeting;

(hhh) "**Residual Assets**" means:

(i) the shares of Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Pine Valley Coal Ltd. and 0541237 B.C. Ltd.;

(ii) the partnership interests in Walter Canadian Coal Partnership, Brule Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership;

(iii) securities of mining and/or mining related businesses held by Walter Canadian Coal Partnership having a cost of approximately $50,000 to be acquired after the date of the Term Sheet and prior to the Proposal Commencement Date and which, for greater certainty, shall not include the capital stock of Cambrian Energybuild Holdings ULC or Belcourt Saxon Coal Ltd., or any partnership interest in Belcourt Saxon Coal Limited Partnership;

(iv) all short term liquid investments affording an appropriate safety of principal held by Wolverine Coal Partnership having a cost of approximately $50,000;

(v) all short term liquid investments affording an appropriate safety of principal held by Brule Coal Partnership having a cost of approximately $50,000;

(vi) all short term liquid investments affording an appropriate safety of principal held by Willow Creek Coal Partnership having a cost of approximately $50,000 (the investments set out in paragraphs (iii) through (vi) are collectively referred to herein as the "**Retained Business Assets**"); and

(vii) the Walter Canada Group's corporate and partnership minute books, financial and accounting records, taxation records and documents (including banking records and other evidence of fund transfers) necessary to substantiate the share capital of WECH;

(iii) "**Residual Liabilities**" means

(i) all liabilities for any Taxes due or accruing due on and after the Proposal Commencement Date; and

(i) all liabilities and claims that are not Claims that can be compromised pursuant to the CCAA or the BIA;

(jjj) "**Resolution**" means the resolution of the Affected Claimants providing for the approval of this Proposal by the Affected Claimants;

(kkk) "**Tax**" means any domestic or foreign federal, state, local, provincial, territorial or municipal taxes or other impositions by any Government Entity, including Transfer Taxes and the following taxes and impositions: net income, gross income, capital, value added, goods and services, capital gains, alternative, net worth, harmonized sales, gross receipts, sales, use, ad valorem, business rates, transfer, franchise, profits, business, environmental, real or immovable property, municipal, school, Canada Pension Plan, withholding, workers' compensation levies, payroll, employment, unemployment, employer health, occupation, social security, excise, stamp, customs, and all other taxes, fees, duties, assessments, deductions, contributions, withholdings or charges of the same or of a similar nature, however denominated, together with any interest and penalties, fines, additions to tax or additional amounts imposed or assessed with respect thereto;

(lll) "**Term Sheet**" means the Term Sheet dated November 28, 2016 among the Walter Canada Group and the Purchaser and the Purchaser Guarantor;

(mmm) "**Transferred Assets**" means all of the Walter Canada Group's right, title and interest in, to, under or relating to the assets, property and undertaking owned or used or held by the Walter Canada Group on the date set for such transfer in this

Proposal and any other Order of the Court, including the following properties, assets and rights:

(i) the Purchase Price;

(ii) all rights of the Walter Canada Group under the Term Sheet, this Proposal and any Orders in the CCAA Proceedings and the BIA Proceedings, unless specified therein;

(iii) all records, documents and information in the possession of the Walter Canada Group, including any records prepared in connection with this Proposal, the Conuma APA, the CCAA Proceedings or any other matter, and all records, documents and information in the possession of the Walter Canada Group but not owned by the Walter Canada Group;

(iv) copies of any book, record, literature, list and any other written or recorded information of the Walter Canada Group as at or prior to the Proposal Commencement Date to which the New Walter Canada Group, the CRO or the Monitor in good faith determine are reasonably likely to be needed to access for bona fide tax or legal purposes, including in respect of any matter arising in the CCAA Proceedings;

(v) all information, materials, documents, reports and/or records, whether written or electronic, prepared by the Walter Canada Group's legal counsel and the Monitor and the Monitor's legal counsel, whether or not prepared before or after Proposal Commencement Date, that is attorney-client privileged and any and all attorney work product (provided however that no material prepared by legal counsel of the Purchaser, who may become legal counsel to the Walter Canada Group after the Proposal Commencement Date, is intended to be included in this paragraph);

(vi) all information, materials, documents, reports and/or records, whether written or electronic, in the possession of the CRO, the Monitor or the Proposal Trustee;

(vii) any deposits held on behalf of the Walter Canada Group, including any deposits held in trust accounts to secure payment of the reasonable fees and disbursements of the Monitor, the Proposal Trustee and any professional advisors of the Walter Canada Group and of the Monitor and Proposal Trustee, any deposits provided to any Governmental Entity in respect of Tax liabilities, and any amounts paid by or on behalf of the Walter Canada Group in respect of any employment liabilities;

(viii) all cash, cash equivalents, bank balances, and moneys in possession of banks, the Monitor, the Proposal Trustee and other depositories;

(ix) marketable shares, notes, bonds, debentures or other securities of or issued by corporations, partnerships or other persons and all certificates or other evidences of ownership thereof owned or held by or for the account of the

Walter Canada Group, including the shares in the capital stock of Cambrian Energybuild Holdings ULC and Belcourt Saxon Coal Ltd., and including any partnership interest in Belcourt Saxon Coal Limited Partnership, but excluding all other shares and partnership interests of other Walter Canada Group entities that constitute Residual Assets;

(x) the accounts receivable, bills receivable, trade accounts, book accounts, and any other amount due or deemed to be due to the Walter Canada Group or any of them including any payments, refunds and rebates receivable;

(xi) refunds due or payable in respect of reassessments for Taxes paid by any member of the Walter Canada Group up to the Proposal Commencement Date;

(xii) refundable Taxes;

(xiii) any person's entitlement to seek recourse pursuant to sections 38 and 95-101 of the BIA and any equivalent provincial statute as against the Walter Canada Group or any other person *mutatis mutandis* and as if this Proposal had not been implemented;

(xiv) amounts owing to the Walter Canada Group or any of them from any director, officer, former director or officer, shareholder, employee of any member of the Walter Canada Group;

(xv) director and officer insurance policies and the right to receive insurance recoveries under (i) any insurance policies for losses that occurred prior to Proposal Commencement Date and (ii) any director and officer insurance policies in respect of any matters at any time;

(xvi) all rights and interests under or pursuant to all warranties, representations, indemnities and guarantees, express, implied or otherwise, of or made by suppliers or others in connection with any other Transferred Assets, the Conuma APA or any Deemed Claims; and

(xvii) all other rights, properties and assets of the Walter Canada Group or any of them as at the Proposal Commencement Date of whatsoever nature or kind and wherever situated (other than such rights, properties and assets that are not transferrable under section 11.3 of the CCAA or 84(1) of the BIA),

but excluding the Residual Assets. For greater certainty and notwithstanding the foregoing, the Transferred Assets shall not include the Walter Canada Group's corporate and partnership minute books, financial and accounting records, taxation records and documents (including banking records and other evidence of fund transfers) necessary to substantiate the share capital of WECH and provided further that the New Walter Canada Group shall be permitted to retain a copy of

any such minute books, financial and accounting records, taxation records and documents;

(nnn) "**Transfer Taxes**" means all goods and services, sales, excise, use, transfer, gross receipts, documentary, filing, recordation, value-added, stamp, stamp duty reserve, and all other similar taxes, duties or other like charges, however denominated, in each case including interest, penalties or additions attributable thereto whether or not disputed, including GST/ HST and PST;

(ooo) "**Trustee Certificate**" has the meaning ascribed to it in Section 5.5;

(ppp) "**UMWA 1974 Pension Plan Claim**" has the meaning given in the Claims Process Order;

(qqq) "**Walter Canada Group**" means Walter Energy Canada Holdings, Inc., Walter Canadian Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Pine Valley Coal Ltd., Wolverine Coal ULC, 0541237 B.C. Ltd., Walter Canadian Coal Partnership, Brule Coal Partnership, Willow Creek Coal Partnership and Wolverine Coal Partnership;

(rrr) "**WECH**" means Walter Energy Canada Holdings, Inc.; and

(sss) "**WEI**" means New WEI, Inc., formerly known as Walter Energy, Inc.

1.2 Interpretation

For purposes of this Proposal:

(a) the division of this Proposal into Articles, Sections, Schedules, and paragraphs and the insertion of captions and headings to Articles, Sections and paragraphs are for convenience only and are not intended to affect or be used in the interpretation of this Proposal;

(b) where the context requires, a word or words importing the singular shall include the plural and vice versa and a word or words importing one gender shall include all genders;

(c) unless otherwise stated, all monetary amounts in this Proposal, including the symbol "$", are in Canadian currency;

(d) the terms "hereof", "herein", "hereunder", "hereto" and words of similar import shall, unless otherwise stated, be construed to refer to this Proposal in its entirety rather than to any particular provision of this Proposal and all references in this Proposal to Articles and Sections are references to Articles and Sections of or to this Proposal;

(e) in the computation of periods of time from a specified date to a later specified date, unless otherwise stated, "from" means "from and including" and the words "to" or "until" mean "to but excluding";

(f) the deeming provisions are not rebuttable and are conclusive and irrevocable; and

(g) the words "includes" and "including" mean "includes, without limitation" and "including without limitation".

1.3 Date for any Action

In the event that any date on which any action is required to be taken under this Proposal by any of the parties is not a Business Day, then, unless otherwise stated herein, that action shall be required to be taken on the next succeeding day that is a Business Day.

1.4 Time

All times expressed in this Proposal are prevailing local time in Vancouver, British Columbia, Canada unless otherwise stipulated.

1.5 Statutory References

Unless otherwise indicated, any reference in this Proposal to a statute refers to that statute and to the regulations made thereunder, as amended and as in force from time to time, or any statute or regulations that supplement or supersede such statute or regulations.

ARTICLE 2
PURPOSE

2.1 Purpose of the Proposal

The purpose of this Proposal is to monetize a significant portion of the remaining value in the Walter Canada Group for the benefit of all Claimants and other stakeholders of the Walter Canada Group.

To achieve this goal, this Proposal is filed by the Bankruptcy Trustee for and on behalf of the Walter Canada Group to cause the Transferred Assets to become assets of the New Walter Canada Group and to cause the Deemed Claims to become liabilities of the New Walter Canada Group so as to preserve the Claims of the Affected Claimants and the interests of other stakeholders in and to the Transferred Assets and to permit the resolution of such Claims and interests pursuant to the CCAA.

The New Walter Canada Group will continue in the place and stead of the Walter Canada Group for all purposes in the CCAA Proceedings, including for the purposes of finally determining all Claims pursuant to the Claims Process Order.

2.2 Effect of the Proposal

The corporate structure of the Walter Canada Group includes a number of partnerships. WECH, the principal entity affected by this Proposal, is the general partner of Walter Canada Coal Partnership, which in turn is the general partner of each of the other Partnerships. As such, all Claimants with a claim against any of the Partnerships have a Claim against WECH. All of the Claimants who have filed a Proof of Claim, were deemed to have filed a Proof of Claim or who filed a notice of civil claim under the Claims Process Order have Claims against one or more of

the Partnerships and, as such, a Claim against WECH as ultimate general partner. The effect of this Proposal is to increase the value available for distribution to any Claimants with Affected Claims against WECH (*i.e.* all Affected Claimants).

For the purposes of determining the nature and priority of the Deemed Claims, the applicable member of the New Walter Canada Group (and the Transferred Assets transferred to such member) shall stand in the place and stead of the member of the Walter Canada Group formerly liable for such Claim (other than any claim that has already been barred pursuant to the Claims Process Order and other than any Residual Liability), and from and after the Proposal Commencement Date, all such Claims against such member of the Walter Canada Group and any encumbrances in respect of such Claims shall be Deemed Claims against the corresponding member of the New Walter Canada Group and shall be deemed encumbrances on the applicable Transferred Assets and such Deemed Claims and deemed encumbrances shall have the same priority with respect to the applicable member of the New Walter Canada Group and the applicable Transferred Assets as they had with respect to the corresponding member of the Walter Canada Group and the Transferred Assets immediately prior to the Proposal Commencement Date, as if the applicable member of the New Walter Canada Group was in all respects the corresponding member of the Walter Canada Group and as if the Transferred Assets had not been transferred and had remained in the possession or control of the member of the Walter Canada Group having that possession or control immediately prior to the transfer.

All Claims against the Walter Canada Group (other than the Residual Liabilities and Priority Claims) shall be compromised, extinguished and released pursuant to the terms hereof.

2.3 Affected Claimants

Although all Claims against the Walter Canada Group (other than the Residual Liabilities and Priority Claims) shall be cancelled, compromised and extinguished pursuant to this Proposal, no Affected Claimant's Claim is adversely affected because each such claim shall become a Deemed Claim against the applicable member of the New Walter Canada Group. Each Affected Claimant's Claim against any member of the Walter Canada Group shall be preserved pursuant to the terms hereof as a Deemed Claim against the applicable member of the New Walter Canada Group as set out herein.

ARTICLE 3
THE CREDITORS' MEETING AND RELATED MATTERS

3.1 Voting Claimants

All Affected Claimants, other than Claimants with Insolvency Claims, shall be entitled to vote their Claims (whether or not such Claims are Allowed Claims) in respect of this Proposal.

Affected Claimants with Insolvency Claims and all Claimants and other stakeholders who are not Affected Claimants, including Claimants to the extent of Priority Claims or to the extent of a Claim under the Promissory Note, will not be entitled to vote at the Creditors' Meeting. Nothing in this Proposal shall affect the defences, both legal and equitable, with respect to any Priority Claim, Deemed Claim or Deemed Interest Amount, including any rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Claims.

3.2 Classes of Creditors

For the purposes of voting on this Proposal, all Affected Claimants' Claims shall be included in a single class of creditors.

3.3 Creditors' Meeting

The Creditors' Meeting held in respect of the Affected Claimants shall be held in accordance with this Proposal for the purposes of, among other things, considering and voting on the Resolution or any other matters to be considered at the Creditors' Meeting.

3.4 Approval by the Affected Claimants

The Walter Canada Group will seek approval of this Proposal by the affirmative vote for the Resolution by the Required Majority. Such vote will be conducted by ballot. For the purposes of determining whether or not the Resolution has passed, the Chair shall tabulate the votes cast or deemed cast by each Affected Claimant.

Any other matter submitted for a vote at the Creditors' Meeting shall be decided by affirmative vote of (i) a majority in number the Affected Claimants (other than Claimants with Insolvency Claims) voting (in person or by proxy) on such matter at the Creditors' Meeting; and (ii) Affected Claimants (other than Claimants with Insolvency Claims) representing not less than 66⅔% in value of the Claims of the Affected Claimants voting on the Resolution (in person or by proxy) at the Creditors' Meeting, which may be adduced by show of hands, unless the Chair decides, in the Chair's sole and absolute discretion, to hold such vote by way of written ballot.

3.5 Claims for Voting Purposes

For each vote conducted by ballot, each Affected Claimant (other than Claimants with Insolvency Claims) with one or more Affected Claimant's Claim shall be entitled to one (1) vote and the weight attributed to such vote (for the purposes of determining the Required Majority) shall be equal to the aggregate Canadian dollar value of such Affected Claimant's Claim (if necessary, converted into Canadian dollars in accordance with the provisions of the Claims Process Order). An Affected Claimant with a Claim that is not yet an Allowed Claim shall be entitled to vote such Claim in respect of the Resolution and the value of the Affected Claimant's Claim for voting purposes shall be the value of such Claim as set out in the Affected Claimant's Proof of Claim or Notice of Dispute, deemed Proof of Claim or notice of civil claim, as applicable. The Proposal Trustee may, in its discretion, maintain a separate tabulation of any Affected Claimants' Claims that are not yet Allowed Claims.

No Affected Claimant shall be entitled to bifurcate or sub-divide a Claim for purposes of voting. If an Affected Claimant has assigned part, but not all, of the Affected Claimant's Claim, then only the Affected Claimant shall be entitled to vote at the Creditors' Meeting (in person or by proxy) and the value of such vote shall be the unassigned portion of such Affected Claimant's Claim. In such case, the assignee of such Affected Claimant's Claim shall not be entitled to vote the assigned portion of such Affected Claimant's Claim at the Creditors' Meeting unless the Chair, in the Chair's sole and absolute discretion, determines that the assignee shall be permitted to vote.

For greater certainty, no Claimant shall be entitled to vote any claim that has been barred pursuant to the terms of the Claims Process Order.

3.6 Adjournment

If the Creditors' Meeting is adjourned or postponed by the Chair upon the direction of the Proposal Trustee (which Proposal Trustee may so direct in its sole and absolute discretion) or because a quorum (as required under the BIA) is not obtained, the Creditors' Meeting will be adjourned, postponed or otherwise rescheduled by the Proposal Trustee to such date, time and place as may be decided by the Proposal Trustee, in the Proposal Trustee's sole and absolute discretion and upon such notice as the Proposal Trustee deems appropriate.

3.7 Voting of Proxies

Where an Affected Claimant has submitted a proxy in advance of the Creditors' Meeting, such Affected Claimant's proxy will be voted on any ballot in accordance with the Affected Claimant's instruction to vote for or against the approval of the Resolution and any other matters before the Creditors' Meeting.

Forms of proxy may confer discretionary authority on the individuals designated therein with respect to amendments or variations of matters identified in the notice of the Creditors' Meeting and other matters that may properly come before the Creditors' Meeting.

All other matters related to the solicitation of votes for the Creditors' Meeting, the delivery of materials to Affected Claimants and the voting procedure and tabulation of votes cast at the Creditors' Meeting shall be as set forth in the BIA Procedure Order.

3.8 Claims Bar Date

If any Claimant that was required to file a Proof of Claim has failed to file its Proof of Claim prior to the relevant Claims Bar Date and has not, in accordance with the Claims Process Order, been permitted to file its Proof of Claim late, or if such Claimant received a Notice of Revision or Disallowance pursuant to the Claims Process Order and did not respond within the time period provided for by the Claims Process Order, such Claimant shall have the Claim provided for in the applicable Notice of Revision or Disallowance and, if such Claim is nil, such Claimant shall be forever barred from voting at the Creditors' Meeting and any meeting in respect of the Proposal and such Claimant shall be forever barred from receiving a distribution under this Proposal or any subsequent plan of compromise or arrangement in respect of the New Walter Canada Group, and (i) the Walter Canada Group and the Purchaser shall be released from the Claims of such Claimant, (ii) such Claims shall not be Deemed Claims against any member of the New Walter Canada Group and (iii) Section 4.3(b) shall apply to all such Claims and, for the purposes of the application Section 4.3(b) pursuant to this Section 3.8, the Released Parties referenced therein shall include the New Walter Canada Group and its present and former advisors, partners, principals, employees, officers, directors, representatives, financial advisors, legal counsel, accountants, investment bankers, consultants, agents, predecessors, affiliates, subsidiaries, related companies, heirs, spouses, dependents, administrators and executors.

3.9 Inspectors

At the Creditors' Meeting, the Affected Claimants with Allowed Claims may appoint from one (1) to five (5) inspectors (each an "**Inspector**") under this Proposal, whose powers shall be restricted to advising the Proposal Trustee in respect of such matters as the Proposal Trustee may consider appropriate from time to time, and considering and approving any amendments to this Proposal which have been agreed and consented to by the Proposal Trustee and the Purchaser.

Provided that all acts done by the Inspectors are done in good faith, the Inspectors shall not be liable to the Affected Claimants for any actions taken by the Inspectors.

ARTICLE 4
TERMS OF THE PROPOSAL

4.1 Terms of the Proposal

Each of the following transactions contemplated by and provided for under this Proposal will be consummated and effected, and shall for all purposes be deemed to occur, commencing at the Proposal Commencement Time and concluding on the Proposal Completion Date, in the manner and the sequence and at the times set forth below:

(a) The Purchaser shall subscribe for 200,000,000 common shares in the capital of WECH and, in respect thereof,

   (i) at least five days before the Proposal Commencement Date, the Purchaser shall pay to the Proposal Trustee (on WECH's behalf) an amount equal to the Purchase Price as the subscription price for such shares,

   (ii) WECH shall issue such shares to the Purchaser as fully-paid and non-assessable common shares in the capital of WECH, and

   (iii) WECH shall add an amount equal to the Purchase Price to the capital in respect of its common shares;

(b) The 1,207,905 issued and outstanding shares in the capital of WECH held by WEI and recorded on the Central Securities Register of WECH shall be repurchased for no consideration but shall not be cancelled and shall continue to be held by WECH;

(c) Any issued and outstanding shares of WECH not recorded on the Central Securities Register of WECH shall be repurchased for no consideration and cancelled, and any option or other right to acquire shares or securities of WECH held by any person shall be cancelled for no consideration;

(d) All obligations of WECH under the Promissory Note shall be released, extinguished and discharged;

(e) The Walter Canada Group shall pay in cash to the Monitor, acting upon the irrevocable direction from the Proposal Trustee, all amounts owed in respect of any Priority Claims that are Allowed Claims (if any) plus the amount of the levy

payable under section 147 of the BIA, and the Monitor shall pay all such Priority Claims and such levy within the time period prescribed under the BIA; for greater certainty, any Priority Claim that is not an Allowed Claim and has not been barred pursuant to the terms of the Claims Process Order shall be a Deemed Claim against the applicable member of the New Walter Canada Group for further determination pursuant to the Claims Process Order;

(f) Each of the applicable member(s) of the New Walter Canada Group shall be deemed liable for all Deemed Claims (which, for greater certainty, exclude the Residual Liabilities and Priority Claims but include the Insolvency Claims) of the corresponding Walter Canada Group entity and WECH shall be deemed liable to WEI for the Deemed Interest Amount, as follows:

(i) all Claims against Wolverine Coal ULC and Wolverine Coal Partnership shall be Deemed Claims against New Wolverine, New WCCP and New Walter;

(ii) all Claims against Brule Coal ULC and Brule Coal Partnership shall be Deemed Claims against New Brule, New WCCP and New Walter;

(iii) all Claims against Willow Creek Coal ULC, Willow Creek Coal Partnership and Pine Valley Coal Ltd. shall be Deemed Claims against New Willow Creek, New WCCP and New Walter;

(iv) all Claims against Walter Canadian Coal Partnership, Walter Canadian Coal ULC and 0541237 BC Ltd shall be Deemed Claims against New WCCP and New Walter;

(v) all Claims against WECH (other than any Claim in respect of the Promissory Note) shall be Deemed Claims against New Walter; and

(vi) New Walter shall be deemed liable for the Deemed Interest Amount, provided however that the Deemed Interest Amount shall be subject to the terms of the Claims Process Order and shall have the same status thereunder as the Claim to which it relates,

and, for certainty, all of the Residual Liabilities shall be and are retained by the applicable member of the Walter Canada Group and shall not be Deemed Claims against any member of the New Walter Canada Group.

(g) All of the Transferred Assets of the Walter Canada Group shall be transferred and deemed transferred to the applicable member(s) of the New Walter Canada Group and, subject to any agreement among the members of the New Walter Canada Group, shall be so transferred specifically as follows:

(i) all Transferred Assets of Wolverine Coal ULC and Wolverine Coal Partnership are transferred to New Wolverine;

(ii) all Transferred Assets of Brule Coal ULC and Brule Coal Partnership are transferred to New Brule;

(iii) all Transferred Assets of Willow Creek Coal ULC, Willow Creek Coal Partnership and Pine Valley Coal Ltd. are transferred to New Willow Creek;

(iv) all Transferred Assets of (A) Walter Canadian Coal ULC, (B) 0541237 BC Ltd. and (C) Walter Canadian Coal Partnership (including, for greater certainty, the Walter Canadian Coal Partnership assets consisting of (i) the shares of Cambrian Energybuild ULC and (ii) if applicable, Walter Canadian Coal Partnership's shares of Belcourt Saxon Coal Ltd. and Walter Canadian Coal Partnership's interest in Belcourt Saxon Coal Limited Partnership) are transferred to New WCCP; and

(v) all Transferred Assets of WECH are transferred to New Walter,

and, for certainty, all of the Residual Assets shall be and are retained by the applicable member of the Walter Canada Group and shall not be transferred to or assumed by any member of the New Walter Canada Group;

(h) Any remaining directors and officers of any member of the Walter Canada Group are deemed to resign and to no longer hold such positions;

(i) The directors nominated by the Purchaser who have executed a consent to act as a director shall be appointed as directors of the applicable member of the Walter Canada Group;

(j) All liabilities of or Claims (other than the Residual Liabilities) against any member of the Walter Canada Group shall be released, discharged and extinguished (and, for greater certainty, the time at which this step occurs shall be the Operative Time);

(k) All Directors/Officers Claims (other than such Directors/Officers Claims that cannot be released pursuant to section 50(14) of the BIA) shall be released, discharged and extinguished at the Operative Time; and

(l) The bankruptcy of the members of the Walter Canada Group shall be annulled as of the Annulment Time and all right, title and interest of the Bankruptcy Trustee in the Residual Assets shall re-vest in the applicable member of the Walter Canada Group free and clear of all liens, charges and encumbrances, except as expressly provided for herein, in the CCAA Procedure Order or a subsequent Order of the Court. For greater certainty, the annulment of the bankruptcy of the members of the Walter Canada Group shall not occur until all of the steps in paragraphs (a) to (k) of this Section 4.1 above have been completed.

4.2 Corporate Actions

From and after the Proposal Commencement Time, all corporate actions contemplated by this Proposal shall be deemed to have been authorized and approved in all respects (subject to the provisions of this Proposal). All matters provided for in this Proposal shall be deemed to have timely occurred in the order and at the times provided for in Section 4.1 of this Proposal, in accordance with applicable law, and shall be effective, without any requirement of further action by any creditors, security holders, shareholders, directors, officers or managers of the Walter Canada Group. On the Proposal Commencement Date, the Proposal Trustee shall be authorized and directed to issue, execute and deliver the agreements, documents, securities and instruments contemplated by this Proposal in the name of and on behalf of the Walter Canada Group.

4.3 Proposal Releases

The following releases will become effective at the Operative Time:

(a) **Releases by the Walter Canada Group and the Purchaser of Walter Canada Group Advisors**

Subject to the provisions of the BIA, the Walter Canada Group and the Purchaser will be deemed to forever release, waive and discharge any and all demands, claims, actions, causes of action, counterclaims, suits, rights, obligations, debts, sums of money, accounts, covenants, damages, judgments, expenses, liabilities, executions, liens, encumbrances, security interests and other recoveries on account of any indebtedness, liability, obligation, demand or cause of action of whatever nature, including interest thereon and costs, fees or other amounts in respect thereof (collectively, the "**Obligations**") (other than the rights of the Walter Canada Group and the Purchaser to enforce this Proposal and the contracts, instruments, and other agreements or documents delivered hereunder) whether reduced to judgment, liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, direct, indirect or derivative, then existing or hereafter arising, in law, equity or otherwise that are based in whole or in part on any act, omission, transaction, event or other circumstance or occurrence existing or taking place on or prior to the Proposal Commencement Time in any way relating to, arising out of or in connection with the business and affairs of the Walter Canada Group, the subject matter of, or the transactions or events giving rise to, any Claims, this Proposal, the CCAA Proceedings and the related BIA Proceedings that could be asserted by or on behalf of the Walter Canada Group or the Purchaser against: (i) the agents, legal counsel, financial advisors and other professionals of the Walter Canada Group, in each case in their respective capacities as of the Proposal Commencement Time; (ii) the CRO; (iii) the Monitor, the Proposal Trustee, the Bankruptcy Trustee and their legal counsel; (iv) the Purchaser and its legal counsel; and (v) where applicable, with respect to each of the above named Persons, such Person's present and former advisors, partners, principals, employees, officers, directors, representatives, financial advisors, legal counsel, accountants, investment bankers, consultants, agents, predecessors, affiliates, subsidiaries, related companies, heirs, spouses, dependents, administrators and executors.

(b) **Releases by Others**

Each of (i) the Walter Canada Group, (ii) the CRO, (iii) KPMG LLP, (iv) KPMG Inc., including in its capacity as Monitor, Bankruptcy Trustee and Proposal Trustee, (v) the Purchaser, and (vi) with respect to each of the above named Persons, such Person's present and former advisors, partners, principals, employees, officers, directors, representatives, financial advisors, legal counsel, accountants, investment bankers, consultants, agents, predecessors, affiliates, subsidiaries, related companies, heirs, spouses, dependents, administrators and executors (collectively, the "**Released Parties**") will be released and discharged from any and all Obligations, whether reduced to judgment, liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, direct, indirect or derivative, then existing or hereafter arising, in law, equity or otherwise, that any Person (including the Claimants, the Purchaser and the Walter Canada Group, and any Person who may claim contribution or indemnification against or from them) may be entitled to assert based in whole or in part on any act, omission, transaction, event or other circumstance or occurrence existing or taking place on or prior to the Proposal Completion Time in any way relating to, arising out of or in connection with the business and affairs of the Walter Canada Group, the subject matter of, or the transactions or events giving rise to, any Claims, this Proposal, the CCAA Proceedings and the related BIA Proceedings (collectively, the "**Released Claims**"), provided, however, that nothing herein will release or discharge: (A) the Walter Canada Group from any Residual Liabilities; or (B) any Released Party if the Released Party is judged by the expressed terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct or to have been grossly negligent.

4.4 Permanent Injunction

At the Operative Time, the Walter Canada Group and the Purchaser shall be permanently and forever barred, estopped, stayed and enjoined with respect to the Obligations set out in Section 4.3(a) and all Claimants and other Persons shall be permanently and forever barred, estopped, stayed and enjoined with respect to the Released Claims from: (i) commencing, conducting or continuing in any manner, directly or indirectly, any actions, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any actions, suits or demands, including, without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien, encumbrance or security interest of any kind; or (v) taking any actions to interfere with the implementation or consummation of this Proposal.

4.5 Waiver of Defaults

At the Operative Time, all Persons shall be deemed to have waived any and all defaults of the Walter Canada Group then existing or previously committed by the Walter Canada Group or caused by the Walter Canada Group, directly or indirectly, or non-compliance with any covenant, positive or negative, pledge, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, purchase order, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Walter Canada Group arising from the filing by the Walter Canada Group under the BIA or the transactions contemplated by this Proposal, and any and all notices of default and demands for payment under any instrument, including any guarantee arising from such default, shall be deemed to have been rescinded; provided, however, that any such defaults may still be asserted against the New Walter Canada Group in accordance with the process established in the CCAA Proceedings and any Order pronounced in respect thereof.

4.6 Books and Records

(a) Notwithstanding any term in this Proposal, from and after the Proposal Commencement Date, the Purchaser, the Walter Canada Group and the New Walter Canada Group will make available to the other, as reasonably requested, and to any Tax authority, all information, records or documents currently or subsequently in the possession or control of such party relating to liability for Taxes with respect to the Residual Assets, the Transferred Assets, the Deemed Claims and the Residual Liabilities for all periods prior to or including the Proposal Commencement Date, and will preserve such information, records or documents until the expiration of any applicable statute of limitations or extensions thereof. In the event that one party needs access to records in the possession of the other party relating to any of the Residual Assets, the Transferred Assets, the Deemed Claims and the Residual Liabilities for purposes of preparing Tax returns or complying with any Tax audit request, subpoena or other investigative demand by any tax authority, or for any other legitimate Tax-related purpose not injurious to the other party, the other party will allow representatives of the first party, at the first party's sole expense, access to such records during regular business hours at the other party's place of business for the sole purpose of obtaining information for use as aforesaid and will permit the other party to make extracts and copies thereof as may be necessary or convenient.

(b) Notwithstanding any term in this Proposal, from and after the Proposal Commencement Date, the Purchaser and the Walter Canada Group shall take all reasonable steps to preserve and keep the books and records delivered to it in connection with the completion of the transaction contemplated by this Proposal, including in respect of the period prior to the date of the Initial Order, for a period of six years from the Proposal Commencement Date, or for any longer period as may be required by any law or Government Entity, and shall make such records available to New Walter Canada Group, the Monitor, the Proposal Trustee, the CRO or the Bankruptcy Trustee of the New Walter Canada Group on a timely basis, as may be required by it, including in connection with the CCAA

Proceedings and the claims process being conducted thereunder and with any administrative or legal proceeding that may be initiated by, on behalf of, or against the New Walter Canada Group and, for greater certainty, any litigation with respect to the UMWA 1974 Pension Plan Claim, including any discovery process that may be ordered in respect thereof.

4.7 Continuation of Partnerships

All of the Partnerships shall continue to exist as partnerships through and after the Proposal Completion Date and are not and shall not be dissolved, notwithstanding the terms of any of the applicable partnership agreements, the *Partnership Act* (British Columbia), the CCAA Proceedings, the BIA Proceedings, this Proposal or the transactions occurring pursuant to the terms hereof.

ARTICLE 5
CONDITIONS

5.1 Confirmation of Proposal

Provided that this Proposal is approved by the Required Majority:

(a) the Proposal Trustee shall forthwith seek the BIA Proposal Approval Order; and

(b) subject to the BIA Proposal Approval Order being made in form and substance acceptable to the New Walter Canada Group, Proposal Trustee and the Purchaser and the satisfaction of the conditions to the implementation of this Proposal set forth in Section 5.3, this Proposal shall be implemented by the Proposal Trustee and shall be binding upon each of the Walter Canada Group and all Persons referred to in this Proposal.

5.2 Paramountcy

From and after the Proposal Commencement Date, any conflict between (i) this Proposal, and (ii) the covenants, warranties, representations, terms, conditions, provisions or obligations, express or implied, of any contract, purchase order, mortgage, security agreement, indenture, trust indenture, loan or other agreement, commitment letter, lease or other arrangement or undertaking, written or oral (including any and all amendments or supplements thereto) existing with, between or among one or more of the Affected Claimants and the Walter Canada Group as at the Proposal Commencement Date will be deemed to be governed by the provisions of this Proposal and the BIA Proposal Approval Order, which shall take precedence and priority. All Affected Claimants shall be deemed irrevocably for all purposes to consent to all transactions contemplated in and by this Proposal.

5.3 Conditions Precedent to Implementation of the Proposal

The implementation of this Proposal is subject to the following conditions precedent, which may be waived in writing as provided in Section 5.4:

(a) there shall be no evidence that WECH does not own, directly or indirectly, 100% of the equity interests of the other members of the Walter Canada Group;

(b) the Walter Canada Group shall have the Retained Business Assets;

(c) from and after the date of the Term Sheet, no special resolution to dissolve any of Walter Canadian Coal Partnership, Wolverine Coal Partnership, Brule Coal Partnership or Willow Creek Coal Partnership (the "**Partnerships**") shall have been passed;

(d) from and after the date of the Term Sheet, no steps shall have been taken to change the membership of the Partnerships nor any member's interest in any of the Partnerships;

(e) from and after the date of the Term Sheet until the Proposal Commencement Date, there shall be no jurisprudence or change in law that would have a material adverse effect on the tax attributes of the Walter Energy Group or tax impact of the transactions contemplated by or related to this Proposal;

(f) the Purchaser shall have paid the Purchase Price to the Proposal Trustee, to hold in escrow for delivery to the New Walter Canada Group in accordance with the terms hereof;

(g) this Proposal shall have been approved by the Required Majority;

(h) The BIA Proposal Approval Order sanctioning this Proposal shall have been made and entered in form and substance satisfactory to the Walter Canada Group, the New Walter Canada Group, the Purchaser and the Proposal Trustee, no appeals or leaves to appeal shall have been filed or commenced in respect of the BIA Approval Order which has not been dismissed or withdrawn and the operation and effect of the BIA Proposal Approval Order shall not have been stayed, revised, modified, reversed or amended, and the BIA Proposal Approval Order shall, among other things:

    (i) declare that this Proposal has been approved by the Required Majority of Affected Claimants in conformation with the BIA and the BIA Procedure Order;

    (ii) declare that all steps taken by the Proposal Trustee as contemplated in the BIA Procedure Order have been satisfied;

    (iii) declare that this Proposal and the transactions contemplated hereby are fair and reasonable, and in the best interests of the Walter Canada Group and its Affected Claimants and other stakeholders of the Walter Canada Group;

    (iv) order that this Proposal (including the settlements, compromises, arrangements, reorganizations, transfers corporate transactions and releases set out herein) is sanctioned and approved pursuant to the BIA and, as at the Proposal Completion Date, will be effective and will enure to the benefit of and be binding upon the Walter Canada Group and all other Persons named or referred to in this Proposal, in the BIA Proposal

Approval Order, the CCAA Procedure Order and any subsequent Order of the Court, if any;

(v) authorize and direct the Proposal Trustee to issue, execute and deliver the agreements, documents, securities and instruments contemplated by this Proposal, in the name of and on behalf of the Walter Canada Group, in order to effect all corporate actions contemplated by this Proposal;

(vi) enjoin the commencement or prosecution, whether directly, derivatively or otherwise, of any demands, claims, actions, causes of action, counterclaims, suits, or any indebtedness, liability, obligation or cause of action released and discharged pursuant to this Proposal;

(vii) annul the bankruptcy of the Walter Canada Group as of the Annulment Time; and

(viii) be pronounced by the Court on or before December 28, 2016;

(i) all relevant Persons shall have executed, delivered and filed all documents and other instruments, in form and substance satisfactory to the Walter Canada Group, the New Walter Canada Group, the Purchaser and the Proposal Trustee, that, in the opinion of the Proposal Trustee acting reasonably, are necessary to implement the provisions of this Proposal;

(j) no effective injunction, writ or preliminary restraining order or any order of any nature shall have been issued and remain in effect by a competent authority prohibiting this Proposal from being consummated as provided herein and no law shall be in effect prohibiting this Proposal from being consummated as provided herein; and

(k) the Purchaser shall be satisfied that the Annulment Time will occur on or before December 30, 2016.

5.4 Waiver of Conditions

Other than the approval of the Proposal by the Required Majority pursuant to Section 5.3(g) and the granting of the BIA Proposal Approval Order pursuant to Section 5.3(h) (but not the specific terms of that Order), the Purchaser and the New Walter Canada Group may, with the consent of the Proposal Trustee, at any time and from time to time waive the fulfillment or satisfaction, in whole or in part, of the conditions set forth in Section 5.3 above, except for the conditions set out in Sections 5.3(a) to 5.3(e), which may only be waived by the Purchaser, and the condition set out in Section 5.3(f), which may only be waived by the New Walter Canada Group, with the consent of the Monitor, in each case without any other notice to parties in interest or the Court and without a hearing.

5.5 Trustee's Certificate

Upon receipt of written evidence of the satisfaction or waiver of each of the conditions precedent set out in Section 5.3, the Proposal Trustee will file with the Court a copy of the certificate given

by the Proposal Trustee to the Walter Canada Group, the New Walter Canada Group, the Purchaser and the Official Receiver stating that all conditions precedent set out in Section 5.3 have been satisfied or waived (the "**Trustee's Certificate**"). The date that the Trustee's Certificate is given to the Walter Canada Group, the New Walter Canada Group, the Purchaser and the Official Receiver and filed with the Court shall be deemed to be the "**Proposal Commencement Date**". The delivery of the Trustee's Certificate to each of the Purchaser, the New Walter Canada Group and the Walter Canada Group shall be conclusive evidence that this Proposal and the transactions contemplated herein shall become effective in accordance with the terms herein.

ARTICLE 6
MISCELLANEOUS

6.1 Modification of Proposal

After the Creditors' Meeting (and both prior to and subsequent to the obtaining of the BIA Proposal Approval Order), the Purchaser and the New Walter Canada Group, in consultation with the Proposal Trustee, may at any time and from time to time agree to modify, amend, vary or supplement this Proposal, without the need for obtaining an Order of the Court or providing notice to the Affected Claimants if the Proposal Trustee determines that such modification, amendment, variation or supplement would not be materially prejudicial to the interests of the Affected Claimants under this Proposal or the BIA Proposal Approval Order and is necessary in order to give effect to the substance of this Proposal or the BIA Proposal Approval Order. The Proposal Trustee shall post on the Proposal Trustee's website, as soon as possible, any such modification, amendment, variation or supplement to this Proposal, with notice of such posting forthwith provided to all known Claimants at the filing date.

6.2 Capacity of Proposal Trustee

KPMG Inc., is acting in its capacity as Bankruptcy Trustee and Proposal Trustee under this Proposal and not in its personal capacity and shall not incur any liabilities or obligations in connection with this Proposal or in respect of the business or obligations of any of the members of the Walter Canada Group or the New Walter Canada Group.

6.3 Capacity of the CRO

The CRO is acting and has acted in its capacity as CRO pursuant to the terms of the Order of the Court dated January 5, 2016, as amended or supplemented by further Court Orders and shall not be responsible or liable for any obligations of any member of the Walter Canada Group or of the New Walter Canada Group; provided however that the CRO shall exercise the powers granted to the CRO to cause the members of the New Walter Canada Group to perform their obligations (if any) under this Proposal, the CCAA Procedure Order and any subsequent Order of the Court.

6.4 Notices

Any notices or communication to be made or given hereunder to the Walter Canada Group, the Purchaser and the Proposal Trustee shall be in writing and shall refer to this Proposal and may,

subject as hereinafter provided, be made or given by fax or e-mail addresses to the respective parties as follows:

(a) if to the New Walter Canada Group, on or prior to the Proposal Commencement Date, the Walter Canada Group:

William E. Aziz
Chief Restructuring Officer

Email: baziz@bluetreeadvisors.com

With a copy to:

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, M5X 1B8

Attention: Marc Wasserman / Patrick Riesterer
Fax No.: 416.862.6666
Email: mwasserman@osler.com / priesterer@osler.com

And with a copy to:

DLA Piper (Canada) LLP
Suite 2800, Park Place
666 Burrard St.
Vancouver, British Columbia V6C 2Z7

Attention: Mary Buttery / Lance Williams
Facsimile: (604) 605-3768
Email: mary.buttery@dlapiper.com / lance.williams@dlapiper.com

(b) If to the Proposal Trustee:

KPMG Inc.
777 Dunsmuir Street, PO Box 10426
Vancouver, British Columbia V7Y 1K3

Attention: Philip Reynolds / Anthony Tillman
Facsimile: (604) 691-3036
Email: pjreynolds@kpmg.ca / atillman@kpmg.ca

with a copy to:

McMillan LLP
181 Bay Street, Suite 440
Toronto, ON M5J 2T3

Attention: Wael Rostom / Caitlin Fell
Facsimile: 416.865.7048
Email: wael.rostom@mcmillan.ca / caitlin.fell@mcmillan.ca

(c) If to the Purchaser, or after the Proposal Commencement Date, the Walter Canada Group:

Jeff Shickele
Director
1098138 B.C. Ltd.
Suite 500, 856 Homer Street
Vancouver, BC V6B 2W5

Facsimile: 604.602.7110
Email: jshickele@amacon.com

and a copy to:

Randy Morphy
Borden Ladner Gervais LLP
Suite 1200 – 200 Burrard Street
PO Box 48600
Vancouver, BC V7X 1T2

Facsimile: 604.622.5006
Email: rmorphy@blg.com

or to such other fax or e-mail as any party may from time to time notify the others in accordance with this Section 6.4. All such notices and communications shall be deemed to have been received, in the case of notice by fax or e-mail sent prior to 5:00 p.m. (local time) on a Business Day, when such fax or email is sent or if sent after 5:00 p.m. (local time) on a Business Day or at any time on a non-Business Day, on the next following Business Day. This Proposal and any action taken by any Person pursuant to this Proposal shall not be invalidated where the BIA Procedure Order provides that any notice may be dispensed with or where there is an unintentional failure by the New Walter Canada Group, the Walter Canada Group or the Proposal Trustee to give any notice contemplated hereunder to any particular Claimant.

Any notices or communications to be made or given hereunder by the New Walter Canada Group, the Walter Canada Group or the Proposal Trustee to a Claimant shall be sent as provided for in the BIA Procedure Order or by fax, e-mail, ordinary mail, registered mail or courier. A Claimant shall be deemed to have received any document sent pursuant to this Proposal: (i) in the case of a document sent by fax or e-mail prior to 5:00 p.m. (local time) on a Business Day, when such fax or email is sent or if sent after 5:00 p.m. (local time) on a Business Day or at any time on a non-Business Day, on the next following Business Day; (ii) in the case of documents sent by courier, on the Business Day immediately following the day on which the document is sent; and (iii) in the case of a document sent by ordinary or registered mail, four (4) Business Days after the document is sent. Documents shall not be sent by ordinary or registered mail during a postal strike or work stoppage of general application.

Notices or communications may be sent to a Claimant as follows: (i) at the addresses set forth in the Proof of Claim filed by such Claimant; (ii) to the address set forth in any written notice of address changes delivered to the Proposal Trustee; or (iii) the last known address for such Claimant available to the Proposal Trustee.

6.5 Severability of Proposal Provisions

If, prior to the Proposal Commencement Date, any term or provision of this Proposal is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Proposal Trustee, the New Walter Canada Group or the Purchaser, shall have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of this Proposal shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

6.6 Non-consummation

If this Proposal is not approved by the Required Majority, if any of the other conditions set forth in Section 5.3 above are not satisfied or waived in accordance with the terns hereof or if the BIA Proposal Approval Order is not granted, then: (i) this Proposal shall be null and void in all respects, (ii) no transfer of Transferred Assets and no assumption of Deemed Claims shall occur; (iii) any Claim, any settlement, compromise or release embodied in this Proposal, assumption or termination, repudiation of executory contracts or leases effected by this Proposal, and any document or agreement executed pursuant to this Proposal shall be deemed null and void, and (iv) nothing contained in this Proposal, and no act taken in preparation for consummation of Proposal, shall:

(a) constitute or be deemed to constitute a waiver or release of any Claims by or against the Walter Canada Group or any other Person;

(b) prejudice in any manner the rights of the Walter Canada Group, the New Walter Canada Group or any other Person in any further proceedings involving the Walter Canada Group or the New Walter Canada Group; or

(c) constitute an admission of any sort by the Walter Canada Group, the New Walter Canada Group or any other Person.

6.7 Governing Law

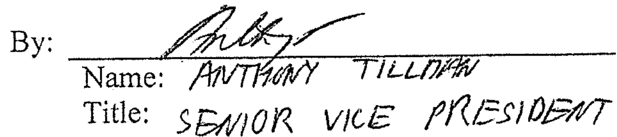
This Proposal shall be governed by and construed in accordance with the laws of the Province of British Columbia and the federal laws of Canada applicable therein. Any questions as to the interpretation or application of this Proposal and all proceedings taken in connection with this Proposal and its provisions shall be subject to the exclusive jurisdiction of the Court.

6.8 Successors and Assigns

This Proposal shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal representatives, successors (including by merger, amalgamation, consolidation, conversion or reorganization or following any winding-up, liquidation or dissolution) and permitted assigns of any Person named or referred to in this Proposal.

DATED as of December 19, 2016

KPMG INC., IN ITS CAPACITY AS BANKRUPTCY TRUSTEE AND PROPOSAL TRUSTEE OF WALTER ENERGY CANADA HOLDINGS, INC., WALTER CANADIAN COAL ULC, BRULE COAL ULC, WILLOW CREEK COAL ULC, PINE VALLEY COAL LTD., WOLVERINE COAL ULC, 0541237 B.C. LTD., WALTER CANADIAN COAL PARTNERSHIP, BRULE COAL PARTNERSHIP, WILLOW CREEK COAL PARTNERSHIP AND WOLVERINE COAL PARTNERSHIP AND NOT IN ITS PERSONAL CAPACITY

By: 
Name: ANTHONY TILLMAN
Title: SENIOR VICE PRESIDENT

TAB 10

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

SUBMISSIONS OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST (THE "1974 PLAN")

DENTONS CANADA LLP
20th Floor, 250 Howe Street
Vancouver, BC V6C 3R8
Telephone: 604-687-4460
Facsimile: 604-683-5214

Craig P. Dennis, Q.C.
John R. Sandrelli
Owen James
Tevia Jeffries
Counsel for the 1974 Plan

TABLE OF CONTENTS

Page

I. **INTRODUCTION** - 1 -

II. **FACTS** - 6 -

A. **Formation and Connections of the 1974 Plan** - 8 -

1. How the 1974 Plan Came into Existence - 8 -

2. The Financial Health of the 1974 Plan Is Declining - 9 -

3. The 1974 Plan Is Connected to the United States - 10 -

B. **Walter Energy Expanded its Business into Canada** - 11 -

C. **Walter Energy and Its Affiliates Operated under Common Ownership and Centralized Management** - 13 -

1. The Walter Canada Group and Walter Resources Share Common Ownership - 13 -

2. The Walter Canada Group and Walter Resources Share Common Management - 14 -

D. **The U.S. Debtors Commenced Chapter 11 Proceedings** - 16 -

E. **Walter Resources' Withdrawal from the 1974 Plan Led to Liability under ERISA for All Walter Entities** - 17 -

F. **The 1974 Plan Claim Is Joint and Several Against All Entities in the Walter Canada Group - 18 -**

G. **Walter Canada Group Commenced CCAA Proceedings** - 19 -

H. **1974 Plan's Efforts to Obtain Discovery** - 20 -

I. **Objections to Expert Evidence** - 22 -

III. **Issues** - 22 -

IV. **Legal analysis** - 24 -

A. **Evidence in the Walter Canada Group's Book of Evidence is Largely Inadmissible** - 24 -

1. Evidence must be trial-quality - 25 -

a. *The Harvey Affidavit* - 27 -

b. *Walter Canada Group and Steelworkers cannot rely on prior interlocutory decisions of this Court to prove facts in this summary trial* - 38 -

c. EDGAR filings are inadmissible for the purpose intimated by the Walter Canada Group .... - 40 -

d. Walter Canada Group seeks to have Court proceed on facts they define as "admitted facts" which have not been admitted .... - 41 -

e. Implications of deficient evidentiary record for Statement of Uncontested Facts - 45 -

g. Conclusion on Walter Canada Group's evidence .... - 46 -

B. The 1974 Plan Relies Upon Admissions Against Interest in Mr. Harvey's Affidavit .... - 47 -

C. The Walter Canada Group's Application is Unsuitable for Summary Trial .... - 50 -

1. Court is unable to find the facts necessary to dispose of preliminary issues in favour of the Walter Canada Group and the Steelworkers .... - 51 -

a. Choice of law issue is fact-dependent .... - 52 -

b. Extraterritoriality issue as framed by the Walter Canada Group is fact-dependent .... - 57 -

c. Public policy issue as framed by the Walter Canada Group and Steelworkers is fact-dependent .... - 63 -

2. Proceeding in absence of discovery would be unjust to the 1974 Plan .... - 65 -

a. Importance of discovery .... - 66 -

b. Important evidence not before the Court .... - 68 -

c. Conclusion on discovery issue .... - 72 -

3. Other considerations militate against proceeding summarily on present record .... - 73 -

a. Amount involved .... - 74 -

b. Complexity of the matter .... - 74 -

c. Urgency and costs of this litigation .... - 75 -

d. Summary trial may create unnecessary complexity in the resolution of the dispute - 77 -

e. Litigating in slices .... - 78 -

4. Conclusion on Suitability .... - 80 -

1. Characterization of 1974 Plan Claim .... - 82 -

2. Choice of Law Rule Applicable to 1974 Plan Claim .... - 87 -

3. Application of Choice of Law Rule to 1974 Plan Claim .... - 88 -

4. The Choice of Law Rule Advocated by the Walter Canada Group and the Steelworkers Is Inappropriate .... - 93 -

E. Preliminary Issue #2: The Withdrawal Liability Provisions of ERISA Apply to the Walter Canada Group .... - 97 -

1. The Presumption Against Extraterritoriality Is Not a Substantive Prohibition .... - 98 -

2. This Case Presents No Extraterritorial Application of U.S. Law .... - 99 -

(a) The "Focus" of a Statute Determines Whether It Is Being Applied Extraterritorially or Domestically .... - 100 -

(b) The "Focus" of the Relevant ERISA Statutory Provisions Is Employer Withdrawal from Multiemployer Plans .... - 101 -

(c) The Walter Canada Group and the Steelworkers Misapprehend the "Focus" Inquiry - 103 -

3. Congress Clearly Indicated Its Intent that ERISA Withdrawal Liability Apply Extraterritorially .... - 108 -

4. Conclusion on Extraterritoriality .... - 111 -

F. Preliminary issue #3: The Withdrawal Liability Provisions of ERISA Do Not Conflict with Canadian Public Policy .... - 112 -

V. CONCLUSION .... - 115 -

I. INTRODUCTION

1. The United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**") is a creditor of the Walter Canada Group (as defined below) by reason of a claim properly governed by U.S. law, specifically ERISA (the "**1974 Plan Claim**"). It is a basic principle of insolvency law that a foreigner with a proven foreign claim stands in the same position as a domestic creditor with a proven domestic claim.[1] Where facts exist such that U.S. law is the "proper law of the obligation", a Canadian entity is liable for withdrawal liability under ERISA.

2. The deficient evidentiary record militates against the Court disposing of the preliminary issues in favour of the Walter Canada Group and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 (the "**Steelworkers**"). However, the evidence that is properly before this Court favours the 1974 Plan on all three preliminary issues.

3. Addressing the first preliminary issue raised by the Walter Canada Group, the first step to determine whether U.S. or Canadian law applies to the 1974 Plan Claim is to characterize the claim. The objective of characterization is to find a rule that is fair to the parties. This requires an understanding of the facts and circumstances surrounding the claim.

4. The 1974 Plan's characterization of its claim rests on settled law. The cases on which the 1974 Plan relies are cases where the precise issue decided was characterization for choice of law purposes.

5. Those cases specifically address the situation where, as in this case, a statute confers a right of action against an entity that itself was not a party to the contract to which the claim relates. That unbroken line of authority establishes the following: where, as here, the "essential nature" of a claim authorized by statute "is to enforce the terms of [a] contract,"[2] then, for choice of law purposes, the correct characterization of the claim is

---

[1] *Teleglobe (Re)*, [2005] O.J. No. 528 (S.C.J.) 1974 Plan's Book of Authorities ["1974 Plan BOA"], Tab 54 at para. 8; and *Halsbury's Laws of England, Conflict of Laws*, vol. 8(1), 4th ed. (Reissue) (London, UK: Butterworths, 1996) at 710, 1974 Plan BOA, Tab 109 at para. 980.

[2] *Through Transport Mutual Assurance Association (Eurasia) Ltd. v. New India Assurance Co Ltd.*, [2004] EWCA Civ 1598, 1974 Plan BOA, Tab 66 at para. 59 [*Through Transport*].

as a claim in contract. That is so notwithstanding that the defendant was not a party to the contract.

6. In contrast to the cases directly on point which support the 1974 Plan's characterization of the 1974 Plan Claim, neither the Walter Canada Group nor the Steelworkers is able to cite a single case which supports characterizing a claim seeking to impose civil liability on a corporation as one "implicating legal personality".[3]

7. In applying the choice of law rule for contract, courts look for the forum with the "closest and most real connection" to the underlying claim. Applying the law with the "closest and most real connection" to the underlying claim reflects a trend towards the use by courts of a principled approach to choice of law.

8. The 1974 Plan Claim is most closely connected with the law of the United States. The Walter Canada Group and the Steelworkers contend that there is no intersection between the Walter Canada entities and their American affiliates. Notwithstanding such protestations, the record – even in its incomplete state – indicates significant connections. The evidence filed by the Walter Canada Group shows that Walter Canada Group's controlling minds were located in the United States at all relevant times. Such evidence further shows that the Walter Canada Group operated the Canadian entities as part of an integrated global enterprise out of their head offices in Birmingham, Alabama. The acquisition of the Walter Canada Group by Walter Energy, Inc. leveraged U.S. assets to acquire assets held in Canadian subsidiaries, removing over US$2 billion in value from the United States to Canada.

9. On the second preliminary issue raised by the Walter Canada Group, application of ERISA to the 1974 Plan Claim is a domestic application of the statute. On the evidence before the Court on this application, the only available conclusion is that there is no problem of extraterritoriality.

10. The experts on both sides cite the 1997 opinion ("**PBGC Opinion 97-1**") of the Pension Benefit Guaranty Corporation (the "**PBGC**"), the United States federal agency

[3] Written submissions of Walter Canada Group, dated December 12, 2016 ["WCG Written Submissions"] at para. 57.

responsible for administering ERISA.[4] The PBGC's view, entitled to deference under U.S. law, is that circumstances such as those at issue in this case do "not implicate extraterritorial application of ERISA."[5] The 1974 Plan's expert reaches the same conclusion: "all of the events involved in the creation, computation and assertion of the withdrawal liability have taken place within the United States."[6]

11. The Walter Canada Group's expert(s) express no conclusion to the contrary.

12. The result is that the Walter Canada Group and the Steelworkers ask the court to reach a conclusion that:

    (a) none of the experts in U.S. law in this case reached,

    (b) is contrary to the opinion of the only expert in the case who has expressed a conclusion on the point, and

    (c) is contrary to the considered opinion on the very point of the United States federal agency responsible for ERISA, and whose opinion is entitled to deference under U.S. law.

13. In any circumstances a Canadian court should be slow to reject the considered opinion on the operation of ERISA of the U.S. "expert agency charged by Congress with interpreting" ERISA.[7] But it ceases even to be an option where, as in this case, there is no contrary opinion in evidence and indeed there is expert opinion evidence agreeing with it.

14. Moving to the third preliminary question raised by the Walter Canada Group, it is a high legal bar for the Walter Canada Group or the Steelworkers to prove that application of U.S. law to the 1974 Plan Claim is contrary to public policy. ERISA does not offend an essential public or moral interest, nor is it contrary to Canadian conceptions of essential justice and morality. The notion that a legislature may decide that others are to

---

[4] Expert Report of Judith Mazo, served November 24, 2016 ["Mazo Report"], 1974 Plan's Book of Evidence ["1974 Plan BOE"], vol. 2, Tab 2 at 17, para. 51; and Expert Report of Marc Abrams, served November 14, 2016 ["Abrams Report"], Walter Canada Group's Book of Evidence ["WCG BOE"], vol. 6, Tab 20 at 10.

[5] PBGC Office of General Counsel, Opinion 97-1, dated May 5, 1997 ["PBGC Opinion"] 1974 Plan's Book of Authorities RE: Mazo Report served November 24, 2016 ["Mazo BOA"], Tab 35; and Mazo Report, *supra* note 4 at paras. 51-54; and *Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (2007), 1974 Plan BOA, Tab 68.

[6] Mazo Report, *supra* note 4 at para. 54.

[7] *Ibid* at para. 51.

participate in the liability of a limited company is not contrary to Canadian public policy. Canadian legislatures have done that in areas ranging from tax to labour and employment to environmental to corporate law. Further, in the course of the statutorily mandated review of Canadian insolvency legislation, Canadian legislators have been considering recommendations from insolvency professionals and industry stakeholders. These recommendations have included the adoption of legislation that would allow Canadian creditors to pursue the assets of corporate group members in foreign jurisdictions. In other words, Canadian insolvency professionals and legal experts have recommended similar legislation.[8] How then can such a law be contrary to public policy? Under the law as it currently stands, such claims are to be assessed on a case-by-case basis.

15. If the Court determines that it can make a determination on the merits given the evidentiary record, evidence in that record permits the Court to dispose of all three preliminary issues in this summary trial in favour of the 1974 Plan. Notwithstanding this, however, the 1974 Plan has been prevented from advancing its claim in the best light. The traditional order of trial sees the plaintiff lead its evidence first and then the defendants lead their responding evidence, if any. In this way a plaintiff is "able to present the evidence in support of [its] claim fully, in an orderly way, and in its best light, before it is challenged by the defendants".[9]

16. The Walter Canada Group's summary trial application – brought less than one and a half months after the close of the pleading period on October 5, 2016, and before any discovery – reverses the natural order of a trial. This has thrown the 1974 Plan onto the defensive at the outset, having to respond to "evidence" that it has had no opportunity to test and arguments that mischaracterize the ultimate issues that must be adjudicated by this Court.

17. The Walter Canada Group's refusal to grant the 1974 Plan any discovery leading up to this summary trial has impeded the 1974 Plan's ability to "prepare for [itself] the representations on the basis of which [the] dispute is to be resolved."[10] The 1974 Plan has pleaded facts that are relevant to the preliminary issues before this Court in this

[8] See Section IV.F.
[9] *Mayer v. Mayer*, 2012 BCCA 77, 1974 Plan BOA, Tab 36 at para. 85.
[10] *Ibid* at para. 78.

summary trial. To prove the truth of many of these facts requires evidence that can best come out of the mouths of the Walter Canada Group's key decision-makers and out of the Walter Canada Group's own documents. It has also curtailed the 1974 Plan's ability to test the "evidence" the Walter Canada Group and the Steelworkers contend is dispositive.

18. The result is an application for summary determination of threshold issues that cannot be decided in this summary trial against the 1974 Plan. There are three key reasons for this conclusion, all of which will be developed below.

19. First, the deficient evidentiary record has left the Court in a position where it cannot find the facts necessary to determine the preliminary issues in favour of the Walter Canada Group and the Steelworkers in this summary trial application.

20. The Walter Canada Group and the Steelworkers rely largely on inadmissible evidence such as the First Affidavit of William Harvey, dated December 4, 2015 (the "**Harvey Affidavit**").[11] Certain statements in the Harvey Affidavit and its exhibits are admissible at the instance of the 1974 Plan as admissions against interest, but the affidavit is not admissible for the Walter Canada Group or the Steelworkers. As a result, the Court will only be in a position to find in favour of the Walter Canada Group and the Steelworkers after the 1974 Plan has had a meaningful opportunity through discovery to obtain evidence of the facts it says are relevant to its claim.

21. Second, it would be unjust for the Court to find against the 1974 Plan Claim on this deficient evidentiary record in the face of the Walter Canada Group's refusal to grant the 1974 Plan any discovery.

22. Third, a consideration of the relevant factors for proceeding summarily on an issue militates against this Court proceeding with this application. The significant amount involved, the complexity of the case, the substantial risk of wasting time and effort, and the undesirability of producing premature appeals on hypothetical facts and issues all point directly against summary disposition based on the present record.

---

[11] 1st Affidavit of William Harvey, dated December 4, 2015 ["Harvey Affidavit"], WCG BOE, vol. 2, Tab 9; and Exhibit "B" to Harvey Affidavit, ["Harvey Affidavit, Exhibit "B""], 1974 Plan BOE, vol. 4, Tab 7. As set out more fully in Section IV.B below, certain statements in the Harvey Affidavit are admissible as admissions against interest (as particularized in Schedule "A"). However, the Harvey Affidavit as a whole is not admissible and the Walter Canada Group and the Steelworkers are not entitled to rely on it to seek dismissal of the 1974 Plan Claim.

23. The Court of Appeal has cautioned that the orderly development of the common law is not enhanced by the Court of Appeal being required to address important issues of law unless the case at hand, in all its aspects, requires it to do so.[12] All three parties in this summary trial agree that the 1974 Plan Claim raises important issues of law. The 1974 Plan submits that this Court should not proceed summarily in this case until the evidentiary record permits it to adjudicate the entirety of the 1974 Plan Claim, and not certain preliminary issues. This will ensure the Court of Appeal is not asked to rule on important issues of law until the entire matter is before it, and not just certain slices.

II. FACTS

24. The 1974 Plan is a multiemployer defined-benefit pension plan that administers retirement benefits for thousands of coal miners and their families.[13]

25. One of the employers that promised to contribute to the 1974 Plan is Jim Walter Resources Inc., now known as New WEI 13, Inc. ("**Walter Resources**").[14] Walter Resources is an American company and wholly owned subsidiary of Walter Energy, Inc., now known as New WEI, Inc. ("**Walter Energy**"), another American company.[15] Walter Energy also wholly owns, either directly or indirectly, Canada Holdings.[16] On December 28, 2015, Walter Resources withdrew from the 1974 Plan, incurring approximately US$900 million in withdrawal liability.[17]

26. The 1974 Plan Claim against the Walter Canada Group arises under:

(a) the United Mine Workers of America 1974 Pension Plan Document (the "**Pension Plan Document**"), effective December 6, 1974, and amended from time to time thereafter,

---

[12] *Bacchus Agents (1981) Ltd. v. Phillippe Dandurand Wines Ltd.,* 2002 BCCA 138, 1974 Plan BOA, Tab 3 para. 25 [*Bacchus Agents*].

[13] 1st Affidavit of Dale R. Stover, dated November 29, 2016 ["Stover Affidavit"], 1974 Plan BOE, vol. 1, Tab 1 at paras. 11 and 25.

[14] *Ibid* at paras. 18, 27, 34 and 41.

[15] Amended Notice of Civil Claim of the 1974 Plan, filed November 9, 2016 ["Amended NOCC"] WCG BOE, vol. 1, Tab 2 at para. 25. Ownership of Canada Holdings is admitted by all three parties, see Statement of Uncontested Facts, WCG BOE, vol. 1, Tab 1 para 20.

[16] *Ibid* at para. 41.

[17] Stover Affidavit, *supra* note 13 at paras. 74, 83 and 84.

(b) the United Mine Workers of America 1974 Pension Trust Documents (the "**Trust Document**"), effective December 6, 1974, and amended from time to time thereafter,

(c) a collective bargaining agreement (CBA) defined more fully below under which Walter Resources assumed pension funding obligations towards the 1974 Plan, and

(d) the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"), 29 U.S.C. §§ 1001 et seq.[18]

27. Walter Resources was a contributing employer to the 1974 Plan under the terms of the collective bargaining agreement (CBA) defined more fully below.[19] As a participating employer, Walter Resources was obligated to pay:

(a) monthly pension contributions for as long as Walter Resources had operations covered by the 1974 Plan; and

(b) "withdrawal liability" accruing upon a partial or complete withdrawal by Walter Resources from participation in the 1974 Plan.[20]

28. Under ERISA, all entities that share at least 80% common ownership with Walter Resources are jointly and severally liable for Walter Resources' withdrawal liability.[21] The Walter Canada group are among those entities.[22]

---

[18] *United Mine Workers of America 1974 Pension Plan (July 1, 2011),* effective December 6, 1974 ["Pension Plan Document"], 1974 Plan BOE, Tab 1 (Stover Affidavit), Exhibit "B" at 181 (see: Article XII B(14)) and 185 (see: Article XIV(A); United Mine Workers of America 1974 Pension Trust Documents, effective December 6, 1974 ["Trust Document"] 1974 Plan BOE, Tab1 (Stover Affidavit), Exhibit C at 200 (see: Article VI (12)) and 205 (see: Article XIII); National Bituminous Coal Wage Agreements of 2011, effective July 1, 2011 ["CBA"] 1974 Plan BOE, Tab 1 (Stover Affidavit), Exhibit "A" at 29 (see: Article XX (g)(4)(b)); and Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 et seq.

[19] Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 77.

[20] *Ibid* at para. 80.

[21] Mazo Report, *supra* note 4 at paras. 39, 43, 53-54.

[22] Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 47 and Exhibit "B".

A. Formation and Connections of the 1974 Plan

1. How the 1974 Plan Came into Existence

29. The 1974 Plan is a pension plan that provides defined benefits to its beneficiaries.[23] The 1974 Plan provides pension and death benefits to approximately 88,000 eligible beneficiaries who are retired or disabled coal miners and their eligible surviving spouses and dependents.[24] The participants and beneficiaries in the 1974 Plan are retired or disabled former hourly coal production employees and their eligible surviving spouses.[25] Multiple companies in the coal industry contribute to the 1974 Plan.[26] Although the 1974 Plan's aggregate benefit payments are large, the individual pensions are modest:

    (a) almost 80% of beneficiaries receive a monthly pension of less than US$800 a month;

    (b) the average monthly pension for a regular retiree is US$674;

    (c) the average monthly pension for a disabled retiree is US$568; and

    (d) the average monthly pension for a surviving spouse is US$340.[27]

30. The 1974 Plan was established pursuant to the collectively bargained National Bituminous Coal Wage Agreements of 1974 (the "**1974 NBWCA**", and each such agreement as approved from time to time an "**NBCWA**").[28] The 1974 NBWCA was negotiated between the United Mine Workers of America (the "**UMWA**") and the Bituminous Coal Operators' Association, Inc. (the "**BCOA**").[29] The BCOA is a multiemployer bargaining association.[30]

---

[23] Stover Affidavit, *supra* note 13 at para. 11.
[24] *Ibid* at paras. 28-29.
[25] *Ibid* at para. 28.
[26] *Ibid* at para. 1.
[27] *Ibid* at paras. 30-33.
[28] *Ibid* at para. 14.
[29] *Ibid*.
[30] *Ibid*.

31. Until its withdrawal, Walter Resources (or a predecessor entity) had been a participating employer in the 1974 Plan since 1978.[31]

2. The Financial Health of the 1974 Plan Is Declining

32. The 1974 Plan has been in serious and increasing financial trouble since 2010, and is expected to become insolvent in six to seven years.[32] The 1974 Plan is unlikely to have sufficient time to recoup its losses from the 2008/09 financial crisis through prudent investment and cannot recover its funding status through increased contributions.[33]

33. The inability of Walter Resources and certain of its U.S. affiliates (the "**U.S. Debtors**") to satisfy their withdrawal liability obligation results in a significant loss of funding to the 1974 Plan.[34] The loss of funding to the 1974 Plan due to the U.S. Debtors' inability to satisfy their obligations has exacerbated the impaired financial status and projected insolvency.[35] That in turn will affect the benefit levels of current and future retirees.[36] If the loss of funding causes the 1974 Plan to become insolvent, such insolvency would reduce (or render the 1974 Plan unable to pay) the pension benefits provided to the 1974 Plan's approximately 88,000 eligible beneficiaries.[37]

34. As a result of the loss of funding caused by Walter Resources' withdrawal and failure to pay the withdrawal liability, the share of the 1974 Plan's unfunded liabilities attributable to each of the remaining employers that contribute to the 1974 Plan will increase proportionally.[38] The remaining employers are not expected to be able to make up the difference.[39]

35. The PBGC guarantees payment of a portion of the 1974 Plan's benefits, but at a reduced level.[40] Under the PBGC's guarantee, the monthly benefits of an estimated 85%

---

[31] *Ibid* at para. 37.
[32] *Ibid* at para. 50.
[33] *Ibid* at para. 72.
[34] *Ibid* at paras. 95-96.
[35] *Ibid* at para. 96.
[36] *Ibid* at para. 96.
[37] *Ibid* at paras. 29 & 97.
[38] *Ibid* at para. 95.
[39] *Ibid* at para. 95.
[40] *Ibid* at para. 98.

of the 1974 Plan's beneficiaries would be reduced.[41] Even with financial assistance from the PBGC, the 1974 Plan will have to reduce the already modest pensions of the vast majority of beneficiaries.[42] The PBGC's multiemployer insurance program is also currently in financial difficulty and is projected to be insolvent within the next ten years.[43]

3. The 1974 Plan Is Connected to the United States

36. The 1974 Plan is resident in Washington, DC.[44]

37. The trustees of the 1974 Plan are resident in the United States.[45]

38. All participating employers in the 1974 Plan are resident in the United States.[46]

39. The Pension Plan Document was signed by the President of the BCOA and the International President of the UMWA in Washington, DC, on September 27, 2011.[47]

40. The Pension Plan Document provides that it is to be interpreted in accordance with ERISA and that withdrawal liability is to be calculated in accordance with ERISA.[48]

41. The 2011 NBCWA provides that trusts and plans connected with the CBA must conform to the requirements of ERISA and other federal laws.[49] Walter Resources signed a collective bargaining agreement (the "**CBA**") with the UMWA that adopted each and every term of the 2011 NBCWA that affected the 1974 Plan.[50]

42. The Trust Document was signed by the President of the BCOA and the International President of the UMWA in Washington, DC on January 13, 1975.[51] The Trust Document was amended and restated as of July 1, 2011.[52]

---

[41] *Ibid* at para. 99.
[42] *Ibid* at para. 100.
[43] *Ibid* at para. 101.
[44] *Ibid* at para. 12.
[45] *Ibid* at para. 13.
[46] *Ibid* at para. 39.
[47] Pension Plan Document, *supra* note 18 at 193.
[48] *Ibid* at 181 (see: Article XII B(14)); at 185 et seq. (see: Article XIV (A)-(N)).
[49] CBA, *supra* note 18 at 29 (see: Article XX (g)(4)(b)).
[50] Stover Affidavit, *supra* note 13 at paras. 17-18.
[51] Trust Document , *supra* note 18 at 200 (see: Article VI (12)) and 205 (see: Article XIII).
[52] *Ibid* at 205.

43. The Trust Document provides that:

(a) the 1974 Plan is to be construed, regulated and administered under the laws of the District of Columbia;

(b) the 1974 Plan will have its principal place of business in Washington, DC; and

(c) the trustees are authorized to do all acts necessary to comply with ERISA or other federal laws.[53]

B. Walter Energy Expanded its Business into Canada

44. The facts alleged by the 1974 Plan point to significant funds being transferred to Canada Holdings from Walter Energy.[54] Because this summary trial application has been brought prior to any discovery being provided to the 1974 Plan, the 1974 Plan has been deprived of evidence from the Walter Canada Group that would enable the 1974 Plan to prove those facts. These facts include:

(a) in the spring of 2011, Walter Energy purchased a group of companies, Western Coal Corp. ("**Western**") and its subsidiaries, which had mines in British Columbia;[55]

(b) this purchase expanded Walter Energy's business into Canada;[56]

(c) on March 9, 2011, Walter Energy incorporated Canada Holdings;[57]

(d) Canada Holdings was incorporated specifically to hold the shares of Western and its subsidiaries;[58]

(e) Western and its subsidiaries operated coal mines in British Columbia, the United Kingdom and the United States;[59]

---

[53] *Ibid* at 205 (see: Article XIII); at 197 (see: Article II); and at 198--200 (see: Articles V and VI(12)).
[54] Amended NOCC, *supra* note 15 at paras. 46, 52-53.
[55] *Ibid* at paras. 40-45.
[56] *Ibid* at para. 47.
[57] *Ibid* at para. 40.
[58] *Ibid* at para. 42.
[59] *Ibid* at para. 43.

(f) on April 1, 2011, Canada Holdings acquired all outstanding common shares of Western (the "**Western Acquisition**");[60]

(g) before 2011, Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom;[61]

(h) total consideration paid by Walter Energy in respect of the Western Acquisition was approximately US$3.7 billion;[62]

(i) concurrently, and in connection with entering into the arrangement agreement with Western, Walter Energy, Western, and Canada Holdings entered into a credit facility (the "**Credit Facility**");[63]

(j) the lenders under the Credit Facility were Morgan Stanley Senior Funding, Inc., the Bank of Nova Scotia and others (the "**Bank Lenders**");[64]

(k) pursuant to the Credit Facility, the Bank Lenders committed to providing Walter Energy, Western and Canada Holdings with US$2.725 billion of senior secured credit facilities;[65]

(l) Walter Energy transferred the proceeds of the Credit Facility to Canada Holdings to fund the cash consideration, fees and expenses in connection with the Western Acquisition;[66]

(m) the majority of the funding Canada Holdings paid for the Western Acquisition was obtained under a hybrid debt transaction (the "**Hybrid Financing**");[67]

(n) as part of the Hybrid Financing, Walter Energy in substance advanced approximately US$2 billion in cash to Canada Holdings to enable Canada Holdings to purchase the Western Coal entities;[68] and

---

[60] *Ibid* at para. 44.
[61] *Ibid* at para. 47.
[62] *Ibid* at para.46.
[63] *Ibid* at para. 48.
[64] *Ibid.*
[65] *Ibid* at para. 49.
[66] *Ibid* at para. 50.
[67] *Ibid* at para. 51.

(o) Walter Energy incurred significant debt in relation to the Western Acquisition.[69]

C. Walter Energy and Its Affiliates Operated under Common Ownership and Centralized Management

45. The Walter Canada Group operated as an integrated global enterprise with its U.S. affiliates.

1. The Walter Canada Group and Walter Resources Share Common Ownership

46. The 1974 Plan alleges that the Walter Canada Group and Walter Resources are wholly owned by Walter Energy.[70] Again, because this summary trial application has been brought prior to any discovery being provided to the 1974 Plan, the 1974 Plan has been deprived of evidence from the Walter Canada Group that would enable the 1974 Plan to prove these facts. These facts include:

(a) Walter Resources is a wholly owned subsidiary of Walter Energy;[71]

(b) Walter Energy is a public company incorporated under the laws of Delaware;[72]

(c) Walter Energy has its headquarters in Birmingham, Alabama ("**Headquarters**"), and did business in West Virginia and Alabama;[73]

(d) Walter Resources is incorporated in Alabama and did business in Alabama;[74]

(e) until implementation of the joint proposal of the Walter Canada Group in December 2016, each of the entities comprising the Walter Canada Group was a wholly owned subsidiary of Walter Energy;[75] and

(f) The "Walter Canada Group" comprises:

---

[68] *Ibid* at para. 52.
[69] *Ibid* at para. 59.
[70] *Ibid* at para. 15.
[71] *Ibid* at para. 25.
[72] *Ibid* at para. 24.
[73] *Ibid* at paras. 24 & 79.
[74] *Ibid* at para. 81.
[75] *Ibid* at para.75.

(i) Canada Holdings and 0541237 BC Ltd.;

(ii) Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Cambrian Energybuild Holdings ULC, and Willow Creek Coal ULC;

(iii) Pine Valley Coal Ltd.; and

(iv) Willow Creek Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership, and Brule Coal Partnership.[76]

(g) Walter Energy's board of directors and its management team operated out of Birmingham, Alabama;[77] and

(h) Walter Resources' management team operated out of Birmingham, Alabama.[78]

2. The Walter Canada Group and Walter Resources Share Common Management

47. The 1974 Plan alleges that the Walter Canada Group is controlled from Birmingham, Alabama.[79] The facts alleged point to common management, including:

(a) Mr. Harvey is the Executive Vice President and Chief Financial Officer of Canada Holdings and Executive Vice President and Chief Financial Officer of Walter Energy;[80]

(b) Walter Energy and its U.S., Canadian and UK affiliates, including the Walter Canada Group, comprise a single global enterprise with integrated businesses;[81]

(c) Walter Energy's legal team provided legal advice to the Walter Canada Group and the rest of the global enterprise;[82]

(d) Mr. Harvey was located in Birmingham, Alabama.[83]

---

[76] *Ibid* at paras. 2-13 & 33.
[77] *Ibid.* at para. 80.
[78] *Ibid* at para. 82.
[79] *Ibid* at para. 34.
[80] *Ibid* at paras. 89-90.
[81] *Ibid* at para. 15.
[82] *Ibid* at para. 100.

(e) at all material times, Walter Energy directed and controlled the affairs of the Walter Canada Group centrally from Headquarters;[84]

(f) the management team and key decision makers of Canada Holdings and the other entities in the Walter Canada Group operated out of the U.S.;[85] and

(g) after the date of the Western Acquisition (as defined herein), the President of Canada Holdings and the rest of the Canadian operations resided in and worked out of Birmingham, Alabama.[86]

48. However, the Walter Canada Group proffered, and the Steelworkers rely upon, the Harvey Affidavit. In the Harvey Affidavit, Mr. Harvey makes a number of statements which align with the facts alleged by the 1974 Plan. For the reasons set out in Section IV.B, the 1974 Plan's position is that the Harvey Affidavit is inadmissible at the instance of the Walter Canada Group or the Steelworkers. However, certain statements in the Harvey Affidavit are admissible at the instance of the 1974 Plan as admissions against interest.[87] These statements include that:

(a) "Walter Energy manages its global operations centrally from its headquarters in Birmingham, Alabama."[88]

(b) until these proceedings, Headquarters provided numerous administrative services to Walter Energy and its affiliates, including the Walter Canada Group;[89] and

(c) services included finance, tax, treasury, human resources, payroll, benefits and communications, information technology, legal, operations and health, safety and environment, among others.[90]

---

[83] *Ibid* at oath.
[84] *Ibid.* at para. 34.
[85] *Ibid* at paras. 88 and 91.
[86] *Ibid* at para. 88.
[87] See Schedule "A" hereto.
[88] Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 66.
[89] *Ibid* at paras. 66-69, 75, 128, 148-149, 151, 161.
[90] *Ibid* at paras. 66-69, 75.

49. In January 2016, the Chief Restructuring Officer in the Walter Canada Group's proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") reported that the directors and officers of the Walter Canada Group had resigned.[91] These directors and officers of the Walter Canada Group did so *after* the U.S. Bankruptcy Court had authorized the U.S. Debtors to withdraw from the 1974 Plan.[92]

D. The U.S. Debtors Commenced Chapter 11 Proceedings

50. On July 15, 2015, the U.S. Debtors commenced proceedings (the "**Chapter 11 Proceedings**") under Chapter 11 of Title 11 of the United States Code (the "**U.S. Bankruptcy Code**").[93] On October 8, 2015, the 1974 Plan filed a proof of claim in the Chapter 11 Proceedings against each of the 23 U.S. Debtors (the "**Proofs of Claim**").[94]

51. Each of the Proofs of Claim stated the contingent estimated withdrawal liability of Walter Resources and members of its "controlled group" (as determined by ERISA) of US$904,367,132, which assumed that Walter Resources would withdraw from participation in the 1974 Plan during that plan year beginning July 1, 2015.[95]

52. When employers withdraw from participation in the 1974 Plan, employees of the Plan calculate and assess the amount of withdrawal liability required under ERISA, using information provided by the 1974 Plan's enrolled actuary in the actuary's annual Valuation Report and other information from the 1974 Plan's financial records.[96]

53. The withdrawal liability calculation set out in the Proofs of Claim was based on estimates because the final figure for withdrawal liability could not be calculated until the date of withdrawal was known and until the enrolled actuary has completed the annual plan valuation with a final calculation of the 1974 Plan's unfunded vested benefits.[97]

---

[91] 1st Affidavit of William E. Aziz dated March 22, 2016 ["*Aziz Affidavit*"], WCG BOE, vol. 2, Tab 9 at para. 21.

[92] *Walter Energy, Inc. (Re),* Chapter 11, Case No 15-02741-TOM11, United States Bankruptcy Court for the Northern District of Alabama, 28 December 2015 ["Rejection Order"], WCG BOE, vol. 3, Tab 12C (1st Affidavit of Miriam Dominguez); Stover Affidavit, *supra* note 13 at para. 83.

[93] Amended NOCC, *supra* note 15 at para. 58.

[94] Stover Affidavit, *supra* note 13 at para. 76.

[95] *Ibid* at para 78.

[96] *Ibid* at para 48.

[97] *Ibid* at paras 46, 78-79.

54. During the U.S. Proceedings, the U.S. Debtors sought authority from the Bankruptcy Court to sell their U.S. assets and operations free and clear of all liabilities.[98] The U.S. Debtors also sought authority to reject the CBA, which would terminate the requirement to make monthly pension contributions, giving rise to withdrawal liability.[99]

55. The joint and several liability under ERISA of those entities who are not U.S. Debtors (as defined below) was never at issue in the U.S. Bankruptcy Proceedings (as defined below). The 1974 Plan could not have made, and therefore did not make, a claim against such non-debtors in the U.S. Bankruptcy Proceedings. Instead, the 1974 Plan is advancing its claim before this Court in these proceedings in a manner that respects this Court's jurisdiction to determine claims against the Walter Canada Group.

E. Walter Resources' Withdrawal from the 1974 Plan Led to Liability under ERISA for All Walter Entities

56. On December 28, 2015, the U.S. Debtors obtained a ruling from the U.S. Bankruptcy Court authorizing the U.S. Debtors to reject the CBA (the "**Rejection Order**").[100] In the Rejection Order, the U.S. Bankruptcy Court "ordered, adjudged and decreed" that the CBA was rejected.[101]

57. The Rejection Order had the effect of terminating Walter Resources' obligation to make monthly payments to the 1974 Plan.[102] Pursuant to section 4203 of ERISA, the termination of the obligation to make monthly pension plan payments constitutes a complete withdrawal from the 1974 Plan by Walter Resources.[103]

58. Under section 4201 of ERISA, upon its withdrawal from a multiemployer pension plan, a previously contributing employer is immediately liable for its proportionate share of the employer's unfunded vested pension liabilities or "withdrawal liability".[104]

59. Under section 4001(b)(1) of ERISA, all entities that are at least 80% owned by the common parent corporation, wherever incorporated, and all trades or businesses under

[98] Rejection Order, *supra* note 92 at 22, para 1; Amended NOCC, *supra* note 15 at para 63.
[99] Rejection Order, *supra* note 92 at 22, para 1; and Amended NOCC, *supra* note 15 at para. 16, 64-65.
[100] Stover Affidavit, *supra* note 13 at para. 83 and Rejection Order, *supra* note 92 at 76.
[101] Stover Affidavit, *supra* note 13 at para. 83 and Rejection Order, *supra* note 92 at 76.
[102] Stover Affidavit, *supra* note 13 at paras. 40 and 87.
[103] Mazo Report, *supra* note 4 at para. 31.
[104] *Ibid* at paras. 31-33.

common control with them, constitute a single employer participating in a multiemployer pension plan (each, an "**Employer**").[105] Employers are legally subject to "withdrawal liability" accruing upon a partial or complete withdrawal from participation in the multiemployer pension plan by the participating employer.[106]

60. This withdrawal liability is a valid and enforceable debt as against the Employer, which includes each affiliate, wherever incorporated, which meets the test under ERISA for a member of the same "controlled group" (i.e., each entity that is at least 80% owned, either directly or indirectly, by the same parent).[107] The Walter Canada Group and the Steelworkers admit that Canada Holdings is wholly owned by Walter Energy.[108]

61. Withdrawal from the 1974 Plan occurred in the United States.[109] The liability created thereby occurred in the United States.[110]

F. The 1974 Plan Claim Is Joint and Several Against All Entities in the Walter Canada Group

62. As a result of Walter Resources' withdrawal from the 1974 Plan on December 28, 2015, the 1974 Plan has a claim for withdrawal liability against each Employer in the amount of US$904,367,132.00.[111]

63. By operation of ERISA, the 1974 Plan Claim is a valid and enforceable claim as against Walter Energy, and each U.S. or foreign affiliate which meets the test under ERISA for a member of the same "controlled group".[112] The 1974 Plan alleges that this includes each of the entities in the Walter Canada Group.[113]

---

[105] *Ibid* at paras. 39 and 43; see: 26 U.S.C. § 414(b), (c), Walter Canada Group's Book of Authorities re: Expert Report of Marc Abrams ("Abrams BOA"), Tab 12; 26 C.F.R. § 1.414(c)-2(b), (c), Abrams BOA, Tab 3.

[106] *Ibid* at para. 33.

[107] *Ibid* at paras. 39, 46-47; Stover Affidavit, *supra* note 13 at para. 74.

[108] Admitted by all parties, see Statement of Uncontested Facts, WCG BOE, vol. 1, Tab. 1, para. 20.

[109] Stover Affidavit, *supra* note 13 at paras 83-84.

[110] *Ibid.*

[111] *Ibid* at paras. 79-82.

[112] Mazo Report, *supra* note 4 at paras. 39, 43, 47, 49-54; and Stover Affidavit, *supra* note 13 at para. 74.

[113] Amended NOCC, *supra* note 15 at para. 73.

G. Walter Canada Group Commenced CCAA Proceedings

64. On December 7, 2015, the Walter Canada Group obtained creditor protection under the *Companies' Creditors Arrangement Act*.[114] In these proceedings, the Walter Canada Group implemented a sales process for its mining assets and a claims process.[115]

65. The claims process approved by this Court provided for a separate process to adjudicate the 1974 Plan Claim.[116]

66. On November 16, 2016, the Walter Canada Group filed a notice of application returnable January 9, 2017 (the "**Summary Trial Application**"), seeking an order that:

(a) the 1974 Plan Claim is governed by Canadian substantive law;

(b) in the alternative, ERISA does not apply extraterritorially;

(c) in the further alternative, ERISA is unenforceable as a penal, revenue or public law; or

(d) in the further alternative, ERISA is unenforceable because it conflicts with Canadian public policy.

67. The Walter Canada Group has since abandoned the position that ERISA is unenforceable as a penal, revenue or public law.[117]

68. On December 2, 2016, the 1974 Plan filed an application returnable January 9, 2017, seeking an order that the Summary Trial Application is not suitable for summary determination.

69. On December 7, 2016, the Walter Canada Group obtained the Court's authorization to close a transaction that has had or will have the following effects, among others:

---

[114] *Walter Energy Canada Holdings Inc. (Re),* (16 August 2016), Vancouver (S-1510120) (BCSC) ["Approval and Vesting Order"], 1974 Plan BOA, Tab 117.

[115] *Walter Energy Canada Holdings Inc. (Re),* (16 August 2016), Vancouver (S-1510120) (BCSC) ["Claims Process Order"], 1974 Plan BOA, Tab 118.

[116] *Ibid* at paras. 30-33.

[117] While the Walter Canada Group states in their submissions that the 1974 Plan Claim against the partnerships was not being advanced, that submission has been withdrawn and it is conceded that the 1974 Plan Claim is advanced against all entities within the Walter Canada Group.

(a) the Walter Canada Group has been declared bankrupt;

(b) the claims against the Walter Canada Group have been declared transferred to the "New Walter Canada Group", one of which is a claim by Walter Energy in respect of the Hybrid Financing; and

(c) if the Walter Canada Group can convince this Court that the 1974 Plan Claim can be summarily dismissed without discovery, nearly $40 million will be paid to Walter Energy in respect of the Hybrid Financing.[118]

70. By order of this Court, the New Walter Canada Group stands in the shoes of the Walter Canada Group with respect to the 1974 Plan Claim. In addition, the New Walter Canada Group is wholly owned, either director or indirectly by Walter Energy.[119]

H. 1974 Plan's Efforts to Obtain Discovery

71. The 1974 Plan has made repeated requests to obtain discovery from the Petitioners.

72. On October 3, 2016, the 1974 Plan prepared an initial list of discovery requests based on facts put in issue by the pleadings. The 1974 Plan requested that the Petitioners produce documents responsive to an itemized list of categories. The Petitioners did not respond to this request.[120]

73. On October 4, 2016, the 1974 Plan sent an email to the Petitioners outlining an option for a summary trial preceded by document discovery and examination for discovery. The 1974 Plan proposed that the summary trial be heard on either the week beginning January 9, 2017, or the week beginning February 20, 2017.[121]

74. On October 26, 2016, the parties appeared before this Court pursuant to a direction made on August 16, 2016 (the "**October Appearance**"). The purpose of the October

---

[118] Walter Energy Canada Holdings Inc. (Re), (7 December 2016), Vancouver (S-1510120) ["New Walter Group Procedure Order"] 1974 Plan BOA, Tab 119.

[119] See: Joint Proposal of the Walter Energy Canada Group, filed December 19, 2016 ["Joint Proposal"], 1974 Plan BOE, vol. 2, Tab 4 (7th Affidavit of Miriam Dominguez), Exhibit "A"; and Monitor's Seventh Report, dated December 11, 2016, ["Monitor's Seventh Report"], 1974 Plan BOE, vol. 3, Tab 6.

The legal analysis below refers to the Walter Canada Group. To the extent the 1974 Plan Claim has been deemed to be against the New Walter Canada Group, all references to the Walter Canada Group apply equally to the New Walter Canada Group, as appropriate.

[120] 6th affidavit of Miriam Dominguez dated December 2, 2016 ["6th Dominguez Affidavit"], 1974 Plan BOE, vol. 2, Tab 3, Exhibit "D" at 15-16.

[121] *Ibid*, Exhibit "A" at 2-3.

Appearance was to determine the procedural vehicle that would be used to determine the issues raised by the 1974 Plan Claim.

75. At the October Appearance, the 1974 Plan reiterated its position that the 1974 Plan Claim should be determined by summary trial on the earliest hearing date that would accommodate necessary pre-trial discovery.[122] The Walter Canada Group submitted that discovery was not necessarily required for a threshold issue.[123]

76. The Court concluded that it was not in a position to determine whether discovery was required for the threshold issue proposed by the Walter Canada Group:

> Proceeding to a determination of the issues, as proposed by Walter Energy and without agreement, poses some risk. Even so, I am simply not in a position to say who is right and who is wrong in terms of what level of discovery is warranted for the purpose of deciding this "threshold" issue or even whether a summary trial on this issue is appropriate.[124]

77. The Court permitted the Walter Canada Group to proceed with a summary trial application.[125] However, the Court cautioned that this could ultimately result in further delays for distribution:

> At the return of the application, the 1974 Plan may still take the position that the application is not appropriate and advance arguments to that effect. If so, Walter Energy and the Union still run the risk that the Court may agree with the 1974 Plan that it cannot or will not decide the issue by summary trial without the sought after disclosure (or perhaps other issues). If that occurs, the parties are not one month, but three to four months behind, in delaying a determination of the issues and hence exacerbating the delay faced by the creditors in terms of a distribution.[126]

78. After receiving the Walter Canada Group's summary trial application, the 1974 Plan again requested that the Walter Canada Group disclose documents related to discovery

---

[122] *Ibid*, Exhibit "C" at 15-16.

[123] *Ibid*, Exhibit "C" at 25 and 27.

[124] 8th Affidavit of Miriam Dominguez, dated December 30, 2016 ["8th Dominguez Affidavit"], Exhibit "C" at 15 at para. 7.

[125] *Ibid* at para. 8.

[126] *Ibid* at para. 9.

categories itemized by the 1974 Plan.[127] The 1974 Plan further requested to examine for discovery Mr. Harvey.[128]

79. The 1974 Plan subsequently brought an application seeking an order for document discovery to allow it to meet the preliminary issues raised by the Walter Canada Group in its summary trial application. The Court did not grant an order for document discovery, concluding that discoveries would remain in play if the Court concluded the preliminary issues were not suitable for summary trial. The Walter Canada Group has not disclosed any of the requested documents to the 1974 Plan or consented to allow the 1974 Plan to examine for discovery Mr. Harvey.

80. On December 23, 2016, the 1974 Plan provided the Walter Canada Group and the Steelworkers with its list of documents.[129] Neither the Walter Canada Group nor the Steelworkers have provided the 1974 Plan with a list of documents.[130]

I. Objections to Expert Evidence

81. The Walter Canada Group filed an expert report authored by Marc Abrams (the "**Abrams Report**"). It also filed an expert report of Alan L. Gropper as a purported reply to the Mazo Report (the "**Gropper Report**").

82. The 1974 Plan has given notice of its objections to the expert reports filed by the Walter Canada Group. The 1974 Plan objects to the entirety of the Gropper Report. The primary (but not only) basis of the objection is that the Gropper Report is not proper reply.

III. ISSUES

83. The issues before this Court are:

   (a) What evidence proffered by the parties is admissible in a summary trial application?

---

[127] 6th Dominguez Affidavit, *supra* note 120, Exhibit "E" at 48-49.
[128] *Ibid.*
[129] 8th Dominguez Affidavit, supra note 124, Exhibit "A" at 2-9.
[130] *Ibid* at para. 2.

(b) Are the issues raised by the Walter Canada Group's notice of application dated November 16, 2016, suitable for summary trial?

(c) Is the 1974 Plan Claim governed by U.S. or Canadian substantive law?

(d) If the 1974 Plan Claim is governed by U.S. substantive law as submitted by the 1974 Plan, does the Walter Canada Group avoid liability by virtue of being incorporated in Canada?

(e) Are the withdrawal liability provisions of ERISA unenforceable because they conflict with Canadian public policy?

84. The 1974 Plan submits that:

(a) Much of the evidence relied on by the Walter Canada Group is inadmissible in this summary trial (although as discussed below, certain statements in the Harvey Affidavit – specified in Schedule "A" to the 1974 Plan's written submissions – are admissible at the instance of the 1974 Plan as admissions against interest). The Harvey Affidavit fails to distinguish between evidence on personal knowledge and evidence on information and belief. Further, the Harvey Affidavit fails to identify, by name, the source for each individual statement on information and belief. Beyond that:

(i) The Walter Canada Group, and to a lesser extent the Steelworkers:

(A) impermissibly seeks to rely on prior interlocutory judgments of this Court to prove certain facts in this summary trial, several of which were not actually stated by the Court;

(B) relies on EDGAR filings of which the affiant attaching them to an affidavit has no personal knowledge; and

(C) seek to have the Court to proceed on assumed facts which have not been admitted by all parties in this proceeding.

(b) The evidentiary record is insufficient for the Court to find the facts necessary to rule in favour of the Walter Canada Group and the Steelworkers. This is so in respect of all the three preliminary issues in this summary trial application.

Further, it would be unjust to dismiss the 1974 Plan Claim summarily in the face of the Walter Canada Group's refusal to grant any discovery. A consideration of the principles for determining an issue summarily militate against proceeding summarily on the present record.

(c) The 1974 Plan Claim is governed by U.S. substantive law. The evidentiary record before the court is incomplete. But the evidence that is properly before the Court indicates that U.S. law has the closest and most real connection to the 1974 Plan Claim.

(d) The Walter Canada Group cannot avoid application of ERISA merely due to their being incorporated in Canada. On the facts of the case at bar, there is no issue of extraterritorial application of the statute. The only available conclusion on the evidence before the Court is that the liability in question represents the domestic application of U.S. law.

(e) The Walter Canada Group and the Steelworkers have not met the high legal bar to prove that application of U.S. law to the 1974 Plan Claim is contrary to public policy. The attribution of liability to others within a corporate group is not unknown to Canadian law. Moreover, Canadian legislators have not barred ERISA claims en masse. Instead, the CCAA allows for a case-by-case assessment, as advocated by the 1974 Plan.

IV. LEGAL ANALYSIS

A. Evidence in the Walter Canada Group's Book of Evidence is Largely Inadmissible

85. The Walter Canada Group seeks a final order dismissing the 1974 Plan Claim. This is not an interlocutory motion. As such, the Walter Canada Group's application must be "conducted in an orderly way with due regard to the rules of pleading and evidence."[131]

86. The Walter Canada Group has not adduced evidence with due regard to the rules of evidence.

87. For instance, the Walter Canada Group and the Steelworkers rely on affidavits that rely on information and belief. Evidence on information and belief is not admissible in an

[131] *Cotton v. Wellsby* (1991), 4 B.C.A.C. 171, 59 B.C.L.R. (2d) 366, 1974 Plan BOA, Tab 21 at para. 37.

application seeking a final order. Witnesses for a summary trial are permitted to say only what they would be able to say when testifying at a conventional trial. This applies to the evidence of former management of the Walter Canada Group. It also applies to legal assistants attaching EDGAR filings without having personal knowledge of the contents of those documents.

88. The Walter Canada Group also asks this Court to rely on statements in previous interlocutory judgments to prove facts in this summary trial application seeking a final order. It further asks this Court to accept certain facts set out in the 1974 Plan's pleadings as "uncontested" when those facts have not been admitted by either or both of the Steelworkers and the Walter Canada Group.

89. The cumulative effect of all of the deficiencies in the Walter Canada Group's evidence is that the Court is being asked to proceed on a summary trial application with very little admissible evidence from the applicants.

1. Evidence must be trial-quality

90. The Walter Canada Group seeks a final order dismissing the 1974 Plan Claim based on affidavit and expert evidence.[132] Accordingly, the rules and principles governing the admissibility of evidence adduced in summary trial applications apply to the Walter Canada Group's application.

91. A summary trial application is a trial. Only trial-quality evidence is admissible. This was explained by Mr. Justice K.J. Smith (then of this Court) in *Zurich Insurance Co. v. Reksons Holdings Ltd.*, 1994 CarswellBC 2925, at paragraph 5:

> Counsel should know that an application under Rule 18A, while summary, is nonetheless a trial. By initiating its application under Rule 18A, the plaintiff represented that it was ready to proceed with a summary trial. In my view it was not. The demand for trial time is such that we cannot waste it, and counsel who elect to go to trial should not routinely expect to be given a second chance if they do not have their cases in order. Careful thought should be given to the legal and factual issues and to the evidence necessary to either make out or defend the

[132] Although the Walter Canada Group appears to be trying to resile from the position that its application is brought under Rule 9-7, the application that the Walter Canada Group was authorized to bring at the October Appearance was a summary trial application. See: 6th Dominguez Affidavit, *supra* note 120, Exhibit "C", at 37-38.

> case, and the case should be presented with no less care and attention than if it were a trial in the usual way.[133]

92. The legal pre-conditions to admissibility are not discretionary. If a fact is not proven by admissible evidence, or admitted, there is no alternative path to the court relying on that fact in its decision. This was emphasized by Madam Justice Southin in *Cotton v. Wellsby* (1991), 4 B.C.A.C. 171, 59 B.C.L.R. (2d) 366 at para. 37:

> I cannot emphasize too strongly that R. 18A is a rule for trial. A trial, whether traditional or summary, must be conducted in an orderly way with due regard to the rules of pleading and evidence. Judges proceeding under R. 18A are not to think of themselves as cadis under palm trees.[134]

93. The requirement to produce admissible evidence is no less merely because the 1974 Plan Claim originated in CCAA proceedings. The CCAA is within the federal domain of bankruptcy and insolvency, and a component of the system of bankruptcy and insolvency law. In all bankruptcy matters, provincial laws of evidence apply to proceedings insofar as they are not inconsistent with, or contrary to, the rules of evidence contained in the *Canada Evidence Act*.[135]

94. The requirement that the Walter Canada Group adduce only trial-quality evidence in this summary trial is not inconsistent with or contrary to the rules of evidence contained in the *Canada Evidence Act*. It also is not inconsistent with purposes of the CCAA. Unlike many CCAA applications, which must be dispensed with quickly and efficiently to maximize the Court's ability to oversee a successful restructuring, the Walter Canada Group seeks adjudication of the Summary Trial Application to proceed with distribution to creditors. Notably, the purported largest of those creditors is the Walter Canada Group's U.S. parent company. Regardless of its ultimate outcome, the 1974 Plan Claim will not prejudice the restructuring of the Walter Canada Group or impede the remedial purpose of the CCAA.

95. There is thus no justification for relaxing the rules of evidence in this summary trial because it stemmed from a CCAA proceeding.

---

[133] 1974 Plan BOA, Tab 61

[134] *Supra*, note 131.

[135] Houlden and Morawetz, *Bankruptcy and Insolvency Analysis*, I§12, p. 958 (2016-2017 edition), 1974 Plan BOA, Tab 110; *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 40, 1974 Plan BOA, Tab 88; *Down (In Bankruptcy)*, 2000 BCCA 218, 1974 Plan BOA, Tab 23; *Mullen (Re)*, 2016 NSSC 203, 1974 Plan BOA, Tab 3.

96. The Court directed that the 1974 Plan Claim proceed by way of Notice of Civil Claim and involve the exchange of pleadings. This direction recognizes that this claim could not be determined without greater process and formality than some determinations within a CCAA proceeding may require. This was highlighted at the October Appearance, where the Court emphasized that evidentiary issues could derail this summary trial. [136]

97. The Court's caution at the October Appearance has proven to be prescient. The Walter Canada Group's book of evidence on this summary application is replete with evidentiary issues. The Walter Canada Group's "Statement of Uncontested Facts" assembles 122 "facts" which, despite the name of the document they are embedded in, are largely contested and very few of them are capable of being accepted as true on the present record.

98. The "Statement of Uncontested Facts" relies on a myriad of sources, including: (a) the Harvey Affidavit; (b) previous decisions of this Court in these proceedings; (c) previous decisions in foreign proceedings; and (d) EDGAR filings attached to an affidavit of a legal assistant at the Walter Canada Group's counsel's law firm. The Statement of Uncontested Facts also includes many facts that either one or both of the Walter Canada Group and the Steelworkers are not prepared to admit generally.

99. Very few "facts" in the Walter Canada Group's "Statement of Uncontested Facts" are capable of being accepted as true on this summary trial application.

100. In addition to these issues, the Walter Canada Group has mischaracterized certain "facts" in their "Statement of Uncontested Facts". The Walter Canada Group also seeks to have the Court proceed on assumed facts which have not been admitted by all parties in this proceeding, and as such cannot be treated by the Court as "uncontested".

a. The Harvey Affidavit

101. The Walter Canada Group adduces the Harvey Affidavit as evidence in the Summary Trial Application. In his affidavit, Mr. Harvey describes himself as the Executive Vice

[136] 6th Dominguez Affidavit, Exhibit "C" at 37-38.

President and Chief Financial Officer of Canada Holdings and the Chief Financial Officer and Executive Vice President of Walter Energy.[137]

102. Many "facts" in the Walter Canada Group's Statement of Uncontested Facts are derived from this affidavit, including paragraphs 39, 43, 46, 57-67, 70, 73-78, 81-89, 94 and 122.

103. The Harvey Affidavit was previously filed in this proceeding in support of the Walter Canada Group's petition for relief under the CCAA on December 4, 2015. The Harvey Affidavit is based on a mixture of personal knowledge and information and belief.

104. The 1974 Plan submits that the Harvey Affidavit is inadmissible in this summary trial application for a final order because he fails to distinguish which of his evidence is based on personal knowledge and which is based on information and belief. The 1974 Plan further submits that the Harvey Affidavit would still be inadmissible even if this Court could accept evidence on information and belief because Mr. Harvey fails to identify, by name, the source for each individual statement on information and belief.[138]

(i) Evidentiary requirements for affidavit evidence

105. The requirements for affidavit evidence tendered in a summary trial application were summarized by Mr. Justice MacAulay in *Sermeno v. Trejo*, 2000 BCSC 846:

> [9] ... The ordinary rules of evidence and pleadings must prevail. Of particular import is the recognition that the rule against hearsay is very much alive in Rule 18A applications: *Adia*, at para. 38.
>
> [10] Hearsay evidence is only admissible on interlocutory applications or by leave of the court (under one of the exceptions to the hearsay rule). Double hearsay is never admissible. Where hearsay is permitted, the source of the information must be precisely set out. The name of the individual providing the information is to be included (*Meier v. Canadian Broadcasting Corp.* (1981), 28 B.C.L.R. 136 (B.C. S.C.)).
>
> [11] Evidence based on information and belief should not be tendered at a trial. Since an 18A application is a trial, the evidence presented in the affidavit material must be based on personal knowledge and not information and belief. If there are any circumstances in which Rules 51(10)(b) or 52(8)(e) permit the use of affidavit evidence based on

[137] Harvey Affidavit, *supra* note 10 at para. 1.

[138] Similar concerns arise with Keith Calder's affidavits which also are based on a mixture of personal knowledge and information and belief.

> information and belief, they must of necessity be few and exceptional: *American Pyramid Resources Inc. v. Royal Bank* (1986), 2 B.C.L.R. (2d) 99 (B.C. S.C.), following *Adia*, *supra*, in *F.E. McCracken Ltd. v. Provident Properties Inc.* (B.C. S.C.).[139]

106. *Sermeno* confirms that: (a) the rule against hearsay is applicable to a summary trial application; (b) evidence based on information and belief should not be tendered at a trial; (c) where hearsay is permitted pursuant to an exception to the hearsay rule, the source of the information, including the name of the individual providing the information, must be precisely set out; and (d) double hearsay is never admissible.

107. In *King v. Malakpour*, 2015 BCSC 2272, Mr. Justice Crawford reiterated that an affidavit containing statements on information and belief must identify the source. In addition, that such information cannot be used to obtain a final order:

> [16] ...If an affidavit contains statements on information or belief then the source of information and belief must be given, and such information cannot be used if a party is seeking a final order: R. 22-2(13).[140]

108. The rationale for requiring evidence in a summary trial to be based on personal knowledge and not information and belief is to exclude hearsay evidence. The rule excluding hearsay evidence is well established. The rationale for the presumptive rule was described by Madam Justice Charron in *R. v. Khelawon*, 2006 SCC 57 at paragraph 2:

> As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. ...[141]

---

[139] 1974 Plan BOA, Tab 52.
[140] 1974 Plan BOA, Tab 33.
[141] 1974 Plan BOA, Tab 45.

109. The requirement to disclose the source of his or her information and belief is not met by the general statement at the beginning of an affidavit that it is wholly or partly based on information and belief. This was explained by Mr. Justice Bouck in *L.M.U. v. R.L.U.*, 2004 BCSC 95:

> [38] Frequently, deponents swear or affirm to the admissibility of hearsay evidence using these words:
>
>> I have personal knowledge of the facts and matters hereinafter deposed to, save where stated to be on information and belief, in which case I verily believe the same to be true.
>
> [39] This type of preamble does not make out-of-court oral or written statements admissible on an interlocutory application for proving the truth of the facts contained in the statements because it is inadequate for that purpose. Nor does it make out-of-court statements admissible for proving such things as the fact that the statement was made since it does not mention another relevant purpose for admitting the statement.[142]

110. The requirement to disclose the source of information and belief is also not met where the source is identified by a general class of people.[143] Rather, the word 'source' is equivalent to 'an identified person'.[144]

111. This was emphasized by Madam Justice Gropper in *Coast Building Supplies Ltd. v. Superior Plus LP*, a case involving an application by the plaintiff for disclosure of documents.[145] The plaintiff sought to rely on an affidavit on information and belief. The sources of information included "representatives of the defendant and certain other companies."[146] The defendant argued that this was impermissible and that the name of the source had to be provided. The plaintiff argued that it was sufficient in the affidavit to generally describe the source and it was not necessary to name the source.

---

[142] 1974 Plan BOA, Tab 34.

[143] *Coast Building Supplies Ltd. v. Superior Plus LP*, 2016 BCSC 1867, 1974 Plan BOA, Tab 19 [*Coast*]; *B.C. Bottle Depot Assn. v. Encorp Pacific (Canada)*, 2009 BCSC 403, 1974 Plan BOA, Tab 6 at paras. 35-36.

[144] *Albert v. Politano*, 2013 BCCA 194, 1974 Plan BOA, Tab 2 at para. 21.

[145] *Coast*, *supra* note 143.

[146] *Ibid.*

112. Gropper J. disagreed with the plaintiff, concluding that the name of the source had to be identified:

> [9] Mr. Sangha's affidavit referring to his sources as certain representatives of the defendant and others must provide a name and the basis for the person's knowledge in order that it is reliable to be stated on information and belief.
>
> [10] The authorities were helpfully summarized by Mr. Justice Kelleher in *XY, LLC v. Canadian Topsires Selection Inc.*, 2015 BCSC 988, beginning at para. 33:
>
>> [33] Affidavit evidence based on information and belief is only admissible if the source is identified, in the sense of "an identified person": *Meier v. Canadian Broadcasting Corporation* (1981), 28 B.C.L.R. 136 at 137-8 [*Meier v. CBC*]. It is not enough to specify the source without naming the individual. If the source wishes to remain anonymous, the evidence in affidavit form is inadmissible: *Meier v. CBC*.
>>
>> [Paragraph 34 is quoted by Gropper J. but omitted here]
>
> [11] I consider that the authorities do not support the plaintiff's position that the name of the source does not have to be provided. Indeed, the authorities demonstrate that it does. Coast did not provide any authority that a confidential source, described generally, is sufficient in an affidavit.
>
> [12] Furthermore, not naming the source is inconsistent with the notion of reliability which is referred to specifically in [*Albert v. Politano*, 2013 BCCA 194].
>
> [Emphasis added.][147]

(ii) The Harvey Affidavit is inadmissible in this summary trial application

113. All of the problems identified by MacAulay J. in *Sermeno*, Crawford J. in *King* and Bouck J. in *L.M.U.* apply to the Harvey Affidavit. As set out in paragraph 1 of his affidavit, it is based on information and belief:

> I am the Executive Vice President and Chief Financial Officer of Walter Energy Canada Holdings, Inc. and the Chief Financial Officer and

[147] *Ibid.* at paras 10-12.

> Executive Vice President of Walter Energy, Inc. and as such have personal knowledge of the facts hereinafter deposed to, except where such facts are stated to be based upon information and belief and where so stated I do verily believe the same to be true.

114. This is not permitted in an application for a final order, where an affidavit "must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial."[148]

115. The Harvey Affidavit relies upon hearsay evidence imparted from several unidentified individuals.

116. This is evident from the express terms of the Harvey Affidavit. After describing at paragraph 1 that his affidavit is based on information and belief, at paragraph 3 Mr. Harvey describes that there are facts in his affidavit based on conversations with a number of unidentified individuals:

> I have spoken with certain officers, directors, employees and advisors of Walter Canada Group and the U.S. Petitioners (defined below), and where I have relied on information from such discussions, I believe such information to be true.

117. The Harvey Affidavit fails to distinguish between facts based on personal knowledge and facts based on information and belief based on conversations with officers, directors and employees. This is impermissible.

118. A similar situation arose in *Joshi v. Vien*, 2003 BCSC 1772. In that case, the defendants sought an order extending the time to file and deliver a jury notice on the basis that the notice inadvertently had been filed late. The defendants sought to rely on an affidavit of a paralegal at the defendants' counsel's law firm, which indicated that the affidavit was based on both personal knowledge and on information and belief. The body of the affidavit failed to identify which statements were based on personal knowledge and which statements were based on information and belief. The Court concluded that it could not rely on this affidavit, setting out its reasoning as follows:

> [18] I find that the evidence on behalf of the defendants in the case at bar is insufficient to support an extension of time to file the jury notice.

---

[148] *Supreme Court Civil Rules* Rule 22-2(12), 1974 Plan BOA, Tab 97.

> [19] The evidence relied on is from a paralegal who deposes to personal knowledge of facts and matters, or fact and matters stated to be on information and belief. However, the body of the affidavit (#3) does not identify which statements are based on personal knowledge and which on information and belief. For example, paragraph 7 states: "The intention to proceed by way of jury trial never changed."
>
> [20] Did the paralegal have personal knowledge of that intention? If so, how did she come by that knowledge? If she was relying on information and belief, she should have said so. The source of the information is not identified. The statement is hearsay about a critical piece of evidence. It is evidence that goes to one of the tests that the applicants must meet, namely, was it their intention to proceed with a jury trial during the requisite period of time to file and deliver the jury notice? Where such a key piece of evidence is involved, the court should not rely on information from an unidentified source.[149]

119. A similar problem arose in *Royal Bank of Canada v. Campbell*, 1997 CanLII 617 (B.C.S.C.) [*Campbell*], where the plaintiff bank brought an application for summary judgment relying on an affidavit of an employee. The Court concluded that the affidavit was inadmissible, noting that it failed to distinguish between evidence on personal knowledge and evidence on and information and belief:

> [18] The order sought is a final order and therefore the affidavit in support should be on personal knowledge not information and belief.
>
> [19] These transactions took place in Fort St. John, British Columbia and Mr. Owen appears to reside in Vancouver, British Columbia. There is nothing in his affidavit to indicate what the basis of his personal knowledge is, nor is there any indication that the statements he makes are based on information and belief. In paragraph (1) he states that he has personal knowledge of the facts except where stated to be upon information and belief but nowhere does he say that any of his statements are on information and belief.[150]

120. Similar concerns arise in this case. The Court has no ability to determine which portions of the Harvey Affidavit may be admissible as evidence in this proceeding and which are hearsay, or even double hearsay.

[149] 1974 Plan BOA, Tab 32.
[150] 1974 Plan BOA, Tab 49.

121. Despite Mr. Harvey stating in his affidavit that he relies on information and belief, the Walter Canada Group suggests, without foundation, that all but one of Mr. Harvey's statements in their Statement of Uncontested Facts are based on personal knowledge.[151]

122. Statements of counsel are not evidence on a summary trial application.[152] The evidence before the Court is the Harvey Affidavit, and that evidence indicates that Mr. Harvey's evidence contains and relies upon hearsay evidence imparted from several unidentified individuals.

123. As in *Joshi* and *Campbell*, it is clear on the face of the Harvey Affidavit that it includes hearsay. In his affidavit, Mr. Harvey describes events leading up to and following the Western Acquisition on April 1, 2011. This evidence cannot be based on personal knowledge, as Mr. Harvey only began working for the Walter Group on July 9, 2012, more than a year after the Western Acquisition.[153]

124. The Walter Canada Group relies on this hearsay evidence at various points in their written submissions, dated December 12, 2016 (the "**Walter Canada Written Submissions**") and Statement of Uncontested Facts.

125. For instance, at paragraph 15 of the Walter Canada Written Submissions, the Walter Canada Group relies on Mr. Harvey's hearsay evidence in asserting that "after completing the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Group into geographical business segments, the Walter U.S. Group, the Walter Canada Group and the Walter UK Group."

126. The Walter Canada Group further relies on this passage from the Harvey Affidavit as an "uncontested fact" of relevant conduct occurring outside of the United States. In particular, the Walter Canada Group relies on Mr. Harvey's hearsay evidence as proof that "[s]ubsidiaries or assets of Walter Canada were transferred to the U.S. entities in

---

[151] WCG Written Submissions, *supra* note 3 at para. 41(b).

[152] *Strathloch Holdings Ltd. v. Christensen Bros. Foods Ltd.* (1997), 29 B.C.L.R. (3d) 341, 1974 Plan BOA, Tab 53 at para. 14 (C.A.).

[153] See: Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 1.

connection with the internal restructuring following the Western Acquisition, thereby providing additional resources for the U.S. pension liabilities."[154]

127. Mr. Harvey does not indicate the source of information regarding the events surrounding the Western Acquisition, of which he could not possibly have personal knowledge because, by his own admission, he was not there at the time. The Court can therefore have no confidence that it can accurately distinguish evidence that is based on Mr. Harvey's personal knowledge from evidence that is based on information and belief.

128. Nor is it the court's function to do so. Such a course of action would be inappropriate. As explained by Mr. Justice Warren in *Porchetta v. Santucci*, 1998 CarswellBC 457 at para. 12 (S.C. Chambers):

> ...it is the responsibility of counsel on an application under Rule 18A to present admissible evidence. It is not the duty of the court to act as censor going through an affidavit with a blue pencil and deleting those portions which the judge considers offends the rules of evidence.[155]

129. Except as set out in Schedule "A" hereto and as discussed in Section IV.B, the 1974 Plan submits that the Harvey Affidavit is inadmissible in this summary trial. No reliance can be placed on any statement in it. The result is that the Walter Canada Group has no admissible evidence of many "facts" it relies upon in the Walter Canada Written Submissions , including:

(a) The Walter Group operated its business in two distinct segments: (i) U.S. Operations, and (ii) Canadian and UK Operations;[156]

(b) After completing the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Group into geographical business segments, the Walter U.S. Group, the Walter Canada Group and the Walter UK Group;[157]

---

[154] WCG Written Submissions, *supra* note 3 at para. 99(b).
[155] 1974 Plan BOA, Tab 41.
[156] WCG Written Submissions, *supra* note 3 at *para. 3.*
[157] *Ibid* at para. 15.

(c) The Walter Canada Group was required to pay approximately $1 million per month to the Walter U.S. Group for the essential management services provided by Walter Energy and its U.S. subsidiaries;[158]

(d) The Walter Canada Group does not have any assets or carry on any business in the U.S.;[159] and

(e) Subsidiaries or assets of Walter Canada were transferred to the U.S. entities in connection with the internal restructuring following the Western Acquisition, thereby providing additional resources for the U.S. pension liabilities.[160]

(iii) The 1974 Plan is entitled to challenge the Harvey Affidavit

130. The Walter Canada Group seeks to admit the Harvey Affidavit on the basis that, because it was previously filed in this proceeding, the Court can consider it without requiring further proof of that document.[161]

131. That the Harvey Affidavit was previously filed in this CCAA proceeding does not prevent the 1974 Plan from contesting the reliance that can be placed on it. A fact in an affidavit does not become "uncontested" merely by reason of the fact's inclusion in an affidavit. That is no different whether the affidavit is newly sworn for the pending application or is relied on for the pending application but was sworn at an earlier stage of the proceeding. The affidavit remains the sworn evidence of one witness only. It does not "bind" the Court.

132. The fact that the Harvey Affidavit was filed for an earlier application does not give it added solemnity as a "court record". Nor does it make the affidavit admissible in this summary trial when the affidavit does not comply with the evidentiary requirements for such an application.

133. The Walter Canada Group has cited no authority to the contrary. The authority the Walter Canada Group cites is *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA

[158] *Ibid* at para. 101.
[159] *Ibid* at para. 99(b).
[160] *Ibid* at para. 99(b).
[161] *Ibid* at paras. 40-41.

367.[162] *Petrelli* does not stand for the proposition that affidavit evidence found in the court record cannot be contested at a later application or at trial.

134. The 1974 Plan submits that the Harvey Affidavit is inadmissible in an application seeking a final order. Nothing said in *Petrelli* – or any other case – prevents the 1974 Plan from challenging the assertions set out in the Harvey Affidavit just because it was previously filed in the court record of this CCAA proceeding.

135. This does not change because the 1974 Plan previously listed the Harvey Affidavit as "Materials to be Relied On" in an Application Response to an interlocutory matter in these CCAA proceedings.

136. The application at issue was an application by the Walter Canada Group for a number of orders regarding the conduct of a potential restructuring. These orders included orders for the retention of several professionals, including a Financial Advisor and a Chief Restructuring Officer (CRO), to supervise a sale of the Walter Canada Group's assets. The Walter Canada Group also sought orders providing for payment of a success fee to the Financial Advisor and the CRO and an order for an intercompany charge.

137. The 1974 Plan, making its first appearance in this CCAA proceeding, opposed several of the orders sought. The position of the 1974 Plan was that the evidence filed by the Walter Canada Group, including the Harvey Affidavit, was insufficient to justify the granting of the orders it opposed.

138. It was for this reason that the 1974 Plan listed the Harvey Affidavit in its "Materials to be Relied On" in its Application Response. The 1974 Plan was arguing that the Walter Canada Group's evidence, including the Harvey Affidavit, did not justify the relief sought.

139. The 1974 Plan was not admitting any of the "facts" set out in the Harvey Affidavit such that it could now be precluded from challenging those "facts".

140. The 1974 Plan is not precluded from challenging Mr. Harvey's evidence tendered by the Walter Canada Group in this summary trial.

---

[162] Book of Authorities of the Petitioners ("WCG BOA"), Tab 12.

b. Walter Canada Group and Steelworkers cannot rely on prior interlocutory decisions of this Court to prove facts in this summary trial

141. The Walter Canada Group also seeks to rely on two prior interlocutory decisions of this Court to prove facts in this summary trial. It submits that factual findings made in previous decisions, absent an appeal, must be accepted as found.[163]

142. The 1974 Plan submits that there are two barriers to the Walter Canada Group's attempt to rely on passages from this Court's previous decisions as "facts" for the purpose of this summary trial. First, the "facts" that the Walter Canada Group refers to in the Walter Canada Written Submissions as stemming from this Court's prior decisions are not supported by the passage it cites.[164]

143. Second, and more fundamentally, a "fact" stated in a prior judgment in this CCAA proceeding does not make it a fact for the purpose of this summary trial.

144. While a court is entitled to take judicial notice of prior decisions of the court, that does not determine what use properly may be made of them.[165]

145. Whether or not a prior decision is admissible in trials on the merits will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions.[166] The standard of proof of the previous judgment is relevant to the weight to be afforded to its findings.[167]

146. To be estopped from contesting a point at trial that arose in an earlier interlocutory decision, the decision in the interlocutory motion must have been rendered in a contentious matter between the parties or their privies.[168]

147. Further, there must be a reasonable expectation by both parties that the decision-maker would be making a final determination of the issue at the time of the proceeding.[169] In

---

[163] WCG Written Submissions, *supra* note 3 at para. 41(a).

[164] *Ibid* at paras. 13, 15, 78-80; *Walter Energy Canada Holdings Inc. (Re),* 2016 BCSC 107, WCG BOE, vol. 2, Tab 7; and *Walter Energy Canada Holdings Inc. (Re)*, 2016 BCSC 1746, WCG BOE, vol. 2, Tab 8.

[165] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, 1974 Plan BOA, Tab 10 at paras. 38-39.

[166] *Ibid* at para. 46.

[167] *Ibid* at para. 47.

[168] Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Toronto: LexisNexis, 2015), 1974 Plan BOA, Tab 106 at 311.

other words, the question of law or fact which is the subject of the later litigation must be identical with, or inextricably involved with, the question of law or fact previously decided.[170]

148. The 1974 Plan submits that in the circumstances, the Walter Canada Group cannot rely on the "facts" it cites in this Court's January 26, 2016 decision as "uncontested facts" for the purpose of this summary trial.

149. The Court's January 26, 2016 decision was an interlocutory application seeking several orders to set the Walter Canada Group "on a path to a potential restructuring".[171] The relief sought included the approval of a sale and solicitation process and the appointment of several professionals to manage that process and complete other necessary management functions. The Walter Canada Group also sought the approval of a key employee retention plan and a further extension of the initial stay to early April 2016.

150. The evidence on the motion largely consisted of the Harvey Affidavit, based on both personal knowledge and information and belief. Mr. Harvey was the only possible source who could provide the "facts" the Walter Canada Group alleges stem from the passage in this Court's decision quoted above.

151. While this Court may have been able to rely on evidence given on information and belief in this prior decision, it cannot rely on evidence on information and belief when making a final order in a summary trial. It would be getting in through the back door what cannot enter through the front door if a "fact" referred to in an earlier judgment, where the standard of admissibility was not personal knowledge, then is used as a fact in a hearing where only evidence on personal knowledge can be received.

152. Further, the passage quoted above was not in any way contentious on the motion. This Court was merely summarizing the nature of the 1974 Plan Claim. The nature of the 1974 Plan Claim – and the facts relevant to the 1974 Plan Claim – was not at issue or in any way interwoven with the issues before the Court on that application. It thus was not

---

[169] *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1, 1974 Plan BOA, Tab 11 at 11 (C.A.).

[170] *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665, 1974 Plan BOA, Tab 14 at para. 17.

[171] *Walter Energy Canada Holdings, Inc (Re)*, 2016 BCSC 107 at para. 9, WCG BOE, Tab 7.

reasonable for either party to expect that the Court would be making a final factual determination on those matters which were in no way pertinent to the issues before the Court.

153. The 1974 Plan submits that the "facts" stated in this Court's previous decisions are entitled to no weight in this summary trial application for a final order.

c. EDGAR filings are inadmissible for the purpose intimated by the Walter Canada Group

154. The Walter Canada Group seeks to admit certain Form 8-K's with attached press releases it says were filed by Walter Energy with the SEC and retrieved through the SEC's EDGAR system (together, the "**Alleged Press Releases**").

155. The Walter Canada Group adduces these materials as the evidence to support the "uncontested fact" that the Western Acquisition was highly publicized.[172]

156. The Walter Canada Group has attached the Alleged Press Releases as schedules to the Second Affidavit of Linda Sherwood dated November 14, 2016 (the "**Sherwood Affidavit**").[173] The affiant, Linda Sherwood, is a legal assistant at the Walter Canada Group's counsel's law firm.[174]

157. The Walter Canada Group asserts that the admission of the Alleged Press Releases does not create any hearsay concerns because it is only relying on the statements in the Alleged Press Releases for "the fact that the statements were made".[175]

158. Despite the Walter Canada Group's protestations to the contrary, the Sherwood Affidavit is inadmissible in this summary trial for the purpose advocated by the Walter Canada Group.

159. The Sherwood Affidavit is hearsay. She is not the author of the Alleged Press Releases, nor does she have personal knowledge of the contents of these documents. The only

---

[172] WCG Written Submissions, *supra* note 3 at paras. 99(a) and 103.
[173] 2nd Sherwood Affidavit, *supra* note 133, Schedules 'A'-'H'.
[174] 2nd Sherwood Affidavit, *supra* note 133 at para. 1.
[175] WCG Written Submissions, *supra* note 3 at para. 43.

non-hearsay evidence that Ms. Sherwood is able to provide is that on the date she accessed EDGAR (which she fails to specify), she found those documents.

160. The Walter Canada Group seeks to rely on the Sherwood Affidavit as proof that Walter Energy filed the Alleged Press Releases with the SEC on the dates listed on the Alleged Press Releases.[176] It further seeks to rely on the contents of the Alleged Press Releases as proof that the statements within those documents were made on those dates.[177]

161. For instance, at paragraph 10 of the Walter Canada Written Submissions, the Walter Canada Group relies on the Sherwood Affidavit as proof that:

> Walter Energy's Western Acquisition was publicly announced in November 2010, when Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly available EDGAR system.

162. This is hearsay. Ms. Sherwood has no personal knowledge that Walter Energy issued a press release or filed a Form 8-K with the SEC in November 2010. The Walter Canada Group is making an inference based on the date noted on the document, which date was generated by Walter Energy.

163. The same issue arises for the other seven EDGAR documents Ms. Sherwood attaches as schedules to the Sherwood Affidavit.[178] None of the statements in the Sherwood Affidavit or in the documents themselves are capable of proving that the documents were publicly available on EDGAR on the dates Ms. Sherwood says they were.

164. The Attached Press Releases are inadmissible as proof that the statements made in those documents were publicly available on EDGAR on the dates the Walter Canada Group states they were.

d. Walter Canada Group seeks to have Court proceed on facts they define as "admitted facts" which have not been admitted

165. Many of the "facts" in the "Statement of Uncontested Facts" are facts that the Walter Canada Group asks this Court to assume as true for the purpose of this summary trial

---

[176] *Ibid* at paras. 10-11.
[177] *Ibid* at para. 43.
[178] *Ibid* at para. 11.

only. These are facts that are pleaded by the 1974 Plan, but are not admitted by either or both of the Walter Canada Group and the Steelworkers.

166. For these categories of "facts", the Walter Canada Group submits that should a subsequent proceeding be required, the Walter Canada or the Steelworkers will maintain the ability to lead contrary evidence.

167. This presents problems in a summary trial application, as it necessarily asks the Court to proceed on a hypothetical set of facts that are still subject to challenge.

168. A formal admission in civil proceedings made for the purpose of dispensing with proof at trial is conclusive as to the matters admitted.[179] In multi-party litigation, however, an admission is only admissible against the party who makes the admission.[180] Accordingly, where a fact necessary for success against two parties is only admitted by one of them, the plaintiff will still be required to prove that fact with admissible evidence.

169. As explained by Master Peppiatt in *Hill v. Church of Scientology of Toronto*, 1986 CarswellOnt 1869, in the context of whether an admission made in examination for discovery is conclusive as against a co-defendant:

> [11] ...Certainly any admissions made by one defendant will not be binding upon a co-defendant; what one defendant says will not eliminate or narrow any issues between the plaintiff and the co-defendant and what the defendant being examined says about his co-defendant's case will have little or no effect on enabling the examining party to know the case he has to meet in respect of the co-defendant or facilitating settlement, pre-trial procedure or the trial with respect to the co-defendant...

170. The 1974 Plan has tendered an affidavit of Dale Stover, the Director of Finance and General Services of the United Mine Workers of America Health & Retirement Funds. Mr. Stover provides direct evidence of several of the 1974 Plan's allegations in its pleadings that either one or both of the Walter Canada Group and the Steelworkers have not admitted in these proceedings. For instance, Mr. Stover provides direct evidence of

---

[179] Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada* (Toronto: LexisNexis, 2014), 1974 Plan BOA, Tab 114 at 1313 ["Sopinka"].
[180] *Ibid* at 400.

the facts set out in paragraphs 7-12, 14, 99 and 113 of the Statement of Uncontested Facts.

171. For these facts, the Court can rely on Mr. Stover's direct evidence and make factual findings.

172. Many other facts pleaded by the 1974 Plan can only be proven through discovery of the Walter Canada Group or admissions by the Walter Canada Group and the Steelworkers. As the Walter Canada Group has not permitted any discovery, the Court is only able to find these facts in this summary trial if both the Walter Canada Group and the Steelworkers admit them. Absent an admission by both, the Court is unable to find these facts on the current record.[181]

173. The Walter Canada Group is essentially asking the Court to assume that these facts are true for the purpose of this summary trial only. That is improper. Proceeding on the basis of assumed facts is rarely appropriate in a summary trial. As explained by Mr. Justice Esson in *Bell Pole Co. v. Commonwealth Insurance Co.*, 1999 BCCA 262 [*Bell Pole*], proceeding with a summary trial on assumed facts "seems inconsistent with the principle that a summary trial is a trial".[182]

174. The Court of Appeal expanded upon this sentiment in *Jam's International v. Westbank Holdings et al.*, 2001 BCCA 121. Mr. Justice Lambert, after citing *Bell Pole*, made the following observations:

> [7] I would like to add this; the problem is particularly acute in those cases where the court has been asked to decide the 18A application on assumed facts which are not conceded by the applicant to be true. In most cases if the application is dismissed the applicant on assumed facts seeks to retain the right to prove the true facts which may or may not be the same as the assumed facts. As in the *Bell Pole* case I would not make a definitive ruling on this issue until the issue itself is argued and not simply raised by this Court.
>
> [8] I think it would be a rare case where the Court was asked to assume facts which were not also conceded to be true for all purposes of the litigation by all parties to the litigation and where it would be wise for the court to give a judgment on those assumed facts. Of course,

[181] See, for example, Amended NOCC, *supra* note 15 at paras. 25, 40, 42, 44-48, 51-52, 54, and 79-82.
[182] 1974 Plan BOA, Tab 7 at para. 15.

> when all parties are prepared to concede that the facts put forward on the application are true and should be treated as such by all parties to the litigation, for all purposes of the litigation and not simply for the 18A proceeding, and all parties agree that that is so, then no problem is likely to arise. But those facts are not assumed facts they are admitted facts.
>
> [Emphasis added.][183]

175. In *Christopher v. Westminster Savings Credit Union*, 2003 BCSC 362, Mr. Justice Halfyard reviewed previous authorities on the issue. Halfyard J. concluded that the Court cannot proceed to try an action summarily on the basis of assumed facts:

> [20] I understood Mr. Cuttler's position to be that, if I found this case to be unsuitable for disposition by summary trial, and dismissed the defendant's application, it would be open to the defendant at a later trial to contest the version of facts advanced by the plaintiffs. <u>In my opinion, the weight of the authorities is that the court should not proceed to the summary trial of an action based on assumed facts, unless all parties agree to that procedure.</u> There is also some authority for the proposition that, even if the parties agree that the court should decide an issue of law on facts that are to be assumed, the summary trial should not be proceeded with, unless all parties agree that the facts are to be admitted finally and conclusively for all purposes in the proceeding as a whole.
>
> ...
>
> [23] <u>In my view, the law dictates that I cannot proceed to try this action summarily, based on the assumed facts proposed by defence counsel.</u> ...
>
> [Emphasis added.][184]

176. The Walter Canada Group and the Steelworkers are not prepared to admit facts that the 1974 Plan cannot prove without discovery. As a result, except as set out in Schedule "A", the Court has no ability to find those facts in this summary trial. The Court should not be asked to decide this claim summarily based on assumed facts, particularly when the 1974 Plan has not consented to such a procedure.

[183] 1974 Plan BOA, Tab 31.
[184] 1974 Plan BOA, Tab 16.

e. Implications of deficient evidentiary record for Statement of Uncontested Facts

177. The Walter Canada Group's "Statement of Uncontested Facts" is a compilation of "facts" from a variety of sources. It is not itself evidence of anything in this summary trial. Where the underlying source of a "fact" outlined in that document is not supported by admissible evidence, it is not open to the Court to find that fact in this summary trial.

178. As a result of the evidentiary deficiencies outlined above, there is no admissible evidence before the Court for many of the statements set out in the "Statement of Uncontested Facts". We have prepared for the Court's convenience a chart that sets out the 1974 Plan's position on each of the "facts" listed in the "Statement of Uncontested Facts", attached hereto as Schedule "B".

f. Implications of deficient evidentiary record for Walter Canada Group's Expert Report

179. The Walter Canada Group relies on the expert evidence of Mr. Abrams. Mr. Abrams opines that the ultimate determination of the extraterritoriality issue requires a determination of whether conduct relevant to ERISA's focus occurred inside the United States.[185] Mr. Abrams then lists a number of factors he says would likely be relevant to this inquiry. He also lists certain "facts" that he believes support a finding that the relevant conduct occurred both inside and outside the United States. Mr. Abrams does not express a conclusion on the issue.

180. An expert is not the source of facts. The expert is simply told what facts to assume. It is the function of an expert report to provide the trier of fact with a ready-made inference from facts to be proven at trial.[186] The weight to be given to an expert report depends on the extent to which those facts are actually proved.[187]

181. The majority of the "facts" that Mr. Abrams assumed to be true that he opines point to relevant conduct occurring outside the United States are not supported by admissible evidence. In particular, there is no admissible evidence to support the following factual assumptions because they are derived from the Harvey Affidavit:

---

[185] Abrams Report, *supra* note 4 at 16-17.
[186] *Lozinski v. Maple Ridge (District)*, 2015 BCSC 2565, 1974 Plan BOA, Tab 35 at para. 21.
[187] *Ibid* at para. 21.

(a) In connection with the internal restructuring that followed the Western Acquisition, subsidiaries or assets of Walter Canada were transferred to the U.S. entities (thereby providing additional resources for the U.S. pension liabilities);

(b) The Walter Canada Group does not have any assets or carry on any business in the United States; and

(c) The Walter Canada Group was not responsible for making the decisions leading to Walter Resources' withdrawal from the 1974 Plan.[188]

182. In addition, there is no admissible evidence to support the assertion that the "Walter Canada Group did not employ any persons who were members of the 1974 Plan and were not contributing employers to the 1974 Plan." The source for this assertion is paragraph 13 of this Court's January 26, 2016 decision. As discussed, that paragraph does not make this finding. Moreover, even if the Court made that finding, the Walter Canada Group cannot rely on this Court's prior interlocutory decision as a source for that fact.[189]

183. Further, the Walter Canada Group has not pointed to an evidentiary source that supports the factual assumption that the Western Acquisition was "consummated in Canada".[190]

g. Conclusion on Walter Canada Group's evidence

184. The Walter Canada Group's position appears to be that the rules of procedure and standards governing the admissibility of evidence for this proceeding should be based, in any given moment, on what suits the Walter Canada Group, rather than on anything known to the *Supreme Court Civil Rules* or the law of evidence.

185. This is wrong. The Court can only rely upon evidence in the Walter Canada Group's book of evidence that would be admissible in a trial of this action. Very little of the evidence relied on by the Walter Canada Group is admissible by that standard.

---

[188] Abrams Report, *supra* note 4 at 21-22.
[189] *Ibid* at 22.
[190] *Ibid* at 21.

186. As we set out below, these evidentiary deficiencies, coupled with the Walter Canada Group's refusal to grant the 1974 Plan any discovery, impair the Court's ability to find the facts necessary to adjudicate the preliminary issues raised in this summary trial.

B. The 1974 Plan Relies Upon Admissions Against Interest in Mr. Harvey's Affidavit

187. The 1974 Plan is entitled to rely on the Harvey Affidavit in this summary trial.

188. An admission is any statement made by a litigant and tendered as evidence at trial by the opposing party. Admissions are not subject to the rules for testimonial qualifications of personal knowledge.[191] Accordingly, statements by parties to a proceeding may be tendered as admissions by an opposing party regardless of whether the statement may or may not be hearsay. This was explained by Mr. Justice Sopinka in *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 24:

> The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in McCormick on Evidence, supra, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.
>
> [Emphasis added.][192]

189. An admission may take many forms. A statement by a party while under oath or contained in an affidavit may be used as an admission in the course of subsequent civil

---

[191] *R. v. Foreman*, [2002] 166 O.A.C. 60, 62 O.R. (3d) 204 at para. 37 (C.A.), 1974 Plan BOA, Tab 44; *R. v. Matte*, 2012 ONCA 504, 1974 Plan BOA, Tab 46 at paras. 19-20.

[192] 1974 Plan BOA, Tab 43.

litigation.[193] This was explained by Mr. Justice Melnick in *R.W. Anderson Contracting Ltd. V. Stambulic Bros. Construction Ltd.*, 1999 CarswellBC 1976 (S.C.):

> [14] I have an initial problem with the position taken by Anderson. Firstly, a letter of April 22, 1998 from Mr. Colgur to Mr. Collins, when read together with an affidavit of Mr. Anderson dated September 23, 1998 filed in the action *Stambulic Bros. Construction Ltd. v. Anderson*, Cranbrook 8138 (B.C. S.C.), is tantamount to an admission by Mr. Anderson of the correctness of the claims for the deficiencies advanced by Stambulic and Mocam. Although that affidavit was filed in another action, Phipson on Evidence, 13 ed., Sweet & Maxwell, (London: 1982), states at para. 20-42 as follows:
>
>> Affidavits and Depositions of Witnesses. So, generally, the depositions of viva voce testimony of a party's witnesses, even when printed in the appendix to a case on appeal to the House of Lords, are not receivable against such party in subsequent proceedings as admissions. But affidavits or documents which a party has expressly caused to be made or knowingly used as true, in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact, even on behalf of strangers; and it is immaterial, in such a case, whether the documents are originals or copies.
>
> [15] On the basis of that authority, I accept that I am able to refer to Mr. Anderson's affidavit in the other action for the purpose of receiving, in this action, his statement against interest.[194]

190. Accordingly, statements in the Harvey Affidavit are admissible at the instance of the 1974 Plan as admissions against interest for the Walter Canada Group.[195]

191. The reasoning behind this result is explained by Mr. Justice Pelletier (then of the trial court) in *Tajgardoon v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C.R. 591 (T.D.). At issue in *Tajgardoon* was the admissibility of certain notes (known as "CAIPS notes") taken by a visa officer in an application for judicial review of the visa

---

[193] Sopinka, *supra* note 179 at 376; *Tipping v. Hornby* (1960), 32 W.W.R. 287 (B.C.S.C.), 1974 Plan BOA, Tab 55.

[194] 1974 Plan BOA, Tab 50.

[195] If the Steelworkers are prepared to admit the admissions set out in Schedule "A" to the 1974 Plan's Written Submissions, then any admission against the Walter Canada Group is similarly an admission against the Steelworkers. If the Steelworkers are not prepared to admit the admissions set out in Schedule "A" to the 1974 Plan's Written Submissions, then the admissions are solely operative against the Walter Canada Group.

officer's refusal to grant the applicant a visa. Pelletier J. concluded that the notes were admissible at the instance of the applicant as an admission against interest, but not at the instance of the respondent:

> [18] ... Admissibility is always a question of "For what purpose?" In the hands of the applicant, the contents of the CAIPS notes tend to be used to show that the visa officer has misconducted himself in some fashion. In the hands of the respondent, the same notes are used to bolster the respondent's submission that all relevant factors were considered. Using the traditional language of the law of evidence, one would say that the applicant relies upon admissions against interest found in the notes while the respondent seeks to use self-serving statements made in an out-of-court document whose author is not available for cross-examination. <u>The conclusion flowing from a traditional analysis of the law is that the CAIPS notes would be admissible at the instance of the applicant as admissions against interest but would not be admissible in the hands of the respondent because they are self-serving hearsay statements.</u>
>
> [Emphasis added.][196]

192. Pelletier J.'s analysis – while addressing a different reason for excluding the evidence – is persuasive.

193. The Harvey Affidavit is inadmissible for the reasons stated above. Notwithstanding the Walter Canada Group having put the Harvey Affidavit before the Court for this summary trial, the 1974 Plan can rely for the truth on admissions against interest found within the document.

194. Mr. Harvey made the Harvey Declaration in his capacity as an officer of Walter Energy Mr. Harvey made his affidavit attaching the Harvey Declaration as an Exhibit in his capacity as an officer of Canada Holdings and of Walter Energy. Statements of Mr. Harvey, given in his capacity as a representative of the Walter Canada Group and Walter Energy and made in that capacity are binding as admissions against the Walter Canada Group.[197]

195. The admissions the 1974 Plan seeks to rely on in the Harvey Affidavit are admissible as evidence in this summary trial despite the hearsay concerns that render the Harvey

[196] 1974 Plan BOA, Tab 54.
[197] Sopinka, *supra* note 179 at 391-392.

Affidavit inadmissible in the hands of the Walter Canada Group and the Steelworkers. The Walter Canada Group cannot resile from what its representative previously stated in his affidavit. To repeat the words of Sopinka J., "what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements."

C. The Walter Canada Group's Application is Unsuitable for Summary Trial

196. The ultimate aim of any trial is to seek and to ascertain the truth. While the parallel objectives of proportionality and efficiency have become increasingly important in the civil procedure context, seeking the truth remains the cardinal principle in civil proceedings.[198]

197. This principle underlies and informs the *Supreme Court Civil Rules* in British Columbia. It manifests itself in Rule 9-7(15)(a), which prevents the Court from granting judgment on a summary trial application where "the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law".

198. The discovery stage of a proceeding is a key to the search for truth, as it facilitates the disclosure of evidence that might enable the parties to establish the truth of the facts they allege.[199] Where there is important evidence potentially relevant to an issue that is not before the Court because of a denial of an opportunity to obtain discovery, it is unjust to dismiss a claim summarily.[200]

199. The Walter Canada Group has staked the Summary Trial Application on the contention that the Court does not need to concern itself with the facts the 1974 Plan says matter to determine the preliminary issues in this summary trial.

200. The 1974 Plan submits that the Walter Canada Group's preliminary issues are currently unsuitable for determination in this summary trial. There are three key reasons for this conclusion, all of which will be developed below.

---

[198] *Imperial Oil v. Jacques*, 2014 SCC 66, 1974 Plan BOA, Tab 30 at para. 24.
[199] *Ibid* at para. 26.
[200] *Supreme Court Civil Rules,* 1974 Plan BOA, Tab 97, Rule 9-7(15)(b); *Chouinard v. Army & Navy Dept. Store Ltd.*, 2008 BCCA 353, 1974 Plan BOA, Tab 15 at para. 19; *Bank of British Columbia v. Anglo-American Cedar Products Ltd.* (1984), 57 B.C.L.R. 350, 1974 Plan BOA, Tab 4 at 353 (S.C.).

201. First, the deficient evidentiary record has left the Court in a position where it cannot find the necessary facts to determine the preliminary issues in this summary trial application. The Court will only be in a position to do so after the 1974 Plan has had a meaningful opportunity through discovery to obtain evidence of the facts it says are relevant to its claim.

202. Second, it would be unjust for the Court to proceed on this deficient evidentiary record and find against the 1974 Plan in the face of the Walter Canada Group's refusal to grant the 1974 Plan any discovery.

203. Third, a consideration of the relevant factors for proceeding summarily on an issue militates against this Court proceeding with this application. The significant amount involved, the complexity of the case, the substantial risk of wasting time and effort, and the undesirability of producing premature appeals on hypothetical issues all point directly against summary disposition based on the present record.

1. Court is unable to find the facts necessary to dispose of preliminary issues in favour of the Walter Canada Group and the Steelworkers

204. The Court cannot decide the Summary Trial Application unless it is able to find the facts necessary to decide the issues of fact or law it raises.[201]

205. It is the nature of the evidence which must determine whether or not the Court is satisfied that the facts can be determined and the law applied.[202]

206. The 1974 Plan submits that the evidentiary record is insufficient for the Court to find the facts necessary to find against the 1974 Plan on any of the three preliminary issues before it on this summary trial application. As a result, if the Court does not resolve the preliminary issues in favour of the 1974 Plan based on the present record, the Walter Canada Group's summary trial application must be dismissed.

---

[201] *Supreme Court Civil Rules*, *supra* note 200, Rule 9-7(15).
[202] *Doell v. Buck*, [1990] B.C.W.L.D. 038, 1999 CarswellBC 438, 1974 Plan BOA, Tab 22 at para. 6 (C.A.).

a. Choice of law issue is fact-dependent

207. The first threshold issue in the Walter Canada Group's summary trial application asks the Court to determine whether the 1974 Plan Claim is governed by U.S. or Canadian substantive law.

208. There is a key dispute between the parties as to the proper characterization of the 1974 Plan Claim. The Walter Canada Group characterizes the claim as an issue of legal personality, requiring the Court to apply the law of the place of incorporation.

209. The 1974 Plan submits that the Walter Canada Group is incorrect; the proper law of the claim requires a principled and contextual analysis that considers which law has the *closest and most real connection* with the claim.

210. If the Walter Canada Group were correct that the only fact which the law requires the Court to consider is the place of incorporation, then there would be an argument that the first threshold issue is suitable for determination on the present record.

211. But the Walter Canada Group is not correct. And the Walter Canada Group is not correct regardless of whether the Court ultimately agrees with the Walter Canada Group's characterization of the 1974 Plan Claim for choice of law purposes.

212. Even if the Court accepts the Walter Canada Group's characterization of the 1974 Plan Claim, the Court would still need more facts than merely the place of incorporation.[203] That is because characterization of a claim and the associated choice of law rule are not ends in themselves. They are a means to an end. The end is to enable the Court to identify the territory with the closest and most real connection with the claim. The Court cannot do so by putting on blinders and, as the Walter Canada Group asks it to do, shutting its eyes to the complex web of connections involved in this case.

213. Simply put, the court first must have a complete picture of the facts and connections before the Court can reach a conclusion on what the appropriate choice of law rule is. Otherwise, the Court is making a decision in a factual vacuum, never knowing whether the result fulfills the fundamental aim of a choice of law analysis.

---

[203] See Section IV.D.

214. The 1974 Plan submits that relevant to this analysis is the degree to which the Walter Canada Group was managed out of the U.S. and an understanding of the Walter Group's global business. The 1974 Plan has pleaded facts relevant to this analysis that without discovery it is incapable of obtaining the evidence to prove. For example, the 1974 Plan sets out the following facts in its Amended Notice of Civil Claim that have not been admitted by the Walter Canada Group:

(a) Walter Energy and its various affiliates, including the Walter Canada Group, constitute a single global enterprise with integrated businesses;[204]

(b) The management team and key-decision makers of Canada Holdings and the other Walter Canada Group operated out of the United States;[205]

(c) U.S. law was the legal system with which the management team and key-decision makers were most familiar and they expected U.S. law to govern the business they directed;[206]

(d) Walter Energy's management team and key-decision makers were guided by U.S. law in their actions;[207]

(e) After the date of the Western Acquisition, the President of Canada Holdings and each of its Canadian subsidiaries resided in and worked out of Birmingham, Alabama, in the United States;[208]

(f) Additional members of the Walter Canada Group's management team resided in the U.S. and operated out of the Birmingham, Alabama office;[209]

(g) Until his resignation, Danny L. Stickel, sole director of Canada Holdings, 0541237 B.C. Ltd., Walter Canadian Coal ULC, Wolverine Coal ULC, Cambrian Energybuild Holdings ULC, Willow Creek Coal ULC, and Brule Coal ULC, and

---

[204] Amended NOCC, *supra* note 15 at para. 15.
[205] *Ibid* at paras. 86-87.
[206] *Ibid* at para. 101.
[207] *Ibid* at paras. 86-87.
[208] *Ibid* at para. 88.
[209] *Ibid* at para. 91.

one of two directors of Pine Valley Coal Ltd., resided in and worked out of the United States and held positions with Walter Energy;[210]

(h) At least four of the five officers of Cambrian Energybuild Holdings ULC lived in and worked out of Birmingham, Alabama;[211]

(i) At least one of the two officers of Canada Holdings, 0541237 B.C. Ltd., Walter Canadian Coal ULC, Wolverine Coal ULC, Willow Creek Coal ULC, and Brule Coal ULC lived in and worked out of Birmingham, Alabama;[212]

(j) Withdrawal from the 1974 Plan occurred in the United States. The liability created thereby occurred in the United States;[213]

(k) The directors of the Canadian entities were familiar with U.S. law;[214]

(l) In relation to operations generally, and the withdrawal liability in particular, the laws and legal system of the United States informed and guided the perceptions and actions of the key players of all of the following: the 1974 Plan; Walter Energy; Walter Resources; Canada Holdings; Walter Canadian Coal ULC; Wolverine Coal ULC; Brule Coal ULC; Cambrian Energybuild Holdings ULC; Willow Creek Coal ULC; Pine Valley Coal, Ltd.; and 0541237 BC Ltd.;[215]

(m) As the legal system that guided the key players and directing minds of the entities listed in preceding subparagraph, and the legal system with which these individuals are the most familiar, U.S. law is the law that these individuals expected to govern their relationships and liabilities, including the 1974 Plan Claim for withdrawal liability;[216] and

---

[210] *Ibid* at para. 92.
[211] *Ibid* at para. 93.
[212] *Ibid* at para. 94.
[213] *Ibid* at para. 96.
[214] *Ibid* at para. 98.
[215] *Ibid* at para. 99.
[216] *Ibid* at para. 100.

(n) The consolidated enterprise, which includes Walter Energy, Canada Holdings and their Canadian and U.S. operations, benefits from the Walter Canada Group's refusal to acknowledge the withdrawal liability.[217]

(collectively, the "**Unadmitted Facts**").

215. The 1974 Plan requires discovery to prove the Unadmitted Facts. The Walter Canada Group does not seem to disagree. Rather, it says that all of these Unadmitted Facts are irrelevant. The Walter Canada Group then lists several "uncontested facts" they suggest point to Canada as the forum with the closest and most real connection to the 1974 Plan Claim.

216. For example, the Walter Canada Group argues that the 1974 Plan will not be able to prove that the Walter Canada Group routinely conducted their affairs under U.S. law because of the following "uncontested facts":

(a) The Walter Canada Group's collective agreements with the Steelworkers and the Christian Labour Association of Canada were governed by the B.C. *Labour Relations Code*;[218]

(b) The Walter Canada Group's operations were subject to environmental assessment under the BC *Environmental Assessment Act* and its predecessor legislation, the *Mine Development Assessment Act*;[219]

(c) The Walter Canada Group experienced some issues meeting certain BC water quality guidelines at the Brule Mine;[220]

(d) Any significant changes to the Walter Canada Group's operations or further development of its properties in BC could have triggered a federal or provincial environmental assessment or both;[221]

(e) Each Walter Group mining site was inspected by the BC Ministry of Energy and Mines in September 2014;[222]

[217] *Ibid* at para. 101.
[218] WCG Written Submissions, *supra* note 3 at para. 114(a).
[219] *Ibid* at para. 114(c).
[220] *Ibid* at para. 114(d).
[221] *Ibid* at para. 114(e).

(f) Pursuant to the BC *Mines Act*, the Walter Canada Group's operations required permits outlining the details of the work at each mine and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land and watercourses affected by the mine;[223]

(g) The Walter Canada Group filed mine plans and reclamation programs for each of its operations and accrued for reclamation costs to be incurred related to the operation and eventual closure of its mines under the *Mines Act* and the *Mine Code*;[224] and

(h) The Walter Canada Group submitted updated five-year mine plans for the Wolverine Mine and the Brule Mine in 2013.[225]

217. The Walter Canada Group further asserts it is an "uncontested fact" that the Walter Canada Group estimated (with the assistance of the then-Proposed Monitor) that obligations in respect of Walter Canada Group unpaid wages, unremitted source deductions, unpaid accrued vacation pay and certain taxes could amount to a total potential director liability of approximately $2.5 million.[226]

218. The relevance of these "facts" and legal conclusions, all drawn from the Harvey Affidavit, is unclear, as they are unrelated to the 1974 Plan Claim. They also say nothing about the degree of integration amongst the entities in the Walter Group or the location of the decision makers for the Walter Canada Group.

219. Even if these "facts" were relevant, there is no admissible evidence on the record to prove them because the assertions in the Harvey Affidavit cannot be relied upon in this summary trial. For example, and as submitted above, the "uncontested fact" regarding director liability is hearsay from an unidentified source and thus would not be admissible in any application, let alone an application for a final order of dismissal.

220. Importantly, however, all of these "facts", even if admissible, are nothing more than untested assertions. The Walter Canada Group's refusal to permit any discovery in this case has left the 1974 Plan unable to test the veracity of these assertions. Accordingly,

---

[222] *Ibid* at para. 114(f).
[223] *Ibid* at para. 114(g).
[224] *Ibid* at para. 114(h).
[225] *Ibid* at 114(h).
[226] *Ibid* at para. 115.

even if these assertions were relevant and admissible, the 1974 Plan has been deprived of its opportunity to uncover and test the evidence, if any, underlying those assertions.

221. It is the 1974 Plan's position that the evidence on the record – even in its limited state – supports a conclusion that the United States is the forum with the closest and most real connection to the 1974 Plan Claim. The 1974 Plan anticipates that, with discovery, it will be able to adduce more evidence that will support that conclusion.

222. The Walter Canada Group and the Steelworkers, on the other hand, have tendered insufficient evidence for the Court to reach the conclusion that Canada is the forum with the closest and most real connection to the 1974 Plan Claim. The Court is accordingly unable to find the facts that would be necessary to dispose of the first preliminary issue in this summary trial in favour of the Walter Canada Group and the Steelworkers.

b. Extraterritoriality issue as framed by the Walter Canada Group is fact-dependent

223. The second issue raised in the Summary Trial Application whether the application of ERISA to the 1974 Plan Claim is an extraterritorial application of the statute. The 1974 Plan's position on this issue is that application of ERISA to the 1974 Plan Claim is a domestic application of the statute. On the evidence before the Court, the only available conclusion is that there is no problem of extraterritoriality.

224. The 1974 Plan further submits that the analysis prescribed by the Abrams Report cannot be performed on the present record.

225. Although Mr. Abrams reaches no conclusion on the point, the Walter Canada Group argues that based on the following "uncontested facts", the relevant conduct occurred in Canada for the purpose of the second prong of Mr. Abrams' analysis:

(a) Western Coal Corp. and its subsidiaries existed and operated in Canada before the Western Acquisition;

(b) The Western Acquisition was approved by the BC Supreme Court on March 10, 2011;

(c) The Western Acquisition was consummated in Canada;

(d) The 1974 Plan did not file any objection to the plan of arrangement at that time, despite the fact that the transaction was disclosed in Walter Energy's news releases and public filings numerous times starting in November 2010;

(e) Subsidiaries or assets of Walter Canada were transferred to the U.S. entities in connection with the internal restructuring following the Western Acquisition, thereby providing additional resources for the U.S. pension liabilities;

(f) No subsidiaries or assets of the U.S. entities were transferred to Walter Canada;

(g) The Walter Canada Group does not have any assets or carry on any business in the U.S;

(h) The Walter Canada Group did not employ any persons who were members of the 1974 Plan; and

(i) The Walter Canada Group were not contributing employers to the 1974 Plan.

226. The 1974 Plan refutes that these facts, even if proven, would be determinative of any of the preliminary issues raised in this summary trial. But even setting that aside, there are two critical problems with the Walter Canada Group's argument.

227. First, of these so-called "uncontested facts", only Item (b) is based on admissible evidence and is open to this Court to find as a fact in this summary trial. Item (a) is not admitted by the Steelworkers and thus cannot be accepted as a fact in this summary trial. There is no evidence on the record of Items (c) and (i). Items (e), (f) and (h) are based on inferences from the Harvey Affidavit, the entirety of which is inadmissible for the truth of its contents in this summary trial (except to the extent that it contains admissions against interest on which the 1974 Plan can rely). Item (g) is also inadmissible on this basis. As for Item (d), there is no admissible evidence that the Western Acquisition was disclosed in Walter Energy's news releases and public filings numerous times starting in November 2010.

228. Accordingly, even if these "facts" were relevant, the Court would be unable to find them on the present record.

229. Second, even if there were admissible evidence of these "facts", that would only make them admissible – it would not make them uncontested. The 1974 Plan has not admitted any of the facts set out in (c) through (i) above. To test the truth of these "facts", the 1974 Plan requires an opportunity to examine documents and a key representative of the Walter Canada Group's management team to uncover information about the Walter Canada Group's business.

230. The same problems plague the Walter Canada Group's attempt to diminish factors Mr. Abrams identified as pointing to relevant conduct occurring in the United States.

231. In his report, Mr. Abrams suggests that the existence of an unfunded liability at the time of the Western Acquisition points to relevant conduct occurring in the United States. Mr. Abrams also suggests that the provision of services by Walter Energy and its U.S. subsidiaries to the Walter Canada Group pursuant to management and intercompany agreements points to relevant conduct occurring in the United States.

232. The Walter Canada Group argues that the "highly publicized" nature of the Western Acquisition negates the significance of the fact that the 1974 Plan was underfunded at the time of the Western Acquisition. The Walter Canada Group suggests that the 1974 Plan, having notice of the transaction, ought not to be permitted to question it.

233. The 1974 Plan refutes that this is a relevant consideration in this case. The 1974 Plan's Claim does not challenge the Western Acquisition. However, even if it were relevant, the Walter Canada Group has adduced no admissible evidence that the 1974 Plan had notice of the Western Acquisition or that it was highly publicized. This is accordingly not a fact that the Court is able to find in this summary trial.

234. The Walter Canada Group also gives two reasons that the "shared services", described by Mr. Harvey in his affidavit as "essential",[227] do not overcome the factors pointing to the relevant conduct occurring in Canada:

(a) the Walter Canada Group was required to pay approximately $1 million per month to Walter Energy for these shared services; and

---

[227] Harvey Affidavit, *supra* note 10 at paras. 7(f), 30, 139, and 149.

(b) a previous U.S. case found that the provision of payroll services by a Canadian parent to a U.S. subsidiary was insufficient to justify the exercise of jurisdiction over the Canadian parent.[228]

235. On the first point, the assertion that the Walter Canada Group was required to pay approximately $1 million per month to Walter Energy for these shared services is not a fact that the Court can find in this summary trial. This "fact" comes from the Harvey Affidavit, which the Court cannot rely upon in this summary trial at the instance of the Walter Canada Group and the Steelworkers.

236. Even if this "fact" were admissible, all that the Harvey Affidavit states is that "as of December 2015, the Walter Canada Group paid approximately $1 million per month to the Walter U.S. group for the Shared Services." This statement does not say anything about whether the Walter Canada Group was making payments prior to December 2015 and, if so, the amount of any such payments.

237. Further, the payment of $1 million per month by a subsidiary to its parent is unlikely to be the arm's length transaction the Walter Canada Group makes it out to be. In the context of a centrally administered global enterprise, any "payments" for services may simply be bookkeeping exercises.

238. In any event, the 1974 Plan has been deprived discovery that would allow it to challenge this evidence.

239. With respect to the Walter Canada Group's second point regarding the shared services, the services provided to it by Walter Energy and its U.S. affiliates went well beyond the provision of "payroll services". This is evident from reviewing the Harvey Declaration, attached as Exhibit "B" to the Harvey Affidavit filed by the Petitioners on this summary trial application.

240. Mr. Harvey states in the Harvey Declaration that Walter Energy provided numerous administrative services to all entities in the Walter Group from its global headquarters in Birmingham, Alabama. In addition to payroll services, these services included finance, tax, treasury, human resources, benefits and communications, information technology,

[228] WCG Written Submissions, *supra* note 3 at paras. 101-102.

legal, operations and health, safety and environment, among others. Mr. Harvey describes some of the essential services Walter Energy provided:

- **Finance**: Walter Energy's Finance Department was responsible for creating and maintaining company-wide accounting policies, performing accounting research for all of Walter Energy's subsidiaries. The Finance Department also was responsible for financial reporting, including SEC reporting and consolidations, forecasts, and budgets. The Finance Department was also involved in creating and monitoring company-wide internal controls.

- **Tax**: Walter Energy's Tax Department maintained all income tax items for the Walter Energy global operations, including financial reporting, regulatory filings and audit controversy settlement in the U.S. The Tax Department also was responsible for directing and concluding regulatory filings, audit and other tax controversy efforts for the Walter Canada Group, as well as restructuring and financial tax reporting activities associated with the Canadian entities. In addition, the Tax Department directed and managed all U.S., U.K., Canadian and state and provincial financial tax reporting to manage the accuracy and timeliness of tax disclosures and financial filings in addition to all regulatory filings required in these jurisdictions.

- **Treasury**: Walter Energy's Treasury Department was involved in the monitoring of bank accounts and cash needs daily; the borrowing and repayment of debt; funds transfers; intercompany payments; bank services management, administration and communications; and foreign exchange transactions for Walter Energy's global operations. Walter Energy also provided risk management activities, including risk identification and development of risk retention and transfer solutions (e.g., the design and management of various insurance programs). The Treasury Department also handled claims management, which included managing pollution legal liability, general liability, automobile liability and property damage claims, as well as managing loss control activities.

- **Human Resources** ("**HR**"): Walter Energy's HR Department provided various HR activities, including compensation, equity and benefits, payroll and other related services for the Walter U.S. Group and the Walter Canada Group.

- **Information Technology** ("**IT**"): Walter Energy's IT Department was responsible for the maintenance of Walter Energy's IT resources, which included servers, backups, software, contractor work and hardware maintenance.

- **Legal**: Walter Energy's Legal Department supported the Walter U.S. Group and their U.S. operations. Certain legal personnel were involved in activities that provided either a global benefit or a direct benefit to the Walter Canada Group or Walter UK Group.

- **Sourcing and Logistics**: Walter Energy's Sourcing Department provided assistance in the negotiation and implementation of global supply contracts for the Walter Group. Walter Energy's sourcing personnel assisted with supplier selection and development, contract negotiations, competitive bid events and asset relocations.

- **Sales and Marketing**: Walter Energy's Sales and Marketing Department managed sales of U.S. coal for the Walter U.S. Group and provided strategic marketing services for the Walter Canada Group and Walter UK Group. These activities included setting the global sales and marketing strategy for the Walter Group, the development of new sales and marketing procedures and similar activities.[229]

241. Mr. Harvey further describes that in the normal course of business, the Walter U.S. Group, Walter Canada Group, Walter UK Group and other affiliates engaged in various intercompany activities which gave rise to intercompany transactions (the "**Intercompany Transactions**"). Mr. Harvey states that the Intercompany Transactions gave rise in the ordinary course to payables and receivables between, among and on behalf of the Walter U.S. Group, Walter Canada Group, Walter UK Group and other affiliates.[230]

242. The Harvey Declaration suggests that Walter Energy controlled nearly every facet of its subsidiaries' businesses. The Walter Canada Group's comparison to a case involving the provision by a parent to its subsidiary of "payroll services" fails to do justice to the high degree of control and integration deposed to by Mr. Harvey.

---

[229] Harvey Affidavit, Exhibit "B", *supra* note 10 at para. 75.
[230] *Ibid* at para. 64.

243. Absent discovery, the Court will not be in a position to resolve the issue as framed by the Walter Canada Group of whether the relevant conduct occurred in Canada or the United States.

c. *Public policy issue as framed by the Walter Canada Group and Steelworkers is fact-dependent*

244. The Walter Canada Group and the Steelworkers submit that ERISA's withdrawal liability provisions should not be enforced as they violate Canadian public policy. This is a narrow exception to the applicability of a foreign law, and the essential justice and morality of Canadians must be at stake.[231]

245. It is the 1974 Plan's position that this preliminary issue does not require the Court to concern itself with the effects of ERISA in the particular circumstances of this case. The public policy exception to the applicability of a foreign law is solely concerned with the foreign law and whether that law is contrary to our view of basic morality.

246. This was emphasized in *Beals v. Saldanha*, 2003 SCC 72, a case cited by the Steelworkers. At issue in *Beals* was the enforceability of a Florida damages award in Ontario. The defendant argued enforcement of the judgment would be contrary to Canadian public policy because the damage award was excessive. Mr. Justice Major rejected the defendant's argument. In the course of his discussion of the public policy exception, Major J. emphasized that the focus is on the foreign law and not the specific facts of the case:

> [71] The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign <u>law</u> is contrary to our view of basic morality. As stated in *Castel and Walker*, supra, at p. 14-28:
>
> > . . . the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts. . . .
>
> [Emphasis in original.][232]

[231] *Block Brothers Realty Ltd. v. Mollard* (1981), 27 B.C.L.R. 17, 1974 Plan BOA, Tab 8 (C.A.).
[232] WCG BOA, Tab 2.

247. Both the Walter Canada Group and the Steelworkers incorrectly focus on the effect of enforcing the controlled group provisions of ERISA in the particular circumstances of this case.

248. The Walter Canada Group submits that the Court "should not now enforce ERISA to shift the burden of U.S. social policy to Walter Canada Group and its Canadian stakeholders."[233] The Walter Canada Group further submits that this Court "should refuse to enforce ERISA in the context of the 1974 Plan Claim because it allows individuals who never had a relationship with any Walter company to benefit at the expense of Walter Canada Group employees and creditors."[234]

249. The Steelworkers are more explicit. The Steelworkers argue that the controlled group liability provisions would offend the basic morality of Canadians where, as here, the "1974 Plan is asking that this Court to find that the labour legacy costs of Walter U.S. are to be born by the workers of Wolverine Mine by reducing their Severance and Termination Pay to almost nothing."[235]

250. The Steelworkers further submit that the 1974 Plan Claim would "have the result of undercutting the public policy objectives of *Employment Standards Act* and the *Labour Relations Code* and Collective Bargaining by diminishing the ability of former Wolverine employees to receive wages and benefits they should have earned by expropriate funds that are meant to satisfy these claims."[236]

251. The 1974 Plan submits that this focus on the effect of applying ERISA in this case is misplaced. But if the Walter Canada Group and the Steelworkers are correct that the effect on the Steelworkers and other creditors were relevant, the Court is not in a position to undertake the factual inquiry that would be required.

252. The Steelworkers suggest as much in their written submissions. The Steelworkers concede that they "do not suggest that Canadian courts should never consider claims against Canadian corporations for pension liabilities under ERISA from related American

[233] WCG Written Submissions, *supra* note 3 at para. 121.
[234] *Ibid* at para. 125.
[235] Written submissions of United Steelworkers, dated December 19, 2016 ["USW Written Submissions"] at para. 84.
[236] *Ibid* at para. 86.

companies."[237] Accordingly, the Steelworkers do not argue that it is always contrary to Canadian public policy to apply ERISA's withdrawal liability provisions to Canadian companies. Rather, the Steelworkers argue that it would be contrary to Canadian public policy to apply ERISA's withdrawal liability provisions in the circumstances of this case.

253. The Steelworkers public policy argument appears to be premised on the assertion that the 1974 Plan is advocating an "automatic application of Controlled Group Liability." This underlies the Steelworkers' argument that the Court is unable to consider a number of relevant factors to the public policy analysis. The factors suggested by the Steelworkers are: (a) the circumstances leading to the debt and the calculation of the debt; (b) the connection between the Canadian company and the facts giving rise to the debt, including ; and (c) the impact of allowing the debt on other parties, particularly relevant in insolvency actions such as CCAA.

254. The 1974 Plan submits that the first two considerations are essentially what the 1974 Plan is submitting the Court must do to determine which forum has the law with the closest and most real connection to the 1974 Plan Claim. The 1974 Plan is not advocating an "automatic application" of ERISA to the Walter Canada Group. Instead, the 1974 Plan is arguing that U.S. law applies to the 1974 Plan Claim if, after a consideration of all of the relevant facts, the Court concludes that the United States has the closest and most real connection to the claim.

255. The 1974 Plan submits that there are insufficient facts for the Court to embark on the contextual and fact-driven analysis proposed by the Steelworkers – if such an analysis were necessary. Information uncovered in discovery is likely to furnish the Court with more facts to determine whether this is one of the cases alluded to by the Steelworkers where the Court can apply the withdrawal provisions of ERISA to Canadian corporations.

2. Proceeding in absence of discovery would be unjust to the 1974 Plan

256. The deficient evidentiary record supplied by the Walter Canada Group, coupled with the lack of any discovery, has impeded the 1974 Plan's ability to put its best foot forward in this summary trial.

---

[237] *Ibid* at para. 75.

257. The Walter Canada Group's refusal to provide discovery constitutes an independent basis to dismiss this summary trial application.

a. *Importance of discovery*

258. The adversarial system is founded on the conception that the parties to an action will bring forward all relevant evidence available to support their case and will present their case in its best light.[238] In that way, "it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved."[239]

259. Pre-trial discovery is the mechanism available to a litigant to access this relevant evidence, providing the litigant with a means to establish the truth of the facts it alleges.

260. Document discovery allows parties to learn what relevant documents are or have been in the possession of other parties, and to inspect and get copies of documents that are not privileged. It is of central importance to the conduct of a case:

> The ability to obtain proper document discovery can be the single most important factor in the outcome of a case. The recollections of witnesses (even honest ones) can be faulty or coincident with their own interests in the matter. Contemporaneous documentary records are rarely fabricated and frequently provide the most reliable evidence on a particular point.[240]

261. Examination for discovery is similarly essential to the trial process. Affidavits are normally crafted by lawyers and tend to present facts in a light favourable to the party on whose behalf they were prepared.[241] The ability to examine a witness for discovery provides an opportunity to the opposing party to uncover facts that would otherwise not be disclosed:

> A critical step in any litigation, the examination can help counsel understand the nature of the other side's case, gain admissions for use at trial, commit an opposing witness to his or her testimony, and narrow the issues in the litigation. Conducted effectively, the examination for

---

[238] *Mayer, supra* note 9 at para. 78.
[239] *Ibid.*
[240] Lyle G. Harris, Q.C., *Discovery Practice in British Columbia*, 2nd ed. (2016 Update) (Vancouver: The Continuing Legal Education Society of British Columbia, 2004), 1974 Plan BOA, Tab 113, § 2.1 ["Harris"].
[241] *Golden Capital Securities v. Holmes*, 2001 BCSC 1487.

> discovery lays the groundwork for successfully resolving a case out of court, or presenting the best case at trial.[242]

262. The importance of pre-trial discovery was highlighted in *Mayer v. Mayer*, 2012 BCCA 77. In *Mayer*, the Court of Appeal reversed the decision of the trial judge to dismiss a claim summarily without permitting the plaintiff an opportunity to develop its case fully through discovery and cross-examination. Mr. Justice Smith described the importance of document discovery and examination-for-discovery as follows:

> Litigants do not always have access to all of the relevant evidence bearing on the issues raised. Often, relevant documents are in the sole possession or control of their opponents. Documentary discovery requires the opponents to disclose such documents and enables the litigants to use them in support of their case. Also, oral discovery offers the opportunity to learn of relevant evidence otherwise not known to the examining party, to obtain helpful admissions, and to explore the strengths and weaknesses of the opponent's case: [citation omitted]. Moreover, when a party is unable to tender necessary evidence in any other way, the party may adduce such evidence from his opponent: [citations omitted]. Clearly, parties are not confined to reliance on their own evidence.[243]

263. Given the fundamental importance of discovery in the life of a lawsuit, the inability of a plaintiff to obtain discovery prior to a summary trial will frequently render it unsuitable for summary determination. Indeed, Rule 9-7(5) specifically contemplates the conduct of discoveries prior to a summary trial application.[244]

264. The plaintiff must not be deprived of an opportunity to uncover or develop all of the evidence that may be important regarding an issue on summary trial.[245] Where there is important evidence potentially relevant to an issue that is not before the Court, it will be unjust to dismiss a claim.[246] The plaintiff should be provided an opportunity to conduct oral and documentary discovery to obtain that relevant evidence.[247]

---

[242] Harris, *supra* note 240, § 3.1.

[243] *Mayer, supra* note 9 at para. 79.

[244] *Roynat Inc. v. Dunwoody & Co.* (1993), 83 B.C.L.R. (2d) 385, 1974 Plan BOA, Tab 50 at para. 50 (S.C.).

[245] *Central Mountain Air Ltd. v. Corporation of the City of Prince George*, 2012 BCSC 1221, 1974 Plan BOA, Tab 13 at paras. 21-22; *656925 B.C. Ltd. v. Cullen Diesel Power Ltd.*, 2009 BCSC 260, 1974 Plan BOA, Tab 1 at para. 42.

[246] *Chouinard, supra* note 200 at para. 19; *Bank of British Columbia* note 200 at 353.

[247] *Chouinard supra* note 200 at para. 19.

265. This was explained by Mr. Justice Smith in *Chouinard v. Army & Navy Dept. Store Ltd.*:

> [19] In my view, the action was not suitable for summary disposition. The individual defendants, who are the allegedly tortious actors, had not yet been served with process and the pleadings had not been closed. It is reasonable to expect that evidence to be obtained from them by the appellant on oral and documentary discovery, and evidence to be obtained from the action brought by the other customer would shed light on the limitation issue, particularly as it affects the causes of action not considered by the trial judge. Thus, there was important evidence potentially relevant to the limitation question that was not before the court and, in the circumstances, it was unjust to the appellant to dismiss the action before affording him an opportunity to obtain that evidence.
>
> [Emphasis added.]

b. Important evidence not before the Court

266. The Walter Canada Group does not admit all of the allegations in the 1974 Plan's pleadings, choosing instead to stake an entire summary trial on the contention that discovery on these matters would be irrelevant.

267. The Walter Canada Group is not right in that contention. And based on the Walter Canada Group's own written submissions, it is clear that they are not right. After refusing the 1974 Plan discovery to obtain evidence of the organization and operations of the Walter Group on the basis that this would be irrelevant, the first "fact" in the Walter Canada Group's written submissions relates to that very issue:

> The Walter Group operates its business in two distinct segments: (i) U.S. Operations; and (ii) Canadian and UK Operations.[248]

268. This assertion, which the Walter Canada Group erroneously labels as an "uncontested fact", is at the heart of the factual inquiry the 1974 Plan has been saying all along will have to be undertaken. Absent document discovery and examinations for discovery, the 1974 Plan has no ability to test that fact and deconstruct the meaning of the Walter Group's alleged "distinct segments".

[248] WCG Written Submissions, *supra* note 3 at para. 3.

269. The Walter Canada Group also relies on expert evidence that says the extraterritoriality issue must ultimately be resolved by considering where the "conduct or transactions" relevant to ERISA's focus or purpose primarily occurred.[249] The factors the Walter Canada Group's expert identifies as relevant to this inquiry are all factual.

270. Similarly, the Steelworkers argue that the Court – in determining the public policy issue – should consider the connection between the Canadian company and the facts giving rise to the claim against the Canadian company.

271. Without the opportunity for the 1974 Plan to obtain discovery of the Walter Canada Group, the Court is deprived of evidence that is important to these preliminary issues as framed by the Walter Canada Group and the Steelworkers.

272. This is clearly not a case, as the Walter Canada Group suggests, that the 1974 Plan's repeated requests for any discovery are blind hopes that "with the aid of the discovery processes something might turn up".[250] Discovery will furnish the 1974 Plan with – in the words of Smith J.A. – "important evidence potentially relevant" to the preliminary issues in this summary trial.

273. Central to the 1974 Plan's claim is its contention that Walter Energy and each of its American, Canadian and UK subsidiaries constitute a single global enterprise with management decisions for the Canadian entities being made in the U.S. To prove this contention, the 1974 Plan requires evidence of the myriad constituent elements it has pleaded that would allow the Court to draw that conclusion.

274. The 1974 Plan is able to rely on statements in the Harvey Affidavit as admissions against interest for several of the facts that have been pleaded but not admitted by both the Walter Canada Group and the Steelworkers. The Harvey Affidavit also contains admissions against interest that support the 1974 Plan's overall contention that the Walter Canada Group is part of Walter Energy's single global enterprise with integrated businesses and management out of the United States.

---

[249] Abrams Report, *supra* note 4 at 16-17.
[250] WCG Written Submissions, *supra* note 3 at para. 135.

275. But simply relying on statements in the Harvey Affidavit as admissions against interest is constraining in this summary trial because it does not address every fact pleaded that is relevant in this summary trial.

276. Further, and more fundamentally, the refusal by the Walter Canada Group to grant any discovery in this case has deprived the 1974 Plan an opportunity to learn of relevant evidence not otherwise known to the 1974 Plan. This, in turn, has deprived the 1974 Plan of preparing for itself the "representations on the basis of which their dispute is to be resolved."

277. The 1974 Plan is deprived of the opportunity to prove all of the facts it has pleaded that it says are relevant to the preliminary issues. To prove the truth of these facts, including the Unadmitted Facts, requires evidence – evidence that can best come out of the mouths of the Walter Canada Group's management and out of the Walter Canada Group's own documents.

278. In these circumstances, where there is "important evidence potentially relevant" to the preliminary issues in this summary trial, it would be unjust for the Court to rule against the 1974 Plan before it has had an opportunity to develop its case through discovery.

279. The Walter Canada Group cites *Tassone v. Cardinal*, 2014 BCCA 149 as authority for the proposition that an application respondent cannot simply argue that "with the aid of the discovery processes something might turn up."[251]

280. *Tassone* is not an apt comparison to this case. *Tassone* concerned an appeal of a summary trial judgment by the defendant. The defendant argued it was an error for the trial judge to grant judgment when discovery had not taken place. Madam Justice Stromberg-Stein dismissed the appeal, noting that the defendant had years to obtain evidence to support her defence. Stromberg-Stein J.A. concluded that "any gaps in the record [were] the result of [the defendant's] <u>failure to take the proper procedural steps to obtain discovery</u>" (emphasis added).

281. A similar result to *Tassone* was reached in *Burg Properties Ltd. v. Economical Mutual Insurance Company*, 2013 BCSC 209, another suitability decision cited by the Walter Canada Group. In *Burg*, the plaintiff argued that a summary trial application brought by

[251] WCG BOA, Tab 17.

the defendant should not proceed until it had an opportunity to conduct a further examination for discovery of another representative of the defendant. Madam Justice Gerow rejected this argument, concluding the plaintiff had ample time to conduct all the examinations it required prior to the summary trial:

> [44] Burg submits the matter should not proceed until it conducts a further examination for discovery of a more informed representative of Economical Mutual. However, it has had plenty of time to take steps to conduct such a discovery. The hearing dates for the summary trial had been adjourned in the past. This matter has been outstanding since 2008. Burg has had ample time to do all the investigations and conduct all the examinations for discovery it deemed necessary to prosecute its claims. Burg cannot rely on its own inaction to deny the defendants the right to have this matter determined.
>
> [Emphasis added.][252]

282. *Tassone* and *Burg* suggest that courts are generally unwilling to entertain arguments by application respondents that they need discovery when they have taken insufficient steps to obtain it prior to the summary trial.

283. This is not the situation here. Unlike the defendant in *Tassone* and the plaintiff in *Burg*, the 1974 Plan has not had years to obtain evidence. Rather, it has been less than three months since the close of the pleading period. Further, the 1974 Plan has taken all the steps it can to obtain the evidence it needs to defend this summary trial application.

284. Unlike in *Tassone* and *Burg*, it is also not the case that the 1974 Plan has sat on its hands and took no steps to obtain discovery and is now seeking to "rely on its own inaction" to defeat this summary trial. The 1974 Plan has made repeated attempts to obtain discovery, including bringing a court application for document discovery. While the Steelworkers erroneously suggest that the 1974 Plan is seeking "additional disclosure from Walter Canada,"[253] the 1974 Plan has not been granted *any* discovery in this case.

285. The 1974 Plan submits that this case is more akin to *656925 B.C. Ltd. v. Cullen Diesel Power Ltd.*, a claim involving the enforceability of a contractual exclusion clause. While

---

[252] WCG BOA, Tab 4.

[253] USW Written Submissions, *supra* note 235 at para. 10.

Madam Justice Dardi noted that the Court rarely finds exclusion clauses to be unenforceable, she concluded that the plaintiff was entitled to discovery prior to having to defend a summary trial application to dismiss its claim:

> [42] At this stage, there has not been full discovery of documents nor examinations for discovery. I am not satisfied that the plaintiff has had an opportunity to uncover or develop all of the evidence that may be important regarding this issue, nor am I persuaded that the plaintiff should be deprived of such an opportunity. While the plaintiff did not take steps prior to the delivery of the 18A application in April 2008, in the intervening months Cullen Diesel took the position that further document production and an examination for discovery were not necessary pending a determination of this 18A application.
>
> [43] Although the court rarely finds enforcement of an exclusion clause to be unfair, unreasonable, or unconscionable, the evidence on this application is insufficient to determine whether this is one of those rare cases. Therefore, it would be unjust to decide the issue on this Rule 18A application.
>
> [Emphasis added.][254]

286. The 1974 Plan has similarly been denied an opportunity to uncover or develop all of the evidence that may be important to the preliminary issues in this summary trial. It would be unjust for the Court to determine the preliminary issues in this summary trial against the 1974 Plan without providing it a chance to develop its case through discovery.

c. *Conclusion on discovery issue*

287. The Walter Canada Group has staked the Summary Trial Application on the contention that an understanding of the Walter Canada Group's business and relationships with the other Walter Group entities is irrelevant. It then filed an expert report suggesting the exact opposite – that the extraterritoriality issue could not be decided without an understanding of the Walter Canada Group's business and its relationship with its U.S. parent and affiliate companies.

288. The Walter Canada Group cannot have it both ways. It cannot say that no facts are required for this Court to adjudicate the preliminary issues in their application while simultaneously seeking to rely on an expert report that says facts matter.

---

[254] *Supra*, note 245.

289. The Harvey Declaration demonstrates that the 1974 Plan is not blindly hoping that "with the aid of the discovery processes something might turn up." Instead, it shows that there is evidence in the possession or control of the Walter Canada Group and in the minds of its witnesses that is relevant to the preliminary issues on this summary trial application.

290. The 1974 Plan should be provided an opportunity to develop its case by conducting oral and documentary discovery to obtain the evidence it needs to meet those issues. To proceed without granting the 1974 Plan this opportunity would be unjust.

3. Other considerations militate against proceeding summarily on present record

291. The considerations that arise in a summary trial also militate against the Court proceeding summarily.

292. The Court of Appeal has articulated a number of factors for a trial judge to consider when deciding if a case is suitable for summary trial. These factors include:

(a) the amount involved;

(b) the complexity of the matter;

(c) its urgency:

(d) any prejudice likely to arise because of delay;

(e) the cost of taking the case forward to a conventional trial in relation to the amount involved;

(f) the course of the proceedings;

(g) the cost of the litigation and the time of the summary trial;

(h) whether credibility is a critical factor in determining the dispute;

(i) whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and

(j) whether the application would result in litigating in slices.[255]

293. Nearly all of these factors are engaged in this case and point directly against this application being suitable for summary disposition.

a. Amount involved

294. The amount involved is entitled to considerable weight.[256] The amount of the claim – over $1 billion – and the amount of funds available for distribution to creditors – approximately $70 million – are clearly significant. If proven, the 1974 Plan Claim will be the most significant claim in these CCAA proceedings by a large margin. While the amount involved is not determinative, a substantial claim is a warning that caution is required.[257]

b. Complexity of the matter

295. The preliminary issues raised by the Walter Canada Group are complex, requiring the Court to address important questions of law regarding the application of ERISA to a Canadian entity. As the Steelworkers acknowledge in their written submissions, this summary trial "is an important case for the parties and for the legal system which raises a significant legal issue of first instance."[258]

296. To resolve the legal questions in this case, the Court is presented with conflicting expert reports on the extraterritorial application of ERISA. Each party's expert will be required to attend the summary trial for cross-examination, further increasing the complexity of this case. To further complicate matters, the Court is being asked to proceed on an incomplete factual record which includes hypothetical facts and contentious evidence.

297. Given the significance of this case and the complicated issues that stem from it, the Court will be required to absorb a large body of evidence and legal argument. The pleadings, including the summary trial pleadings, come from ten documents and occupy approximately 80 pages. The Court will be required to consider 11 volumes of evidence

---

[255] *Gichuru v. Pallai*, 2013 BCCA 60, 1974 Plan BOA, Tab 25 at para. 52.

[256] *W.I.B. Co. Construction Ltd. v. The Board of School Trustees of School District No. 23 (Central Okanagan)*, 1997 CarswellBC 896, 1974 Plan BOA, Tab 60 at para. 34 (S.C.) [*W.I.B.*].

[257] *Ibid.*

[258] USW Written Submissions, *supra* note 235 at para. 1.

totalling approximately 1700 pages. This evidence includes approximately 80 pages of expert opinion.

298. The written arguments prepared by the parties canvass a multitude of issues and, together, are likely to exceed 200 pages after the Walter Canada Group files its Reply Submissions. Accompanying the submissions are 6 volumes of authorities containing approximately 180 authorities totalling over 3,000 pages. There are three additional volumes of authorities for the expert witnesses, which collectively contain more than 80 U.S. authorities totalling over 1,000 pages.

299. The Walter Canada Group says that the complexity in this case is legal, not factual.[259] That statement does not square with the six volumes of evidentiary materials it has filed, which includes its "Statement of Uncontested Facts" listing 122 "facts" the Walter Canada Group says are relevant to this application (many of which are inadmissible and disputed). Many of those facts that are disputed largely relate to the degree of integration amongst the entities in the Walter Group – an enterprise of more than 30 corporate entities with operations in three countries selling to customers world-wide.

300. The volume of materials filed by the parties underscores the importance and complexity of the issues in this summary trial and suggests that this case currently is not suitable for summary determination.[260]

301. The 1974 Plan submits that much of the complexity in this summary trial falls away if it is granted discovery. Discovery will permit the parties to return to Court with a more robust evidentiary record. This in turn will allow the Court to address the legal issues in this case head on without the added complexity of having to address the myriad of evidentiary issues that have arisen in this summary trial application.

c. *Urgency and costs of this litigation*

302. Both the Walter Canada Group and the Steelworkers focus extensively on their desire to adjudicate the 1974 Plan Claim quickly.

[259] WCG Written Submissions, *supra* note 3 at para. 138.

[260] *Coast Foundation v. Currie*, 2003 BCSC 1781, 1974 Plan BOA, Tab 20 at para. 12; *Chu v. Chen*, 2002 BCSC 906, 1974 Plan BOA, Tab 18 at paras. 64-75.

303. The desire of the Walter Canada Group and the Steelworkers to adjudicate this claim quickly cannot come at the expense of the 1974's Plan's ability to have its day in court and to be afforded an opportunity to fairly prosecute its substantial claim.

304. Trial judges can properly consider the objectives of proportionality and efficiency codified in Rule 1-3 of the *Supreme Court Civil Rules*. However, it is a misapplication of the rule to focus on speed in the completion of the proceedings at the expense of a determination of the proceedings on their merits.[261] The proper administration of justice requires that issues of importance be decided at the appropriate time through the appropriate procedures.[262]

305. Both the Walter Canada Group and the Steelworkers rely on *Hryniak v. Mauldin*, 2014 SCC 7. *Hryniak* dealt with the Ontario summary judgment rule. It does not change the law regarding summary trials in British Columbia.[263] Further, *Hryniak* does not advocate that trial judges proceed summarily to save time at the expense of fairness. As stated by Madam Justice Karakatsanis:

> [32] ... While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. ...
>
> [33] A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.[264]

306. The 1974 Plan has always recognized the importance of attempting to adjudicate its claim in an expeditious manner. As the creditor with the largest claim, the 1974 Plan stands to lose the most from lengthy delays. That is why, contrary to the assertion of both the Walter Canada Group's and the Steelworkers, the 1974 Plan has consistently advocated for an approach that would avoid a conventional trial.[265] Indeed, on October

---

[261] *Houston v. Kine*, 2011 BCCA 358, 1974 Plan BOA, Tab 28 at para. 33.
[262] *Weldon v. Teck Metals Ltd.*, 2011 BCSC 489, 1974 Plan BOA, Tab 59 at para. 32, aff'd 2012 BCCA 53.
[263] *N.J. v. Aitken Estate*, 2014 BCSC 419 1974 Plan BOA, Tab 39 at para. 33.
[264] WCG BOA, Tab 8.
[265] WCG Written Submissions, *supra* note 3 at para. 141; and USW Written Submissions, *supra* note 235 at para. 97.

4, 2016, the 1974 Plan proposed a summary trial for the week of January 9-13 to be preceded by targeted document discovery and examinations for discovery.[266]

307. The 1974 Plan submits that in light of its substantial claim, this was a reasonable and proportionate proposal that would have expedited the adjudication of its claim while giving it an opportunity to put its best foot forward.

308. The Walter Canada Group rejected that proposal, electing instead to bring forward this summary trial application without the benefit of any pre-trial discovery. This impaired the 1974 Plan's ability to meet the preliminary issues raised in the Walter Canada Group's summary trial application.

309. The dispute between the parties is in relation to a distribution. The three parties who are seeking the largest shares are the 1974 Plan, the Steelworkers and Walter Energy. Regardless of its ultimate outcome, the 1974 Plan Claim will not prejudice the restructuring of the Walter Canada Group. There is no justification for the Walter Canada Group and the Steelworkers rushing to a summary trial on a deficient evidentiary record. That is particularly so where, as here, there is an alternative procedure available that will allow this claim to be resolved on its merits in an expedited fashion after necessary discovery.

d. Summary trial may create unnecessary complexity in the resolution of the dispute

310. The Walter Canada Group does not seek to finally adjudicate the 1974 Plan Claim. Instead, it raises several preliminary issues, the determination of which cannot result in a finding of liability against the Walter Canada Group. As a result, there is a risk that the findings reached on this summary trial will be irrelevant. If the 1974 Plan were to succeed on this Summary Trial Application but its claim were later to fail on the facts, the summary trial will have proved to be a waste of the parties' – and the Court's – time.[267]

311. Of further concern to the efficient resolution of this proceeding is the prospect of an appeal from the Walter Canada Group's summary trial application. Indeed, counsel for the Walter Canada Group submitted to this Court that given the 1974 Plan Claim raises

---

[266] 6th Dominguez Affidavit, *supra* note 120, Exhibit "A" at 2-3.
[267] *Prevost v. Vetter*, 2002 BCCA 202, 1974 Plan BOA, Tab 42 at para. 25.

an important issue of law (i.e. the applicability of ERISA to Canadian entities) there is a high probability of appeal on either side.[268]

312. As the Summary Trial Application raises only certain preliminary issues, any result in the Court of Appeal in favour of the 1974 Plan would require further adjudication in this Court. This would unnecessarily prolong the litigation, add unnecessary complexity and dramatically increase the costs to the prejudice of all parties in the CCAA proceedings.

e. *Litigating in slices*

313. Because the Walter Canada Group seeks only to adjudicate certain preliminary issues, their application raises concerns about litigating in slices. This is underscored by the Walter Canada Group's characterization of the issues in this case as "preliminary issues". It is also highlighted by the Steelworkers, who intend to raise two additional issues in a subsequent proceeding to defeat the 1974 Plan Claim.[269]

314. The concern with litigating only slices of the 1974 Plan Claim is amplified in this case because the Court is being asked to decide matters of first impression in Canada based on hypothetical facts and without a complete record. Regardless of this Court's decision on the preliminary issues, there is likely to be an appeal. The Court of Appeal has cautioned that trial judges should not address important issues of law unless the case at hand actually requires them to do so. As stated by Madam Justice Southin:

> The orderly development of the common law is not enhanced by this Court addressing issues of law of the nature of these issues unless the case at hand, in all its aspects, requires it to do so.[270]

315. This consideration arises in this case because the Court is not being asked to finally adjudicate the 1974 Plan Claim. As a result, the determination of the preliminary issues will of necessity be hypothetical. The 1974 Plan submits that the Court of Appeal should not be asked to address the important issues of law raised in this case until this Court is asked to address all elements of the 1974 Plan Claim and not just certain preliminary issues.

---

[268] 6th Dominguez Affidavit, *supra* note 120, Exhibit "C, at 27.
[269] USW Written Submissions, *supra* note 235 at para. 104.
[270] *Bacchus, supra* note 12 at para. 25.

316. The Walter Canada Group disputes this position. It says that determining the preliminary issues on this summary trial would not be hypothetical because if the Court agrees with the Walter Canada Group, the 1974 Plan Claim will be dismissed. The Walter Canada Group misses the mark because it is only considering the issue from the standpoint that it is successful in the Summary Trial Application. If this Court were to hold in favour of the 1974 Plan on all three preliminary issues, any appeal would of necessity require the Court of Appeal to address a hypothetical claim. As stated by Southin J.A., the Court of Appeal should not be asked to rule on "important issues of law in an action which may ultimately fail on its facts."[271]

317. Further complicating the matter here is that Court is being asked to assume facts are true for the purpose of the Summary Trial Application but either or both of the Walter Canada Group and the Steelworkers reserve the right to contest those facts at a later stage. For these "facts", the Court is of necessity being asked to proceed on hypothetical facts because it is not open to the Court to make a final factual determination in this trial.

318. The Steelworkers also seek to raise additional issues if the 1974 Plan is successful on all three preliminary issues in this summary trial. In particular, the Steelworkers intend to argue that "allowing the 1974 Plan Claim will effectively eliminate the Employee Claims for the Steelworkers and is therefore not a reasonable or equitable plan".[272] The Steelworkers also intend to alternatively argue that "if the 1974 Plan Claim is allowed, it must be in a separate class than the Employee Claims and only paid out after the Employee Claims are satisfied in full."[273]

319. These are essentially policy arguments. Indeed, the Steelworkers indicate these issues will "involve significant arguments and evidence of the role of CCAA proceedings and the different nature of the claims, including the significance of the Employee Claims as statutory claims and the policy reasons to grant these a higher priority than American pension plan unfunded liability."[274]

320. These additional issues, if decided in the Steelworkers' favour, would negate the argument that the application of the withdrawal liability provisions of ERISA in this case

[271] *Ibid* at para. 29.
[272] USW Written Submissions, *supra* note 235 at para. 104.
[273] *Ibid* at para. 104.
[274] *Ibid* at para. 105.

would be contrary to Canadian public policy due to the effect it would have on the Steelworkers. As set out above, the Steelworkers argument on the third preliminary issue in this summary trial is that the Court's application of ERISA in this case is against Canadian public policy because it would reduce the Wolverine Mine employees' severance and termination pay to "almost nothing". If the Steelworkers are successful in the additional issues, however, their claims will be unaffected by the 1974 Plan Claim.

321. A Canadian court should be reluctant to pass judgment on the morality of a foreign law unless and until the court determines that the case inescapably requires the court to do so. The public policy issue, as the Walter Canada Group and Steelworkers have argued it, should not be decided in isolation from the additional issues the Steelworkers wish to raise.

322. The Walter Canada Group argues that concerns about "litigation in slices" do not arise in this case because the same judge is seized with all matters.[275] This argument was made – and rejected – in *Mayer*, *supra* note 9, where Mr. Justice Smith confirmed that a judge seized of a matter was required to weigh the same factors before litigating in slices as a judge not seized with the matter.

4. Conclusion on Suitability

323. The Walter Canada Group's application raises only preliminary issues that could only resolve the 1974 Plan Claim if one answer is given, but not if another answer is given. In these circumstances, the law imposes a special obligation on the Walter Canada Group to justify proceeding summarily. As described by Mr. Justice Lambert in *North Vancouver (District) v. Lunde* (1998), 162 D.L.R. (4th) 402 at para. 33 (B.C.C.A.) [*Lunde*]:

> If the answer to an issue sought to be tried under Rule 18A will only resolve the whole proceeding if one answer is given, but not if a different answer is given, then the applicant should be required to demonstrate, and the judge should be expected to decide, that the administration of justice, as it affects not just the parties to the motion, but also the orderly use of court time, will be enhanced by dealing with the issue as a separate issue.[276]

[275] WCG Written Submissions, *supra* note 3 at para. 141.
[276] 1974 Plan BOA, Tab 38.

324. The Walter Canada Group cannot meet this obligation in this case. The deficient evidentiary record supplied by the Walter Canada Group, coupled with the 1974 Plan's inability to obtain any discovery, has left the Court in a position where it is proceeding on incomplete facts. Not only has this prevented the 1974 Plan from presenting its case in its strongest light, but it has also necessitated disputes over evidentiary matters and the overall suitability of this summary trial that already has and will continue to occupy significant court time. These problems likely will fall away if the 1974 Plan is granted discovery prior to proceeding to a summary trial – as it customary.

325. The orderly use of court time will not be enhanced by proceeding summarily on the present record. The 1974 Plan submits that the Walter Canada Group's summary trial will not assist in the efficient resolution of the proceeding and should be dismissed.

D. Preliminary Issue #1: The 1974 Plan Claim Is Governed by U.S. Substantive Law

326. The 1974 Plan is a creditor of the Walter Canada Group by reason of a claim properly governed by U.S. law, specifically ERISA. It is a basic insolvency law principle that a foreigner with a proven claim governed by foreign law stands in the same position as a domestic creditor with a proven claim governed by domestic law.[277] To determine whether the 1974 Plan Claim is a valid, provable claim, the Court should apply domestic choice of law rules to determine the proper law of the claim.[278] The application of these rules points to U.S. law as the proper law of the obligation the Walter Canada Group owe to the 1974 Plan.

327. Determining the proper law of a claim requires applying the law of the forum in a series of steps:

(a) characterize the issue;

(b) identify the appropriate choice of law rule based on that characterization; and

(c) apply the connecting factor indicated by the appropriate choice of law rule.[279]

---

[277] *Teleglobe, supra* note 1 at para. 8; and *Halsbury's Laws of England, Conflict of Laws, supra* note 1 at 710, para. 980

[278] Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws,* (Toronto: Irwin Law, 2010), 1974 Plan BOA, Tab 115 [*Pitel*] at 217.

[279] *Ibid* at 211.

1. Characterization of 1974 Plan Claim

328. The objective of categorization of a claim is to find a choice of law rule that is fair to the parties.[280] What is fair to parties cannot be known without an understanding of the factual matrix underlying the claim. Choice of law categories are defined not by their content, but by their purpose:

> The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issues which the law recognizes at the first stage [i.e. for characterisation] are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived.[281]

329. Characterization is critical in conflicts as depending on how the claim is characterized different conflict rules will apply and the application of different conflicts rules can lead to different outcomes.[282] The 1974 Plan Claim must be characterized or categorized so that the appropriate "connecting factor" can be determined.[283]

330. The issue underlying the claim is characterized according to the law of the forum (*lex fori*).[284] The legal categories used for characterization are ones with which the forum is familiar: property law, law of obligations, family law, and law of corporations and insolvency.[285] Within each category are sub-categories. Under the law of obligations the sub-categories are: contract, tort and unjust enrichment.

331. Courts are to take the following approach in respect of characterization:

> The *lex fori* will characterise in accordance with its rules in a liberal manner, not insisting that all its technical requirements are complied with...Therefore under private international law, concepts such as

[280] T.M. Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004), 1974 Plan BOA, Tab 116 [*Yeo*] at 72, para 3.10.

[281] A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London: Sweet & Maxwell, 2012), 1974 Plan BOA, Tab 102 [*Dicey*] at 51, endorsing and quoting the view expressed in *Raiffeisen Zentralbank Osterreich AG v An Feng Steel Co Ltd*, [2001] EWCA Civ 68, 1974 Plan BOA, Tab 65 at para. 27.

[282] Janet Walker, *Castel & Walker Canadian Conflict of Laws,* 6 ed., loose-leaf (consulted on 10 December 2016), (Toronto, ON: LexisNexis, 2005), [*Castel & Walker*], 1974 Plan BOA, Tab 111, vol. 1, ch. 3 at 3-1.

[283] *Pitel, supra* note 278 at 211.

[284] *Pitel, supra* note 278 at 217.

[285] *Dicey, supra* note 281 and *Yeo*, *supra* note 280 at 76.

> "contract", "tort", "corporation" and "unjust enrichment" are to be given a liberal interpretation.[286]

332. *Dicey* suggests that when a court must characterize a claim, the court should consider the rationale of the potentially applicable conflict rules:

> The way the court should proceed is to consider the rationale of the [forum's] conflict rule and the purpose of the rule of substantive law to be characterized. On this basis it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created.[287]

333. Choice of law categories are functional categories in the sense that they are intended to bring together problems which, because of their similarity, ought to share the same connecting factor.[288] The "proper approach" to characterization is to "identify according to the *lex fori* the true issue or issues thrown up by the claim and defence."[289] Characterization is ultimately a question of substance and not form.[290]

334. The 1974 Plan's characterization of the 1974 Plan Claim rests on settled law. The 1974 Plan Claim arises under the Pension Plan Document, the CBA and the provisions of ERISA implicated thereby. There is a consistent line of authority in which courts have addressed the appropriate characterization for choice of law purposes of the precise issue to be decided here.[291]

335. Those cases specifically address the situation where, as in this case, a statute confers a right of action against an entity that itself was not a party to the contract to which the claim relates.[292] That unbroken line of authority establishes that where, as here, the

---

[286] George Panagopoulos, R*estitution in Private International Law* (Oxford: Hard Publishing, 2000), 1974 Plan BOA, Tab 106 [*Panagopoulos*] at 31 [citing *Bonacina (Re)*, [1912] 2 Ch 394, where the Court of Appeal characterised a matter as contractual, even though the relevant foreign agreement was not supported by consideration].

[287] *Dicey, supra* note 281 at 51, para 2-039.

[288] *Yeo, supra* note 280 at 71, para. 3.09.

[289] *MacMillan Inc v Bishopsgate Investment Trust (No 3)*, [1995] EWCA Civ 55, 1974 Plan BOA, Tab 64 at para 78.

[290] *Panagopoulos, supra* note 286 at 31.

[291] See: *Dicey, supra* note 281 at 48-49; and for example: *Through Transport, supra* note 2; *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain,* [2013] EWHC 3188, 1974 Plan BOA, Tab 63 [*London Steam-Ship*]; and *Youell v Kara Mara Shipping Company Ltd,* [2000] EWHC 220, 1974 Plan BOA, Tab 67 [*Kara Mara Shipping*].

[292] See: *Dicey, supra* note 281 at 48-49; and for example: *Through Transport, supra* note 2; *London Steam-Ship, supra* note 291; and *Kara Mara Shipping, supra* note 291.

"essential nature" of a claim authorized by statute "is to enforce the terms of [a] contract," then, for choice of law purposes, the correct characterization of the claim is as a claim in contract.[293] That is so notwithstanding that the defendant was not a party to the contract.

336. What ERISA grants to the 1974 Plan "is essentially a right to enforce" against the Walter Canada Group the contractual obligations to the 1974 Plan of Walter Resources.[294] As such, just as in the settled line of authority relied on by the 1974 Plan, the issue "is one of obligation under the contract" and therefore appropriately is characterized as a claim in contract.

337. In contrast to the cases directly on point which support the 1974 Plan's characterization of the claim, neither the Walter Canada Group nor the Steelworkers is able to cite a single case which supports characterizing a claim seeking to impose civil liability on a corporation as one "implicating legal personality".[295]

338. Tellingly, the section of Walter Canada Group's written submission addressed to the question of characterization of the claim[296] does not cite a single case where characterization of a claim for choice of law purposes was the issue decided in the case (apart from *Minera Aqualine Argentina SA v. IMA Exploration Inc. And Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102, WCG BOA, Tab 10 *[Minera]*, which the Walter Canada Group cites only for the general, and uncontroversial, statement of the "importance of properly characterizing a claim").[297]

339. The principal case cited by the Walter Canada Group and the Steelworkers in support of their argument on characterization (*JTI-Macdonald*) is a case concerning the constitutional validity of provincial legislation in which the issue of choice of law did not arise for decision.[298]

340. The argument of the Steelworkers further illustrates that the arguments contrary to the 1974 Plan are unsound in law. The Steelworkers go so far as to argue that "British

---

[293] *Through Transport, supra* note 2 at para. 59.
[294] *Ibid.*
[295] WCG Written Submissions, *supra* note 3 at para. 57.
[296] *Ibid* at paras. 48-61.
[297] WCG Written Submissions, *supra* note 3 at para. 49.
[298] *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312, WCG BOA, Tab 9.

Columbia substantive law applies in this proceeding because the 1974 Plan Claim is brought against the Walter Canada Group in British Columbia, where Walter Canada is ordinarily resident."[299] That argument conflates choice of law with jurisdiction. If the proper law were invariably the law of the forum, then choice of law would not exist as a subject within the topic of the conflict of laws. The Walter Canada Group then compounds the confusion by relying on the case of *Beals*.[300] *Beals*, yet again, is not a case involving a decision on choice of law. *Beals* concerns, and the statements made in it relate to, the discrete subject within the conflict of laws of the enforceability of a foreign judgment.

341. The unbroken line of authority cited by the 1974 Plan are directly applicable to the case at bar because they decide precisely the issue raised by the Walter Canada Group's notice of application.[301]

342. In *Through Transport Mutual Assurance Association (Eurasia) Ltd v. New India Assurance Association Co Limited*, [2004] EWCA Civ 1598, the English Court of Appeal considered Finnish legislation that gave a direct right to sue an insurer rather than the insured. The Court of Appeal agreed with the trial judge's characterization of the claim for choice of law purposes:

> If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterized as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterized as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law.[302]

343. The Court of Appeal held that the judge below was correct to find that the obligations arose under the contract because the Act in question gave the claimant a right of action directly against the insurer without the need for the formalities of an assignment (i.e. to

[299] USW Written Submissions, *supra* note 235 at para. 31.

[300] WCG Written Submissions, *supra* note 3 at para. 56; *Beals, supra* note 232.

[301] *Through Transport*, *supra* note 2; *London Steam-Ship*, *supra* note 291; and *Kara Mara Shipping, supra* note 291.

[302] *Through Transport*, *supra* note 2 at para. 57, emphasis added.

obtain the benefit that the insured would himself have been entitled to obtain under the contract).[303] Therefore, pursuant to the terms of the contract that stated English law applied, English law was the proper law of the claim.[304]

344. In *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain,* [2013] EWHC 3188, the Court followed the analysis from *Through Transport,* stating that in deciding whether or not a direct action right under an insurance statute is "in substance" a claim to enforce the contract or a claim to enforce an independent right of recovery, what matters most is the content of the right, rather than the derivation of its content.[305] The Court held that the essential content of the right was provided by a contract. However, because a section of the statute at issue created a liability for an event that would not normally be insurable, the question became whether the extent of the exceptions was such as to change the essential nature of the right created so that it could no longer be regarded as being in substance a contractual right. The Court held the exceptions in the statute did not go this far.[306] The direct action right conferred by Spanish law against liability insurers was found to be in substance a right to enforce the contract rather than an independent right of recovery.[307]

345. The Court in *Youell v Kara Mara Shipping Company Ltd,* [2000] EWHC 220, also held that a Louisiana direct action statute created a right that was contractual in nature.[308] This is because the statute "confers a statutory right to make a claim on a contract to which [the defendant] was not originally a party."[309]

346. These three cases all involve a party advancing a claim against another party in respect of a lability arising under a contract. In all three cases, the defendant was not a party to the contract. In all three cases, the plaintiff claimed that a statute from a law other than the *lex fori* caused the defendant to be liable. In all three cases, the court characterized the claim under contracts because the claim only existed by reference to the contract. The case at bar is the same. The 1974 Plan Claim exists because Walter Resources

[303] *Ibid* at para. 59.
[304] *Ibid* at paras. 57-60.
[305] *London Steam-Ship, supra* note 291 at para. 87.
[306] *Ibid* at para. 90.
[307] *Ibid* at para. 95.
[308] *Kara Mara Shipping, supra* note 291 at para. 61.
[309] *Ibid* at para. 58.

was a signatory to the CBA. ERISA says that the Walter Canada Group is liable in relation to Walter Resources' rejection of the contract and withdrawal from the 1974 Plan. The 1974 Plan is pursuing the Walter Canada Group in Canada in respect of the withdrawal liability. For choice of law purposes, the character of the 1974 Plan Claim is contractual.

2. Choice of Law Rule Applicable to 1974 Plan Claim

347. Claims for obligations related to contract are determined with reference to the "proper law" of the obligation.[310] The "proper law" of the obligation is the law of the country with which the claims have their "closest and most real connection" or "closest and most substantial connection."[311]

348. The trend in choice of law analysis is towards a more principled approach, rather than a blind application of rules.[312] In *Minera,* Koenigsberg J. rejected a categorical approach to the choice of law analysis for unjust enrichment claims and instead adopted a "principled approach", looking for the "closest and most substantial connection" to the claim. Similarly, in contract, rather than apply blanket rules, Canadian courts seek to find the system of law with which, in all the circumstances, the contract has its closest and most real connection.[313]

349. Thus, a principled approach that analyzes the factual matrix to determine which forum has the closest and most real connection to the 1974 Plan Claim aligns with Canadian jurisprudence.

350. The Court should examine the following non-exhaustive list of factors to determine which set of laws has the closest and most real connection to the obligation in that case:

---

[310] *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443, 1974 Plan BOA, Tab 29 at 448; *Etler v. Kertesz,* [1960] O.R. 672, 26 D.L.R. (2d) 209 (C.A.) at 215-218; and *Richardson International Ltd v. Zao RPK "Starodubskoe",* 2002 FCA 97, 1974 Plan BOA, Tab 48 [*Richardson International*]; and *Castel & Walker, supra* note 282 at 31-11 to 31-13.

[311] *Minera Aqualine Argentina SA v. IMA Exploration Inc. And Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102, WCG BOA, Tab 10 [*Minera*] at paras. 195 and 200, aff'd 2007 BCCA 319, leave to appeal ref'd [2007] S.C.C.A. No. 424; *Colmenares, supra* note 310 at 448; *Barrick Gold Corp v Goldcorp Inc,* 2011 ONSC 3725, 1974 Plan BOA, Tab 5 at paras. 770-777 and 839-848; *Castel & Walker, supra* note 282at ch. 32, 32-1-32-2; *Christopher v Zimmerman,* 2000 BCCA 532, 1974 Plan BOA, Tab 17.

[312] See: *Minera, supra* note 311 at paras. 195-200.

[313] The approach evolved through *Etler, supra* note 310, *Colmenares, supra* note 310, and *Richardson International, supra* note 310.

(a) the law applicable to the contract, if any;

(b) the language, nature and subject matter of the contract;

(c) other factors that serve to localize the contract;

(d) where the transaction underlying the obligation occurred or was intended to occur;

(e) where the transaction underlying the obligation was or was intended to be carried out;

(f) where the parties are resident;

(g) where the parties carry on business;

(h) what the expectations of the parties were with respect to governing law at the time the obligation arose; and

(i) the country where the immovable, if any, is situated;

(j) whether the application of a particular law would cause an injustice to either of the parties.[314]

The factors should be given weight according to a reasonable view of the evidence and the importance of the factors to the issue at stake.[315]

351. The characterization advocated by the Walter Canada Group and the Steelworkers is incompatible with a principled analysis. In fact, the approach they advocate purposefully ignores any connections a claim has with any jurisdiction other than the jurisdiction in which the defendant is incorporated.

3. Application of Choice of Law Rule to 1974 Plan Claim

352. The record does not allow the Court to find all of the facts necessary to apply the factors set out above and to determine which law has the closest and most real connection. The

[314] *Minera, supra* note 311 at paras. 195 & 200; *Colmenares*; *Richardson International* at para. 82; and *Castel & Walker*, *supra* note 282 at 31-12 et seq; *Etler, supra* note 310; *Canaccord Capital Corp v 884003 Alberta Inc*, 2005 BCCA 124, 1974 Plan BOA, Tab 12 at para 9; *Pitel, supra* note 278 at 275;

[315] *Minera, supra* note 311 at para 201.

1974 Plan has pleaded facts relevant to this determination and sought discovery from the Walter Canada Group of evidence to enable the 1974 Plan to establish these facts. Because the 1974 Plan was denied discovery prior to the summary trial application, the 1974 Plan has been forced into trial without being afforded the means to prove its claim.

353. The following facts are established on the record and support application of U.S. law as the law with the closest and most real connection to the 1974 Plan Claim:

(a) The Pension Document and the Trust Document are governed by the law of the District of Columbia and the federal laws of the United States applicable therein.[316] The Pension Document was signed in Washington, DC.[317] The Trust has its principal place of business in Washington, DC.[318] The CBA provides that trusts and plans connected with the CBA must conform to the requirements of ERISA and other U.S. federal laws.[319]

(b) Withdrawal from the 1974 Plan occurred and was carried out in the United States, and was intended to occur and be carried out, with approval from the U.S. Bankruptcy Court.[320]

(c) The 1974 Plan and its trustees are all resident in the United States.[321] All participating employers in the 1974 Plan are resident in the United States.[322]

(d) The 1974 Plan carries on business in the United States.[323]

(e) Walter Energy Canada and its U.S. parent company, Walter Energy, were enriched when Walter Energy Canada failed to pay the withdrawal liability. After the sale transactions accomplished in these proceedings, the New Walter Canada Group has more cash than allowed claims.[324] If the 1974 Plan Claim is

[316] Pension Plan Document, *supra* note 18 at 181 (see: Article XII, B(14)); and 185 (see: Article XIV(A)_; and Trust Document, *supra* note 18 at 200 (see: Article VI (12)); and 205 (see: Article XIII).

[317] Pension Plan Document, *supra* note 18 at 193.

[318] Trust Document, *supra* note 18 at 197 (see: Article II).

[319] CBA, *supra* note 18 at 29 (see: Article XX(g)(4)(b)).

[320] Rejection Order, *supra* note 92.

[321] Stover Affidavit, *supra* note 13, at paras. 12-13.

[322] *Ibid* at para. 39.

[323] Stover Affidavit, *supra* note 13, at paras. 11-13.

[324] Monitor's Seventh Report, dated December 11, 2016, ["Monitor's Seventh Report"], 1974 Plan BOE, vol. 3, Tab 6, at paras 35 (c) and 38.

disallowed, the New Walter Canada Group will have cash available to pay to Walter Energy qua creditor.[325] Specifically, Walter Energy will have a claim against the New Walter Canada Group for nearly $40 million.[326] This claim is in respect of interest accrued on the intercompany transfers made to Canada Holdings to fund the Western Acquisition.[327]

(f) Application of Canadian law works an injustice on the 1974 Plan because of the removal of assets out of reach of ERISA.[328]

The 1974 Plan has pled more connections between the 1974 Plan Claim and the United States, which it expects to be able to prove.[329]

354. In *Mayer*, *supra* note 9, the British Columbia Court of Appeal commented on the unfairness and injustice resulting from a plaintiff's not being permitted "to develop his case fully through discovery."[330] The Court in that case found that a summary trial application brought by the defendants added to the injustice.[331]

> The traditional order of trial is described in Rule 40(53) [now Civil Rule 12-5(72)]: plaintiffs lead their evidence first and then defendants lead their responding evidence, if any. In this way, plaintiffs are able to present the evidence in support of their claims fully, in an orderly way and in its best light, before it is challenged by the defendants.[332]

The 1974 Plan have been prejudiced by its inability to develop and present its case. As such, the 1974 Plan has been "deprived of the advantages accruing to plaintiffs in a normal trial."[333]

355. Although the 1974 Plan is of the view that the Harvey Affidavit is admissible for the truth of its contents, statements therein point to U.S. law as having the closest and most real

---

[325] *Ibid;* and Joint Proposal, *supra* note 119.

[326] Monitor's Seventh Report, *supra* note 119 at paras. 35 (c) and 38; 7th Affidavit of Miriam Dominguez, 1974 Plan BOE, Tab 4, Exhibit "A", p. 4.

[327] Joint Proposal, *supra* note 119 and Monitor's Seventh Report, *supra* note 119 at para. 32.

[328] Amended NOCC, *supra* note 15 at paras 46, 52-53.

[329] *Ibid* at paras 15, 26, 80-101.

[330] *Mayer*, *supra* note 9 at para. 83.

[331] *Ibid* at para 84.

[332] *Ibid.*

[333] *Ibid.*

connection. These statements demonstrate that there are relevant facts worthy of further inquiry:

(a) The global Walter Energy Group operated as a consolidated enterprise.[334] This consolidated enterprise, which includes Walter Energy's Canadian and U.S. operations, benefitted from the Walter Canada Group's refusal to acknowledge the withdrawal liability. The entire global enterprise in both Canada and the United States were enriched when the Walter Canada Group refused to pay the withdrawal liability.

(b) Walter Energy is incorporated under the laws of Delaware, is headquartered in Birmingham, Alabama, and did business in West Virginia and Alabama.[335] Walter Energy's board of directors and management team operated out of Birmingham, Alabama.[336] Walter Resources is incorporated in and did business in Alabama. Walter Resources' management team operated out of Birmingham, Alabama.[337] While most of the Walter Canada Group is incorporated in Canada, it appears that their management team and key decision makers were also involved in the decision making for Walter Energy.[338] More than just payroll services, the Walter Canada Group shared with the global enterprise finance, tax, treasury, human resources, payroll, benefits and communications, information technology, legal, operations and health, safety and environment and other services.[339]

(c) The management team of the Walter Canada Group was guided by the U.S. legal system. Specifically, Walter Energy's legal department provided services for the global group and specifically for the Walter Canada Group.[340] With discovery, the 1974 Plan believes it can prove that the U.S. legal system was the legal system that guided the key players and directing minds of all the Walter Canada Group entities. The Walter Canada Group's management team and key decision makers would have been familiar with ERISA and other U.S. law. They expected

---

[334] Harvey Affidavit, Exhibit "B", *supra* note 10 at paras. 32, 47, 66-69, 75, 105, 106, 128, 129, 136, 148, 149, 151, 161.

[335] Harvey Affidavit, *supra* note 10 paras. 10 and 22.

[336] Harvey Affidavit, Exhibit "B", *supra* note 10 at paras 1 (n. 1), 66 and 128.

[337] *Ibid.*

[338] *Ibid* at paras. 66-67; and Aziz Affidavit, *supra* note 91.

[339] *Ibid* at paras. 66-67.

[340] *Ibid* at para. 67.

U.S. law to govern elements of the business they directed, and were guided by U.S. law in their actions. While the management team of the Walter Canada Group resigned, they did so after the Bankruptcy Court authorized and directed Walter Energy to withdraw from the Plan.[341]

356. As *Dicey* on the conflict of laws states at Rule 173-(2):

> A corporation is resident in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or more countries then the corporation is resident in each of these countries.[342]

357. *Dicey* cites the example of *De Beers Consolidated Mines Ltd v Howe*, [1906] AC 455 (HL), as authority for this rule. In considering a tax issue, the House of Lords in *De Beers* had reason to consider where a company incorporated in South Africa was resident. The company's work focussed on mines in South Africa, which was also the location of the company's head office. Directors of the company lived in South Africa and England. Directors' meetings were held in South Africa and England. The Court found that it was clear that the majority of directors lived in England and that the directors' meetings in London were the meetings where "real control" was exercised over the important business of the company. As a result, the Court held that the company was resident in England.[343]

358. The 1974 Plan has alleged that the majority of the directors of the Walter Canada Group lived and met in Birmingham, Alabama.[344] If this is proven, on the authority of *De Beers*, the Walter Canada Group has a residence in the United States, as well as in BC where its mines were situate.

359. This Court should not be put in the position of having to make a choice of law decision without a full understanding of the facts on which law has the closest and most real connection. The fact that the directing minds of a defendant were informed and guided

---

[341] Aziz Affidavit, *supra* note 91 at para. 21.

[342] *Dicey, supra* note 281 at 1528, 30R-001, Rule 173(2).

[343] *De Beers Consolidated Mines Ltd v Howe,* [1906] AC 455, 1974 Plan BOA, Tab 62 (H.L.). Canadian authorities have relied on *De Beers* in considering the residence of a corporation in numerous contexts: see *Pet Milk Canada Ltd v. Olympia & York Developments* (1974), 4 O.R. No. 48, 1974 Plan BOA, Tab 40.

[344] Amended NOCC, *supra* note 15 at paras 86-87 and 91-92.

by a particular law has been found to be determinative. In *Minera*, the BC Supreme Court found that, where:

(a) the defendant had mining properties in Argentina (which were presumably governed by Argentinian mining laws and regulations, and inspected by Argentinian inspectors);

(b) the principal actors on both sides were aware of Canadian or Colorado law in relation to a specific legal relationship and obligation;

(c) the U.S. and Canadian systems were the systems of law under which both parties routinely conducted their affairs; and

(d) a principal of the defendant admitted to being familiar with Canadian law and its implications,

"the legal system that informed and guided the perceptions and actions of the key players at the time the [actions underlying the dispute] occurred was Canadian and American law".[345] As a result, the Court found that, notwithstanding that "some important choice of law factors point[ed] to Argentine law," British Columbia law had the "closest and most real connection to the obligation" between the parties.[346]

360. The 1974 Plan alleges that the U.S. legal system informed and guided the perceptions and actions of the global enterprise including the Canadian entities at all relevant times. Certain statements put before the Court by the Walter Canada Group support this statement. The Walter Canada Group and the Steelworkers tell the Court to ignore this possibility, and all other ties the Walter Canada Group has to the U.S. They ask the Court to find that all facts indicating a connection with the U.S. are irrelevant, while maintaining that the facts indicating a connection to Canada are relevant. This approach cannot be supported given existing case law on characterization in Canada and a principled approach to choice of law.

4. The Choice of Law Rule Advocated by the Walter Canada Group and the Steelworkers Is Inappropriate

[345] *Minera, supra* note 311 at para. 206.
[346] *Ibid* at 207.

361. The Walter Canada Group and the Steelworkers ask this Court to characterize the 1974 Plan Claim on the basis of the effect of applying ERISA, rather than on the basis of the nature of the underlying claim. Yet they do not cite a case that supports such an effects-based approach to characterization. Further, the Walter Canada Group and the Steelworkers ask this Court to ignore all relevant facts indicating connections between the Walter Canada Group and its U.S. affiliates. Such relevant facts and connections are specifically referenced in the materials filed by the Walter Canada Group and the Steelworkers and discussed in the 1974 Plan's submissions.

362. The choice of law rule advocated by the Walter Canada Group and the Steelworkers is intended for matters related to corporate existence, such as whether a corporate entity has the capacity to sue or be sued.[347] The rule may also apply to issues of corporate governance, such as shareholder rights, authority of directors, power to make contracts, or rights to issue or transfer stock.[348]

363. The characterization method advocated in *Dicey* provides that the choice of law rule and the substantive law to be applied should have the same or similar purposes.[349] The purpose of the substantive law sought to be applied, here ERISA, is to ensure that employees who are promised retirement benefits actually receive those benefits.[350] This purpose is entirely different from a choice of law rule whose purpose is the determination of corporate capacity or corporate governance.

364. The cases cited by the Walter Canada Group and the Steelworkers illustrate how inappropriate their preferred choice of law rule is for the circumstances of this case. *JTI-Macdonald Corp.* is a case about whether a Provincial Act was *ultra vires* due to its intended extraterritorial effect.[351] The case does not deal with characterization for choice of law purposes.

365. *National Trust Co. v. Ebro Irrigation and Power Co.*, cited by the Walter Canada Group, is about what law governs the acts of shareholders related to the issuance of shares,

---

[347] *Castel & Walker*, *supra* note 282 at ch 30, 30-1, 30.1; and *Halsbury's Laws of Canada,* 1st ed. (2016 Reissue) (Toronto, ON: LexisNexis, 2016), 1974 Plan BOA, Tab 107, Foreign Corporations at 970-71, para. 269.

[348] *Castel & Walker*, *supra* note 282 at ch 30, 30-1, 30.1; and *Halsbury's Laws of Canada, supra* note 347.

[349] *Dicey, supra* note 281 at 51, para. 2-039.

[350] Mazo Report, *supra* note 2 at para. 25; *Connolly v P.B.G.C.*, 475 US 211, 214 (1986), 1974 Plan BOA, Tab 71.

[351] *Supra*, note 298.

election of boards of directors, and other corporate governance issues.[352] *Singer Sewing Machine Co of Canada Ltd (Re)* is a pre-UNCITRAL model law insolvency case regarding whether to recognize a U.S. judgment where the U.S. court appeared to exercise its jurisdiction improperly.[353] *Concept Oil Services Ltd v En-Gin Group LLP* is a case about whether a UK-incorporated company can be transformed into an Anguillan-incorporated company by virtue of an Anguillan statute.[354] It is a case about a company's status and existence. None of these cases are remotely analogous to the case at bar because they deal with corporate existence, capacity and governance whereas the 1974 Plan Claim does not.

366. The only choice of law case cited by the Steelworkers is *Minera*.[355] All of the other cases cited by the Steelworkers are about application of different laws, not about the method a court uses to determine the appropriate law applicable to a claim.[356] The Steelworkers do not cite any authority that supports their apparent contention that the Court should choose the applicable law based on the results of application of such law.

367. The 1974 Plan Claim does not raise an issue about the corporate status or existence of the Walter Canada Group entities. Being subject to a form of civil liability – withdrawal liability under ERISA – does not affect the corporate existence *qua* incorporated entities of the Walter Canada Group. The legal basis of withdrawal liability under ERISA does not equate to a loss of corporate status or existence.

368. As described by *Castel & Walker*,

> [q]uestions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation.

---

[352] [1954] O.R. 463 (S.C.), WCG BOA, Tab 11.

[353] 2000 ABQB 116, WCG BOA, Tab 16.

[354] [2013] EWHC 1897 (Comm.), WCG BOA, Tab 5.

[355] USW Written Submissions, *supra* note 235 at 8-16.

[356] *Shoppers Drug Mart v 6470360 Canada Inc*, 2014 ONCA 85, Brief of Authorities of the Respondent Steelworkers on Summary Trial Application ("USW BOA"), Tab 10 (about piercing the corporate veil); *Gregorio v Intrans-Corp*, [1994] O.J. No. 1063, 115 D.L.R. (4th) 200, USW BOA, Tab 4 (C.A.) (about piercing the corporate veil; *Harrington v Dow Corning Corp*, [1998] B.C.J. No. 831 (S.C.), USW BOA, Tab 5 (about alter ego or agency relationship between a parent and a subsidiary); *Emtwo Properties Inc v Cineplex (Western Canada) Inc*, 2011 BCSC 1072, USW BOA, Tab 3 (about piercing the corporate veil); *Beals, supra* note 232 (about recognition of a foreign judgment).

...

> The law of the state, province or territory under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts and the rights of shareholders. Furthermore, the instrument of incorporation and the laws of a corporation's domicile govern not only its creation and continuing existence, but also all matters of internal management, the creation of share capital and related matters. The issues governed by the laws of the corporation's domicile include its capacity to sue, the authority of directors, who may be appointed a director, its power to make contracts, the validity of conveyances of corporate property, the corporation's right to issue stock, and the validity of transfers of its stock.[357]

None of these matters of corporate existence or internal management dictate whether civil liability attaches to a corporate entity.

369. Characterization of a claim under ERISA as the Walter Canada Group has framed it would result in a blanket denial of all ERISA claims against Canadian entities in Canadian courts. Such denial would occur notwithstanding how connected the Canadian entity may be with its American affiliates. The Canadian entity might have assets and operations in the U.S., but because ERISA would cause one entity to be liable in respect of a contract of an affiliate, it cannot be liable in Canada. Such blanket denial of ERISA was rejected by the Canadian Bar Association's statutory review of the CCAA.[358] The joint legislative review task force of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals (the "**Joint Task Force**") similarly concluded that broader consideration of the enforceability of ERISA claims may be warranted.[359]

---

[357] *Castel & Walker*, *supra* note 282 at 30-1, s. 30.1.

[358] Canadian Bar Association Bankruptcy, Insolvency and Restructuring Law Section and Canadian Corporate Counsel Association, *Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act,* July 2014, 1974 Plan BOA, Tab 104 [*Canadian Bar Association Report*] at 28 (available at: https://www.cba.org/CMSPages/GetFile.aspx?guid=f5f60f1c-9440-4c12-8a03-9b8ab9066606).

[359] Joint legislative review task force of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals, *Report on the statutory review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act,* July 15, 2014, 1974 Plan BOA, Tab 112 [*Joint Task Force Report*] at 31 (available at https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Joint_IIC_CAIRP_submission_July_15_2014.pdf/$FILE/Joint_IIC_CAIRP_submission_July_15_2014.pdf).

370. Such a characterization would threaten principles of international comity. Using the choice of law rule advocated by the Walter Canada Group, a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability.

371. The 1974 Plan does not advocate for such a blanket approach. Rather, the 1974 Plan suggests that, where facts exist such that U.S. law is the "proper law of the obligation", a Canadian entity is liable for withdrawal liability under ERISA. Where U.S. law is not the "proper law of the obligation", then ERISA would not apply. But that is a different situation from the case at bar.

E. Preliminary Issue #2: The Withdrawal Liability Provisions of ERISA Apply to the Walter Canada Group

372. Application of ERISA to the 1974 Plan Claim is a domestic application of U.S. law. On the evidence before the Court on this application, this is the only available conclusion.

373. The experts on both sides cite the PBGC Opinion 97-1, the United States federal agency responsible for administering ERISA.[360] The PBGC's view is that circumstances such as those at issue in this case do "not implicate extraterritorial application of ERISA."[361] The 1974 Plan's expert reaches the same conclusion: "all of the events involved in the creation, computation and assertion of the withdrawal liability have taken place within the United States."[362]

374. The Walter Canada Group's experts express no conclusion to the contrary. The written submissions of Walter Canada Group concede that their expert does not comment on "whether the application of ERISA to Walter Canada Group is domestic or extraterritorial."[363]

375. The PBGC is the "expert agency charged by Congress with interpreting" ERISA.[364] As such, the PBGC's opinion is entitled to deference under U.S. law.[365] In any

[360] Mazo Report, *supra* note 4 at para 51 and Abrams Report, supra note 4 at 10.
[361] Opinion Letter, *supra* note 5.
[362] Mazo Report, *supra* note 4 at para. 54.
[363] WCG Written Submissions, *supra* note 3 at para 100.
[364] Mazo Report, *supra* note 4 at para 51; *Beck*, *supra* note 5.
[365] Mazo Report, *supra* note 4 at para 51.

circumstances, a Canadian court should be slow to reject the considered opinion of the PBGC on the operation of ERISA. Rejection of such opinion ceases even to be an option where, as in this case, there is no contrary opinion in evidence, and indeed there is expert opinion evidence agreeing with it. Given the evidence before the Court, the only available conclusion is that reached by the PBGC: "the liability in question represents the domestic application of United States law."[366]

376. The Walter Canada Group and the Steelworkers resist the 1974 Plan Claim, arguing that requiring it to pay would be an extraterritorial application of U.S. law. The Walter Canada Group and the Steelworkers contend that this is improper because, in their view, the U.S. Congress never intended for foreign trades or businesses to be jointly and severally liable for the withdrawal liability of a related American trade or business.

377. The Walter Canada Group and the Steelworkers are mistaken. This case does not present any extraterritorial application of U.S. law. And even if it did, the U.S. Congress has made clear that ERISA and its withdrawal liability provisions apply extraterritorially.

1. The Presumption Against Extraterritoriality Is Not a Substantive Prohibition

378. The presumption against extraterritoriality is simply a canon of statutory interpretation.[367] It is not a substantive prohibition on the reach of federal law.[368] Congress can regulate extraterritorial conduct when it chooses to do so. The presumption against extraterritoriality helps courts decide whether, in a particular statute, Congress has chosen to do so. The decisions that the Walter Canada Group cites and quotes say as much. They recognize that the presumption is "a canon of statutory construction."[369]

379. The presumption against extraterritoriality is implicated only when a court is asked to apply U.S. law to conduct occurring outside of that country. The presumption is rebutted when Congress has clearly expressed its intent to regulate extraterritorial conduct; the presumption is irrelevant when the "focus" of the federal statute is conduct that, in a particular case, occurred domestically (*i.e.*, within the United States).[370] The two parts of

[366] Opinion Letter, *supra* note 5.
[367] *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016), Abrams BOA, Tab 33 [*RJR Nabisco*].
[368] *See Morrison v. Nat'l Australian Bank*, 561 U.S. 247, 255 (2010), Abrams BOA, Tab 23 [*Morrison*].
[369] WCG Written Submissions, *supra* note 3 at para. 75.
[370] *RJR Nabisco, supra* note 367 at 2101; Mazo Report, *supra* note 4 at para. 50.

this framework for analyzing extraterritoriality are separate and distinct, and a court is free to consider the parts in either order.[371]

380. The question whether Congress intended for ERISA's withdrawal liability provisions to apply extraterritorially has yet to be addressed by any U.S. court but has been addressed by the PBGC. This case involves no extraterritorial application of ERISA, but even so, Congress has clearly expressed its intent to hold related trades or businesses jointly and severally liable without regard to whether or where they may be incorporated.[372]

2. This Case Presents No Extraterritorial Application of U.S. Law

381. The Walter Canada Group's extraterritoriality challenge flows from a false premise – that applying U.S. law to an entity incorporated in a foreign country is inherently "extraterritorial". However extraterritoriality does not depend on the identity, domicile, or citizenship of a defendant in litigation.[373] Foreign entities often are held liable for conduct that occurred in the United States without implicating extraterritoriality concerns.[374]

382. Whether application of a statute is extraterritorial, or not, depends on the "focus" of the statute.[375] Once the "focus" is determined, a court then examines where the actions related to that focus occurred. The focus of the applicable provisions of ERISA is withdrawal from multiemployer pension plans.[376] All actions related to such withdrawal in this case occurred in the U.S.

383. The focus inquiry is not restricted to the actions of the defendant, here the Walter Canada Group.[377] Even if it were, the 1974 Plan alleges that the Walter Canada Group

---

[371] See *RJR Nabisco*, *supra* note 367 at 2101 n.5.

[372] Mazo Report, *supra* note 4 at para. 51; PBGC Opinion Letter, *supra* note 5.

[373] *Meridian Funds Grp. Secs. & Emps. Ret. Income Sec Act (ERISA) Litig. (Re)*, 917 F. Supp. 2d 231, 237 (S.D.N.Y. 2013), 1974 Plan BOA, Tab 80 ("The test for extraterritoriality is not simply whether a foreign entity is made to comply with a provision of U.S. law."); see Mazo Report *supra* note 4 at para. 54; *Mastafa v. Chevron Corp.*, 770 F.3d 170, 184 n.11 (2d Cir. 2014), 1974 Plan BOA, Tab 79 ("[D]omestic conduct must be the focal point of our inquiry.").

[374] See, e.g., *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoreman's Ass'n Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989), 1974 Plan BOA, Tab 77 at 1540 [*Korea Shipping 2d Cir.*] (holding Korean business subject to ERISA withdrawal liability); *P.B.G.C. v. Asahi Tec Corp.*, 979 F. Supp. 2d 46 (D.D.C. 2013), Abrams BOA, Tab 36 (holding Japanese business subject to ERISA liability for domestic conduct of member of Japanese business's controlled group).

[375] *Morrison*, *supra* note 368 at 266.

[376] Mazo Report, *supra* note 4 at para. 54.

[377] *Ibid.*

shared common control with Walter Resources in the United States. Even so, Congress intended ERISA to apply extraterritorially.[378]

(a) The "Focus" of a Statute Determines Whether It Is Being Applied Extraterritorially or Domestically

384. A statute's "focus" is the "object[] of the statute's solicitude," determined by what the statute "seeks to regulate" and who the statute "seeks to protect."[379] Identifying a statute's "focus" is essentially a matter of statutory interpretation, looking to all of the relevant statutory provisions.[380]

385. When the "focus of congressional concern" behind a statute is conduct that, in a particular case, occurred domestically, a plaintiff relying on that statute "seek[s] no more than domestic application" of the law.[381] That is, "[i]f the conduct relevant to the statute's focus occurred in the United States," then application of the statute is domestic, "even if other conduct occurred abroad."[382] Only where "the conduct relevant to the focus occurred in a foreign country" does a case involve an extraterritorial application, and only in such a case is it necessary to decide whether Congress clearly intended for extraterritorial application of a statute.[383]

386. This approach to the focus of U.S. statutes reflects common sense. A U.S. statute that prohibits robbery is not extraterritorial whenever a foreign citizen commits a robbery inside the United States; the focus of that statute is robbery, not foreigners. Likewise, a U.S. statute that regulates employment discrimination is not extraterritorial whenever a business operating in the U.S. has foreign officers and/or owners who make employment policies from foreign offices. Again, the focus of that statute is ending workplace discrimination, not foreigners. These statutes may have consequences that play out

---

[378] Mazo report, *supra* note 4 at 49-54.

[379] *Morrison*, *supra* note 368 at 267.

[380] See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring), Abrams BOA, Tab 31 (analyzing related provisions to determine the focus of a statute); *Loginovskaya v. Batrachenko*, 764 F.3d 266, 272 (2d Cir. 2014), 1974 Plan BOA, Tab 78 (looking to the "common thread" of the relevant statutory provisions to determine their "focus"); *Elsevier, Inc. v. Grossman,* No. 12 Civ. 5151, 2016 WL 7077109 (S.D.N.Y. 2016), 1974 Plan BOA, Tab 72 at *10 (interpreting *Morrison* as setting a statute's "focus" on "the set of transactions that the statute seeks to regulate" and concluding that the "focus" of the statute at issue was on a "class" of conduct).

[381] *Morrison*, *supra* note 368 at 266.

[382] *RJR Nabisco*, *supra* note 367 at 2101.

[383] *RJR Nabisco*, *supra* note 367 at 2101.

extraterritorially, but extraterritorial consequences that are outside the "focus" of a U.S. statute are not material considerations.

(b) The "Focus" of the Relevant ERISA Statutory Provisions Is Employer Withdrawal from Multiemployer Plans

387. The "focus of congressional concern" in enacting ERISA's withdrawal-liability provisions is the conduct of employers withdrawing from multiemployer plans.[384] "Congress was *concerned* about the threat to the solvency and stability of multiemployer plans caused by employer withdrawals."[385]

388. The text of the withdrawal-liability provisions reflects Congress's focus on withdrawal. "If an employer withdraws from a multiemployer plan in a complete or partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability."[386] "When an employer withdraws from a multiemployer plan, the plan sponsor" is to take certain actions.[387] "[A] complete withdrawal from a multiemployer plan occurs when an employer ... permanently ceases to have an obligation to contribute under the plan, or ... permanently ceases all covered operations under the plan."[388] These are just examples; "withdrawal" is the focal point throughout the provisions of the *Multiemployer Pension Plan Amendments Act* ("MPPAA") of ERISA.[389]

389. Congress's deliberate focus on withdrawal throughout the operative withdrawal liability provisions confirms that the "objects of the statute's solicitude"[390] are employer withdrawals from multiemployer plans. In other words, employer withdrawals are what the statute "seeks to regulate"[391] and the employees or other plan beneficiaries threatened by withdrawals are whom the statute "seeks to protect."[392]

---

[384] Mazo Report, *supra* note 4 at paras. 49, 54.

[385] *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoreman's Ass'n Pension Trust Fund*, 663 F.Supp. 766, 768-69 (S.D.N.Y. 1987) (emphasis added); accord *Connolly*, *supra* note 350 at 216-17 (Congress enacted MPPAA "[t]o alleviate the problem of employer withdrawals"); Mazo Report, *supra* note 4 at paras. 49, 54-55.

[386] 29 U.S.C. § 1381(a) (emphasis added), Abrams BOA, Tab 11.

[387] 29 U.S.C. § 1382 (emphasis added), Abrams BOA, Tab 12.

[388] 29 U.S.C. § 1383(a) (emphases added), Abrams BOA, Tab 29.

[389] *Multiemployer Pension Plan Amendments Act*, 29 USC § 1381 *et seq.*, *supra* note 386.

[390] *Morrison*, *supra* note 368 at 267.

[391] see 29 U.S.C. §§ 1381-83, *supra* notes 402-03, Mazo BOA, Tab 29.

[392] see *Korea Shipping 2d Cir.*, *supra* note 374 at 1537 (threats to "plans' financial viability" was "the precise threat Congress aimed to shield [the plans] from when it enacted the MPPAA"); *Bd. of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. – Pension Fund v. Centra*, 983 F.3d 495, 504 (3d Cir. 1992), Abrams BOA,

390. In this case, the conduct relevant to that statutory focus occurred in the United States. In a U.S. Bankruptcy proceeding, in a U.S. Bankruptcy Court in Alabama, Walter Resources (a U.S. company) withdrew from the 1974 Plan (a U.S. pension plan).[393] The beneficiaries of the 1974 Plan – the individuals that Congress sought to protect from employer withdrawal from multiemployer plans – are (or were at the relevant time) U.S. workers. Assessing withdrawal liability on Walter Resources or any entity under common control involves a domestic application of U.S. law.[394]

391. The PBGC has adopted the same analysis. In PBGC Opinion 97-1, the agency considered whether companies incorporated in the United Kingdom would be subject to withdrawal liability arising out of a U.S.-based controlled group member's withdrawal from a multiemployer plan through U.S. bankruptcy proceedings.[395] The PBGC explained that the UK entities would be subject to withdrawal liability and that the imposition of withdrawal liability on the UK entities would "not implicate extraterritorial application of ERISA."[396] Consistent with the focus analysis, the PBGC's conclusion turned on the facts that the "<u>events that triggered liability under ERISA</u> took place in the United States and involved the cessation of the contribution obligation ... of one or more United States entities."[397] Because all of the relevant conduct took place in the United States, and because ERISA treats controlled group members as a "single employer" for withdrawal liability purposes, the PBGC found irrelevant "[t]he fact that this liability may ultimately include within its scope certain foreign affiliates."[398]

392. Insofar as there is any ambiguity as to the withdrawal-liability provisions' "focus", the PBGC's reasonable interpretation would be entitled to deference.[399]

393. The Walter Canada Group alleges that this analysis "eviscerates the presumption against extraterritoriality."[400] That makes no sense. The presumption plays its part

---

Tab 19 ("MPPAA was designed to protect the interests of participants and beneficiaries in financially distressed multiemployer plans.")

[393] Stover Affidavit, *supra* note 12 at paras. 75-76.

[394] Mazo Report, *supra* note 4 at paras. 53-54.

[395] PBGC Opinion, *supra* note 5.

[396] *Ibid* at 2.

[397] *Ibid* (emphasis added).

[398] *Ibid*; and see Mazo Report, *supra* note 4 at paras. 51-55.

[399] See, e.g., *Beck, supra* note 5 ("We have traditionally deferred to the PBGC when interpreting ERISA, for to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embark upon a voyage without a compass.").

whenever the conduct relevant to the focus of the statute at issue occurs outside the United States, like withdrawal from multiemployer plans that are not based in the United States. Any employer's withdrawal from such a plan, whether the employer be American, Canadian, or Chinese, would not be covered by ERISA.

394. The Walter Canada Group also complains that, under this analysis, "it does not matter where [an] affiliate is incorporated."[401] That is true, but it has nothing to do with extraterritoriality. The U.S. Congress expressly decided to treat all related "trades or businesses" as a "single employer" under ERISA "whether or not" those trades or business are "incorporated."[402] A U.S. affiliate of Walter Resources is jointly and severally liable for Walter Resources' withdrawal, even though the affiliate may be incorporated in a state far away from Alabama. Such affiliate is liable even though the affiliate may have had nothing to do with Walter Resources' decision to withdraw from the 1974 Plan. The Walter Canada Group is misapplying principles of extraterritoriality to undermine Congress's purpose and the text of ERISA.

(c) The Walter Canada Group and the Steelworkers Misapprehend the "Focus" Inquiry

395. The Walter Canada Group and the Steelworkers compare the "focus" inquiry with U.S. law concerning personal jurisdiction, *i.e.*, the power of U.S. courts to adjudicate disputes against particular defendants.[403] The two doctrines are unrelated.[404] As noted above, the presumption against extraterritoriality and the correlative "focus" inquiries are canons of statutory construction. The U.S. constitutional limitations on personal jurisdiction have nothing to do with the meaning of statutes. Those limitations protect liberty and property interests by requiring "fair play and substantial justice."[405] Even the cases Mr. Abrams cites make clear that "jurisdiction and liability are two separate inquiries."[406]

---

[400] WCG Written Submissions, *supra* note 3 at para. 104.
[401] *Ibid.*
[402] 29 U.S.C. § 1301(b)(1), Abrams BOA, Tab 9.
[403] See: WCG Written Submissions, *supra* note 3 at paras. at 89-95.
[404] Mazo Report, *supra* note 4 at para. 56.
[405] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), 1974 Plan BOA, Tab 75.
[406] *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000), Abrams BOA, Tab 19; see *Smit v. Isiklar Holding*, 354 F. Supp. 2d 260, 267 (S.D.N.Y. 2005), 1974 Plan BOA, Tab 84 (whether defendants are a "single employer and a controlled group under common control" for ERISA purposes is irrelevant to whether court has "personal jurisdiction over foreign defendants").

396. The Supreme Court of Canada has found in relation to the respective analyses of jurisdiction and choice of law that, in the United States,

> state laws are given generous application to disputes with limited connections to the enacting jurisdiction (see, e.g., *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981)) to the point where Professor Laurence Tribe has commented:
>
> > There is much to be said for the view that the current state of the Supreme Court's personal jurisdiction and choice-of-law doctrines is precisely backwards. It is easy for a state to apply its law (which is by definition outcome-determinative) to a case, but relatively difficult for it to obtain jurisdiction over a dispute, even though jurisdiction is never directly outcome-determinative. Jurisdictional issues are unpredictable and endlessly litigated; choice-of-law matters are largely unregulated.
> >
> > (L. H. Tribe, American Constitutional Law (3rd ed. 2000), vol. 1, at p. 1292)[407]

397. The Walter Canada Group and the Steelworkers link extraterritoriality and personal jurisdiction by arguing that both focus on *conduct of a defendant*.[408] In the view of Walter Canada Group, if a defendant's conduct inside the United States does not reach the minimum-contacts threshold (such that the defendant is subject to the personal jurisdiction of U.S. courts), "it does not seem possible for a court to conclude that conduct displaces the presumption against extraterritoriality."[409] This argument proceeds from a false assumption: the extraterritoriality analysis is not limited to considering only the conduct of the defendant.[410]

398. The *Morrison* case disproves the assumption of the Walter Canada Group and the Steelworkers. *Morrison* considered the extraterritorial effect of U.S. securities laws and held that the "focus" of Section 10(b) of the *Securities Exchange Act* is the "purchases and sales of securities in the United States."[411] In a private suit under Section 10(b), the defendant rarely, if ever, will be the entity that purchased or sold securities in the United

---

[407] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, 1974 Plan BOA, Tab 57 at para. 74

[408] See WCG Written Submissions, *supra* note 3 at para. 91.

[409] *Ibid.*

[410] *Ibid* at 92-95.

[411] *Morrison*, *supra* note 368 at 266.

States. Usually, it is the plaintiff who has purchased or sold securities domestically, and the defendant is the person or persons whose fraudulent statements or omissions injured the plaintiff in connection with that purchase or sale. Indeed, in *Morrison*, the plaintiffs were the buyers of securities, but the defendants were not the sellers.[412] The defendants were the persons who allegedly committed fraud.[413] Even though the defendants acted inside the United States, Morrison involved an extraterritorial application of Section 10(b) because the plaintiffs bought securities at issue outside of the United States.[414]

399. Thus, the assertion of the Walter Canada Group and the Steelworkers that the Walter Canada Group's own conduct must be the focus of the relevant ERISA provisions is incorrect.[415] As Ms. Mazo and the PBGC have found, the focus of ERISA's withdrawal liability provisions is withdrawal from a multiemployer pension plan governed by ERISA.[416] It is undisputed that the multiemployer pension plan at issue here (the 1974 Plan) was based in the U.S., and that the withdrawal from that plan (by Walter Resources) occurred within the U.S. Thus, the conduct that is the "focus" of the relevant ERISA provisions happened in the United States, so no extraterritoriality issue is even presented by this case.

400. The Walter Canada Group and Mr. Abrams also argue that the ERISA provision whose focus matters is not Section 1381, but Section 1301(b)(1).[417] Section 1301(b)(1) is not a conduct-regulating provision, but a definition. It defines "single employer" as all "trades or businesses (whether or not incorporated) which are under common control." The focus of this statutory provision is ownership and control of trades or businesses, and on the facts of this case, that is domestic to the United States as well: Walter Energy owned and controlled the Walter Canada Group from its headquarters in the state of Alabama.

401. Mr. Abrams posits a different, incorrect statutory "focus" for Section 1301(b)(1) – the "fractioning [of] operations into many separate entities."[418] Mr. Abrams does so by

---

[412] *Ibid* at 250-52.
[413] *Ibid*.
[414] *Ibid*. at 266, 273.
[415] WCG Written Submissions, *supra* note 3 at paras 98-103.
[416] Mazo Report, *supra* note 4 at paras. 49-55; PBGC Opinion, *supra* note 5 at 2.
[417] See 29 U.S.C. § 1301(b)(1), *supra* note 402.
[418] Abrams Report, *supra* note 4 at 17; see WCG Written Submissions, *supra* note 3 at para. 98.

isolating Section 1301(b)(1) – what he calls the "controlled group liability provision[]"[419] – from the other relevant statutory provisions.

402. As noted, Section 1301(b)(1) defines "employer" as all "trades or businesses (whether or not incorporated) which are under common control." As a definitional provision, Section 1301(b)(1) does not directly regulate anything in isolation and so cannot truly be "extraterritorial" in isolation. Regardless, Section 1301(b)(1) protects the same individuals as the operative withdrawal liability provisions that it helps define. "Congress extended liability to all entities in common control with the actual withdrawing employer because the existing legislation prior to MPPAA did not adequately protect plans from the adverse consequences that resulted when individual employers terminated their participation in, or withdrew from, multiemployer plans."[420] Were it proper to consider Section 1301(b)(1) in isolation, the "focus" would remain employer withdrawal from multiemployer plans.[421]

403. Section 1301(b)(1) may "prevent businesses from shirking their ERISA obligations by fractionalizing operations in many separate entities."[422] However that *consequence* of Section 1301(b)(1) is not Section 1301(b)(1)'s *focus*. Section 1301(b)(1) does not regulate corporate machinations generally or for withdrawal liability in particular. A different ERISA provision does that.[423]

404. Even if Mr. Abrams's "focus" were the correct one, there would be no extraterritorial application of U.S. law here because all of the conduct relevant to the controlled group still occurred in the United States. The single-employer concept in Section 1301(b)(1) was designed "to make it clear that [ERISA's] coverage and antidiscrimination provisions cannot be avoided by operating through separate corporations instead of separate branches of a one corporation."[424] On this view of Section 1301(b)(1), the "focus" would be on the enterprise of related trades and businesses – that is, the "single employer" –

---

[419] Abrams Report, *supra* note 4 at 17.

[420] *Centra*, *supra* note 392 at 503-04 (citing *P.B.G.C. v. R.A. Gray & Comp.*, 104 S.Ct. 2709, 467 U.S. 717, 1974 Plan BOA, Tab 83 at 722).

[421] See *Morrison*, *supra* note 368 at 267 (statutory "focus" is the transactions that affect the individuals "that the statute seeks to protect").

[422] *Bd. of Trustees v. H.F. Johnson Inc.*, 830 F.2d 1009, 1013 (9th Cir. 1987), 1974 Plan BOA, Tab 70.

[423] See 29 U.S.C. § 1392(c) ("If a principle purpose of any transaction is to evade or avoid liability under this part [i.e., withdrawal liability], this part shall be applied (and liability shall be determined and collected) without regard to such transaction.").

[424] *H.F. Johnson*, *supra* note 422 at 1013 (citing legislative history).

without regard to each branch's place of incorporation. Only if that enterprise were a foreign enterprise would applying withdrawal liability be extraterritorial.

405. Before the U.S. Supreme Court held in *RJR Nabisco* that the *Racketeer Influenced & Corrupt Organizations Act* ("RICO") clearly overcomes the presumption against extraterritoriality, many U.S. courts examined the focus of RICO and held that "focus" is the corrupt "enterprise." To determine whether an enterprise was foreign or domestic, those courts applied the so-called "nerve centre" test.[425] A RICO enterprise is located where its "brains" reside-i.e., where "the decisions effectuating the relationships and common interest of its members" are made.[426] In other words, the enterprise lives where it is controlled.[427] *Dicey* affirms this reasoning, holding that a "corporation is resident in the country where its central management and control is exercised."[428]

406. The 1974 Plan has not been permitted discovery to put forward admissible, trial-quality evidence in respect of application of the "nerve centre" test. What can be said on the current record is that Walter Energy wholly owned every member of the Walter Canada Group. What the Harvey Declaration indicates could be proven, if permitted, is that:

(a) Walter Energy was based in the U.S. and from the U.S. "provided essential management services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions, and legal advice";[429]

---

[425] See, e.g., *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistic, Inc.*, 871 F. Supp. 2d 933, 940 (N.D. Cal. 2012), 1974 Plan BOA, Tab 82. (This is same test US courts use to determine which US state is "home" to a corporation. See Hertz Corp. v. Friend, 559 U.S. 77, 93 (2010).)

[426] *Mitsui*, *supra* note 425 at 940.

[427] To be clear, the US Supreme Court in *RJR Nabisco* held that this inquiry is not necessary for RICO cases because Congress clearly rebutted the presumption against extraterritoriality. In passing, the Supreme Court listed many reasons why it would be peculiar and counterproductive for the "focus" of any statute to be the identity of the regulated party rather than conduct. "A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results. It would exclude from RICO's reach foreign enterprises—whether corporations, crime rings, other associations, or individuals—that operate within the United States": *RJR Nabisco*, *supra* note 367 at 2105. The Court rejected the suggestion that transnational enterprises be "carved" up into foreign and domestic components, as that suggestion actually shows that Congress was not "concerned about whether an enterprise is foreign or domestic, but whether the relevant conduct occurred here or abroad." *Id*. "Our point in reciting these troubling consequences ... is simply to reinforce our conclusion, based on RICO's text and context, that Congress intended the prohibitions ... to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise." *Ibid* at 2105.

[428] *Dicey, supra* note 281 at 1528, 30R-001, Rule 173(2).

[429] Abrams Report, *supra* note 4; and Harvey Affidavit, Exhibit "B", *supra* note 10 at paras 66-67.

(b) Walter Canada's Chief Financial Officer worked out of Walter Energy's headquarters in Alabama;[430]

(c) all or almost all enterprise decisions were made in the U.S.[431]

407. Thus, even if the enterprise – rather than the withdrawal – were the relevant statutory focus, this case would still concern only a domestic application of U.S. law.

3. Congress Clearly Indicated Its Intent that ERISA Withdrawal Liability Apply Extraterritorially

408. This case does not involve any extraterritorial application of U.S. law, but even if it did, such application would be appropriate. To overcome the presumption against extraterritoriality requires a "clear indication of extraterritorial effect," but "an express statement of extraterritoriality is not essential."[432] Other signals, including statutory context, can clearly indicate extraterritorial effect and even can be "dispositive" of the question.[433] For instance, in *RJR Nabisco*, the U.S. Supreme Court held that RICO's cross-references to other statutes with clear extraterritorial application were enough to show that Congress intended RICO to have extraterritorial application as well.[434]

409. As Ms. Mazo and the PBGC have found, in ERISA, Congress clearly expressed its extraterritorial intent by using cross-references to the U.S. Internal Revenue Code.[435] The drafters of MPPAA selectively incorporated the Internal Revenue Code's controlled-group provisions in order to ensure that ERISA applied to all related trades or businesses wherever incorporated.[436]

410. In particular, Congress intentionally elected not to incorporate a provision that exempts foreign corporations from membership in the controlled group. That election was

---

[430] *Ibid.*
[431] Harvey Affidavit, Exhibit "B", *supra* note 10 at paras. 66-67.
[432] *RJR Nabisco*, *supra* note 367 at 2101.
[433] *Ibid.*
[434] *Ibid* at 2102.
[435] Mazo Report, *supra* note 4 at paras 39-45.
[436] *Ibid,* at para. 41 n.24.

deliberate and makes clear that Congress wanted ERISA to extend to foreign members of a controlled group.[437]

411. The relevant incorporations (and non-incorporations) start with Section 1301(b)(1), 29 U.S.C. § 1301(b)(1), and end without incorporating Section 1563(b) of the Internal Revenue Code, 26 U.S.C. § 1563(b), which includes the foreign-entity exemption:

(a) Step 1. Congress directed that "common control" for ERISA be "consistent and coextensive with" principles of "common control" under Section 414(c) of the Internal Revenue Code.[438]

(b) Step 2. Section 414(c), in turn, instructs that common control be determined as provided in Section 414(b).[439]

(c) Step 3. Section 414(b) treats related entities as a "single employer" if they are "members of a controlled group of corporations (within the meaning of Section 1563(a)."[440]

(d) Step 4. Section 1563(a) includes foreign corporations. Foreign corporations are exempted by Section 1563(b),[441] but Section 1563(b) is not incorporated into ERISA.

412. Thus, ERISA's definition of a single-employer expressly borrows from Section 414(c) (Step 1), which expressly borrows from Section 414(b) (Step 2), which expressly borrows from Section 1563(a) (Step 3) to the exclusion of Section 1563(b) (Step 4). Congress's deliberate decision to legislate by cross-reference demonstrates clear intent that ERISA's withdrawal liability provisions apply extraterritorially.

413. This legislation by cross-reference is not unusual with statutory schemes as complex, "comprehensive[,] and reticulated" as ERISA.[442] Indeed, cross-references were dispositive in *RJR Nabisco*.[443]

---

[437] *Ibid* at paras. 29-41 & n.24.
[438] 29 U.S.C. § 3201(b)(1).
[439] 26 U.S.C. § 414(c), *supra* note 105.
[440] 26 U.S.C. § 414(b), *supra* note 105.
[441] see 26 U.S.C. § 1563(b)(2)(C),

414. The Walter Canada Group argues that Ms. Mazo misapplied the presumption against extraterritoriality, supposedly because she misstates the presumption as in favour of extraterritoriality.[444] The Walter Canada Group misunderstands Ms. Mazo and takes snippets of her analysis out of context. Ms. Mazo and the PBGC correctly stated and applied the presumption against extraterritoriality.[445] The absence of a congressional intent to restrict ERISA to the U.S. shows that nothing in ERISA contradicts the clear import of Congress's affirmative cross-references to the Internal Revenue Code.

415. The Walter Canada Group purports to locate "other provisions of ERISA [that] indicate that Congress did not intend for ERISA's 'controlled group' liability provisions to apply extraterritorially."[446] Specifically, the Walter Canada Group points to statutory provisions that give U.S. federal courts exclusive jurisdiction over certain ERISA claims.[447] Those provisions have nothing to do with extraterritoriality. None of the Walter Canada Group, Mr. Abrams, nor Mr. Gropper cites a single case involving any federal statute where a court mentioned such a provision as relevant to the presumption against extraterritoriality.

416. Under U.S. law, exclusive-jurisdiction provisions serve a distinct purpose. The United States is a federal system: the federal government has its own courts, and the fifty states have their own courts. In the absence of a contrary statement by Congress, state and federal courts have concurrent jurisdiction.[448] Exclusive-jurisdiction provisions like the ones in ERISA simply prohibit state courts from exercising concurrent jurisdiction. These provisions have no bearing on courts of foreign nations.[449]

---

[442] *R.A. Gray*, *supra* note 420 at 720. See: Mazo Report, *supra* note 4, at para. 41 n.24 ("[T]he use of incorporation-by-reference in the drafting of U.S. tax and related laws has become a fine art. The governing ideas are so complex and detailed that drafters are wary of copying them when the same idea is used in different provisions, out of concern that something might be left out or they may make a formatting or other mistake that could change the meaning of the rule.").

[443] See *RJR Nabisco*, *supra* note 367 at 2102.

[444] See WCG Written Submissions, *supra* note 3 at para. 80.

[445] PBGC Opinion Letter, *supra* note 5 at 2 ("It is well settled that Congress has the power to enact laws that have extraterritorial application, but is presumed not to have exercised that power unless its intent to do so is clear from the statute. We think controlled group liability under ERISA was intended to have extraterritorial application, and that this is clear from the relevant statutes."); Mazo Report, *supra* note 4 at para. 50 (summarizing the presumption inquiry as "whether the law gives a clear indication that it is intended to have extraterritorial effect").

[446] WCG Written Submissions, *supra* note 3 at para 81.

[447] *Ibid.*

[448] *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 748 (2012)

[449] See, e.g., *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 953 (9th Cir. 2008) ("Congress has no power to tell courts in foreign countries whether they could entertain suit against an American defendant. It would be up to

417. In fact, other ERISA provisions support the conclusion that the multiemployer plan withdrawal liability provisions are designed to apply extraterritorially. Section 1321 of ERISA defines the scope of subchapter III, which includes Section 1301 ("single employer" definition) and Section 1381 (operative withdrawal liability provision), as reaching any plan established or maintained by any employer engaged in commerce.[450] While plain references to "commerce" are usually not enough to rebut the presumption against extraterritoriality,[451] Congress manifested a broader intent here. Section 1321(b) exempts specific plans from subchapter III, including plans "established and maintained outside of the United States," but not all such plans; the exemption is limited to those foreign plans established or maintained "primarily for the benefit of individuals substantially all of whom are nonresident aliens."[452] This exception is limited to purely foreign benefit plans. The exception is necessary because Section 1321(a)'s reference to "commerce" includes transnational trades and businesses, like the Walter Canada Group.

4. Conclusion on Extraterritoriality

418. In summary, on the evidence before the Court, the only conclusion open to the Court is that application of ERISA to the 1974 Plan Claim is domestic, not extraterritorial. The "focus" of a statute and the actions related to such focus determine whether application of a statute is extraterritorial. The focus of the relevant provisions of ERISA is on employer withdrawal from multiemployer plans. This withdrawal occurred in the U.S.

419. The factual circumstances here are similar to other cases where U.S. courts applied ERISA to foreign entities without implicating extraterritoriality concerns.[453]

420. The "focus" of a statute is not restricted to the conduct of a defendant, but even if it were, application of ERISA to the 1974 Plan Claim would still be domestic. This is because, as the 1974 Plan alleges, the Walter Canada Group was controlled from the United States.

---

any foreign court to determine whether it wanted to apply [US law] to litigation occurring within its borders."); *Gucci (Re)*, 309 B.R. 679, 683-84 (S.D.N.Y. 2004) (US law granting exclusive jurisdiction provision to US federal courts does not apply to foreign courts).

[450] See 29 U.S.C. § 1321(a), 1974 Plan BOA, Tab 98.

[451] See *RJR Nabisco*, *supra* note 367 at 2105,

[452] 29 U.S.C. § 1321(b)(7), 1974 Plan BOA, Tab 99.

[453] See, e.g., *Korea Shipping 2d Cir.*, *supra* note 374 at 1540 (holding Korean business subject to ERISA withdrawal liability); *PBGC v. Asahi Tec. Corp.*, *supra* note 374 (holding Japanese business subject to ERISA liability for domestic conduct of member of Japanese business's controlled group).

421. Even if application of ERISA to the 1974 Plan Claim were extraterritorial, such is not precluded by the presumption against extraterritoriality. Congress intended for members of a corporate group, wherever incorporated, to be treated as a single employer and to be held liable for withdrawal liability.

F. Preliminary issue #3: The Withdrawal Liability Provisions of ERISA Do Not Conflict with Canadian Public Policy

422. The Walter Canada Group submits that all else failing, ERISA's withdrawal liability provisions should not be enforced as they violate Canadian public policy. There is a high bar for this narrow exception to the application of a foreign law to apply. Fundamental values, and the essential justice and morality of Canadians must be at stake.[454] As stated by Carthy J.A. in *Boardwalk Regency Corp. v. Maalouf (*1992), 88 D.L.R. (4th) 612 (Ont. C.A.) at 622:

> This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.

423. It is plainly not the case that the exception is invoked merely because a foreign law differs from the law of the forum. Where foreign law is applicable, Canadian courts will generally apply the law even if the result may be contrary to domestic law.[455]

424. There is nothing to indicate that ERISA's withdrawal liability provisions violate Canadian public policy. In *Robbins v Pepsi-Cola Metropolitan Bottling Co,* 636 F. Sp. 641 (N.D. Ill. 1986), the Court held at 669:

> The challenged sections of ERISA and the MPPAA [the *Multiemployer Pension Plan* Amendments *Act of 1980*, 29 U.S.C. § 1381 et seq.] are neither criminal nor penal in nature; they are remedial provisions designed to protect the vested rights of workers covered by a given pension plan.[456]

425. As a general principle, the notion that, in some circumstances, a legislature may decide that others are to participate in the liability of a limited company is not contrary to

[454] *Block Brothers Realty, supra* note 231.
[455] *Boardwalk Regency Corp. v. Maalouf (*1992), 88 D.L.R. (4th) 612 (Ont. C.A.), 1974 Plan BOA, Tab 9 at 616.
[456] Abrams BOA, Tab 41.

Canadian public policy. Canadian legislatures have done that in areas ranging from tax to labour and employment to corporate to environmental law, to name a few examples.[457]

426. In addition, in the specific insolvency or CCAA context, corporate group withdrawal liability legislation is not contrary to Canadian public policy. It is something under consideration in the context of the statutorily mandated review of the *Bankruptcy and Insolvency Act* and the CCAA. Faced with a suggestion that Canada consider a blanket prohibition on claims based on ERISA, the Joint Task Force has recently weighed in favour of claims based on ERISA being considered on a case-by-case basis in CCAA proceedings. Moreover, Industry Canada, as part of a statutory review of the CCAA has been considering implementing similar legislation in Canada.[458]

427. In making submissions in the course of that review, the Canadian Bar Association questioned whether the *Bankruptcy and Insolvency Act* and the CCAA should impose a blanket prohibition of claims based on ERISA. The Canadian Bar Association believed to

---

[457] For example, federal and provincial employment and labour statutes affix such liability on related corporations or successor corporations. *The Employment Standards Act*, R.S.B.C. 1996, c 113, s. 95, 1974 Plan BOA, Tab 91, states that if the employment standards director considers that certain businesses are carried on by or through more than one corporation under common control or direction, the director may treat those corporations as one employer and they will be jointly and separately liable for amounts owed from any or all of them. There are similar provisions in Labour Codes (see: *Labour Relations Code*, R.S.B.C., 1996, c. 244, s. 38, 1974 Plan BOA, Tab 96). Similarly, successor provisions in labour legislation hold the purchaser of a business to the vendor-employer's collective agreement and obligations, binding the successor to all rights and duties of its predecessor (i.e., *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 43, 1974 Plan BOA, Tab 89; and *Labour Relations Code,* R.S.B.C. 1996, c. 244, s. 35, 1974 Plan BOA, Tab 96). Labour boards rely on the provisions to look behind the form of a transaction and assess its substance. Employment statutes also hold directors liable for wages owed to employees of the corporation; see: *Employment Standards Act*, s. 96, 1974 Plan BOA, Tab 91, and *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 s. 119(1), 1974 Plan BOA, Tab 87.

Numerous other statutes cause others to participate in the liability of a company. Corporate statutes create liability for shareholders in certain situations; see: the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, s. 226(4), 1974 Plan BOA, Tab 87; and the *Business Corporations Act*, R.S.O., 1990 C. B.16, s. 243(1), 1974 Plan BOA, Tab 86. Similarly, the BC *Business Corporations Act,* S.B.C. 2002 c. 57, s. 154, 1974 Plan BOA, Tab 85, creates liability for directors of a corporation in several circumstances. Tax legislation holds directors of a corporation liable for the corporation's unremitted income tax deducted at source from wages (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 227.1(1), 1974 Plan BOA, Tab 95; see also: *Excise Tax Act,* R.S.C. 1985, c. E-15, s. 323(1), 1974 Plan BOA, Tab 94). The *Environmental Protection Act,* R.S.O. 1990, c. E.19, s. 99(2), 1974 Plan BOA, Tab 93, creates liability for an "owner of the pollutant" or "the person having control of the pollutant". The *Environmental Management Act*, SBC 2003, c 53, s. 121, 1974 Plan BOA, Tab 92, states that an offence committed by a corporation is an offence committed by certain officers and directors of the corporation. The *Construction Lien Act,* R.S.O. 1990, c. C.30, s. 13, 1974 Plan BOA, Tab 90 holds certain directors, officers and others who have effective control of a corporation liable for a breach of trust by the corporation.

[458] Industry Canada, "Corporate, Insolvency and Competition Law Policy: Statutory Review of the Bankruptcy and Insolvency Act and the Companies Creditors Arrangement Act, Discussion Paper, 2014 at 28: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Discussion_Paper_StatutoryReview-eng.pdf/$FILE/Discussion_Paper_StatutoryReview-eng.pdf

do so may have unintended consequences in the context of cross-border insolvencies involving a globally integrated group of companies.[459] The Canadian Bar Association suggested that insolvency legislation be amended to give the court jurisdiction to determine on a case-by-case basis whether to recognize foreign-law based claims. The Joint Task Force submitted that a broader consideration of the enforceability of ERISA claims may be warranted. The Joint Task Force noted the inconsistency in denying the enforceability of ERISA claims in Canada while adopting similar pension legislation in Canada.[460]

428. That enforcement of a foreign law might have serious repercussions for a Canadian defendant is not sufficient for the law to be contrary to public policy. In *Ivey*, the Court stated it is not the case that enforcement will be refused simply because the foreign law is more strict or severe than the law of the forum.

429. As discussed at Section IV.C.1.c, the Supreme Court of Canada has found, citing *Castel and Walker*, that "the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts."[461] A law seeking to protect pension plan beneficiaries is not a repugnant law. So then, the only reasons to object to ERISA on public policy grounds are because of the relative size of claims in this case, or because of the nationality of the claimants.

430. Moreover, the Steelworkers simultaneously argue that ERISA is unenforceable on public policy grounds and that the Court has a mechanism by which it can mitigate the harm they allege is done by allowing the 1974 Plan Claim. Given how narrow the public policy exception is, and the exception's focus on laws that are repugnant to Canadian morals, how can a law be unenforceable on public policy grounds if its "repugnant" effects can be so easily remedied?

431. That Canada does not have similar pension legislation does not mean ERISA violates public policy or essential Canadian morality. Rather it would be against public policy to permit the CCAA regime to adopt a policy that permits the CCAA court to distinguish

[459] *Canadian Bar Association Report, supra* note 358 at 28.
[460] *Joint Task Force Report, supra* note 359 at 31.
[461] *Beals, supra* note 232 at para 71.

between claimants based on nationality. Foreign creditors stand equal with domestic creditors in CCAA proceedings.[462]

V. CONCLUSION

432. U.S. law is the proper law applicable to the 1974 Plan Claim. Such application does not involve extraterritorial application of ERISA but rather furthers the goals of ERISA and international principles of comity. There is nothing morally offensive about applying ERISA to the 1974 Plan Claim, unless there is something offensive about recognizing the valid legal claims of American pensioners over Canadian workers by virtue of their nationality.

433. The 1974 Plan submits that, on the evidentiary record, the preliminary issues raised by the Summary Trial Application are unsuitable for summary determination without affording the 1974 Plan an opportunity for discovery. The deficient evidentiary record supplied by the Walter Canada Group and the Steelworkers prevents this Court from finding the facts necessary to resolve the preliminary issues against the 1974 Plan.

434. Further, the 1974 Plan's inability to obtain discovery despite repeated attempts renders it unjust for the Court to proceed summarily. The 1974 Plan should be afforded the opportunity to develop the facts necessary to put its best foot forward in advancing its claim. Given the present record, the amount of the 1974 Plan Claim, the complexity of the issues raised, and the risks of litigating in slices, the Summary Trial Application should be dismissed as unsuitable for summary determination.

435. The 1974 Plan respectfully requests an Order from this Court:

    (a) granting the application of the 1974 Plan dated December 2, 2016; and

    (b) dismissing the Summary Trial Application; or

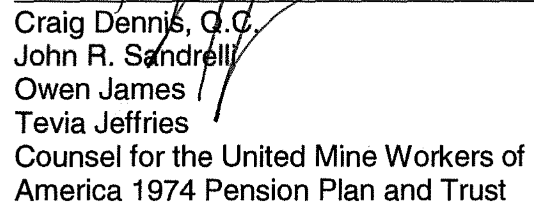
    (c) in the alternative, those of the three preliminary issues that the Court determines to be suitable for summary determination be answered as proposed by the 1974 Plan.

---

[462] *Teleglobe, supra* note 1 at para. 8; and *Halsbury's Laws of England, Conflict of Laws*, *supra* note 1 at 710, para. 980.

All of which is respectfully submitted this 30th day of December, 2016.

DENTONS CANADA LLP

Per: 

Craig Dennis, Q.C.
John R. Sandrelli
Owen James
Tevia Jeffries
Counsel for the United Mine Workers of America 1974 Pension Plan and Trust

TAB 11

File 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

EIGHTH REPORT OF THE MONITOR, KPMG INC.

January 12, 2017

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF PROCEEDINGS 1
PURPOSE OF THE MONITOR'S REPORT 7
REPORT RESTRICTIONS AND SCOPE LIMITATIONS 8
COMPLETION OF THE AMACON TRANSACTION 9
CLAIMS PROCESS UPDATE 13
ACTUAL RECEIPTS AND DISBURSEMENTS COMPARED TO FORECAST 17
UPDATED CCAA CASH FLOW FORECAST 22
OTHER MATTERS 25
THE MONITOR'S OBSERVATIONS AND RECOMMENDATIONS 27

INDEX TO SCHEDULES

Schedule A	Trustee’s Certificate – Proposal Commencement Date
Schedule B	Monitor’s Certificate - CCAA Continuity
Schedule C	Form 46 – Certificate of Full Performance of Proposal
Schedule D	Summary of Intercompany Charges
Schedule E	Updated CCAA Cash Flow Forecast for the 22-Week Period Ending June 3, 2017

INTRODUCTION AND SUMMARY OF PROCEEDINGS

Introduction and Changes to the Composition of Walter Canada / the Petitioners

1. KPMG Inc. ("**KPMG**" or the "**Monitor**") was appointed as Monitor pursuant to the order (the "**Initial Order**") issued by this Honourable Court on December 7, 2015 (the "**Filing Date**") in respect of the motion (the "**Application**") filed by Walter Energy Canada Holdings, Inc. ("**WECH**"), Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Cambrian Energybuild Holdings ULC, Willow Creek Coal ULC, Pine Valley Coal Ltd. and 0541237 B.C. Ltd. (collectively, the "**Original Petitioners**") under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36, as amended (the "**CCAA**") granting, *inter alia*, a stay of proceedings (the "**Stay**") until January 6, 2016. The proceedings brought by the Original Petitioners under the CCAA will be referred to herein as the "**CCAA Proceedings**".

2. Pursuant to the Initial Order, the Stay and certain other relief was extended to certain of the Original Petitioners' partnerships (collectively with the Original Petitioners, "**Old Walter Canada**"):

   i) Walter Canadian Coal Partnership;

   ii) Wolverine Coal Partnership;

   iii) Brule Coal Partnership; and

   iv) Willow Creek Coal Partnership.

3. As will be discussed subsequently in greater detail, the following entities were formed on December 8, 2016 (thereby creating the "**New Walter Group**") and were added as petitioners in the CCAA Proceedings as at that date pursuant to the New Walter Group Procedure Order which was granted by this Honourable Court on December 7, 2016:

   i) New Walter Energy Canada Holdings, Inc. ("**New WECH**");

   ii) New Walter Canadian Coal Corp.;

   iii) New Brule Coal Corp.;

   iv) New Willow Creek Coal Corp.; and

   v) New Wolverine Coal Corp.

4. Also as subsequently discussed, effective on December 28, 2016, the CCAA Proceedings in respect of all of the Old Walter Canada entities, except for Cambrian Energybuild Holdings ULC ("**Cambrian**") were terminated pursuant to an order pronounced by this Honourable Court on December 21, 2016 (the "**CCAA Continuity & Vesting Order**") which also, amongst other things, provided that the CCAA Proceedings shall continue with respect to every member of the New Walter Group and Cambrian (as reflected in the amended style of cause of these CCAA Proceedings shown on the cover of this report) and transferred Walter Canadian Coal Partnership's 50% interest (the "**Belcourt Interest**") in Belcourt Saxon Coal Ltd. ("**BSCL**") and Belcourt Saxon Coal Limited Partnership ("**BSCLP**"), to New Walter Canadian Coal Corp. Accordingly, after December 28, 2016, these CCAA Proceedings are in respect of each of the five members of the New Walter Group and Cambrian (together, "**New Walter Canada**" or the "**Petitioners**") and the Stay and other relief granted pursuant to the Initial Order applies to New Walter Canada. The limited stay of proceedings provided for in paragraph 20 of the Initial Order with respect to BSCL and BSCLP remains in place.

5. New Walter Canada is, for all relevant purposes, a replicate of Old Walter Canada as all of the assets and liabilities of each of the Old Walter Canada entities were transferred to and/or deemed assumed by an applicable New Walter Canada entity such that creditors of Old Walter Canada enjoy the same claim against the same pool of assets in New Walter Canada. Accordingly, to reflect this continuity and to reduce confusion to the reader, hereinafter the term "**Walter Canada**" shall be used to refer to either Old Walter Canada or New Walter Canada, as the context requires, unless it is important to distinguish between them, in which case the applicable group shall be specified.

Summary of Proceedings Subsequent to Filing Date

6. On December 7, 2015, KPMG filed the Pre-Filing Report of the Proposed Monitor (the "**Pre-Filing Report**") which, amongst other things, described certain of Walter Canada's background information, its cash flow forecast and the current status of its operations.

7. On December 31, 2015, KPMG filed the First Report of the Monitor (the **"First Report"**) which, amongst other things, described the Monitor's activities to date, Walter Canada's actual receipts and disbursements against forecast as well as its updated cash flow forecast for the 16-week period ending April 9, 2016, the proposed Sale and Investment Solicitation Process (the "**SISP**"), the proposed retention of PJT Partners LP as financial advisor and investment banker (the "**Financial Advisor**"), the proposed retention of BlueTree Advisors Inc. as Chief Restructuring Officer (the "**CRO**") and the proposed Key Employee Retention Plan (the "**KERP**").

8. On January 5, 2016, this Honourable Court granted an order (the "**January 5 Order**") which, amongst other things, extended the Stay to April 5, 2016 and approved the SISP, the KERP and the retention of both the Financial Advisor and the CRO.

9. On March 24, 2016, KPMG filed the Second Report of the Monitor (the "**Second Report**") which, amongst other things, described the Monitor's activities to date, Walter Canada's actual receipts and disbursements against forecast as well as its updated cash flow forecast for the 16-week period ending July 2, 2016, a status update on the SISP and updates in respect of various other matters.

10. On March 30, 2016, this Honourable Court granted an order which, amongst other things, extended the Stay to June 24, 2016.

11. On June 22, 2016, KPMG filed the Third Report of the Monitor (the "**Third Report**") which, amongst other things, provided a status update on the SISP and the Liquidation RFP Process, information regarding Walter Canada's actual receipts and disbursements against forecast as well as its updated cash flow forecast for the 18-week period ending October 15, 2016 and updates in respect of certain other matters.

12. On June 24, 2016, this Honourable Court granted an order which, amongst other things, extended the Stay to August 19, 2016.

13. On August 11, 2016, KPMG filed the Fourth Report of the Monitor (the "**Fourth Report**") which, amongst other things, provided a status update on the SISP as well as information in respect of Walter Canada's proposed transaction (the "**Conuma Transaction**") with Conuma Coal Resources Limited ("**Conuma**"), its proposed claims process (the "**Claims Process**"), an amendment to the FA Engagement Letter, information regarding Walter Canada's actual receipts and disbursements against forecast, its updated cash flow forecast for the 26-week period ending January 28, 2017 (the "**Previous CCAA Cash Flow Forecast**") and updates in respect of various other matters.

14. Also on August 11, 2016, the Monitor prepared its Confidential Supplemental Report to the Fourth Report (the "**First Confidential Report**") in which it provided certain additional details in respect of the Bids and Liquidation Proposals, along with the Monitor's corresponding analysis.

15. On August 15, 2016, this Honourable Court granted an order (the "**First Sealing Order**") sealing the First Confidential Report as well as the Affidavit #4 of Mr. William E. Aziz sworn August 9, 2016 (the "**Confidential Aziz Affidavit**") until further order of this Honourable Court.

16. On August 16, 2016, this Honourable Court granted the following orders:

    a) the Approval and Vesting Order which, amongst other things, approved the Conuma Transaction and authorized and directed Walter Canada to take such additional steps and execute such additional documents as may be necessary or desirable to complete the Conuma Transaction;

    b) the Claims Process Order which, amongst other things, approved the Claims Process; and

    c) an order which, amongst other things, extended the Stay to January 17, 2017, approved the amendment to the FA Engagement Letter and expanded the powers of the Monitor.

17. On October 24, 2016, KPMG filed the Fifth Report of the Monitor (the "**Fifth Report**") that provided a status update on the closing of the Conuma Transaction, a status update with respect to the Claims Process, information regarding Walter Canada's actual receipts and disbursements against forecast and updates in respect of various other matters.

18. On October 26, 2016, this Honourable Court pronounced an order (the "**Case Plan Order**") requiring that a case plan be complied with for the Court hearing of certain matters related to the claim of the 1974 Pension Plan (to be heard commencing on January 9, 2017).

19. On December 5, 2016, KPMG filed the Sixth Report of the Monitor (the "**Sixth Report**") which included, amongst other things, a discussion of the process undertaken by Walter Canada, the CRO and the Monitor to obtain offers in respect of Walter Canada's remaining assets (the "**Remaining Assets**") after the closing of the Conuma Transaction (the "**Remaining Asset Sale Process**"), the CRO's selection of the Bid (the "**Amacon Bid**") submitted by 1098138 B.C. Ltd. and guaranteed by Amacon Land Corporation (taken together, "**Amacon**"), Walter Canada's application for approval to enter into the proposed restructuring transaction with Amacon (the "**Amacon Transaction**") pursuant to the Term Sheet executed on November 28, 2016 (the "**Term Sheet**"), and the Monitor's observations and recommendations in respect of Walter Canada's motion returnable December 7, 2016.

20. Also on December 5, 2016, the Monitor prepared its Confidential Supplemental Report to the Sixth Report (the "**Second Confidential Report**") in which it provided certain confidential information to this Honourable Court in respect of the reasons for the selection of the Amacon Bid by the CRO and the Monitor's support for that selection, as well as certain details regarding the other LOIs and Bids which were submitted pursuant to the Remaining Asset Sale Process.

21. On December 7, 2016, this Honourable Court granted the following orders:

    a) an order (the "**Second Sealing Order**") sealing the Second Confidential Report until further order of this Honourable Court; and

b) the New Walter Group Procedure Order which, amongst other things:

   i. approved the Amacon Transaction and authorized Old Walter Canada to take such additional steps and execute such additional documents as may be necessary or desirable to complete the Amacon Transaction;

   ii. authorized but did not direct each of the Old Walter Canada entities to make an assignment in bankruptcy;

   iii. authorized the formation of the New Walter Group entities pursuant to the Term Sheet and deemed each of the New Walter Group entities to, upon formation, be a debtor company (as defined in the CCAA), added as a Petitioner in the CCAA Proceedings and be subject to the CCAA charges and, amongst other things, extended the appointment of the Monitor to the New Walter Group; and

   iv. deemed the CRO to have been engaged by the New Walter Group effective on the formation of the New Walter Group and terminated the appointment of the CRO in respect of such members of Old Walter Canada which make an assignment in bankruptcy, effective immediately before the bankruptcy.

22. On December 12, 2016, KPMG filed the Seventh Report of the Monitor (the "**Seventh Report**") which included, amongst other things, a discussion of the terms of the joint proposal which was expected to be filed pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") on behalf of certain members of Old Walter Canada (the "**Proposal**") as part of the process of implementing the Amacon Transaction, comments regarding certain proposed procedural steps in the bankruptcy and in respect of the Proposal (the "**Proposed Procedural Amendments**") and the Monitor's observations and recommendations in respect of the Proposal and the Proposed Procedural Amendments.

23. Also on December 12, 2016, this Honourable Court granted an order (the "**Amendment to New Walter Group Procedure Order**") amending the New Walter Group Procedure Order by approving certain amendments to the terms of the Amacon Transaction, as well as an order amending Schedule B to each of the two Orders which were pronounced on December 7, 2016.

24. Terms not specifically defined herein shall have the meanings as defined in the First Report, the Second Report, the Third Report, the Fourth Report, the Fifth Report, the Sixth Report and the Seventh Report (collectively, the "**Previous Reports**"), the SISP or the Claims Process Order.

25. The Monitor maintains a website at www.kpmg.com/ca/walterenergycanada (the "**Monitor's Website**") on which copies of the Previous Reports as well as further information regarding these CCAA Proceedings can be found.

PURPOSE OF THE MONITOR'S REPORT

26. The purpose of this eighth report of the Monitor (the "**Eighth Report**") is to provide this Honourable Court with information regarding the following:

    a) An update in respect of the steps that were completed, both in these CCAA Proceedings and in multiple BIA proceedings, in order to successfully complete the Amacon Transaction on December 29, 2016;

    b) An update regarding the Claims filed with the Monitor to date;

    c) Walter Canada's actual cash flow results for the 22-week period ended December 31, 2016 as compared to the Previous CCAA Cash Flow Forecast;

    d) Walter Canada's updated cash flow forecast for the 22-week period ending June 3, 2017 (the "**Updated CCAA Cash Flow Forecast**");

    e) An update in respect of certain additional matters involving Walter Canada's stakeholders and related developments; and

    f) The Monitor's observations and recommendations in respect of Walter Canada's motion returnable January 16, 2017 seeking an extension of the Stay to May 31, 2017 (the "**Extended Stay Period**").

REPORT RESTRICTIONS AND SCOPE LIMITATIONS

27. In preparing this report and making the comments herein, the Monitor has been provided with, and has relied upon, unaudited financial information, books and records and financial information prepared by Walter Canada and/or certain of its affiliates, discussions with management of Walter Canada ("**Management**") and information from other public third-party sources (collectively, the "**Information**"). Except as described in this report in respect of the Previous CCAA Cash Flow Forecast and the Updated CCAA Cash Flow Forecast:

    a) The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion or other form of assurance in respect of the Information; and

    b) Some of the information referred to in this report consists of forecasts and projections. An examination or review of the financial forecasts and projections, as outlined in the *Chartered Professional Accountants Canada Handbook*, has not been performed.

28. Future oriented financial information referred to in this report was prepared based on Management's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be material.

29. The information contained in this report is not intended to be relied upon by any prospective purchaser or investor in any transaction with Walter Canada.

30. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

COMPLETION OF THE AMACON TRANSACTION

31. The Amacon Transaction involved the completion of a series of transactions to effect the acquisition by Amacon of the share interests in WECH and its interest in each of the other Old Walter Canada entities except for Cambrian and except for Walter Canadian Coal Partnership's interests in BSCL and BSCLP and the completion of a restructuring of Old Walter Canada pursuant to assignments in bankruptcy (the "**Bankruptcy Proceedings**") and BIA proposal proceedings (the "**Proposal Proceedings**") in respect of certain of the Old Walter Canada entities. The Amacon Transaction was expected to create additional value for Walter Canada's creditors in the amount of $17,350,000, and ultimately generated $17,375,000 of proceeds with the addition of $25,000 which was received from Amacon pursuant to the subsequently discussed Letter of Support (which was also discussed in the Seventh Report).

32. The Sixth Report included a discussion (in the section entitled "Terms of the Successful Bid") of the key terms of the Term Sheet and the steps which were to be taken to implement and complete the Amacon Transaction. The Seventh Report included a more detailed discussion (in the "Filing of and Terms of the Proposal" section) of the steps required to be undertaken in the proposed Bankruptcy Proceedings and Proposal Proceedings, the terms of the Proposal and the specific steps to be taken in the Proposal Proceedings to implement the Term Sheet.

33. The following is a summary of the steps which were taken to implement the Term Sheet and complete the Amacon Transaction on December 29, 2016; readers are referred to the aforementioned discussions in the Sixth Report and Seventh Report for additional details regarding these steps:

    a) On application by Old Walter Canada, this Honourable Court granted the New Walter Group Procedure Order on December 7, 2016;

b) On December 12, 2016, this Honourable Court granted the aforementioned Amendment to New Walter Group Procedure Order approving certain amendments to the Amacon Transaction as set out in the Letter of Support, following the granting of which Amacon paid the $14,925,000 balance of the purchase price to the Monitor (having previously paid the $2,625,000 deposit to the Monitor), along with an additional $25,000 pursuant to the Letter of Support;

c) Each of the Old Walter Canada entities with the exception of Cambrian (the resulting group of eleven entities are referred to herein as the "**BIA Debtors**") filed a voluntary assignment in bankruptcy on December 15, 2016 and KPMG was appointed as the trustee (in that capacity, the "**Bankruptcy Trustee**") of each of the Estates;

d) On December 16, 2016, this Honourable Court made an Order in the Bankruptcy Proceedings (the "**Bankruptcy Procedure Order**") pursuant to which, amongst other things, the Bankruptcy Trustee was authorized to administer the procedural matters relating to the Bankruptcy Proceedings of each of the BIA Debtors on a consolidated basis as well as to file the BIA Debtors' joint Proposal;

e) In accordance with the Bankruptcy Procedure Order, the Bankruptcy Trustee held a joint First Meeting of Creditors for all of the BIA Debtors on the morning of December 19, 2016. Following the First Meeting of Creditors, a meeting of the inspectors who were appointed at such meeting was convened at which time the Proposal was approved by the inspectors;

f) Following obtaining inspector approval of the Proposal, the Bankruptcy Trustee filed the Proposal with the Official Receiver, along with certain other prescribed documents, on the morning of December 19, 2016 to commence the Proposal Proceedings;

g) KPMG, in its capacity as proposal trustee (in such capacity, the "**Proposal Trustee**"), convened a meeting of creditors to consider the Proposal in the afternoon of December 19, 2016, at which the Proposal was accepted by the required majority of creditors, with 100% of voting creditors in both dollar value and in number having cast votes, either in person or by voting letter, for the acceptance of the Proposal;

h) On application by the Proposal Trustee, this Honourable Court (in the Proposal Proceedings) granted the Proposal Sanction Order on December 21, 2016 which, amongst other things, sanctioned and approved the Proposal, and authorized and directed the BIA Debtors, the New Walter Group and the Proposal Trustee to take all actions necessary to implement the Proposal;

i) Also on December 21, 2016, on the application of the Petitioners and the Original Petitioners, this Honourable Court granted the CCAA Continuity & Vesting Order which, amongst other things, provided that the CCAA Proceedings in respect of the BIA Debtors would be terminated effective upon delivery of a specified form of Monitor's Certificate to the BIA Debtors, the New Walter Group and Amacon;

j) In accordance with the Proposal Sanction Order, the Proposal Trustee delivered the "Trustee's Certificate – Proposal Commencement Date" (a copy of which is attached hereto as Schedule "**A**") to the BIA Debtors, the New Walter Group, Amacon and the Official Receiver on December 28, 2016 (the "**Proposal Commencement Date**") and filed it with this Honourable Court on that same date, whereupon the Proposal became effective and all the steps set out in Section 4.1 of the Proposal occurred and were deemed to occur commencing on the Proposal Commencement Date and concluding on December 29, 2016 (the "**Proposal Completion Date**");

k) Also on December 28, 2016, the Monitor delivered the "Monitor's Certificate: CCAA Continuity" (a copy of which is attached hereto as Schedule "**B**") to the BIA Debtors, the New Walter Group and Amacon in accordance with the CCAA Continuity & Vesting Order thereby terminating the CCAA Proceedings in respect of the BIA Debtors as well as discharging the Monitor as Monitor of the BIA Debtors; and

l) On the Proposal Completion Date, pursuant to section 65.3 of the BIA, the Proposal Trustee delivered the "Form 46 – Certificate of Full Performance of Proposal" (a copy of which is attached hereto as Schedule "**C**") to the BIA Debtors, the New Walter Group, Amacon and the Official Receiver and also filed a copy of the Proposal Sanction Order with the Official Receiver in respect of each of the BIA Debtors' bankruptcy Estates, whereupon the eleven bankruptcies were annulled.

34. As a result of completing the above steps, the Amacon Transaction was successfully completed on December 29, 2016, generating an additional $17,375,000 of cash for Walter Canada's creditors and other stakeholders. The final cash transfers from the Old Walter Canada entities to the New Walter Canada entities were completed on December 30, 2016, on which date all funds were transferred to the New Walter Entities except for the $200,000 cost value of certain securities which were to remain with the Old Walter Canada entities pursuant to the Term Sheet.

CLAIMS PROCESS UPDATE

35. The following table summarizes the Claims received to date:

Summary of Claims Received as at the Date of this Report		
(CAD $000)	**# of Claims**	**Amount**
Allowed Claims		
Employee Claims	290	12,625
Other Claims		
Restructuring Claims	2	84
Pre-Commencement Claims	13	581
Total Allowed Claims	**305**	**13,290**
Total Unresolved Claims[1]	**9**	**1,251,399**
Total	**314**	**1,264,689**
Note 1: See "Summary of Unresolved Claims" table below for details.		

Allowed Claims

Employee Claims

36. As discussed in the Fifth Report, a total of 21 Employee Claimants filed Notices of Dispute of Employee Claim (each an "**Employee Dispute**") to increase their Claims by a total of approximately $258,000.

37. Based upon its review of the information provided with these 21 Employee Disputes, as well as certain additional supporting information those Employee Claimants provided at the Monitor's request, the Monitor accepted the higher Claim amounts for twenty of these Employee Claimants with the result that the Allowed Claims of those Employee Claimants who filed Employee Disputes increased, on an aggregate net basis, by approximately $255,000.

38. As at the date of this report, 290 Employee Claims have been admitted as Allowed Claims in the total amount of approximately $12.6 million and only one Employee Claim remains unresolved, that being the Claim of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 ("**USW**"), which is discussed below.

Other Claims

39. A total of 24 Restructuring and Pre-Commencement Claims totaling approximately $30.9 million have been submitted to date, of which 15 (totaling $665,000) are now considered Allowed Claims. Of the remaining nine Claims:

a) three Claimants were issued a Notice of Revision or Disallowance ("**NORD**") on November 7, 2016 which disallowed their Claims in full. No Notice of Dispute for these three Claims was received by the Monitor. Accordingly, these Claims are finally disallowed pursuant to the Claims Process Order;

b) five Claimants were issued NORDs and their Claims are detailed below in the Unresolved Claims section; and

c) one Claimant recently submitted a Restructuring Claim, as subsequently discussed in the Unresolved Claims section (under note (d)).

Unresolved Claims

40. There are nine Claims which have not been revolved as at the date of this report, as set out in the following table and discussed in the Monitor's corresponding notes in respect of each of the unresolved Claims:

Summary of Unresolved Claims as at the Date of this Report			
(CAD $000)	**Notes**	**Claim Type**	**Amount**
James, Kevin	a	Restructuring	6,747
Strong, Joseph	a	Pre-Commencement	51
USW	a	Employee	293
USW	a	Pre-Commencement	12
Warrior Met Coal LLC	b	Pre-Commencement	9,892
West Moberly First Nation	c	Restructuring	11,375
Mitsui Matsushima Co. Ltd.	d	Restructuring	810
Pelly Construction Ltd.	e	Pre-Commencement	1,323
1974 Pension Plan Claim	f	UMWA 1974 Pension Plan	1,220,896
Total Unresolved Claims			**1,251,399**

a) NORDs were sent to each of Mr. Kevin James, Mr. Joseph Strong and the USW on November 7, 2016. Each Claimant responded with a Notice of Dispute prior to the required deadline as set by the Claims Process Order.

Pursuant to the terms of Claims Process Order, the Monitor, in consultation with Walter Canada, and upon the request of counsel for Mr. James, extended the date upon which a disputing party must bring a motion before the Court to resolve disputed Claims from January 9, 2017 to February 9, 2017. A letter was sent to each of Mr. James, Mr. Strong and the USW on December 21, 2016 informing them of this extension.

b) A NORD was sent to Warrior Met Coal, LLC ("**Warrior**"), on November 7, 2016. Pursuant to paragraph 36 of the Claims Process Order, Claimants who were sent a NORD were required to deliver a completed Notice of Dispute to the Monitor by no later than 5:00 p.m. on the later of December 6, 2016 or the day which is twenty business days after the date of the applicable NORD or such other date as may be agreed by the Monitor. As of December 6, 2016, the Monitor had not received a Notice of Dispute from Warrior in respect of its NORD. On December 14, 2016, the Monitor received a letter from Warrior's counsel informing the Monitor that Warrior was disputing the effectiveness of the disallowance of its Claim and was submitting a Notice of Dispute.

The late filing of this Notice of Dispute appears to be due to the inadvertence of Warrior. The Monitor, in consultation with Walter Canada, has informed Warrior that it is accepting the late filing of the Notice of Dispute. Warrior was also informed that the Monitor's acceptance of the late Notice of Dispute is without prejudice to the ability of any other creditor to raise an objection to the acceptance of the late filed Notice of Dispute.

c) The claim of the West Moberly First Nation ("**West Moberly**") was submitted as a Restructuring Claim on November 7, 2016 and is based on amounts claimed as owing under a Cooperation Agreement dated January 9, 1998, a Cooperation Agreement dated October 18, 2004 and an unexecuted Impact Benefit Agreement, some of which were executed by predecessor companies to Walter Canada.

A NORD was issued to West Moberly on December 19, 2016, and West Moberly has twenty business days from the date thereof to submit a Notice of Dispute.

d) Mitsui Matsushima Co. Ltd. ("**Mitsui**") was sent a proof of claim package on December 12, 2016. A Proof of Claim from Mitsui was received by the Monitor on January 3, 2017 in the amount of US$600,000. As any Claim which Mitsui may have arises or will arise as a result of a disclaimed agreement, it is considered a Restructuring Claim. The Monitor is currently in the process of reviewing this Claim with Walter Canada and its legal counsel.

e) On November 7, 2016 the Monitor, in consultation with Walter Canada, issued a NORD to Pelly Construction Ltd. ("**Pelly**") for its claim of $1,520,000 relating to camp and equipment demobilization. On November 27, 2016 the Monitor received a Notice of Dispute from Pelly. Upon review of the Notice of Dispute, the Monitor, in consultation with Walter Canada, agreed to accept the Claim of $196,800 for outstanding camp demobilization pursuant to the terms of the Asset and Transition Agreement between Pelly and Brule Coal Partnership dated October 25, 2012.

The remaining contingent portion of Pelly's Claim of $1.3 million relates to equipment and camp demobilization that has yet to occur. The Monitor, in consultation with Walter Canada, has agreed to extend the date for which Pelly can complete the demobilization to July 31, 2017 at which time, if the demobilization has not occurred, the Claim of $1.3 million will be disallowed.

f) The Claim filed by the 1974 Pension Plan is in dispute in its entirety and is currently being heard by this Honourable Court pursuant to the Case Plan Order.

Other Claim Matters

41. As discussed in the Fifth Report, the Canada Revenue Agency ("**CRA**") submitted two Pre-Commencement Claims relating to: (i) outstanding Goods and Services tax ("**GST**") of $9,800; and (ii) a $1.00 "marker claim" in respect of a potential Claim for 2014 and 2015 payroll source deductions.

42. On November 7, 2016 the Monitor sent two NORDs to the CRA disallowing both Claims in full. However, the Monitor continues to cooperate with the CRA to provide any additional information that they may require as it relates to the ongoing trust examination for payroll source deductions for the years of 2014, 2015 and 2016.

43. A trust examiner of the CRA visited the offices of the Monitor in Prince George, British Columbia on December 13, 2016 to review certain of Walter Canada's payroll records. Additional requests for records were then made by the CRA with said documents being provided by the Monitor on January 4, 2017. The outcome of the trust examination is not yet known as at the date of this report.

44. Pursuant to the Bankruptcy Procedure Order, all Claims filed in the CCAA Proceedings were considered as filed in the BIA proceedings and Claimants were not required to further prove their claims. However, creditors of Walter Canada with claims arising after the deadline set out in the Claims Process Order were given an opportunity to file their Claims in accordance with the BIA.

45. The Bankruptcy/Proposal Trustee received two Claims as a result of the BIA proceedings and is in the process of reviewing these Claims in consultation with Walter Canada and its counsel.

46. The Claims summary table included in paragraph 35 herein does not take into account a claim in respect of the Deemed Interest Amount (as defined in the Proposal) against New WECH in relation to the US$2.0 billion hybrid debt transaction. Under the Proposal, New WECH is deemed liable for the Deemed Interest Amount provided however that the Deemed Interest Amount shall be subject to the terms of the Claims Process Order. The Monitor is still assessing whether this claim is valid and, in light of the Proposal, whether proceeds will be available to satisfy such claim.

47. As the assignment of certain contracts to Conuma has not been completed, additional Claims may be received in due course.

ACTUAL RECEIPTS AND DISBURSEMENTS COMPARED TO FORECAST

48. Walter Canada's actual cash receipts and disbursements for the 22-week period ended December 31, 2016 (the "**Reporting Period**"), as compared with the Previous CCAA Cash Flow Forecast, are summarized in the table on the following page.

Walter Canada Summary of Actual versus Forecast Cash Flow For the 22-Week Period Ended December 31, 2016[1] Prepared on a Consolidated Basis Unaudited (CAD $000)	Actual	Forecast	Variance
Cash Inflow			
Sale Proceeds - Amacon Transaction[3]	17,575	-	17,575
Sale Proceeds - Conuma Transaction	42,040	-	42,040
Letters of Credit Cash Collateral Refund	22,570	-	22,570
Other Receipts	806	125	681
Total Cash Inflow	**82,991**	**125**	**82,866**
Cash Outflow - Operating Disbursements			
Payroll	(246)	(300)	54
Payroll Taxes	(99)	(160)	61
Benefits	(42)	(80)	38
Operating Leases and Storage Facilities	(29)	(20)	(9)
Property Taxes	(624)	(785)	161
Utilities	(40)	(90)	50
Fuel	(4)	-	(4)
Maintenance and Supplies	(323)	(410)	87
Environmental Monitoring and Consulting	(176)	(495)	319
Tenure/Lease Payments	(267)	(140)	(127)
Professional Fees	(28)	(230)	202
Information Technology	(95)	(60)	(35)
Total Cash Outflows - Operating Disbursements	**(1,973)**	**(2,770)**	**797**
Cash Outflow - Non-Operating Disbursements			
CRO and Restructuring Advisor Fees	(4,602)	(4,266)	(336)
KERP / Success Fees	(2,062)	-	(2,062)
Province of British Columbia re: Cash Collateral	(22,570)	-	(22,570)
Bank Fees	(28)	(985)	957
Total Cash Outflows - Non-Operating Disbursements	**(29,262)**	**(5,251)**	**(24,008)**
Net Cash Flow	**51,756**	**(7,896)**	**59,652**
Cash, beginning of period (July 31, 2016)	**17,424**	**17,424**	**-**
Effect of Foreign Exchange translation	934	-	934
Cash, end of period (December 31, 2016)[2][3]	**70,114**	**9,528**	**60,586**

Note 1: Readers are cautioned to read the "Report Restrictions and Scope Limitations" section of this report.

Note 2: The ending cash position noted above excludes approximately US$270K which was received upon closing of Walter Canada's previous account network at the Bank of Nova Scotia, given that discussions as to whether these funds belong to Walter Canada or Walter U.S. are ongoing.

Note 3: Included in the ending cash balance above were GIC's held by Wolverine Coal Partnership, Brule Coal Partnership, Willow Creek Coal Partnership, and Walter Canadian Coal Partnership ($50,000 for each entity, for a total of $200,000). Pursuant to terms of the Term Sheet with Amacon, these GIC's were Residual Assets which were to remain in the custody of Old Walter Canada and, accordingly, they were redeemed and the proceeds were remitted to Amacon on January 4, 2017 as set out in the Updated CCAA Cash Flow Forecast.

49. The following is a summary of the more significant variances in respect of the $59.7 million aggregate net favourable cash flow variance during the Reporting Period:

a) Gross sale proceeds from the Amacon Transaction were $17.575 million, including the $200,000 cost of the aforementioned securities that were to remain with the Old Walter Canada entities upon completion of the Amacon Transaction. The proceeds from these securities were transferred subsequent to the end of the Reporting Period (as subsequently discussed in respect of the Updated CCAA Cash Flow Forecast). As the Remaining Asset Sale Process had not commenced when the Previous CCAA Cash Flow Forecast was filed with this Honourable Court, no proceeds from a sale of the Remaining Assets had been forecast and, accordingly, this is a permanent variance;

b) To date, the receipts and disbursements associated with the Conuma Transaction, including any transaction costs, have been excluded from the Monitor's reporting of Walter Canada's actual receipts and disbursements because their quantum was being kept confidential to preserve the confidentiality of the Bids and Liquidation Proposals and to maintain the competitive nature of the sale process in the event that the Conuma Transaction did not complete. As the Conuma Transaction was completed on September 9, 2016, Walter Canada and the Monitor are of the view that the quantum of the proceeds from the Conuma Transaction need not remain confidential with the exception of the portion of those proceeds relating to the sale of the Belcourt Interest for which Walter Canada continues to hold a put as this sale has not completed (the "**Belcourt Amount**"). Gross sale proceeds from the Conuma Transaction, excluding the Belcourt Amount, were $42.0 million (US$32.6 million). As these proceeds were not included in the Previous CCAA Cash Flow Forecast, they represent a permanent favourable variance. The Monitor has segregated the Belcourt Amount in a separate bank account;

c) As part of the closing of the Conuma Transaction, the Monitor paid $22.57 million to the Province of British Columbia on September 9, 2016. Subsequently, the Letters of Credit written by the Bank of Nova Scotia ("**BNS**") to the Province of British Columbia totaling $22.57 million were cancelled and the cash collateral in the same amount that was previously deposited with BNS was paid to the Monitor;

d) Other Receipts had a permanent favourable variance of $681,000 consisting of a $600,000 previously withheld refund from the CRA in respect of tax credits that Walter Canada had claimed in previous years and receipt of an $80,000 retainer refund from legal counsel who is no longer active;

e) The aggregate $153,000 permanent favourable variance for Payroll, Payroll Taxes and Benefits during the Reporting Period was the result of the earlier than anticipated closing of the Conuma Transaction. The transaction closed on September 9, 2016, whereas the Previous CCAA Cash Flow Forecast had contemplated the payment of Payroll and associated costs until October 1, 2016, resulting in reduced costs totaling $195,000, which were partially offset by continued payment of Walter Canada's sole director throughout the Reporting Period, an amount which was not included in the Previous CCAA Cash Flow Forecast;

f) The $161,000 permanent favourable variance in respect of 2016 Property Taxes was also the result of the early closing of the Conuma Transaction as the Previous CCAA Cash Flow Forecast had assumed the payment of property taxes up to September 30, 2016;

g) The aggregate permanent favourable variance of $406,000 for Maintenance and Supplies and Environmental Monitoring and Consulting resulted from a combination of the early closing of the Conuma Transaction as well as actual costs during the Reporting Period being lower than forecast;

h) The $127,000 permanent unfavourable variance for Tenure and Lease Payments was the result of higher than expected payments up to the closing of the Conuma Transaction;

i) Disbursements for Professional Fees incurred in the normal course of business operations had a $202,000 permanent favourable variance to forecast during the Reporting Period as costs incurred were lower than forecast;

j) The $35,000 permanent unfavourable variance for Information and Technology costs during the Reporting Period was the result of continuing to maintain the electronic data room longer than anticipated so that it could be used to support the Remaining Asset Sale Process;

k) As a result of soliciting offers for the Remaining Assets, the related execution of the Amacon Transaction and the litigation associated with the 1974 Pension Plan, the CRO and Restructuring Advisor Fees were $336,000 higher than forecast during the Reporting Period;

l) KERP and Success Fee payments totaling $2.1 million for the Financial Advisor's success fee (in respect of the Conuma Transaction) and the KERP bonus (the quantum of which is confidential pursuant to a sealing order granted by this Honourable Court on January 5, 2016) were triggered upon closing of the Conuma Transaction on September 9, 2016 and were paid on October 3, 2016. As neither of these payments were provided for in the Previous CCAA Cash Flow Forecast for reasons of confidentiality this variance is a permanent difference; and

m) In respect of quarterly fees associated with the Letters of Credit that were held with BNS, the $957,000 permanent favourable variance for Bank Fees is the result of those payments not being required to be paid.

Intercompany Charges

50. An updated summary of total intercompany advances and the resulting Intercompany Charges was attached as Schedule "I" to the Fifth Report, and included the advances totaling $1.5 million ($500,000 each) made during the Reporting Period by three Old Walter Canada entities to a fourth Old Walter Canada entity to fund its operating requirements. The corresponding Promissory Grid Notes which document the terms and amounts of the various intercompany advances were updated to reflect the additional $1.5 million of intercompany advances.

51. Since the date of the Fifth Report, there have been no further intercompany advances. However, attached hereto as Schedule "**D**" is a revised summary of intercompany advances which has been updated to reflect the transfer of the balances from the Old Walter Canada entities to certain New Walter Canada entities pursuant to the Amacon Transaction and terms of the Proposal.

UPDATED CCAA CASH FLOW FORECAST

52. The Updated CCAA Cash Flow Forecast has been prepared by Walter Canada, with the assistance of the Monitor, on a consolidated basis for the 22-week period ending June 3, 2017 (the "**Updated Cash Flow Period**") to correspond with the requested Extended Stay Period, and reflects certain updated assumptions of Management based on developments to date during the course of these CCAA Proceedings. A copy of the Updated CCAA Cash Flow Forecast is attached hereto as Schedule "**E**" and is summarized in the table below:

Walter Canada Summary of the Updated CCAA Cash Flow Forecast For the 22-Week Period from January 1, 2017 to June 3, 2017 (1) Prepared on a Consolidated Basis Unaudited (CAD $000)	
Cash Inflow	
Other Receipts	50
Total Cash Inflow	**50**
Cash Outflow - Operating Disbursements	
Director's Fees	(72)
Consulting	(120)
Professional Fees	(50)
Maintenance and Supplies	(63)
Information Technology	(45)
Total Cash Outflows - Operating Disbursements	**(350)**
Cash Outflow - Non-Operating Disbursements	
CRO and Restructuring Advisor Fees	(4,517)
Success Fees	(1,750)
Transfer of GIC's	(200)
Walter U.K. Funding	(180)
Total Cash Outflows - Non-Operating Disbursements	**(6,647)**
Net Cash Flow	**(6,947)**
Cash, beginning of period (January 1, 2017)	**70,114**
Cash, end of period (June 3, 2017)	**63,167**
Note 1: Readers are cautioned to read the "Report Restrictions and Scope Limitations" section of this report.	

53. Net cash outflows during the Updated Cash Flow Period are expected to total $6.9 million, which Walter Canada will fund from its current cash resources on hand. On June 3, 2017, at the end of the Updated Cash Flow Period, Walter Canada expects to have approximately $63 million of combined cash resources remaining.

54. The following is a summary of the more significant components of the Updated CCAA Cash Flow Forecast:

a) Other Receipts of $50,000 represents expected interest to be earned on Walter Canada's cash holdings during the Updated Cash Flow Period;

b) Forecast Director's Fees totaling $72,000 relates to the monthly payment of Walter Canada's sole director;

c) Consulting disbursements totaling $120,000 relate to monthly recurring payments for services provided by an external consultant in respect of the operations of Walter UK;

d) Professional Fees costs incurred in the normal course of business operations are forecast at $50,000, primarily relating to various tax matters;

e) The $63,000 forecast for Maintenance and Supplies relates to the expected payment to Canadian Forest Products Ltd. for Old Walter Canada's share of structural repair work in accordance with terms of the Conuma Transaction;

f) Forecast Information Technology costs in the amount of $45,000 represent the expected costs for maintaining the electronic data room in support of efforts to realize on Walter UK;

g) The CRO's monthly fees and Restructuring Advisor Fees are forecast at approximately $4.5 million during the Updated Cash Flow Period for payments to Walter Canada's counsel in Canada, the U.S. and the U.K., the Monitor and its counsel, and the Chief Restructuring Officer, including payment of certain restructuring professional fee invoices which had not been delivered to Walter Canada and/or paid as at December 31, 2016. Professional fee cost levels are anticipated to be higher over the short term due to the effort related to the Remaining Asset Sale Process and the 1974 Pension Plan Claim;

h) Forecast Success Fees in the amount of $1.75 million represent payment of the success fee owing to the CRO (in respect of the Conuma Transaction) as well as an additional success fee payment to the Financial Advisor in respect of the Amacon Transaction;

i) The $200,000 forecast Transfer of GIC proceeds relates to the previously discussed assets which were to remain with Old Walter Canada, and includes the redemption of four GIC's, each with a value of $50,000, held within Old Walter Canada and the transfer of those funds to Old Walter Canada; these transfers were completed during the first week of January 2017;

j) The forecast $180,000 Walter UK Funding disbursement represents a planned secured advance by Walter Canada to Walter UK which is currently expected to be required before the end of January 2017 and which was approved by this Honourable Court pursuant to the CCAA Continuity & Vesting Order; and

k) Excluded from the opening and closing cash balances in the Updated CCAA Cash Flow Forecast is the amount of approximately US$270,000 which was received from BNS when Walter Canada's account network at BNS was closed. The Monitor is engaged in discussion with BNS and Walter Energy U.S. to determine whether these funds belong to Walter Energy U.S. or to Walter Canada, and will provide an update to this Honourable Court once those discussions are completed and the appropriate disposition of these funds is determined.

55. The Updated CCAA Cash Flow Forecast indicates that Walter Canada has the necessary liquidity to fund its expected cash requirements to the end of the Updated Cash Flow Period.

OTHER MATTERS

Permit Transfers

56. Further to the discussion in Previous Reports, the transfer of all of the transferable mining permits, cutting permits, environmental assessment certificates and other rights to Conuma was completed by December 15, 2016 as a result of Walter Canada's and Conuma's efforts to work with the various Ministries of the Province of British Columbia to complete those transfers. Certain permits, including a number of road-use permits, were not capable of being transferred and Conuma will be required to apply for new permits.

Walter UK

57. Old Walter Canada's interest in Walter UK was transferred to New Walter Canada as part of the Amacon Transaction given that Amacon did not acquire Walter UK. Pursuant to discussion in certain of the Previous Reports, some Bids in respect of Walter UK were received during the course of the SISP; however, to date, no transaction involving Walter UK has been completed and, accordingly, the CRO and Walter Canada have continued to review strategic alternatives for dealing with the assets and operations of Walter UK.

58. As discussed by the CRO in his 8th Affidavit of William E. Aziz sworn December 20, 2016 (the "**8th Aziz Affidavit**"), Walter UK is currently engaged in negotiations with an interested party in respect of a potential sale of certain of the Walter UK entities including Energybuild Ltd. ("**Energybuild**"), the operating company which owns the anthracite coal mine in South Wales which is Walter UK's primary asset and which is currently in care and maintenance.

59. Walter UK's latest updated cash flow forecast indicates that it has insufficient liquidity to meet its obligations as they come due after approximately January 27, 2017. As discussed in the 8th Aziz Affidavit, the directors of Energybuild requested an advance, on a secured basis, in the amount of £110,000 from Cambrian to enable Energybuild to meet its working capital needs until the week ending March 3, 2017 while they seek to either conclude a transaction with the interested party for the sale of Energybuild and certain other Walter UK entities or for them to determine that a sale cannot be completed, in which case other options will need to be considered and additional advances from Cambrian may be requested by Energybuild.

60. This Honourable Court, pursuant to the CCAA Continuity & Vesting Order, authorized Cambrian to loan up to £250,000 to Energybuild on a secured basis. The Monitor is of the view that it is reasonable for Cambrian to loan the requested £110,000 to Energybuild at this time to enable its directors, as well as the CRO and Walter Canada, additional time to conclude a sale or determine another course of action for disposing of Walter UK.

THE MONITOR'S OBSERVATIONS AND RECOMMENDATIONS

61. In the Monitor's opinion, New Walter Canada is continuing to act in good faith and with due diligence in an effort to further its restructuring efforts.

62. The Monitor is of the view that New Walter Canada is making progress to finalize the realization of all of its assets, of which Walter UK and the Belcourt Interest remain, to continue the Claims Process and to move the Estate towards a distribution to creditors.

63. Based on the foregoing discussion in this report, the Monitor recommends to this Honourable Court that it grant New Walter Canada's request for an extension of the Stay to May 31, 2017.

All of which is respectfully submitted this 12th day of January, 2017.

KPMG INC., in its sole capacity as
Monitor of New Walter Energy Canada Holdings, Inc. et al

Per: Philip J. Reynolds
Senior Vice President

Per: Anthony Tillman
Senior Vice President

Schedule “A”

Trustee’s Certificate – Proposal Commencement Date

TRUSTEE'S CERTIFICATE

Court File No.: B-160976
Estate No: 11-2199860
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE JOINT PROPOSAL OF WALTER ENERGY CANADA HOLDINGS, INC. WALTER CANADIAN COAL ULC, BRULE COAL ULC, WILLOW CREEK COAL ULC, PINE VALLEY COAL LTD., WOLVERINE COAL ULC, 0541237 B.C. LTD., WALTER CANADIAN COAL PARTNERSHIP, BRULE COAL PARTNERSHIP, WILLOW CREEK COAL PARTNERSHIP AND WOLVERINE COAL PARTNERSHIP.

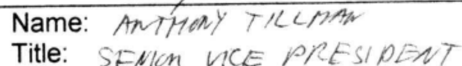
TRUSTEE'S CERTIFICATE – PROPOSAL COMMENCEMENT DATE

1. All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the joint proposal concerning, affecting and involving the Debtors dated December 19, 2016 (the "**Joint Proposal**"), a copy of which is attached as Schedule "B" to the Order of the Court made in these proceedings on the 21st day of December, 2016 (the "**Order**"), as such Joint Proposal may be amended, varied or supplemented from time to time in accordance with the terms thereof, the BIA or an Order of the Court.

2. Pursuant to paragraph 8 of the Order, KPMG Inc. in its capacity as Bankruptcy Trustee and Proposal Trustee of the Debtors (the "**Trustee**") delivers to the Debtors, the New Walter Canada Group, the Purchaser and the Official Receiver this certificate and hereby certifies that the conditions set out in Sections 5.3(g) and 5.3(h) of the Joint Proposal have been satisfied and all other conditions set out in Section 5.3 of the Joint Proposal have been satisfied or waived in accordance with the terms of the Proposal and the Proposal Commencement date shall occur upon the filing of this certificate with the Court.

DATED at the City of Vancouver, in the Province of British Columbia, this 28th day of December, 2016.

KPMG INC., in its capacity as Bankruptcy Trustee and Proposal Trustee of Walter Energy Canada Holdings, Inc., *al.* and not in its personal or corporate capacity

By: 

Name: ANTHONY TILLMAN
Title: SENIOR VICE PRESIDENT

Schedule "B"

Monitor's Certificate: CCAA Continuity

Monitor's Certificate

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

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

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THOSE PARTIES LISTED ON
SCHEDULE "A" HERETO

PETITIONERS

MONITOR'S CERTIFICATE: CCAA CONTINUITY

RECITALS

1. All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the joint proposal concerning, affecting and involving the Walter Canada Group dated as of December 19, 2016 (the "**Proposal**"), a copy of which is attached as Schedule "B" to the Order of the Court made in these proceedings on the 21st day of December, 2016 (the "**Order**"), as such Proposal may be amended, varied or supplemented from time to time in accordance with the terms thereof, the BIA or an Order of the Court.

2. Pursuant to paragraph 3 of the Order, KPMG Inc. in its capacity as Monitor hereby delivers to the Walter Canada Group, the New Walter Canada Group and the Purchaser this certificate and hereby certifies that it has delivered the Trustee's Certificate in accordance with the Proposal.

DATED at the City of Vancouver, in the Province of British Columbia, this 28th day of December, 2016.

KPMG Inc., in its capacity as Monitor of Walter Energy Canada Holdings, Inc. and the other entities referenced on Schedule "A" hereto

Per: [signature]

Name: ANTHONY TILLMAN

Title: SENIOR VICE PRESIDENT

SCHEDULE "A" to Monitor's Certificate

Petitioners

1. Walter Canadian Coal ULC
2. Wolverine Coal ULC
3. Brule Coal ULC
4. Cambrian Energybuild Holdings ULC
5. Willow Creek Coal ULC
6. Pine Valley Coal, Ltd.
7. 0541237 B.C. Ltd.
8. New Walter Energy Canada Holdings, Inc.
9. New Walter Canadian Coal Corp.
10. New Wolverine Coal Corp.
11. New Brule Coal Corp.
12. New Willow Creek Coal Corp.

Partnerships

1. Walter Canadian Coal Partnership
2. Wolverine Coal Partnership
3. Brule Coal Partnership
4. Willow Creek Coal Partnership

Schedule “C”

Form 46 – Certificate of Full Performance of Proposal

District of: British Columbia
Division No. 03 - Vancouver
Court No. B-160976
Estate No. 11 2199860, 11-2199859, 11-2199857, 11-2199861, 11-2199858, 11-2199862, 11-2199813, 11-254026, 11-254024, 11-254025, 11-254023

FORM 46

Certificate of Full Performance of Proposal
(Section 65.3 and 66.38 of the Act)

In the Matter of the Proposal of
Walter Energy Canada Holdings, Inc., Walter Canadian Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Pine Valley Coal Ltd., Wolverine Coal ULC, 0541237 B.C. Ltd., Walter Canadian Coal Partnership, Brule Coal Partnership, Willow Creek Coal Partnership and Wolverine Coal Partnership

We, KPMG Inc.

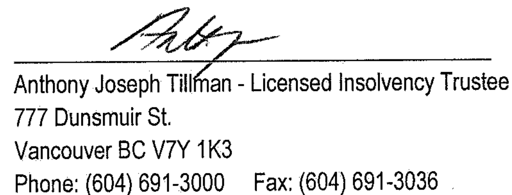
[X] the trustee acting in the proposal of Walter Energy Canada Holdings, Inc., Walter Canadian Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Pine Valley Coal Ltd., Wolverine Coal ULC, 0541237 B.C. Ltd., Walter Canadian Coal Partnership, Brule Coal Partnership, Willow Creek Coal Partnership and Wolverine Coal Partnership, certifies that the proposal,

[ ] the administrator acting in the consumer proposal of Walter Energy Canada Holdings, Inc., Walter Canadian Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Pine Valley Coal Ltd., Wolverine Coal ULC, 0541237 B.C. Ltd., Walter Canadian Coal Partnership, Brule Coal Partnership, Willow Creek Coal Partnership and Wolverine Coal Partnership, a consumer debtor, certifies that the consumer proposal,

as filed with the official receiver on the 19th day of December 2016 has been fully performed as of the 29th day of December, 2016.

Dated at the City of Vancouver in the Province of British Columbia, this 29th day of December 2016.

KPMG Inc.
Per:



Anthony Joseph Tillman - Licensed Insolvency Trustee
777 Dunsmuir St.
Vancouver BC V7Y 1K3
Phone: (604) 691-3000 Fax: (604) 691-3036

Schedule "D"

Summary of Intercompany Charges

New Walter Energy Canada Holdings, Inc. et al
Summary of Intercompany Charges
(CAD $000's)[3]

SUMMARY OF NEW WCCC[1] PAYABLE

Transactions [2]	Amount			
	New WCCC[1] (was WCCP[4])	New BCC[1] (was BCP[4])	New WICC[1] (was WICP[4])	New WCC[1] (was WCP[4])
December 2015 - WCCP[4] funds Old Walter Canada mine entities for operational purposes	(4,500)	3,000	500	1,000
December 2015 - USD funds transferred from BCP[4] to WCCP[5]	3,474	(3,474)	-	-
December 2015 - Excess balance remaining with WCCP after purchase of CAD and collateralization of Letters of Credit[6]	2,430	(2,430)	-	-
January 2016 - BCP funds WCCP's Letter of Credit obligation	188	(188)	-	-
February 2016 - Old Walter Canada Mine entities fund WCCP for operational purposes	6,000	(2,000)	(2,000)	(2,000)
March 2016 - WCP[4] funds Belcourt Saxon Joint Venture on behalf of WCCP	150	-	-	(150)
April 2016 - Fund WCCP in USD for Payment of Shared Services to Walter Energy U.S.	1,317	(439)	(439)	(439)
April 2016 - Old Walter Canada Mine entities fund WCCP in USD for operational purposes	750	(250)	(250)	(250)
July 2016 - Old Walter Canada Mine entities fund WCCP in CAD for operational purposes	1,500	(500)	(500)	(500)
September 2016 - Old Walter Canada Mine entities fund WCCP in CAD for operational purposes	1,500	(500)	(500)	(500)
Ending New WCCC Payable to entities as noted	**12,809**	**(6,781)**	**(3,189)**	**(2,839)**

SUMMARY OF NEW WCC[1] PAYABLE

Result of LC Collateralization	Amount	
	New WCC (was WCP[4])	New BCC (was BCP[4])
January 2016 - BCP funds WCP's LC obligation	11,545	(11,545)
Ending New WCC Payable to New BCC	**11,545**	**(11,545)**

SUMMARY OF NEW WICC[1] PAYABLE

Result of LC Collateralization	Amount	
	New WICC (was WICP[4])	New BCC (was BCP[4])
January 2016 - BCP funds WICP's[4] LC obligation	6,100	(6,100)
Ending New WICC Payable to New BCC	**6,100**	**(6,100)**

NOTES:

(1) - New WCCC refers to New Walter Canadian Coal Corp., New BCC refers to New Brule Coal Corp., New WICC refers to New Willow Creek Coal Corp., and New WCC refers to New Wolverine Coal Corp., each a New Walter Canada entity.

(2) - The transactions establishing the various Intercompany Charges took place amongst certain Old Walter Canada entities, as specifically noted in the transaction description. The Intercompany Charges were then transferred to the corresponding New Walter Canada entities pursuant to the Amacon Transaction.

(3) - The intercompany transactions above that were denominated in USD have been converted to CAD using the Bank of Canada USD/CAD exchange rate at noon on the date of the transaction.

(4) - WCCP refers to Walter Canadian Coal Partnership, BCP refers to Brule Coal Partnership, WICP refers to Willow Creek Coal Partnership, and WCP refers to Wolverine Coal Partnership, each an Old Walter Canada entity.

(5) - Payable results from the residual balance remaining in WCCP's USD account from the USD funds transferred by BCP that was not required to purchase CAD$25M to cash collateralize the LC's.

(6) - The residual CAD balance remaining in WCCP from the CAD$25M purchased after collateralizing the Letters of Credit.

Schedule "E"

Updated CCAA Cash Flow Forecast for the 22-Week Period Ending June 3, 2017

New Walter Energy Canada Holdings, Inc. et al.

Updated CCAA Cash Flow Forecast for the 22-Week Period Ending June 3, 2017[1]

(in CAD $000's)																	
Foreign Exchange Rate Assumptions - (USD/CAD) 1.32 and (GBP/CAD) 1.65															Month End		22-Week
Week No.		1	2	3	4	5	6	7	8	9	10	11	12	13	4 weeks	5 weeks	Total
Week Ending	**Notes**	1/7/17	1/14/17	1/21/17	1/28/17	2/4/17	2/11/17	2/18/17	2/25/17	3/4/17	3/11/17	3/18/17	3/25/17	4/1/17	4/29/17	6/3/17	
OPERATING CASH FLOW																	
Operating Receipts																	
Other Receipts	**2**	-	-	-	-	10	-	-	-	10	-	-	-	10	-	20	50
Total Operating Receipts		**-**	**-**	**-**	**-**	**10**	**-**	**-**	**-**	**10**	**-**	**-**	**-**	**10**	**-**	**20**	**50**
Operating Disbursements																	
Director's Fees	**3**	(12)	-	-	-	(12)	-	-	-	(12)	-	-	-	-	(12)	(24)	(72)
Consulting	**4**	(20)	-	-	(20)	-	-	-	(20)	-	-	-	-	(20)	(20)	(20)	(120)
Professional Fees	**5**	-	-	-	-	(10)	-	-	-	(10)	-	-	-	(10)	(10)	(10)	(50)
Maintenance and Supplies	**6**	-	(63)	-	-	-	-	-	-	-	-	-	-	-	-	-	(63)
Information Technology	**7**	(35)	-	-	(10)	-	-	-	-	-	-	-	-	-	-	-	(45)
Total Operating Disbursements		**(67)**	**(63)**	-	**(30)**	**(22)**	**-**	**-**	**(20)**	**(22)**	**-**	**-**	**-**	**(30)**	**(42)**	**(54)**	**(350)**
Non-Operating Disbursements																	
CRO and Restructuring Advisor Fees	**8**	(557)	-	-	(1,900)	(112)	-	-	(750)	(112)	-	-	(250)	-	(362)	(474)	(4,517)
Success Fees	**9**	-	-	-	(1,750)	-	-	-	-	-	-	-	-	-	-	-	(1,750)
Transfer of GIC's	**10**	(200)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(200)
Walter U.K. Funding	**11**	-	-	(180)	-	-	-	-	-	-	-	-	-	-	-	-	(180)
Total Non-Operating Disbursements		**(757)**	**-**	**(180)**	**(3,650)**	**(112)**	**-**	**-**	**(750)**	**(112)**	**-**	**-**	**(250)**	**-**	**(362)**	**(474)**	**(6,647)**
TOTAL NET CASH FLOW		**(824)**	**(63)**	**(180)**	**(3,680)**	**(124)**	**-**	**-**	**(770)**	**(124)**	**-**	**-**	**(250)**	**(20)**	**(404)**	**(508)**	**(6,947)**
BEGINNING CASH (FX Effected)		**70,114**	**69,290**	**69,227**	**69,047**	**65,367**	**65,243**	**65,243**	**65,243**	**64,473**	**64,349**	**64,349**	**64,349**	**64,099**	**64,079**	**63,675**	**70,114**
Net Cash Flow		(824)	(63)	(180)	(3,680)	(124)	-	-	(770)	(124)	-	-	(250)	(20)	(404)	(508)	(6,947)
ENDING CASH (FX Effected)		**69,290**	**69,227**	**69,047**	**65,367**	**65,243**	**65,243**	**65,243**	**64,473**	**64,349**	**64,349**	**64,349**	**64,099**	**64,079**	**63,675**	**63,167**	**63,167**

UNAUDITED CASH FLOW FORECAST PREPARED BY MANAGEMENT, MUST BE READ IN CONJUNCTION WITH THE NOTES AND ASSUMPTIONS

New Walter Energy Canada Holdings, Inc. et al ("New Walter Canada")

Notes to the Unaudited Updated CCAA Cash Flow Forecast for the 22-Week Period Ending June 3, 2017

Unless otherwise noted, the Updated CCAA Cash Flow Forecast is presented in Canadian Dollars using an exchange rate of US$1.00/CDN$1.32 for conversion of any U.S. Dollar amounts and an exchange rate of GBP£1.00/CDN$1.65 for conversion of any British Pound amounts.

1. **Purpose**
   The Updated CCAA Cash Flow Forecast has been prepared solely for the purpose of reflecting Management's best estimate of the cash flow of New Walter Canada during its CCAA proceedings, and readers are cautioned that it may not be appropriate for other purposes.

Receipts

2. **Other Receipts**
   Amounts forecast represent interest expected to be earned on various short term investments purchased with New Walter Canada's surplus cash holdings.

Operating Disbursements

3. **Director's Fees**
   Monthly compensation costs for New Walter Canada's sole director.

4. **Consulting**
   These disbursements relate to costs of an external consultant engaged to perform consulting in respect of New Walter Canada's operations in the U.K.

5. **Professional Fees**
   Represents fees for various tax filings by New Walter Canada.

6. **Maintenance and Supplies**
   The forecast disbursement of $63,000 represents payment to Canadian Forest Products Ltd. for the Blind Creek structural repairs. Reimbursement associated with these repairs was agreed to as per the purchase deposits schedule in the Conuma Asset Purchase Agreement.

7. **Information Technology**
   Forecast payments represent expected costs to maintain use of an electronic data room.

Non-Operating Disbursements

8. **CRO and Restructuring Advisor Fees**
   Forecast disbursements for professional fees specific to New Walter Canada's restructuring efforts including New Walter Canada's counsel in Canada, the U.S. and the U.K., the Monitor and its counsel and the Chief Restructuring Officer ("**CRO**"). The forecast amounts include payment of certain restructuring professional fee invoices which had not been delivered to Old Walter Canada and/or paid as at December 31, 2016.

9. **Success Fees**
   The disbursement forecast of $1.75 million is comprised of a payment to the CRO that remains owing in the amount of approximately $1.49 million (US$1,130,000 including HST). In addition to the success fee payable to the CRO, a payment in the amount of approximately $260,000 to the Financial Advisor is forecast pursuant their engagement letter in regards to the Amacon Transaction.

10. **Transfer of GIC's**
    The forecast disbursement represents the redemption of four GIC's, each with a value of $50,000 for a total of $200,000, held by Old Walter Canada that is to be paid to Amacon after redemption.

11. **Walter UK Funding**
    The forecast payment represents an advance, on a secured basis, in the amount of GBP£110,000 (approximately $180,000) by New Walter Canada to Walter UK as Walter UK is expected to require funding in the near term.

TAB 12

RECEIVED
MAR 1 0 2017
VANCOUVER
SUPREME COURT SCHEDULING

File 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

NINTH REPORT OF THE MONITOR, KPMG INC.

March 10, 2017

TABLE OF CONTENTS

INTRODUCTION AND PURPOSE OF THE MONITOR'S SPECIAL PURPOSE REPORT 1
BACKGROUND OF THE DISPUTES BETWEEN WALTER CANADA AND THE USW 2
PLANNED DISTRIBUTION 3
THE MONITOR'S OBSERVATIONS AND RECOMMENDATIONS 4

INDEX TO SCHEDULES

Schedule A Fund Distribution Schedule

INTRODUCTION AND PURPOSE OF THE MONITOR'S SPECIAL PURPOSE REPORT

1. This is the ninth report of the Monitor (the "**Ninth Report**") and has been prepared as a special purpose report to provide this Honourable Court with information regarding the following:

    a) The background to the disputes between Walter Canada and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 ("**USW**");

    b) The planned distribution of the funds held in trust by Victory Square Law Office LLP, counsel for USW in the amount of $780,660.61, inclusive of interest to January 18, 2017, and interest, if any, accruing thereafter (the "**Fund**"); and

    c) The Monitor's observations and recommendations in respect of the planned distribution of the Fund (the "**Fund Distribution**").

2. Terms not specifically defined herein shall have the meanings as defined in the Eighth Report of the Monitor dated January 12, 2017 (the "**Eighth Report**"). For further information in respect of the changes to the composition of Walter Canada / the Petitioners please refer to the Eighth Report.

3. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

BACKGROUND OF THE DISPUTES BETWEEN WALTER CANADA AND THE USW

Events Preceding the CCAA Proceedings

4. The Wolverine Mine was the last of Walter Canada's three operating mines to be idled and put on a care and maintenance program. On or about April 15, 2014, Wolverine Coal Partnership (the "**Employer**") announced a temporary layoff of workers at the Wolverine Mine, including approximately 300 members of the USW. The Employer did not give notice pursuant to section 54(1) of the *Labour Relations Code*, R.S.B.C. 1966, c. 244(b) (the "**Code**") to the USW at least 60 days before the date on which the layoff occurred.

5. On May 9, 2014, the USW filed an application to the British Columbia Labour Relations Board (the "**Board**") alleging the Employer breached section 54 of the Code. In its initial decision the Board found that the Employer did in fact breach section 54 of the Code. However, on December 11, 2014, the initial decision was overturned by a reconsideration panel and the matter was remitted to a new Vice-Chair of the Board. Supplementary submissions were then received by the Board with an oral hearing taking place on May 4 and 5, 2015. On June 9, 2015, the Board upheld its original decision and ordered that the Employer pay damages equivalent to 60 days' pay for each affected employee, subject to mitigation.

6. Due to the Chapter 11 filing in the United States of Walter Energy, Inc., the USW was concerned that a filing in Canada would also take place, thus jeopardizing its ability to quantify and collect the amounts owing to its members. On July 15, 2015, the USW applied to the Board for further relief and on July 22, 2015, the Board ordered that the Employer pay $771,378.70 to the USW, in trust, pending final disposition of the matter.

7. The Employer paid the amount ordered to Victory Square Law Office LLP "in trust" on July 29, 2015 and the Fund was invested in an interest bearing account. Interest of $9,281.91 has accrued to January 18, 2017 bringing the total held in trust to $780,660.61.

8. On November 20, 2015, the Employer sought judicial review of the decisions of the Board (the "**Adjustment Plan Judicial Review**").

9. Already ongoing at that time was a separate proceeding, filed on February 13, 2015, where the USW was seeking a judicial review of a decision of the Board in regards to a northern

allowance for its members (the "**Northern Allowance Judicial Review**").

10. Pursuant to the Initial Order granted by this Honourable Court on December 7, 2015, both the Adjustment Plan Judicial Review and the Northern Allowance Judicial Review (collectively, the "**Judicial Review Applications**") were stayed by the CCAA Proceedings.

Events Subsequent to the CCAA Proceedings

11. On January 24, 2017, the Monitor received a request from the USW to consent to lift the stay of proceedings in respect of the Judicial Review Applications. The intention of this request was to seek an Order dismissing the Judicial Review Applications and to have the Monitor perform the Fund Distribution to the affected former employees.

12. The Monitor and its counsel performed a review of the Fund to determine whether it should form part of the estate of Walter Canada and is of the view that the Fund constitutes a trust in favour of the USW for those of its members who the Board ruled were entitled to notice under section 54 of the Code and therefore should not form part of the assets of Walter Canada.

13. On March 2, 2017, New Wolverine Coal Corp. and the Monitor consented to a lifting of the stay for the sole purpose of the discontinuance or dismissal of the Judicial Review Applications. On March 6, 2017, New Wolverine Coal Corp. and the Monitor consented to the discontinuance or dismissal of the Adjustment Plan Judicial Review and also consented to the discontinuance or dismissal of the Northern Allowance Judicial Review. The Board consented to the discontinuance of the Judicial Review Applications without costs. The Adjustment Plan Judicial Review and the Northern Allowance Judicial Review have since been discontinued without costs to any party.

14. The Monitor has agreed to assist the USW by distributing the Fund on a *pari passu* basis to the USW members whose section 54 Claims have been allowed pursuant to the Claims Process.

PLANNED DISTRIBUTION

15. Pursuant to the Claims Process Order granted on August 16, 2016, a negative claim process was commenced for former employees. Former employees were not required to file proofs

of claim. Instead, they were sent notice of their Claim amounts, including the section 54 Claim amounts, based on calculations prepared by Walter Canada, in consultation with the Monitor and the USW.

16. Twenty Notices of Dispute of Employee Claim filed by individual employees were received by the Monitor prior to the required deadline as set by the Claims Process Order, all of which have been resolved as of the date of this report. The USW has also filed certain Notices of Dispute of Employee Claim. Discussions regarding the USW's Claims are ongoing, but these matters are not relevant for the purposes of the Fund Distribution.

17. The Claims of the USW members pursuant to section 54 of the Code total $2,573,695.78 and include 207 former employees as detailed in the Fund Distribution Schedule attached as Schedule "A".

18. The Fund Distribution to the former employees will be deducted from the portion of their Claims related to section 54 of the Code in calculating any subsequent distribution from the Walter Canada estate.

THE MONITOR'S OBSERVATIONS AND RECOMMENDATIONS

19. The Monitor is of the view that the Fund Distribution should proceed at this stage.

20. Based on the foregoing discussion in this report, the Monitor recommends to this Honourable Court that it approve the payment of the Fund to the Monitor for distribution to the former employees and that the Monitor be authorized and directed to distribute the Fund in accordance with the attached Schedule "A".

All of which is respectfully submitted this 10th day of March, 2017.

KPMG INC., in its sole capacity as
Monitor of New Walter Energy Canada Holdings, Inc. et al

Per: Philip J. Reynolds
Senior Vice President

Per: Anthony Tillman
Senior Vice President

Schedule “A”

Fund Distribution Schedule

Fund Distribution Schedule				
#	Name of USW Employee	Accepted Claim Amounts	Accepted Section 54 Claims	Distribution Amount
1	Abromovich, Shawn	45,147.99	5,474.60	1,660.57
2	Adekat, Lester Mervin	50,252.42	15,476.99	4,694.52
3	Arsenault, Kriston	45,482.43	12,747.24	3,866.53
4	Arsenault, Lloyd	55,510.03	16,051.19	4,868.69
5	Bailey, Bobby Douglas	47,228.46	2,955.09	896.35
6	Bargy, Brenda F	44,032.33	14,444.53	4,381.36
7	Barker, Eugene	57,259.71	12,986.34	3,939.05
8	Beausoliel, Katrina	51,764.70	14,932.14	4,529.26
9	Begon, Gary R	44,045.53	14,457.73	4,385.36
10	Bennett, Garrett Colin	43,119.93	3,809.64	1,155.55
11	Bergson, Patti N	40,758.00	14,457.73	4,385.36
12	Bielecki, Artur	65,506.50	18,741.94	5,684.86
13	Bisset, Jason T	46,405.17	13,390.11	4,061.53
14	Bisset, John T	41,213.89	11,626.09	3,526.46
15	Bisson, Tyla	65,206.75	18,442.19	5,593.94
16	Boutilier, Trevor David	48,179.08	14,694.93	4,457.31
17	Bowerman, Kevin	49,266.80	9,593.41	2,909.90
18	Bradley, Kenneth	3,291.19	3,291.19	998.29
19	Brake, Cassandra Mary	48,179.08	14,694.93	4,457.31
20	Bredeson, Shaia Lynn	43,788.91	7,091.19	2,150.92
21	Bright, Clint S	44,045.53	14,457.73	4,385.36
22	Brown, Monika	55,612.67	16,021.85	4,859.79
23	Brown, Troy Richard	44,778.88	14,984.69	4,545.20
24	Browne, Drew M	44,045.53	14,457.73	4,385.36
25	Bryla, William Richard	57,396.49	16,302.67	4,944.97
26	Caljouw, Steve	62,059.71	17,786.34	5,395.00
27	Campbell, Lloyd	55,440.14	15,766.75	4,782.41
28	Case, Erin Edith	47,333.07	14,457.73	4,385.36
29	Chabot, Adelard	53,729.97	15,476.99	4,694.52
30	Chapman, Kevin Oakley	47,333.07	14,457.73	4,385.36
31	Chmelyk, Bailey W	33,075.62	11,830.99	3,588.61
32	Clare, Kevin R	44,045.53	14,457.73	4,385.36
33	Cook, Ronald J	55,695.24	16,021.85	4,859.79
34	Corbett, Jesse R	43,174.35	14,457.73	4,385.36
35	Curtis, Brandon R	44,045.53	14,457.73	4,385.36
36	Curtis, Gordon	57,396.49	16,302.67	4,944.97
37	Cyr, Sandra	55,440.14	15,766.75	4,782.41
38	Dawborn, Eric	52,788.96	13,115.57	3,978.25
39	Dewetter, Lee	50,876.00	11,126.12	3,374.81
40	Doonan, Marcie	40,176.25	3,680.79	1,116.47
41	Dore, Darcy C	44,045.53	14,457.73	4,385.36
42	Drover, Ann Marie	60,955.43	18,442.19	5,593.94
43	Dubois, Jarrod S	50,006.27	15,230.84	4,619.86

Fund Distribution Schedule				
#	Name of USW Employee	Accepted Claim Amounts	Accepted Section 54 Claims	Distribution Amount
44	Duck, Jody	51,764.70	14,932.14	4,529.26
45	Duhaime, Jack	39,421.94	10,434.21	3,164.93
46	Dunn, James	51,609.79	14,918.94	4,525.25
47	Durand, Orville	55,384.61	14,290.79	4,334.72
48	Durdle, David L	39,048.41	5,564.26	1,687.77
49	Erickson, Bruce	53,729.97	15,476.99	4,694.52
50	Estate of William F Lenart	43,335.69	5,082.71	1,541.70
51	Farmer, Devon Jesse	53,608.99	11,095.75	3,365.59
52	Felker, Lisa M	44,045.53	14,457.73	4,385.36
53	Ferguson, Eric Cody	38,444.27	6,403.74	1,942.40
54	Fergusson, Bret	57,479.35	10,714.79	3,250.04
55	Filion, Pascal	42,866.09	10,130.90	3,072.93
56	Fiss, Stefanie	55,404.76	16,021.85	4,859.79
57	Fitzgerald, Dave	51,764.70	14,932.14	4,529.26
58	Fleury, Jason	55,695.24	16,021.85	4,859.79
59	Fortier, Alisan R	33,075.62	11,830.99	3,588.61
60	Gano, Darlene S	48,179.08	14,694.93	4,457.31
61	Gashinsky, Craig Andre	48,179.08	14,694.93	4,457.31
62	Grant, Kristina M	45,361.79	12,486.45	3,787.42
63	Greene, Arthur D	31,175.25	1,884.13	571.50
64	Grinnell, Frederick E	44,045.53	14,457.73	4,385.36
65	Guimont, Sylvie	48,179.08	14,694.93	4,457.31
66	Haider, Brian	45,122.46	10,305.83	3,125.99
67	Hall, Joseph J	55,023.89	18,142.45	5,503.02
68	Halverson, Jaelene	53,570.19	15,510.52	4,704.69
69	Hammon, Mark D	42,565.07	12,977.27	3,936.30
70	Hampel, William	51,527.49	14,694.93	4,457.31
71	Hanna, Cody W	35,933.53	6,345.73	1,924.80
72	Hansen, Dusty A	45,377.00	14,984.69	4,545.20
73	Harvey, Crystal G	44,045.53	14,457.73	4,385.36
74	Hewitt, Ewart	51,764.70	14,932.14	4,529.26
75	Hohner, Sarah J	44,045.53	14,457.73	4,385.36
76	Homister, Marty	53,729.97	15,476.99	4,694.52
77	Homister, Patrick S	47,294.18	1,300.02	394.33
78	Howes, Kevin Cassey	41,232.83	6,457.40	1,958.68
79	Hughes, Dawson D	54,342.98	14,669.59	4,449.62
80	Hughes, Gary	41,249.25	4,198.62	1,273.54
81	Hunter, Wayne	45,427.70	5,754.31	1,745.41
82	Hurley, Melvin P	53,729.97	15,476.99	4,694.52
83	Hutchison, Matthew R	51,011.08	14,694.93	4,457.31
84	Irving, Kyle R	44,717.75	4,000.03	1,213.30
85	Jamieson, Kimberly D	53,716.77	15,463.79	4,690.52
86	Jamieson, Shane M	41,790.61	696.79	211.35

Fund Distribution Schedule				
#	Name of USW Employee	Accepted Claim Amounts	Accepted Section 54 Claims	Distribution Amount
87	Jaswal, Guleena	48,179.08	14,694.93	4,457.31
88	Jeffrey, Joshua D	51,257.81	14,694.93	4,457.31
89	Jensen, Don	51,764.70	14,932.14	4,529.26
90	Johnston, Justin D	44,045.53	14,457.73	4,385.36
91	Jones, Jenifer D	39,441.77	14,457.73	4,385.36
92	Just, Daniel Christopher	48,044.24	14,694.93	4,457.31
93	Just, Jamie K	46,684.42	5,966.70	1,809.84
94	Kao, Natasha	51,534.66	18,142.45	5,503.02
95	Kirkham, Brody R	43,506.17	14,457.73	4,385.36
96	Klikach, Kade Barry	47,395.83	14,694.93	4,457.31
97	Kloosterboer, Ryan K	50,717.66	17,325.45	5,255.20
98	Knowles, Clayton J	54,965.16	15,291.77	4,638.34
99	Knowles, Jason E	46,984.96	5,891.14	1,786.92
100	Kortz, Jason	48,179.08	14,694.93	4,457.31
101	Lacey, Timothy G	51,418.17	14,694.93	4,457.31
102	Landa, Chuck Dustin	43,015.90	6,183.34	1,875.55
103	Larsson, Carl D	51,527.49	14,694.93	4,457.31
104	Leblanc, Bernard G	44,045.53	14,457.73	4,385.36
105	Lemon, Amber Nicole	51,527.49	14,694.93	4,457.31
106	Lewis, Kristopher	55,801.07	16,051.19	4,868.69
107	Loxam, Colin P	45,466.26	5,792.87	1,757.11
108	Lutgen, Nicole	47,075.15	14,457.73	4,385.36
109	Lutz, Erin M	29,718.19	500.00	151.66
110	MacEachern, Lorne E	57,359.64	16,566.70	5,025.06
111	Mackay, Ashlee	50,424.02	15,766.75	4,782.41
112	Mackie, Corey A	46,816.02	6,098.30	1,849.75
113	Mackie, Jessica Jane	51,833.47	15,766.75	4,782.41
114	Marie, Rolain L	44,045.53	14,457.73	4,385.36
115	Martin, Maurice Leo	48,179.08	14,694.93	4,457.31
116	Matthews, Robert D	44,045.53	14,457.73	4,385.36
117	Maxon, Jessie	51,687.07	15,766.75	4,782.41
118	McArthur, Rema A	46,980.75	14,105.41	4,278.49
119	McCallum, Michael G	40,758.00	14,457.73	4,385.36
120	McCarthy, Tina E	39,326.13	14,457.73	4,385.36
121	McClure, Dallas James	50,006.27	15,230.84	4,619.86
122	McClure, Roger A	45,381.66	16,038.63	4,864.88
123	McClure, Sandra L	40,758.00	14,457.73	4,385.36
124	Mendoza, Cresenciano A	55,429.99	13,204.72	4,005.29
125	Mercredi, Margaret S	55,149.66	15,766.75	4,782.41
126	Micha, Colin M	42,323.88	7,659.49	2,323.30
127	Miller, Fred C	51,605.89	13,352.91	4,050.24
128	Moineau, Robert Lucien	45,381.66	16,038.63	4,864.88
129	Nicholls, Crystal J	51,527.49	14,694.93	4,457.31

Fund Distribution Schedule				
#	Name of USW Employee	Accepted Claim Amounts	Accepted Section 54 Claims	Distribution Amount
130	Nicholson, Jacob Ryan	39,299.89	5,815.74	1,764.05
131	O'Handley, Deborah	47,761.79	10,929.23	3,315.08
132	O'Handley, Joseph B	41,817.15	12,229.35	3,709.44
133	Pack, Justin J	43,074.75	10,339.56	3,136.22
134	Peitzsche, Ralph W	55,440.14	15,766.75	4,782.41
135	Pesonen, Harry E	55,294.90	15,766.75	4,782.41
136	Pettipas, Erin Patrice	52,442.16	12,768.77	3,873.06
137	Philpott, Ashton	44,045.53	14,457.73	4,385.36
138	Pidwerbeski, Donald C	65,164.10	18,741.94	5,684.86
139	Pimm, Trevor J	65,506.50	18,741.94	5,684.86
140	Pindera, Geoffrey L	49,574.88	13,287.65	4,030.45
141	Pittman, Jordan Myles	47,063.39	14,457.73	4,385.36
142	Pouliot, Dawn	43,310.69	14,457.73	4,385.36
143	Pouliot, Jordan D	56,016.00	13,930.68	4,225.49
144	Power, Conrad Phillip	39,151.72	9,392.45	2,848.94
145	Power, Elliot R	58,331.25	11,566.69	3,508.44
146	Rae, Neil A	53,729.97	15,476.99	4,694.52
147	Reimer, Al D	44,045.53	14,457.73	4,385.36
148	Rempel, Joshua David	48,179.08	14,694.93	4,457.31
149	Richards, Chad L	58,853.56	12,089.00	3,666.87
150	Robbins, Curtis	44,045.53	14,457.73	4,385.36
151	Roberge, Tavis	64,301.55	17,708.19	5,371.30
152	Robinson, Harold	53,729.97	15,476.99	4,694.52
153	Rosborough, Paul Philip	37,477.39	5,374.10	1,630.09
154	Rose, Tina F	39,364.28	9,776.48	2,965.43
155	Rowe, George D	47,426.46	11,155.36	3,383.68
156	Rumbolt, Karisa T	51,527.49	14,694.93	4,457.31
157	Sanders, Dave	41,696.78	3,443.80	1,044.58
158	Saul, George Karr	48,056.19	14,694.93	4,457.31
159	Schneider, Thomas	34,232.59	1,475.45	447.54
160	Schofield, Timmothy K	47,847.99	11,015.43	3,341.23
161	Sebastian, Deanna	47,189.65	10,357.09	3,141.54
162	Sevigny, Brent Adrian	60,119.64	18,442.19	5,593.94
163	Sherburne, Wayne	51,527.49	14,694.93	4,457.31
164	Simington, Robert G	65,506.53	18,741.97	5,684.87
165	Slaney, Jamie M	47,521.53	7,848.14	2,380.52
166	Smathers, Thomas L	41,733.16	11,004.32	3,337.86
167	Smith, Timothy W	7,226.59	7,226.59	2,191.99
168	Snodgrass, Walter H	49,839.10	9,046.16	2,743.91
169	Splinter, Christopher A	53,203.74	15,230.84	4,619.86
170	Stangoe, Ward Ian	50,766.42	17,992.58	5,457.56
171	Steele, Glenn	42,236.56	2,563.17	777.47
172	Stern, Matt J	44,045.53	14,457.73	4,385.36

#	Name of USW Employee	Accepted Claim Amounts	Accepted Section 54 Claims	Distribution Amount
Fund Distribution Schedule				
173	Stevenson, Tyler R	45,884.22	13,149.03	3,988.40
174	Stirling, Philip C	42,617.90	2,944.51	893.14
175	Stjepanovic, Dennis S	43,758.68	4,008.80	1,215.96
176	Strand, Ole C	46,657.32	5,563.50	1,687.54
177	Strand, Tonia	41,550.01	4,717.45	1,430.91
178	Strang, Daniel V	49,645.32	5,371.95	1,629.43
179	Strang, Jeffrey M	44,045.53	14,457.73	4,385.36
180	Strong, Joseph	50,951.98	9,858.16	2,990.21
181	Tackaberry, Brian J	55,796.50	9,031.94	2,739.59
182	Taylor, Bruce	59,036.21	16,948.10	5,140.75
183	Taylor, Christopher S	40,394.37	3,898.91	1,182.63
184	Taylor, Eric	55,695.24	16,021.85	4,859.79
185	Taylor, Scot C	47,922.42	9,669.44	2,932.96
186	Thurston, Jason K	39,733.81	14,457.73	4,385.36
187	Torraville, Jared D	46,512.69	8,259.71	2,505.36
188	Torraville, Jordan S	58,776.11	14,826.90	4,497.34
189	Traverse, Fraser T	48,432.51	12,294.93	3,729.33
190	Van Basten, Jaylene Ashley	40,361.79	7,756.13	2,352.61
191	Verge, Hedley D	48,949.35	2,184.79	662.70
192	Verge, Holi	44,045.53	14,457.73	4,385.36
193	Wagner, Stephen Anthony	36,730.89	15,566.29	4,721.61
194	Walter, Richard	50,591.96	10,918.57	3,311.85
195	Warner, James L	59,936.45	15,663.08	4,750.97
196	Watt, Braden	47,980.97	11,418.09	3,463.37
197	Watt, Richard S	53,729.97	15,476.99	4,694.52
198	Wied, Brian Daniel	47,063.39	14,457.73	4,385.36
199	Williams, Don	55,695.24	16,021.85	4,859.79
200	Wilson, Keith O	49,049.53	16,038.63	4,864.88
201	Woods, Robert Kevin	48,179.08	14,694.93	4,457.31
202	Worthington, Richard Nicholas	51,310.75	15,766.75	4,782.41
203	Yandeau, Lance T	49,936.99	15,230.84	4,619.86
204	York, Charles C	14,016.14	14,016.14	4,251.41
205	Zavaglia, Geno	48,786.16	4,674.87	1,417.99
206	Zimmer, Justin A	33,075.62	11,830.99	3,588.61
207	Zunti, Conrad	44,820.38	3,726.56	1,130.35
Total		**9,879,865.46**	**2,573,695.78**	**780,660.61**

TAB 13

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

SECOND MONITOR'S CERTIFICATE

1. Pursuant to an Order of the Court dated August 16, 2016 (the "**Approval and Vesting Order**"), the Court approved the Asset Purchase Agreement dated August 8, 2016 (the "**Sale Agreement**") between Walter Energy Canada Holdings, Inc., and the other entities listed in Schedule A thereto (collectively, the "**Seller**"), Conuma Coal Resources Limited (the "**Purchaser**") and the Guarantors party thereto (collectively, the "**Parties**"), and ordered that upon the Seller's and the Monitor's receipt from the Purchaser of a certificate certifying that (i) all Transfer Approvals and Permits contemplated under the Sale Agreement and any Ancillary Agreements have been transferred or issued, as applicable, to the Purchaser, and (ii) there have been no incidents, violations or occurrences during the term of the Contract Mining Agreement that may give rise to a Claim against the Seller (the "**Purchaser's Certificate**"), the Monitor shall thereafter, and following satisfaction by the Monitor that there have been no incidents, violations or occurrences during the term of the Contract Mining Agreement that may give rise to a claim by the Seller against the Purchaser, deliver this second Monitor's certificate to the Purchaser certifying that it received the Purchaser's Certificate and the Indemnification Security Interest Charge shall be extinguished.

2. Pursuant to an Order of the Court dated December 7, 2016, each of the Petitioners (with the exception of Cambrian Energybuild Holdings ULC ("**Cambrian**")) was added as a Petitioner in these *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings and pursuant to an Order of the Court dated December 21, 2016, the CCAA proceedings in respect of the Seller (with the

exception of Cambrian) was terminated, all right, title and interest of the Seller in the Sale Agreement was transferred to the Petitioners and each of the Petitioners continued to have the benefit of the Indemnification Security Interest Charge as set out in the Approval and Vesting Order.

3. Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Sale Agreement.

THE MONITOR HEREBY CERTIFIES as follows:

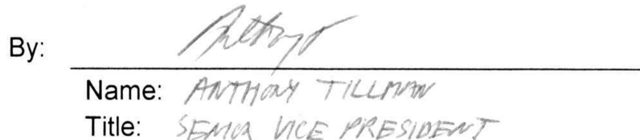
(a) The Monitor has received the Purchaser's Certificate;

(b) The Monitor is not aware of any incidents, violations or occurrences during the term of the Contract Mining Agreement that may give rise to a claim by the Seller or the Petitioners against the Purchaser; and

(c) The Indemnification Security Interest Charge shall be extinguished.

DATED at the City of Vancouver, in the Province of British Columbia, this 17th day of March 2017.

KPMG INC., in its capacity as the Court-appointed Monitor of New Walter Energy Canada Holdings, Inc., *et al.* and not in its personal or corporate capacity



By: ______________________

Name: ANTHONY TILLMAN
Title: SENIOR VICE PRESIDENT

TAB 14

This is the 10th Affidavit of
William E. Aziz in this case and
was made on May 18, 2017

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 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

AFFIDAVIT

I, **WILLIAM E. AZIZ**, Chief Restructuring Officer, of the Town of Oakville, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the President of BlueTree Advisors Inc. ("**BlueTree**") which has been retained to provide my services as Chief Restructuring Officer ("**CRO**") to the Petitioners (the "**New Walter Canada Group**"). As such I have personal knowledge of the facts hereinafter deposed, except where such facts are stated to be based upon information and belief, and where so stated I do verily believe the same to be true.

2. This Affidavit is made in support of a motion by the New Walter Canada Group under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "**CCAA**") seeking the following orders:

(a) An Order authorizing but not requiring Cambrian Energybuild Holdings ULC ("**Cambrian**") to advance up to a further £350,000 (for an aggregate maximum of £600,000) to the members of the Walter UK Group, on a secured basis, to provide working capital for Energybuild Ltd., and approving, *nunc pro tunc*, any steps taken in respect of such advances prior to the date of the Order.

(b) An Order extending the stay of proceedings in respect of the New Walter Canada Group to September 29, 2017.

3. I was initially retained by Walter Energy Canada Holdings, Inc. ("**Walter Energy Canada**") to provide my services as CRO to Walter Energy Canada, its direct and indirect subsidiaries and affiliates, and the partnerships listed on Schedule "C" to the Order of this Honourable Court made on December 7, 2015 (the "**Initial Order**") (collectively, the "**Old Walter Canada Group**"). I was retained pursuant to an engagement letter dated December 30, 2015, as amended in response to certain requests made by Old Walter Canada Group stakeholders. BlueTree was appointed as CRO of the Old Walter Canada Group pursuant to the Order of this Honourable Court made on January 5, 2016 (the "**SISP Order**").

4. My engagement as CRO of the Old Walter Canada Group (other than as CRO of Cambrian) was terminated on December 15, 2016, when the entities comprising that group filed for bankruptcy.

5. The companies comprising the New Walter Canada Group (other than Cambrian) were incorporated on December 8, 2016, pursuant to the authorization granted in paragraph 5 of the Order of this Honourable Court made on December 7, 2016 (the "**CCAA Procedure Order**"). Each such company became a Petitioner in these CCAA proceedings and subject to the CCAA Charges (as defined in the CCAA Procedure Order), and I became CRO of each new company in the New Walter Canada Group, when the new companies in the New Walter Canada Group were formed.

6. Capitalized terms used but not defined in this Affidavit have the meanings given to such terms in the affidavits I have previously sworn in these CCAA proceedings.

7. The information in this Affidavit is arranged under the following headings:

I. Activities Since Last Update 3

II. Approval of Further Advances to the Walter UK Group 7

III. Stay Extension 8

I. ACTIVITIES SINCE LAST UPDATE

A. Potential Sale of Belcourt Saxon Limited Partnership and Related Assets

8. The Old Walter Canada Group owned a 50 percent interest in Belcourt Saxon Limited Partnership ("**BelSax LP**") and Belcourt Saxon Coal Ltd. ("**BelSax GP**"), which has since been transferred to the New Walter Canada Group pursuant to the CCAA Continuity and Vesting Order. The other 50 percent interest in BelSax LP and BelSax GP is owned by the Peace River Coal Inc. ("**PRC**"), a third party not affiliated with the New Walter Canada Group. It is affiliated with Anglo American Exploration (Canada) Ltd.

9. The Belcourt Saxon Limited Partnership Agreement ("**BelSax LPA**") contains certain rights of first refusal (the "**ROFR**") and certain tag along rights in respect of a sale of a limited partner's interest in BelSax LP, BelSax GP and certain related assets (collectively, the "**BelSax Assets**"). PRC has the benefit of the ROFR with respect to any sale of the BelSax Assets by the New Walter Canada Group.

10. As described in my third affidavit sworn on August 9, 2016 in these proceedings (the "**Third Aziz Affidavit**"), the Old Walter Canada Group, as vendors, and Conuma Coal Resources Limited ("**Conuma**"), as purchaser, entered into an agreement made August 8, 2016 (the "**Conuma APA**") for the sale of a majority of Walter Energy Canada's assets (the "**Conuma Transaction**"). Conuma sought to acquire the Old Walter Canada Group's BelSax Assets as well. The Conuma APA contained the an option (the "**Belcourt Put Option**"), pursuant to which Conuma would acquire the BelSax Assets if the Old Walter Canada Group was able to satisfy or obtain a waiver of the ROFR

prior to the date 60 days following the Closing Date (as defined in the Conuma APA). The unredacted Conuma APA that sets out the purchase price for the Old Walter Canada Group's BelSax Assets is sealed pursuant to an Order of this Honourable Court dated August 15, 2016.

11. Conuma extended the period for the exercise of the Belcourt Put Option while the Old Walter Canada Group sought a waiver of the ROFR from PRC. To date, no waiver has been obtained.

12. On February 1, 2017, Conuma materially increased the purchase price offered to acquire the New Walter Canada Group's BelSax Assets and made other significant changes to its offer. Subsequently, the New Walter Canada Group engaged in negotiations with Conuma to clarify and document the revised offer. During this process, the New Walter Canada Group obtained a further improved purchase price for the BelSax Assets and other improvements to the offer. The New Walter Canada Group and Conuma negotiated a third party offer for the BelSax Assets that is intended to satisfy all the requirements for such an offer set out in the BelSax LPA. The New Walter Canada Group received the executed third party offer from Conuma on April 24, 2017, and signed an indication of its willingness to accept that third party offer on April 27, 2017.

13. The New Walter Canada Group's indication of its willingness to accept Conuma's third party offer triggered certain rights of PRC under the BelSax LPA, including the ROFR. On May 2, 2017, the New Walter Canada Group delivered (i) Conuma's offer; (ii) a corresponding offer to sell the BelSax Assets to PRC on substantially the same terms, as required by the BelSax LPA; and (iii) an alternative request that PRC waive the ROFR. This triggered a 45-day review period under the BelSax LPA in respect of the sale of the BelSax Assets, at the conclusion of which the New Walter Canada Group will be permitted to sell the BelSax Assets to Conuma unless PRC agrees to exercise its ROFR. PRC has not yet responded to the third party offer.

14. Following the conclusion of the review period, the New Walter Canada Group anticipates seeking an order from this Honourable Court approving the sale of the BelSax Assets either to Conuma or to PRC and vesting the BelSax Assets in the purchaser.

B. Termination of New Walter Canada Group's Interests in Twin Sisters Nursery Limited Partnership

15. Walter Canadian Coal Partnership ("**WCCP**"), a member of the Old Walter Canada Group, was party to two agreements in relation to the Twin Sisters Native Plants Nursery Limited Partnership ("**Twin Sisters LP**"): (i) a Shareholders' Agreement dated April 11, 2013 with the Saulteau First Nation ("**Saulteau**"), the West Moberly First Nation ("**West Moberly**"), and Twin Sisters Native Plants Nursery General Partner Inc. ("**Twin Sisters GP**"); and (ii) a Side Agreement dated April 11, 2013 with Saulteau, West Moberly, and Twin Sisters GP. WCCP's interests were transferred to New Walter Canadian Coal Corp. ("**New WCCC**").

16. Among other reasons, WCCP was party to these agreements in connection with a deed of gift in respect of a parcel of land near Chetwynd, BC. Pursuant to the deed of gift, WCCP gave the parcel of land to Twin Sisters GP in order for a plant nursery to be constructed to supply plants in connection with mine remediation efforts. WCCP retained an option to repurchase the parcel of land in certain circumstances. This option to repurchase was sold to Conuma as part of the Conuma Transaction.

17. As a result of the sale of the option to repurchase (and certain subsequent transactions) and these CCAA proceedings, the New Walter Canada Group had no further reason to be party to the agreements in respect of the Twin Sisters LP. The Walter Canada Group was asked by counsel to Twin Sisters GP to enter into agreements to terminate its interests in the Shareholders' Agreement and the Side Agreement. Therefore, New WCCC entered into (i) a Termination Agreement, made as of February 2, 2017, with Saulteau, West Moberly, and Twin Sisters GP; and (ii) a Termination and Amending Agreement, made as of February 2, 2017, with Saulteau and West Moberly. These agreements terminated New WCC's interests in the Shareholders' Agreement and the Side Agreement, respectively, and provided customary mutual releases in respect of matters related to Twin Sisters LP and Twin Sisters GP.

C. Update Regarding Other Matters

18. Since January 12, 2017, the date of the ninth affidavit I swore in these CCAA proceedings, the New Walter Canada Group has:

    (a) attended to post-closing matters in respect of the Residual Asset Sale Transaction (as described in my fifth affidavit sworn in these proceedings on December 21, 2016);

    (b) attended to post-closing matters in respect of the Conuma Transaction, including, among other things, obtaining a certificate from Conuma certifying that all permits and other approvals contemplated under the Conuma APA have been transferred to Conuma or otherwise obtained and that there were no incidents, violations or occurrences that may have given rise to a claim by the New Walter Canada Group against Conuma under the Contract Mining Agreement. The Contract Mining Agreement therefore terminated in accordance with its terms and the Monitor issued its second certificate to Conuma to extinguish the Indemnification Security Interest Charge granted over certain property vested in Conuma pursuant to the Approval and Vesting Order of this Honourable Court to secure Conuma's indemnification obligations under the Contract Mining Agreement; and

    (c) arranged for directors and officers liability insurance for the New Walter Canada Group to be extended to June 30, 2017

19. In addition, since January 12, 2017, the New Walter Canada Group has attended to various matters related to the claims process established by the order of this Honourable Court made on August 16, 2016 (the "**Claims Process**"), including the following:

    (a) Settling the claim of Joseph Strong, a former employee at the Wolverine Mine who had been disputing the disallowance of his claim by the Monitor.

    (b) Reaching an agreement with United Steelworkers, Local 1-424 on dismissing the petitions for judicial review as discussed in greater detail in the Ninth Report of the Monitor dated March 10, 2017, and on a process for the Monitor to receive funds held in trust by counsel

for the Steelworkers and to disburse those funds to members of the Steelworkers with allowed claims under Section 54 of the B.C. *Labour Relations Code*, R.S.B.C. 1996, c. 44.

(c) Engaged with parties holding disputed claims regarding the process for the advancing their claims.

II. APPROVAL OF FURTHER ADVANCES TO THE WALTER UK GROUP

20. Pursuant to the authorization granted by the Order of this Honourable Court dated December 21, 2016, Cambrian loaned £250,000 to the Walter UK Group, on a secured basis, to provide working capital to Energybuild Ltd. while efforts were made to sell the Walter UK Group or its assets. All the members of the Walter UK Group have guaranteed the loan and have granted security for those guarantees.

21. As described in my eighth affidavit sworn on December 20, 2016 in these proceedings (the "**Eighth Aziz Affidavit**"), Energybuild Ltd. is the operating company that owns and operates the Aberpergym underground coal mine located at the Neath Valley in Wales. The mine is currently in care and maintenance.

22. The New Walter Canada Group and the directors of the Walter UK Group have been analyzing Energybuild Ltd.'s business and seeking opportunities to sell Energybuild Ltd. and its affiliates or their assets. As described in the Eighth Aziz Affidavit, an interested party has come forward regarding a potential sale of Energybuild Ltd. 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 Ltd. and any of its affiliates that may be acquired.

23. The New Walter Canada Group and the Walter UK Group have engaged in discussions with the relevant persons in respect of their claims in an effort to satisfy the interested party's requests. These discussions are ongoing.

24. As a result of the interested party's conditions and other matters in these CCAA proceedings, including litigation in respect of the Claims Process, the additional month that was originally forecast for the completion of the negotiations of a sale of Energybuild Ltd. has proven to be overly optimistic. Further time is needed to negotiate with the interested party and other stakeholders in an effort to achieve a resolution that is in the best interests of the New Walter Canada Group, the Walter UK Group and their respective stakeholders.

25. The New Walter Canada Group has been provided with cash flow forecasts for Energybuild Ltd. that indicate a cash need of approximately £350,000 through to the end of the proposed extended Stay Period. As such, the New Walter Canada Group is seeking this Honourable Court's authorization to advance up to an additional £350,000 (for an aggregate total of £600,000) on a secured basis to the Walter UK Group to fund Energybuild Ltd.'s working capital needs while negotiations regarding a potential sale continue.

26. The New Walter Canada Group anticipates completing the sale of Energybuild Ltd. or finding another option for the Walter UK Group prior to the conclusion of the proposed extended Stay Period, but is seeking authorization to make such further secured advances as the New Walter Canada Group determines, in the exercise of their business judgement, are in the best interests of Cambrian and the other members of the New Walter Canada Group up to an aggregate maximum of £600,000. No additional funds will be advanced unless the New Walter Canada Group determines that such further advance will be in the best interests of Cambrian and the other members of the New Walter Canada Group.

III. STAY EXTENSION

27. This Honourable Court granted a stay of proceedings in the Initial Order, until January 6, 2016 or such later date as this Honourable Court may order (the "**Stay Period**"). On January 5, 2016, this Honourable Court extended the Stay Period until and including April 5, 2016. On March 30, 2016, this Honourable Court extended the Stay Period until and including June 24, 2016. On June 24, 2016, this Honourable Court extended the Stay Period until and including August 19, 2016. On

August 16, 2016, this Honourable Court extended the Stay Period until and including January 17, 2017. On January 16, 2017, this Honourable Court extended the Stay Period until and including May 31, 2017.

28. The New Walter Canada Group is requesting an extension of the Stay Period until and including September 29, 2017. This extension is being requested to allow the New Walter Canada Group to continue the Claims Process (including any further adjudication of the 1974 Plan's claim), to move forward with the sale of the BelSax Assets, and to address matters relating to the Walter UK Group.

29. From my review of the current cash flow projections, I do verily believe that the New Walter Canada Group will have sufficient operating cash to continue operations during the proposed extended Stay Period.

30. The New Walter Canada Group has been proceeding in good faith and with due diligence in these proceedings, as outlined above.

31. It is my understanding that the Monitor supports the extension of the Stay Period and will file a report attaching a cash flow forecast that demonstrates, subject to the assumptions more fully set out in the report, that the New Walter Canada Group has sufficient liquidity to continue its operations as currently conducted through to the end of the proposed extended Stay Period.

32. It is in the best interests of the New Walter Canada Group and all its stakeholders that the Stay Period be extended to September 29, 2017 to enable the New Walter Canada Group to complete the Claims Process, move forward with the sale of the BelSax Assets, and deal with matters relating to the Walter UK Group.

SWORN BEFORE ME at Toronto, in the Province of Ontario, on May 18, 2017.	)))	
Commissioner for Taking Affidavits and Notary Public in the Province of Ontario Patrick Riesterer	)))	WILLIAM E. AZIZ

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 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

AFFIDAVIT #10 OF WILLIAM E. AZIZ

OSLER HOSKIN & HARCOURT LLP
Barristers & Solicitors
1055 West Hastings Street
Suite 1700, The Guinness Tower
Vancouver, BC V6E 2E9

Tel. No. 416.862.4924
Fax No. 416.862.6666

Client Matter No. 1164807

TAB 15

Court of Appeal File No. CA44448
Supreme Court File No. S1510120
Supreme Court Registry Vancouver

COURT OF APPEAL

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 WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

(APPELLANT)

MEMORANDUM OF ARGUMENT OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST FOR LEAVE TO APPEAL AND FOR A STAY OF PROCEEDINGS OR EXECUTION

DENTONS CANADA LLP
Barristers and Solicitors
20th Floor, 250 Howe Street
Vancouver, BC V6C 3R8
Telephone: 604-687-4460

Craig P. Dennis, Q.C, John R. Sandrelli,
Owen James, Tevia Jeffries,
Counsel for the United Mine Workers of America 1974 Pension Plan and Trust

PART I: FACTS

A. OVERVIEW

1. This application for leave to appeal involves a discrete question of law: under Canadian conflict of law rules, does Canadian or U.S. substantive law apply to the claim of an American creditor against estate assets valued at approximately $63 million? The judge below held that Canadian law applies. For the reasons that follow, this question of law warrants appellate review.

2. The U.S. law in issue is the *Employee Retirement Income Security Act of 1974.* [1] As stated by the judge below, this case is "the first time that a Canadian court [has] considered whether ERISA applies in Canada and in these circumstances."[2] The same was recognized in the submission in the court below of the United Steelworkers of America, Local 1-424 (the "**Steelworkers**"). The written argument of the Steelworkers described this case as "an important case for the parties and for the legal system which raises [a] significant legal issue of first instance".[3]

3. The holding of the judge below rested on a conflict of law analysis. That analysis required her, at the first step, to characterize the claim at issue. As she acknowledged, there is no "case authority involving the type of characterization exercise involved here."[4] The judge distinguished the cases supporting the applicant's characterization, which would have characterized the claim under the law of obligations. This characterization recognizes that the essential nature of the claim is to enforce the terms of a contract. The chambers judge instead opted for the characterization proposed by the respondents, namely that the claim involved a challenge to the status and separate legal personalities of entities within the so-called Walter Canada Group. In so doing she was able to cite only one trial level decision in support, an authority which the judge herself described as "limited" since it arose "in the context of a constitutional challenge" and not a choice of law analysis.[5]

4. It is appropriate to grant leave to appeal for the following reasons:

   (1) *The appeal is of significance to the practice*: As noted, the Steelworkers, a respondent to this application, described the case as important for the legal

---

[1] *Employee Retirement Income Security Act of 1974*, as amended [**ERISA**], 29 U.S.C. §§ 1001 et seq.
[2] *Walter Canada Holdings, Inc. (Re)*, 2017 BCSC 709 at para. 4 ["**Reasons for Judgment**"].
[3] Written Submissions of the Steelworkers on Summary Trial Application, filed December 19, 2016, at para. 1 ["**Written Submissions of the Steelworkers**"].
[4] Reasons for Judgment at para. 140.
[5] Reasons for Judgment at para. 142.

system and as raising a significant legal issue of first impression. Academic and industry professionals likewise have identified the need for guidance on the issue.

(2) *The point raised is of significance to the action itself*: The extent of recovery by the applicant, on the one hand, or the Steelworkers and other creditors, on the other, turns on the outcome of these proceedings. As noted, the Steelworkers acknowledged in the court below the importance of the case to the parties.

(3) *The appeal is prima facie meritorious*: The appeal involves a question of law for which, as noted, there is no case authority on point. The only authority cited by the judge below in support of her characterization is one that she herself described as "limited." As detailed below, the chambers judge made errors in her legal analysis. In particular, the passage from *Castel & Walker* quoted by the judge in her reasons omitted the passage of most relevance to this case: "arguably, piercing the corporate veil should be characterized as a function of the dispute and not of the status of the corporation."[6] She otherwise failed to apply or misapplied core principles of the conflict of law analysis necessary to determine the issue.

(4) *The appeal will not unduly hinder the progress of the action*: The issue arose in the context of a proceeding under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceedings**").[7] However, there are ongoing matters in the CCAA Proceedings with which the appeal will not interfere. The applicant also seeks an order that the appeal be heard on an expedited basis". If such an order is granted, prejudice in delaying the distribution will be ameliorated.

B. ORDER UNDER APPEAL

5. The United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**") seeks leave to appeal the order of the Honourable Madam Justice Fitzpatrick. That order granted a declaration that the 1974 Plan's claim under ERISA (the "**1974 Plan Claim**") is governed by Canadian law and thus invalid (the "**Order**").

---

[6] Janet Walker, *Castel & Walker: Canadian Conflict of Law,* 6 ed., (Toronto: LexisNexis, 2005) (loose-leaf Rel. 60-2/2017) at 3-1 ["***Castel & Walker***"].
[7] R.S.C. 1985, c. C-36 [**CCAA**]; *Walter Energy Canada Holdings Inc. (Re)*, (7 December 2016), Vancouver (S-1510120) ["**Initial Order**"].

6. The applicability of foreign law in a Canadian court is determined, *inter alia*, according to the characterization of the claim. Where facts exist such that U.S. law is the "proper law of the obligation", as the 1974 Plan submits they do here, a Canadian entity can be liable under a foreign law. Indeed, it is a basic principle of insolvency law that a foreigner with a proven foreign claim stands in the same position as a domestic creditor with a proven domestic claim.[8] However, the chambers judge refused to characterize the claim under the law of obligations, limiting the issue to one of corporate personality and finding that the law to be applied was that of the jurisdiction of the petitioners' incorporation, i.e. B.C. or Alberta.

c. THE PARTIES

7. The 1974 Plan is a multiemployer benefit plan.[9] Employer obligations to the 1974 Plan are governed by collective bargaining agreements (the "**CBAs**").[10] The 1974 Plan's beneficiaries include approximately 88,000 retired or disabled coal miners and their spouses and dependents, all of whom look to the 1974 Plan for pension benefits that the miners' employers promised to provide.[11]

8. A participating employer of the 1974 Plan was Jim Walter Resources Inc. ("**Walter Resources**"), an American company and wholly-owned subsidiary of Walter Energy, Inc. ("**Walter Energy**"), another American company.[12] Walter Resources was a party to a CBA, under which it assumed pension funding obligations towards the 1974 Plan in accordance with the pension documents and ERISA.[13] Prior to commencing proceedings under Chapter 11 of Title 11 of the United States Code (the "**Chapter 11 Proceedings**"), Walter Energy was the holding company of a group of companies which ran coal mining operations in the U.S., Canada and the U.K. (the "**Walter Group**").[14]

9. 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 are the successors in interest to Walter Energy's wholly-

---

[8] *Halsbury's Laws of England, Conflict of Laws,* vol. 8(1), 4th ed. (Reissue) (London, UK: Butterworths, 1996) at 710, para. 980.

[9] Reasons for Judgment at paras. 51-52.

[10] Reasons for Judgment at paras. 53-54.

[11] Reasons for Judgment at para. 55.

[12] Reasons for Judgment at paras. 41 and 57. Walter Resources is now known as NEW WEI 13, Inc. Walter Energy is now known as New WEI, Inc.

[13] Reasons for Judgment at paras. 54 and 57.

[14] Joint Proposal of the Walter Energy Canada Group, filed December 19, 2016: 7th Affidavit of Miriam Dominguez, sworn December 20, 2016, Exhibit "A".

owned Canadian subsidiaries (the "**Walter Canada Group**").[15] The 1974 Plan alleges, *inter alia*, that the Walter Canada Group is controlled by Walter Energy from Birmingham, Alabama, with the management team and key decision makers of the Walter Canada Group entities based there.[16]

D. THE 1974 PLAN CLAIM

10. On July 15, 2015, Walter Energy and certain U.S. affiliates (the "**U.S. Debtors**") commenced the Chapter 11 Proceedings. In the Chapter 11 Proceedings, the U.S. Bankruptcy Court granted the U.S. Debtors authority to reject the CBA.[17] Such rejection, *inter alia*, gave rise to withdrawal liability to Walter Resources for Walter Resources' proportionate share of the employer's unfunded vested pension liabilities.[18] By current estimates the withdrawal liability is in excess of US$933 million.[19]

11. Under ERISA, an employer's withdrawal liability extends to all entities that are at least 80% owned by a common parent corporation, wherever incorporated (i.e. the "controlled group").[20] The Walter Canada Group and the Steelworkers agreed that it could be assumed that the Walter Canada Group entities were within the "controlled group" of Walter Energy.[21] As a result, to the extent U.S. law is applicable to the 1974 Plan Claim, the 1974 Plan Claim is valid against each of the entities in the Walter Canada Group.

12. In Canada the Walter Canada Group commenced the CCAA Proceedings.[22] Through the CCAA Proceedings, the Walter Canada Group has sold its Canadian mining assets and is pursuing a sale of its U.K. mining assets in the short term.[23] The Walter Canada Group

---

[15] ***Walter Energy Canada Holdings Inc. (Re)***, (7 December 2016), Vancouver (S-1510120) ["**New Walter Group Procedure Order**"]. The legal analysis below refers to the Walter Canada Group. To the extent the 1974 Plan Claim has been deemed to be against the "New Walter Canada Group", all references to the Walter Canada Group apply equally to the New Walter Canada Group.
[16] The Amended Notice of Civil Claim of the 1974 Plan, filed November 9, 2016 at paras. 34, 88 and 91.
[17] Reasons for Judgment at para. 76.
[18] Reasons for Judgment at para. 73.
[19] Reasons for Judgment at para. 80.
[20] Reasons for Judgment at para. 89, citing 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 414(b); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c).
[21] Reasons for Judgment at paras. 91-92.
[22] Initial Order.
[23] Eighth Report of the Monitor, KPMG Inc., dated January 12, 2017, at paras. 34, 57-60 and 62 ["**Eighth Monitor's Report**"]; Second Monitor's Certificate, dated March 17, 2017.

no longer owns or maintains an ongoing mining business in Canada and all claims of creditors have attached to the proceeds of sale. [24]

13. Together with the sales process, the Walter Canada Group implemented a claims process.[25] Under this claims process the 1974 Plan was authorized to file and serve a Notice of Civil Claim, which was followed by an exchange of pleadings. It was in these proceedings that Walter Canada Group filed their notice of application seeking a declaration, *inter alia*, that the 1974 Plan Claim is governed by Canadian substantive law (the "**Application**").

E. POSITIONS OF THE PARTIES AND THE ORDER

14. The first issue raised by the Walter Canada Group on the Application was whether the 1974 Plan Claim is governed by Canadian or U.S. substantive law. The core issue that presented was whether the 1974 Plan Claim is more appropriately characterized as a claim akin to contract than as an issue of corporate status or personality. The Walter Canada Group and the Steelworkers argued that the 1974 Plan Claim is properly characterized as an issue of legal corporate personality. The 1974 Plan argued that the 1974 Plan Claim concerned the law of obligations as it is essentially a right to enforce against the Walter Canada Group the legal obligations of Walter Resources to the 1974 Plan. ERISA, in the 1974 Plan's submissions, confers a right of action against entities that were not themselves parties to the contract to which the claim relates.

15. In reasons issued May 1, 2017, the chambers judge found that the 1974 Plan Claim was to be characterized as an issue of separate legal personality, that Canadian substantive law applied, and that the 1974 Plan Claim was thus invalid.[26]

PART II: POINTS IN ISSUE

16. The issues before the Court are:

(a) Whether the 1974 Plan should be granted leave to appeal the Order;

(b) If so, whether the Court should grant an order that the appeal be heard on an expedited basis; and

[24] *Walter Energy Canada Holdings Inc. (Re),* (16 August 2016), Vancouver (S-1510120) (BCSC) ["**Approval and Vesting Order**"].

[25] *Walter Energy Canada Holdings Inc. (Re),* (16 August 2016), Vancouver (S-1510120) (BCSC) ["**Claims Process Order**"].

[26] Reasons for Judgment at paras. 145-46, 177 and 182.

(c) Whether proceedings upon or execution of the Order should be stayed pending the outcome of the appeal.

PART III: ARGUMENT

A. THE TEST FOR LEAVE TO APPEAL

17. Section 13 of the CCAA provides that an order made under the Act may be appealed on leave from, *inter alia*, a judge of the court to which the appeal lies.

18. Leave to appeal from the Order should be granted where the Court is satisfied that there exists "serious and arguable grounds that are of real and significant interest to the parties".[27] This Court has applied a four-pronged test when granting leave to appeal in CCAA matters, namely: (a) whether the point on appeal is of significance to the practice; (b) whether the point raised is of significance to the action itself; (c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (d) whether the appeal will unduly hinder the progress of the action.[28]

19. Procedurally the issue arises in the context of a CCAA proceeding. However, the legal issue raised by this appeal is one of general commercial law. It does not involve bankruptcy or insolvency. The Order determined the 1974 Plan's right to advance the 1974 Plan Claim as a matter of law. It was not discretionary and did not involve a balancing of interests. Further, there is no ongoing, dynamic restructuring of the Walter Canada Group to protect. The Walter Canada Group's business has been sold and the only issue remaining with respect to the 1974 Plan Claim is the distribution of the Walter Canada Group's sale proceeds.

20. Factors which sometimes militate against granting leave from CCAA orders thus do not apply in this case. [29] The resolution of the discrete point of law raised by this appeal – the choice of law between Canadian and American substantive law – did not involve a balancing of competing interests by the supervising judge or intimate knowledge of the reorganization process. Indeed, the result of the chambers judge's legal analysis was that the sole determinative fact was the place of incorporation or organization of certain entities – that fact was not in dispute and not affected by the procedural setting in which the legal issue arose (i.e. in CCAA proceedings).

---

[27] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323 at para. 7.
[28] *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 17 [***Edgewater***].
[29] *Ibid* at para. 25.

(1) The Point on Appeal Is of Significance to the Practice

21. All counsel at the Application agreed that no court has considered whether ERISA applies in Canada in this context.[30] Given this absence of authority, and the substantial amounts of the claims, academics and industry professionals have recognized that claims like the 1974 Plan Claim place hurdles to restructuring negotiations.[31] The question of ERISA's enforceability in Canada is thus significant to the practice. The same was recognized by the Steelworkers who, as addressed above, wrote in their submissions that the proceedings addressed "an important case for the parties and for the legal system which raises [a] significant legal issue of first instance".[32]

(2) The Point on Appeal Is of Significance to the Parties

22. The 1974 Plan Claim is the largest third-party claim against the Walter Canada Group. If valid, most of the proceeds of sale of the business of the Walter Canada Group will be paid to the 1974 Plan. If invalid, it is anticipated that all unsecured claims against the Walter Canada Group filed by unrelated parties will be paid in full.[33] In addition, the successor to Walter Energy will be paid approximately $40 million pursuant to a hybrid debt transaction under which it transferred approximately $2 billion to Canada Holdings. Those funds were transferred from Walter Energy to purchase the companies which became the Walter Canada Group.[34]

23. The 1974 Plan Claim is the only opportunity that the 1974 Plan has to recover funds in respect of the nearly US$1 billion in withdrawal liability owed by the Walter Energy Group.[35] The inability of the Walter Group to satisfy its withdrawal liability obligation has resulted in a substantial loss of funding to the 1974 Plan.[36] Because of the impact of the 2008/2009 financial crisis and the severe downturn in the coal industry, the 1974 Plan is expected to become insolvent in six to seven years.[37] Recovering on its claim in these proceedings will ameliorate those difficulties.

24. Accordingly, the point in issue is significant to the 1974 Plan and to the Steelworkers as it will determine the extent of recovery for their members under their respective

---

[30] Reasons for Judgment at para. 4; see also Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013) at 705-09.

[31] Janis P. Sarra, "Maneuvering through the Insolvency Maze -- Shifting Stakeholder Identities and Implications for CCAA Restructurings" (2011) 27 B.F.L.R. 155 at 175-76.

[32] Written Submissions of the Steelworkers at para. 1.

[33] Reasons for Judgment at para. 84.

[34] Reasons for Judgment at para. 84.

[35] Reasons for Judgment at para. 85.

[36] Stover Affidavit at paras. 95-96.

[37] Reasons for Judgment at para. 61; see also Stover Affidavit at paras. 50 and 72.

claims against the Walter Canada Group. The recovery for all other creditors is also directly affected.

(3) The Appeal Is *Prima Facie* Meritorious

25. Where leave to appeal is sought the proposed appeal must have sufficient merit to warrant scrutiny by a division of this Court. The question is not whether the appeal will succeed but whether the points raised are arguable or "not frivolous".[38]

26. Leave to appeal will also be more readily granted in CCAA proceedings where, as here, the dispute could have arisen outside of the CCAA context and the applicant would have had an appeal as of right.[39]

(a) The Chambers Judge Erred in Her Choice of Law Analysis

27. Where a court is asked to apply foreign law it must identify the most appropriate law to govern the issue. To do so the court follows a three-part process: (1) characterize the question or issue, (2) identify the appropriate choice of law rule based on that characterization, and (3) apply the connecting factor indicated by the appropriate choice of law rule.[40]

(i) The Chambers Judge Erred in Characterizing the 1974 Plan Claim as Concerning the Status and Legal Personality of the Entities within the Walter Canada Group

28. As noted above, a key dispute between the parties on the Application was the proper characterization of the 1974 Plan Claim. The 1974 Plan argued that the correct characterization of the claim for conflict of law purposes is as a claim in contract. The respondents, on the other hand, argued that the proper characterization of the claim is as a claim implicating the status and legal personalities of the entities within the Walter Canada Group.

29. The chambers judge adopted the characterization advanced by the respondents. The 1974 Plan submits that the chambers judge erred in this characterization.

30. The 1974 Plan Claim against the Walter Canada Group arises because Walter Resources was a contributing employer to the 1974 Plan under the terms of a CBA. The claim exists because Walter Resources is a signatory to that contract. What ERISA grants the 1974 Plan is essentially a right to enforce against the Walter Canada Group the contractual

---

[38] *Edgewater* at para. 30.

[39] *Edgewater* at para. 30.

[40] Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* , 2nd ed. (Toronto: Irwin Law, 2016) at 221 ["***Pitel & Rafferty***"]; *Castel & Walker* at 3-1.

obligations to the 1974 Plan of Walter Resources. Accordingly, the true issue in this case is one of obligation under the contract. The 1974 Plan Claim therefore appropriately is characterized as a claim in contract for choice of law purposes.

31. As noted by the chambers judge, "there is no case authority from Canada that addresses ERISA, nor any case authority involving the type of characterization exercise involved here".[41] That said, the characterization of the 1974 Plan Claim as a claim in contract is supported by a number of recent authorities in the United Kingdom. [42] These cases all involved claims against a defendant for a liability arising under a combination of a contract and a statute from a jurisdiction other than the forum. In each case, the court concluded that the essential nature of the claim authorized by statute was to enforce the terms of a contract and characterized the claim as arising under contract for choice of law purposes. This was so notwithstanding the absence of privity of contract.

32. In contrast, neither the Walter Canada Group nor the Steelworkers was able to provide the chambers judge with a single choice of law case that supported their characterization of the 1974 Plan Claim as one implicating the legal personality of the Walter Canada Group.

33. The principal case cited by the respondents in support of their argument on characterization – and ultimately relied upon by the chambers judge – is *JTI-Macdonald Corp. v. British Columbia (Attorney General)*.[43] Although acknowledging that the result of this case is "limited" since it arose in the context of a constitutional challenge, the chambers judge went on to describe the case as "provid[ing] substantial support" for the respondents' position that the claim is properly characterized as concerning the status and legal personality of corporations".[44] Relying on the case at all fails to address that *JTI* involved a constitutional challenge to the extraterritorial effect of provincial legislation on federal or foreign corporations and did not involve a choice of law analysis.

34. The chambers judge also appears to have misapprehended other authorities before her. The chambers judge cited *Castel & Walker* at 30-1 to conclude that the law of corporations includes questions of the liability of a corporation for the obligations of a foreign

[41] Reasons for Judgment at para. 140.

[42] See *Through Transport Mutual Assurance Association (Eurasia) Ltd. v. New India Assurance Association Co. Limited*, [2004] EWCA Civ 1598; *The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain,* [2013] EWHC 3188; *Youell v. Kara Mara Shipping Company Ltd.,* [2000] EWHC 220.

[43] 2000 BCSC 312 [***JTI***].

[44] Reasons for Judgment at paras. 143 and 145.

related entity.[45] The passage she cites provides that: "...the law applicable to the status and capacity of the [company] should determine whether its corporate veil can be pierced". The chambers judge did not quote, and apparently failed to consider, the remainder of the paragraph, which continues:

> For other matters, the law governing the contract or tort that gives rise to the litigation against the foreign subsidiary would determine whether its corporate veil should be pierced since, arguably, piercing the corporate veil should be characterized as a function of the dispute and not of the status of the corporation".[46]
>
> [Emphasis added.]

35. The chambers judge's conclusion that the 1974 Plan Claim should be characterized as concerning the status and legal personality of the entities in the Walter Canada Group was not grounded in authority. It appears rather to have been grounded in her consideration of the "effect" of ERISA.[47]

36. To characterize the issue or cause of action in a choice of law analysis, the court must consider the purpose of the substantive law to be characterized. [48] On this basis, the court can determine the foreign law's equivalent in the forum. The conflict rule for the characterization selected then determines the law to be applied. Considering the purpose of the substantive law to be characterized ensures that the characterization accepted and the legal questions it raises are addressed by the conflict rule.[49]

37. On the Application, the 1974 Plan argued that the purpose of ERISA is to ensure that employees who are promised retirement benefits actually receive those benefits. The chambers judge agreed that the purpose of ERISA is to ensure the goal of retirees' receiving contracted-for benefits.[50] However, the chambers judge continued to focus on the "effect" of ERISA, i.e. to "collapse the corporate structure" for this purpose.[51]

38. The chambers judge's focus on the mechanics and effects of ERISA contradicts a core principle of the characterization analysis. As provided by *Pitel & Rafferty*:

---

[45] Reasons for Judgment at para. 151.

[46] *Castel & Walker* at 30-1-30-2.

[47] Reasons for Judgment at paras. 129-138.

[48] A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London: Sweet & Maxwell, 2012) at 51, para. 2-039 [***Dicey***].

[49] *Dicey* at 51, para. 2-039

[50] Reasons for Judgment at para. 129.

[51] Reasons for Judgment at para. 130.

> One of the hallmarks of the traditional process is that it chooses the applicable law without focusing on the content of that law or on the result it will reach when applied.[52]

The "controlled group" provisions are merely a means of protecting multi-employer pension plans and helping to ensure that contributing employers pay for the promised benefits.[53] This effect is not properly the focus of a characterization analysis.

39. The 1974 Plan submits that the chambers judge erred in failing to identify that withdrawal liability under ERISA arises by right of the employer's agreement to accept the contribution obligations. As the liability is ground in this agreement, the 1974 Plan Claim ought to be characterized as based on the law of obligations. For choice of law purposes -- as the authorities relied on by the 1974 Plan demonstrate -- it is no obstacle to characterizing the claim as contractual in nature that the parties to the dispute are not in privity of contract.

(ii) The Chambers Judge Erred in Identifying the Appropriate Choice of Law Rule

40. In the course of determining the applicable choice of law rule, the chambers judge determined that the "controlled group" provisions of ERISA disregard the "limited liability" of the Walter Canada Group entities.[54]

41. These comments fail to acknowledge that several entities in the Walter Canada Group do not enjoy limited liability, being unlimited liability corporations or partnerships. Indeed, shareholders of unlimited liability corporations may be liable to satisfy the debts and obligations of the company on its liquidation or dissolution.[55] Likewise, limited partners may be liable for the partnership's debts and obligations to the extent they contributed to it.[56]

42. The chambers judge thus failed to reconcile how the foundation of her analysis – the principles outlined in *Salomon v. Salomon & Co* – bears in any way on the characterization of a claim against entities that in law do not enjoy that limited liability.[57]

(iii) The Chambers Judge Misapplied the Connecting Factor Indicated by her Erroneous Characterization

43. At the third stage of the choice of law analysis the court is to apply the connecting factor indicated by the appropriate choice of law rule.

---

[52] *Pitel & Rafferty* at 210.

[53] *Connolly v. P.B.G.C.*, 475 U.S. 211, 214 (1986); *P.B.G.C. v. Ouimet Corp.*, 711 F.2d 1085, 6 (1st Cir.1983), cited at Reasons for Judgment at para. 139.

[54] Reasons for Judgment at para. 143.

[55] *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 51.11 and 51.3(1).

[56] *Partnership Act*, R.S.B.C. 1996, c. 348, s. 57.

[57] [1897] A.C. 22 (H.L.), cited at Reasons for Judgment at para. 131.

44. As addressed above, the chambers judge characterized the issue as one of the status and separate legal personalities of corporations. She then found that the choice of law rule was that questions concerning the status of a corporation are governed by the law of the place of incorporation. The connecting factor was thus the corporation's domicile. However, if this analysis is accepted, the chambers judge nonetheless erred in applying the connecting factor from the perspective of the Canadian entities. If the issue in the characterization analysis is the status and separate legal personalities of corporations, the corporation whose veil was pierced was more accurately Walter Resources. If the issue is to be governed by the law of the place of incorporation, it should have been governed by U.S. law.

45. At this stage the chambers judge also based her decision, in part, on an argument raised by the Walter Canada Group that the 1974 Plan failed to include in its claim any allegations against the partnerships. Those partnerships were included in the Initial Order but not named as petitioners in the CCAA Proceedings.[58] Claims against the partnerships, by the Walter Canada Group's argument, were barred since the claims bar date had passed.

46. However, the Walter Canada Group abandoned this line of argument in its submissions and the chambers judge was advised not to rely on it at the Application.[59] While she did not rely on it "solely", relying on this argument at all is an error of process.

(b) The Chambers Judge Erred by Awarding Costs When Such Costs were Not Pleaded or Sought

47. The chambers judge awarded costs to the Walter Canada Group and the Steelworkers. However, neither the pleadings nor the written or oral submissions of the Walter Canada Group or the Steelworkers sought costs. The 1974 Plan submits this aspect of the Order was an error of law.

48. A court should not make an order on a matter that was not before it; the parties ought to have reasonable notice of the relief sought against them.[60] Furthering this prejudice, there is a practice in commercial insolvency applications that each party bears its own costs.[61] Accordingly, the 1974 Plan argues that it was not provided notice of this relief and was deprived of the opportunity to argue against the awarding of costs.

---

[58] Reasons for Judgment at paras. 158-59.

[59] Submissions of the United Mine Workers of America 1974 Plan and Trust (the 1974 Plan"), dated December 30, 2016, at FN117.

[60] *Naderi v. Naderi*, 2012 BCCA 16 at paras. 20-22.

[61] *Indalex Ltd. (Re)*, 2011 ONCA 578 at para. 4, rev'd on other grounds 2013 SCC 6; *Calpine Canada Energy Ltd. (Re)*, 2008 ABQB 537 at para. 1; *Semcanada Crude Co (Re)*, 2013 ABQB 102 at para. 5.

(4) The Appeal Will Not Unduly Hinder the Progress of the Action

49. The appeal will not unduly hinder the progress of the CCAA Proceedings. Subject to the outcome of this application, October 19 has been set tentatively as the hearing date for the appeal (if leave is granted).

50. The CCAA Proceedings will be required to continue for reasons unrelated to an appeal concerning 1974 Plan Claim. An application is extant to extend the stay of proceedings to September 29, 2017.[62] The claims process is outstanding, with disputed claims (excluding the 1974 Plan Claim) of approximately $30.5 million yet to be determined.[63] No distribution order has been sought and there is no imminent distribution planned. Further, the Walter Canada Group's 50 percent interest in a mining joint venture has yet to be realized upon and the process to sell the U.K. entities is ongoing.[64]

51. As it concerns the 1974 Plan Claim, the only remaining step in the CCAA Proceedings is to distribute sale proceeds. Regardless of the result of these proceedings the Walter Canada Group will be in the same position – having distributed the proceeds from sale of its assets to its creditors.

52. To the extent that time constraints are present in this case, the 1974 Plan seeks an order that the appeal be heard on an expedited basis according to the appended Schedule "A". Prejudice in delaying a distribution will be ameliorated by this order. That prejudice is further ameliorated by the recent distribution of approximately $780,000 to the Steelworkers.[65] Any prejudice to the Steelworkers and other creditors thus does not justify denying leave to appeal. The pensioners of the 1974 Plan ought not have a claim of over US$900 million (which if allowed would amount to a recovery of approximately Can$63 million) denied without appellate review when that decision, by its own acknowledgement, is the first in Canada on the issue and for which there is no case authority for the conflict of laws issues raised.[66]

B. <u>The Test for a Stay of Proceedings or Execution from the Order</u>

53. To grant a stay the Court must analyse the application in three stages: (1) whether there is a serious question to be tried; (2) whether the appellant would suffer

[62] 10th Affidavit of William E. Aziz, sworn May 18, 2017, at para. 28 ["**Tenth Aziz Affidavit**"].
[63] Eighth Monitor's Report at para. 35; Tenth Aziz Affidavit at para. 19.
[64] Tenth Aziz Affidavit at paras. 20 and 26.
[65] Ninth Report of the Monitor, KPMG Inc., dated March 10, 2017.
[66] Reasons for Judgment at para. 140.

irreparable harm if the application for a stay were dismissed; (3) which of the two parties would suffer the greater harm depending on whether it grants or refuses the stay pending a decision on the merits.[67]

(1) There is a Serious Question to be Tried

54. Whether there is a serious question to be tried is not an onerous test.[68] The motions judge need only be satisfied that the application is neither vexatious nor frivolous..

55. As addressed above, the issues raised in this appeal are matters of first instance to which the 1974 Plan's grounds of appeal are *prima facie* meritorious. It follows that there is a serious question to be tried.

(2) The 1974 Plan Would Suffer Irreparable Harm if the Application is Dismissed

56. The second branch of the test examines the potential harm to the party seeking the stay should the stay be refused. Irreparable harm can be found where "one party cannot collect damages from the other".[69]

57. The Walter Canada Group has entered bankruptcy proceedings and is no longer continuing as a going concern. The amount that may be recovered from it is limited to those funds generated by the sales process. If those funds are distributed pending the appeal, the 1974 Plan will be unable to recover any amount with respect to its claim. Accordingly, the 1974 Plan would suffer irreparable harm if the application for a stay were dismissed.

(3) The Balance of Interest Favours the 1974 Plan

58. This stage of the analysis involves a weighing of the interests of the parties and a balancing of the potential harm to each party.[70]

59. As addressed above, there is no prejudice to the Walter Canada Group in delaying the distribution of the sale proceeds. With respect to the other creditors, and to the extent that time constraints are present in this case, the 1974 Plan seeks an order that the appeal be heard on an expedited basis according to the appended Schedule "A". Again, if such an order is granted, prejudice in delaying the distribution will be ameliorated.

---

[67] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) [***RJR-MacDonald***]
[68] *Peachland (District) v. Peachland Self Storage Ltd.*, 2013 BCCA 230 at para. 16 [***Peachland***].
[69] *RJR-MacDonald* at para. 59.
[70] *Peachland* at para. 18.

PART IV. ORDERS SOUGHT

60. The 1974 Plan seeks:

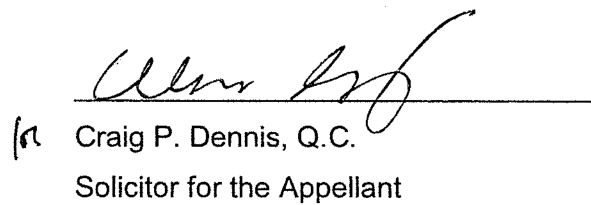
(d) an order granting leave to appeal from the Order;

(e) an order that the appeal be heard on an expedited basis;

(f) an order staying the execution of, or proceedings upon, the Order; and

(g) costs of this application in any event of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2017.



for Craig P. Dennis, Q.C.
Solicitor for the Appellant

PART V. TABLE OF AUTHORITIES

CASE LAW

1 *Calpine Canada Energy Ltd. (Re),* 2008 ABQB 537

2 *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,* 2008 BCCA 323

3 *Edgewater Casino Inc. (Re)*, 2009 BCCA 40

4 *Indalex Ltd. (Re)*, 2011 ONCA 578

5 *JTI-Macdonald Corp. v. British Columbia (Attorney General),* 2000 BCSC 312

6 *Naderi v. Naderi*, 2012 BCCA 16

7 *Peachland (District) v. Peachland Self Storage Ltd.*, 2013 BCCA 230

8 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.)

9 *Semcanada Crude Co (Re)*, 2013 ABQB 102

10 *The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain,* [2013] EWHC 3188

11 *Through Transport Mutual Assurance Association (Eurasia) Ltd. v. New India Assurance Association Co. Limited*, [2004] EWCA Civ 1598

12 *Youell v. Kara Mara Shipping Company Ltd.,* [2000] EWHC 220.

SECONDARY SOURCES

13 A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London: Sweet & Maxwell, 2012) at 51, para. 2-039

14 *Halsbury's Laws of England, Conflict of Laws,* vol. 8(1), 4th ed. (Reissue) (London, UK: Butterworths, 1996)

15 Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* , 2nd ed. (Toronto: Irwin Law, 2016) at 221

16 Janis P. Sarra, "Maneuvering through the Insolvency Maze -- Shifting Stakeholder Identities and Implications for CCAA Restructurings" (2011) 27 B.F.L.R. 155

17 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013)

18 Janet Walker, *Castel & Walker: Canadian Conflict of Law,* 6 ed., (Toronto: LexisNexis, 2005) (loose-leaf Rel. 60-2/2017)

LEGISLATION

19 *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 51.11 and 51.3(1)

20 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13.

21 *Partnership Act*, R.S.B.C. 1996, c. 348, s. 57

SCHEDULE "A" – TIMELINE

Stage of Proceeding	Deadline
Appeal	October 19, 2017
Appeal Record	On or before June 30, 2017.
Appellant's Factum and Appeal Book	On or before August 4, 2017.
Respondents' Factums and Appeal Books	On or before September 15, 2017.
Appellant's Reply Factum (If Any)	On or before September 22, 2017.

TAB 16

B.C. Statutes
Business Corporations Act
Part 2.1 — Unlimited Liability Companies (ss. 51.1-51.9) [Heading added 2007, c. 7, s. 13.]

S.B.C. 2002, c. 57, s. 51.11

s 51.11 Notice of articles of unlimited liability company must include statement

Currency

51.11Notice of articles of unlimited liability company must include statement
A company formed under section 10 is an unlimited liability company if its notice of articles contains the following statement:

> The shareholders of this company are jointly and severally liable to satisfy the debts and liabilities of this company to the extent provided in section 51.3 of the *Business Corporations Act*.

Amendment History
2007, c. 7, s. 13

Currency
British Columbia Current to B.C. Reg. 52/2017 (February 28, 2017)

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

B.C. Statutes
Business Corporations Act
Part 2.1 — Unlimited Liability Companies (ss. 51.1-51.9) [Heading added 2007, c. 7, s. 13.]

S.B.C. 2002, c. 57, s. 51.3

s 51.3 Liability of shareholders of unlimited liability companies

Currency

51.3Liability of shareholders of unlimited liability companies

51.3(1) Subject to subsection (2), shareholders and former shareholders of an unlimited liability company are jointly and severally liable as follows:

(a) if the company liquidates, the shareholders and former shareholders are jointly and severally liable, from the commencement of the company's liquidation to its dissolution, to contribute to the assets of the company for the payment of the unlimited liability company's debts and liabilities;

(b) whether or not the company liquidates, the shareholders and former shareholders are jointly and severally liable, after the company's dissolution, for payment to the company's creditors of the unlimited liability company's debts and liabilities.

51.3(2) A former shareholder of an unlimited liability company is not liable under subsection (1) unless it appears to the court that the shareholders of the unlimited liability company are unable to satisfy the debts and liabilities referred to in subsection (1), and, even in that case, is not liable under subsection (1)

(a) in respect of any debt or liability of the unlimited liability company that arose after the former shareholder ceased to be a shareholder of the unlimited liability company,

(b) in a liquidation of the company, if the former shareholder ceased to be a shareholder of the unlimited liability company one year or more before the commencement of liquidation, or

(c) on or after a dissolution of the company effected without liquidation, if the former shareholder ceased to be a shareholder of the unlimited liability company one year or more before the date of dissolution.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

51.3(3) The liability under subsections (1) and (2) of a shareholder or former shareholder of an unlimited liability company continues even though the unlimited liability company transforms, and, in that event,

(a) a reference in subsections (1) and (2) to

(i) **"shareholder"** is deemed to be a reference to a person who was a shareholder of the unlimited liability company at the time it transformed, and

(ii) **"former shareholder"** is deemed to be a reference to a person who ceased to be a shareholder of the unlimited liability company before it transformed, and

(b) a reference in subsection (1)(a) or (b) or (2)(b) or (c) to **"the company"** is deemed to be a reference to the successor corporation.

51.3(4) In subsection (3) and this subsection:

"successor corporation", in relation to an unlimited liability company, means any corporation that results from the company, or any of its successor corporations, transforming;

"transform", in relation to an unlimited liability company or any of its successor corporations, means to

(a) alter its notice of articles to become a limited company,

(b) continue into another jurisdiction, or

(c) amalgamate with another corporation.

Amendment History
2007, c. 7, s. 13

Currency
British Columbia Current to B.C. Reg. 52/2017 (February 28, 2017)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.6)

R.S.C. 1985, c. C-36, s. 13

s 13. Leave to appeal

Currency

13.Leave to appeal
Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Amendment History
2002, c. 7, s. 134

Currency
Federal English Statutes reflect amendments current to May 4, 2017
Federal English Regulations are current to Gazette Vol. 151:9 (May 3, 2017)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

B.C. Statutes
Partnership Act
Part 3 — Limited Partnerships (ss. 48-80)

R.S.B.C. 1996, c. 348, s. 57

s 57. Liability of limited partner

Currency

57.Liability of limited partner

Except as provided in this Part, a limited partner is not liable for the obligations of the limited partnership except in respect of the amount of property he or she contributes or agrees to contribute to the capital of the limited partnership.

Currency

British Columbia Current to B.C. Reg. 52/2017 (February 28, 2017)

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.