



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

**NOTICE OF APPLICATION**

**Name of applicants:** 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 (the "**New Walter Canada Group**")

To: Service List attached hereto as **Schedule "A"**

TAKE NOTICE that an application will be made by the applicants to the Honourable Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, BC, V6Z 2E1 on May 17, 2019 at 9:00 a.m. for the order set out in Part 1 below.

**Part 1: ORDERS SOUGHT**

1. An Order substantially in the form attached hereto as **Schedule "B"**:
  - (a) severing the proceedings for adjudicating the claim asserted by Kevin James (the "**James Claim**") such that the Court will first determine whether Mr. James is entitled to any royalties and, only if the Court determines that Mr. James is entitled to royalties, the Court will schedule a subsequent hearing to determine the quantum of royalties; and
  - (b) admitting into evidence the Fawcett Affidavits (defined below) in the James Claim proceeding.

**Part 2: FACTUAL BASIS**

1. Reference is made to the facts set out in the Twenty-seventh Affidavit of William E. Aziz (the "**Twenty-seventh Aziz Affidavit**").

2. Any capitalized term used but not defined below shall have the meaning given to it in the Twenty-seventh Aziz Affidavit.
3. On December 7, 2015, this Honourable Court granted an initial order (as amended and restated from time to time, the "**Initial Order**") in favour of the Old Walter Canada Group pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**").
4. The Initial Order granted a stay of proceedings until January 6, 2016 or such later date as this Honourable Court may order (the "**Stay Period**").
5. The terms of the Initial Order, including the Stay Period, were subsequently extended by further orders of the Court to August 16, 2019.
6. On August 16, 2016, this Honourable Court granted an order (the "**Claims Process Order**") establishing a procedure for the identification, valuation, and adjudication of disputes regarding claims in these proceedings.
7. Pursuant to the terms of the Claims Process Order, on October 5, 2016, Mr. James submitted a proof of claim for a \$6,747,203 unsecured claim.

#### Severing the James Claim Proceeding

8. The New Walter Canada Group proposed that Mr. James consent to the Court severing the question of entitlement to royalties from the question of quantum of royalties. Mr. James has not consented to that proposal.
9. Severing the James Claim proceeding is prudent and cost-efficient:
  - (a) If the Court concludes that Mr. James is not entitled to royalties, the parties will not incur additional costs to cross-examine experts and make arguments about valuation.
  - (b) If the Court concludes that Mr. James is entitled to royalties, the parties will incur the same costs that would have been incurred but for severance. In addition, the parties will be in a better position to negotiate a settlement (which would also avoid the costs associated with the quantum phase) as each side will have a clearer understanding of the potential outcome.
10. There is little, if any, duplication between the evidence relevant to Mr. James' entitlement to royalties (which depends on the correct interpretation of the Royalty Sharing Agreement (the "**RSA**")) and the valuation of any royalties owing to him (which will be determined through expert evidence).
11. The evidence relevant to the Court's determination of Mr. James' entitlement to royalties is (i) Affidavit #1 of Kevin James sworn August 12, 2016 in these proceedings; (ii) Affidavit #2 of Kevin James sworn January 25, 2017 in these proceedings; (iii) Affidavit #1 of David Austin sworn February 27, 2017 in these proceedings; (iv) Affidavit #1 of Kevin James sworn June 14, 2005 in the Corporate Formalities Application (Docket No. L050703); (v) Affidavit #1 of Dave Austin made June 2, 2005 in the Corporate Formalities Application (Docket No. L050703); (vi) Affidavit #1 of David Fawcett sworn June 2, 2005 in the Corporate Formalities Application (Docket No. L050703) (the "**First Fawcett Affidavit**"), if admitted; and (vii) Affidavit #1 of David Fawcett sworn January 19, 2007 in the Criminal Interest Application (Docket No. S070436) (the "**Second Fawcett Affidavit**", and with the First Fawcett Affidavit, the "**Fawcett Affidavits**"), if admitted.
12. The evidence relevant to the Court's valuation of royalties, if necessary, is the (i) Confidential Affidavit #1 of Philip L. Evans Jr. sworn December 14, 2017; (ii) the Expert Report of PwC, dated December 15, 2017; (iii) the Expert Report of MNP dated January 2, 2017; and (iv) the Limited Critique Report of MNP dated March 8, 2019.

13. The parties have been unable to complete pre-hearing steps by the deadlines contemplated in their agreed-upon schedule, and a failure to sever the James Claim proceeding may result in additional delay.
14. The James Claim may soon become the only reason why the New Walter Canada Group needs to extend the Stay Period, which would result in additional costs to the estate by prolonging these proceedings.

#### The Fawcett Affidavits

15. The James Claim is based on Mr. James' assertion that he is entitled to a royalty under the RSA, which has been the subject of prior proceedings including (i) the Corporate Formalities Application (Docket No. L050703); and (ii) the Criminal Interest Application (Docket No. S070436) (collectively, the "**Prior Proceedings**").
16. The New Walter Canada Group seeks an order admitting into evidence the Fawcett Affidavits which were sworn for purposes of the Prior Proceedings.
17. Mr. James and Mr. Fawcett were both founding directors of Western Canadian Coal Corporation and have had a long-standing relationship.
18. Mr. James was a party to the Prior Proceedings and filed evidence in those Proceedings.
19. Mr. James did not challenge the accuracy of the Fawcett Affidavits in the Prior Proceedings nor did he cross-examine Mr. Fawcett on them.
20. At the time the Twenty-seventh Aziz Affidavit was sworn, the New Walter Canada Group was not aware of Mr. Fawcett's current whereabouts and did not have any current contact information for him. Although asked, Mr. James had not and has not provided to the New Walter Canada Group his most recent contact information for Mr. Fawcett.
21. Since the date of the Twenty-seventh Aziz Affidavit's swearing, counsel has located Mr. Fawcett, but has been unable to confirm that Mr. Fawcett is available or willing to participate in these proceedings, particularly given the passage of time.

### **Part 3: LEGAL BASIS**

#### The Court Should Sever the Proceedings for Resolving the James Claim

22. Paragraph 51 of the Claims Process Order provides that the New Walter Canada Group may apply to the Court for advice and directions in respect of the Claims Process.
23. Section 20(1)(a)(iii) of the CCAA states that claims should be resolved through a summary procedure. In that context, the CCAA is designed to be a "flexible mechanism" wherein the court retains considerable discretion to determine the appropriate format for resolving disputes.

*Re Ted Leroy Trucking Ltd*, 2010 SCC 60 at para. 14

24. In these Walter CCAA proceedings, this Court previously held that a CCAA Court has the jurisdiction to craft an appropriate procedure for adjudicating claims, and that this discretion should 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."

*Re Walter Energy Canada Holdings, Inc*, 2017 BCSC 709 at paras. 23 – 26,  
leave to appeal granted but appeal settled

25. This CCAA Court exercised this flexibility to determine an appropriate procedure in adjudicating the 1974 Plan's claim in this CCAA proceeding. In that case, on consent, this Court severed a determination of liability for the claim from a determination of the quantum of potential damages. The CCAA Court also departed from established procedural strictures to provide a summary determination of the claim in a format appropriate to the circumstances. As this Court noted at the time, "[a]lthough described as a "summary hearing", the nature of the hearing can be described as a hybrid one."

*Walter*, at para. 11

26. Significantly, this CCAA Court agreed to hear a potentially dispositive summary application in spite of the 1974 Plan asserting that doing so amounted to inappropriate "litigating in slices".

*Walter*, at para. 14(e)

27. The New Walter Canada Group proposes to take a similar approach with respect to the James Claim by severing the issue of Mr. James' entitlement to royalties from the issue of quantifying those royalties if he is entitled to them.

28. Severing entitlement and quantum is timely, inexpensive, just and fair:

- (a) If the Court holds that Mr. James is not entitled to any royalties, no further costs will be incurred.
- (b) If the Court holds that Mr. James is entitled to royalties, the parties will either incur the costs that would have been incurred in a non-severed hearing or settle the dispute having received clarity from the Court on the question of Mr. James' entitlement to royalties.

29. Refusing severance may further delay resolving the James Claim and prolong these CCAA proceedings, resulting in additional costs to the estate.

30. Therefore, it is in the best interests of the New Walter Canada Group's stakeholders and consistent with the CCAA's objectives to sever the James Claim proceedings.

31. Although Rule 12-5(67) of the *Supreme Court Civil Rules* (which permits severing issues in a trial) does not apply directly to this case, case law applying the Rule provides valuable guidance:

- (a) The Court's discretion to sever an issue is not restricted to extraordinary or exceptional cases.

*The Council of the Haida Nation v British Columbia*, 2018 BCSC 277 at para. 21, aff'd on appeal, 2018 BCCA 462

- (b) A genuine likelihood of significant savings in time and expense may constitute a compelling reason to order severance.

*Spiering v Trevor*, 2012 BCSC 1653 at para. 15

- (c) Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.

*Haida*, at para. 21

- (d) Severance is most appropriate in judge-alone proceedings.

*Haida*, at para. 21

32. Each of these considerations supports severance of the James Claim.
33. The recent decision of this Court in *Kitsul* is on point as the Court severed the issues of liability and damages in a lawyers' negligence case in part because:
- (a) If liability could not be established, then the matter was at an end; conversely, if liability was established, that would significantly enhance the prospects of settlement of the damages claim.

*Kitsul v Slater Vecchio LLP*, 2015 BCSC 1394 at para. 32

- (b) The question of damages and liability were separate issues on the facts of the case, and there was little concern of overlapping issues and inconsistent credibility findings.
- Kitsul*, at paras. 28 – 30
34. The same considerations apply here and support severing the James Claim proceedings:
- (a) If the Court concludes that Mr. James is not entitled to any royalties, that will be the end of the parties' dispute.
- (b) If the Court determines that Mr. James is entitled to royalties, it will enhance the prospects of settlement.
- (c) The amount of royalties (if any) owing to Mr. James has no bearing on whether he is entitled to any royalties, and the two issues will be determined based on evidence from different witnesses. Severance will not result in overlapping issues or inconsistent credibility findings.

#### **The Court Should Admit the Fawcett Affidavits**

35. The general rule of evidence is that all relevant evidence is admissible, subject to exclusionary rules.

*R v Zeolkowski*, [1989] 1 SCR 1378 at para. 18

36. Although the Fawcett Affidavits were sworn in the context of the Prior Proceedings, they are relevant: the Prior Proceedings related to the formation and interpretation of the RSA.
37. Without conceding that the Fawcett Affidavits are properly characterized as hearsay, courts have admitted sworn evidence from prior proceedings where it satisfies the principled exception to hearsay, *i.e.*, where the evidence meets the requirements of threshold reliability and necessity.

*R v Hawkins*, [1996] 3 SCR 1043

38. First, the Fawcett Affidavits are reliable. A statement is reliable for purposes of the principled exception if the hearsay statement is made in circumstances that provide sufficient guarantees of its trustworthiness.

*Hawkins*, at para. 74

39. The threshold reliability criterion is not concerned with whether the statement is true; it is only concerned with whether the circumstances surrounding the statement provide circumstantial guarantees of trustworthiness.

*R v Starr*, 2000 SCC 40 at para 215

40. In *Hawkins*, the Supreme Court held that evidence given under oath at a preliminary inquiry was sufficiently reliable because it was given under oath and there was an opportunity to cross-examine the declarant when the evidence was given.

*Hawkins*, at paras. 77 and 79

41. The Court added that “it is difficult to imagine more reliable circumstances for a declarant to utter an out-of-court statement which is then tendered into evidence.”

*Hawkins* at para. 77

42. These guarantors of reliability are present in the present case: the Fawcett Affidavits are sworn evidence given in the Prior Proceedings where multiple parties, including Mr. James, had an opportunity to contemporaneously contradict or cross-examine Mr. Fawcett.

43. Second, the Fawcett Affidavits are necessary. Necessity and reliability are not independent criteria but exist on a sliding scale. Courts may relax the necessity criterion when evidence bears significant indicia of reliability.

Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) at §6.116-6.117

44. Evidence is necessary if the declarant is unavailable to testify and evidence of similar quality cannot be obtained from another source.

*Hawkins*, at para. 71

45. In this case, counsel for the New Walter Group has located Mr. Fawcett, but has been unable to confirm that Mr. Fawcett is available or willing to participate in these proceedings, particularly given the passage of time. Even if Mr. Fawcett was available or willing to participate, his memory would be refreshed using the Fawcett Affidavits, each of which were sworn within a few years of the events described in them.

46. Finally, admitting the Fawcett Affidavits does not prejudice Mr. James as the Court can consider and account for any potential frailties.

47. If the Fawcett Affidavits are admitted into evidence, this Court will have the opportunity to consider them like any other evidence and assign them the weight the Court considers appropriate in all the circumstances. Mr. James will be free make any arguments based on the fact that the Fawcett Affidavits were sworn in the context of the Prior Proceedings, and the Court will have the discretion to give effect to those arguments if they have any bearing on the probative value of the Fawcett Affidavits.

#### **Other Grounds**

48. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended;
49. *Supreme Court Civil Rules*, BC Reg 168/2009, including Rules 8-1 and 13-1; and
50. The inherent and equitable jurisdiction of this Honourable Court and such further and other legal bases and authorities as counsel may advise and this Honourable Court may permit.

#### **Part 4: MATERIAL TO BE RELIED ON**

1. The Twenty-seventh Aziz Affidavit;
2. Pleadings and other materials filed herein; and

3. Such further and other materials as counsel may advise and this Honourable Court may permit.

The applicant(s) estimate(s) that the application will take 1 hour.

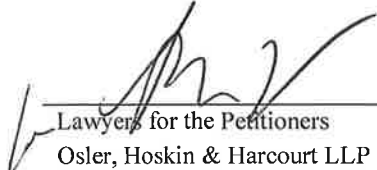
This matter is within the jurisdiction of a master.

X This matter is not within the jurisdiction of a master. The Honourable Madam Justice Fitzpatrick is seized of these proceedings and the hearing of this application has been arranged with Trial Scheduling.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days of services of this Notice of Application,

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed Application Response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: May 15, 2019

  
\_\_\_\_\_  
Lawyers for the Petitioners  
Osler, Hoskin & Harcourt LLP  
(Marc Wasserman & Mary Paterson)

**To be completed by the court only:**

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this Notice of Application

with the following variations and additional terms:

Date: \_\_\_\_\_

	Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master
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**TAB A**

**SCHEDULE "A"**

**(see attached)**

**SERVICE LIST**  
**(as of Apr 25, 2019)**

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**TAB B**

**SCHEDULE "B"**

**(see attached)**

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

**ORDER MADE AFTER APPLICATION  
(James Claim Procedure)**

BEFORE THE HONOURABLE )  
MADAM JUSTICE FITZPATRICK ) FRIDAY, THE 17<sup>TH</sup> DAY OF  
 ) MAY, 2019

ON THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 17<sup>th</sup> day of May, 2019; AND ON HEARING Mary Paterson, counsel for the Petitioners, \_\_\_\_\_, counsel for KPMG Inc. and those other counsel listed on **Schedule "A"** hereto; AND UPON READING the material filed, including the 27th Affidavit of William E. Aziz sworn May 10, 2019 (the "**Twenty-seventh Aziz Affidavit**");

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. All capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Initial Order in these proceedings dated December 7, 2015 (the "**Initial Order**").

### **JAMES CLAIM PROCEDURE**

3. The proceeding for adjudicating the claim of Kevin James (the "**James Claim**") is severed such that the Court will first determine whether Mr. James is entitled to any royalties and then, only if the Court determines that Mr. James is entitled to royalties, the Court will schedule a subsequent hearing to determine the quantum of royalties owing to Mr. James.
4. Affidavit #1 of David Fawcett sworn June 2, 2005 in the Corporate Formalities Application (Docket No. L050703) and Affidavit #1 of David Fawcett sworn January 19, 2007 in the Criminal Interest Application (Docket No. S070436) are admissible and form part of the evidentiary record in the proceeding for adjudicating the James Claim.

### **GENERAL**

5. 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 Petitioners 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 Petitioners 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:

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Mary Paterson  
Counsel for the Petitioners

BY THE COURT

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REGISTRAR





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*,  
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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

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**ORDER MADE AFTER APPLICATION  
(James Claim Procedure)**

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Client Matter No. 1164807

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

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**NOTICE OF APPLICATION  
(James Claim Procedure)**

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