

NO. S-1510120  
VANCOUVER REGISTRY

**VANCOUVER**  
**IN THE SUPREME COURT OF BRITISH COLUMBIA**  
**DEC 02 2016**  
**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"**

PETITIONERS

**NOTICE OF APPLICATION**

**Name of applicant:** United Mine Workers of America 1974 Pension Plan and Trust  
(the "applicant" or "1974 Plan")

To: Service List attached hereto as Schedule "B"

TAKE NOTICE that an application will be made by the applicant to the Honourable Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia on 9/Jan/2017 at 10:00 a.m. for the orders set out in Part 1 below.

**Part 1: ORDERS SOUGHT**

1. An order dismissing the Petitioners' Summary Trial Application, returnable January 9, 2017, with costs payable to the applicant.
2. Such further relief as may be required in the circumstances and this Honourable Court deems just.

**Part 2: FACTUAL BASIS**

3. This notice of application is delivered in accordance with the case plan order made in these proceedings and entered November 14, 2016 (the "Case Plan Order").

4. The 1974 Plan relies on the facts set out in Part 1 of the 1974 Plan's Amended Notice of Civil Claim filed November 9, 2016 (the "**Amended Notice of Civil Claim**"). Capitalized terms used but not defined herein have the meaning ascribed to them in the Amended Notice of Civil Claim.

#### Overview of Application

5. Pursuant to the Case Plan Order, the Petitioners have brought a notice of application for summary trial of four issues described by the Petitioners as "preliminary issues" (the "**Summary Trial Application**").

6. The Petitioners have staked this summary trial on their contention that there is a threshold legal issue that can be adjudicated that does not involve facts. The Petitioners have since resisted every attempt by the 1974 Plan to obtain any form of pre-trial discovery.

7. As a result, the Court can only adjudicate the preliminary issues if the Petitioners are right that facts do not matter. The Petitioners are not right. The resolution of the preliminary issues raised in the Summary Trial Application involves matters of disputed fact that can only be properly and fairly adjudicated after the 1974 Plan has had an opportunity to obtain pre-trial discovery.

8. In particular, the parties are in disagreement as to the degree of integration between the Petitioners and their affiliates in the U.S. and the U.K. (together with the Petitioners, the "**Walter Group**"). An understanding of the Walter Group's operations and the relationships between the entities in the Walter Group is central to resolving the 1974 Plan Claim. It is not enough for the Petitioners to simply admit certain facts the 1974 Plan has plead without admitting others the 1974 Plan says are relevant to the adjudication of the issues.

9. Evidence of the Walter Group's operations must come out of the mouths and documents of the Walter Group. The 1974 Plan has made consistent and repeated requests of the Petitioners to obtain necessary pre-trial document discovery. The Petitioners have not responded to these requests. To date, the Petitioners have not disclosed any of the requested documents to the 1974 Plan.

10. The 1974 Plan has also requested to examine for discovery Mr. William G. Harvey, the former Executive Vice President and Chief Financial Officer of Walter Energy Canada Holdings, Inc. ("**Canada Holdings**"), the parent company of the rest of the Petitioners. Simultaneously Mr. Harvey was also the Chief Financial Officer and Executive Vice President of Walter Energy, Inc., itself the parent company of Canada Holdings.

11. Mr. Harvey is a key witness in this case and has critical knowledge regarding the Walter Group's global operations and the degree of integration amongst all members of the Walter Group, including the Petitioners. Indeed, the Petitioners rely on an affidavit of Mr. Harvey in this summary trial proceeding.

12. The Petitioners have not responded to the 1974 Plan's request to examine for discovery Mr. Harvey. To date, the Petitioners have not consented to allow the 1974 Plan to examine Mr. Harvey.

13. The 1974's Plan's inability to obtain necessary pre-trial discovery has impeded its ability to uncover all of the evidence that is important to its case and the issues raised in the Summary Trial Application. Absent the requested document discovery and examination for discovery, the 1974 Plan will be unable to meet the Petitioners' Summary Trial Application and the Court will be unable to find the facts necessary to adjudicate the preliminary issues raised therein. It is unjust to proceed with this summary trial application without permitting the 1974 Plan to develop its case fully through discovery.

14. Further, the Petitioners' Summary Trial Application raises concerns about "litigating in slices" as it does not seek to resolve the 1974 Plan Claim finally. If the Court were to find in favour of the 1974 Plan on each of the four preliminary issues raised in the Summary Trial Application, the 1974 Plan would still have to prove its claim.

15. In the circumstances of this case, the preliminary issues raised by the Petitioners' application are not suitable for disposition by summary trial and will not assist in the efficient resolution of the proceeding.

16. The Petitioners' Summary Trial Application should be dismissed.

#### Summary of the 1974 Plan Claim

17. The 1974 Plan Claim against the Petitioners arises under the *Employee Retirement Income Security Act of 1974, as amended*, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), as well as the United Mine Workers of America 1974 Pension Plan Document and United Mine Workers of America 1974 Pension Trust Documents, each effective December 6, 1974, and amended from time to time thereafter, and the CBA (as defined in the Amended Notice of Civil Claim).

18. The 1974 Plan alleges that pursuant thereto, each of the Petitioners, along with its U.S. affiliates, is jointly and severally liable to the 1974 Plan for the claimed pension withdrawal liability of Jim Walter Resources Inc. ("**Walter Resources**"), one of the Petitioners' U.S. affiliates.

19. Pursuant to a global settlement and a related effectuating order approved by the U.S. Bankruptcy Court (the "**Global Settlement**"), the 1974 Plan has been determined to hold a claim for withdrawal liability against each of the U.S. entities in the Walter Group (the "**U.S. Entities**") in an amount equal to approximately US\$904 million. The anticipated distribution to the 1974 Plan under the Global Settlement is expected to be *de minimis*. The Global Settlement does not release claims of unsecured creditors against the U.S. Entities or their affiliates.

20. The 1974 Plan alleges that the 1974 Plan Claim is a valid and enforceable debt as against Walter Resources, and each foreign affiliate 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 Walter Energy), which includes the Petitioners.

Notice of Application for Summary Trial

21. The Petitioners' Summary Trial Application outlines the following preliminary issues which the Petitioners assert are appropriate for summary disposition:

- (a) Under Canadian conflict of laws rules, is the 1974 Plan's claim against the Petitioners governed by Canadian substantive law or United States substantive law (including ERISA)?
- (b) If the 1974 Plan's claim against the Petitioners is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA extend extraterritorially?
- (c) If the 1974 Plan's claim against the Petitioners is governed by United States substantive law (including ERISA), and ERISA applies extraterritorially, is that law unenforceable by Canadian courts as a penal, revenue or other public law of the United States?
- (d) If the 1974 Plan's claim against the Petitioners is governed by United States substantive law (including ERISA), and ERISA applies extraterritorially, is that law unenforceable by Canadian courts because it conflicts with Canadian public policy?

22. The Petitioners have filed their evidence for the Summary Trial Application. There are a number of relevant facts pleaded in the Amended Notice of Civil Claim that have not been admitted by the Petitioners, including:

- (a) Walter Energy and its various affiliates, including the Petitioners, constitute a single global enterprise with integrated businesses (para. 15);

- (b) The management team and key-decision makers of Canada Holdings and the other Petitioners operated out of the United States, U.S. law was the legal system with which they were most familiar, they expected U.S. law to govern the business they directed, and they were guided by U.S. law in their actions (paras. 86-87);
- (c) 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 (para. 88);
- (d) Additional members of the Petitioners' management team resided in the U.S. and operated out of the Birmingham, Alabama office (para. 91);
- (e) 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 one of two directors of Pine Valley Coal Ltd., resided in and worked out of the United States and held positions with Walter Energy (para. 92);
- (f) At least four of the five officers of Cambrian Energybuild Holdings ULC lived in and worked out of Birmingham, Alabama (para. 93);
- (g) 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 (para. 94);
- (h) Withdrawal from the 1974 Plan occurred in the United States. The liability created thereby occurred in the United States (para. 96);
- (i) The directors of the Canadian entities were familiar with U.S. law (para. 98);
- (j) 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. (para. 99);
- (k) As the legal system that guided the key players and directing minds of the entities listed in paragraph 99, 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 (para. 100); and

- (l) The consolidated enterprise, which includes Walter Energy, Canada Holdings and their Canadian and U.S. operations, benefits from the Petitioners' refusal to acknowledge the withdrawal liability (para. 101);

(the "**Unadmitted Facts**").

#### The Abrams Report

23. The Petitioners filed an expert report of Marc Abrams (the "**Abrams Report**"). Mr. Abrams was asked to address the second question arising in the Petitioners' Summary Trial Application:

If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially?

24. Mr. Abrams outlined a two-part test for determining whether the presumption against extraterritoriality applies in a particular case. According to Mr. Abrams, the second step involves looking at whether conduct relevant to the statute's focus occurred in the United States. Mr. Abrams concedes that if the conduct relevant to the statute's focus primarily occurred in the United States, no issue of extraterritoriality would even arise.

#### 1974 Plan's Repeated Requests for Discovery

25. The 1974 Plan has made repeated requests to obtain discovery from the Petitioners.

26. On October 3, 2016, the 1974 Plan prepared an initial list of discovery requests based on facts put in issue by the pleadings and requested that the Petitioners produce documents responsive to an itemized list of categories. The Petitioners did not respond to this request.

27. 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. Rather than a summary trial, the Petitioners proposed a determination of points of law governed by Rule 9-4 that would not require discovery.

28. On October 26, 2016, the parties appeared before this Court pursuant to a direction made on August 16, 2016 to determine the procedural vehicle that would be used to determine the issues raised by the 1974 Plan Claim (the "**October Appearance**").

29. 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. The Petitioners submitted that discovery was not necessarily required for a threshold issue that arose in the case (being the extraterritorial applicability of ERISA).

30. The issues raised in the Petitioners' Summary Trial Application filed after the October Appearance go beyond what the Petitioners stated would be before the Court.

31. On November 22, 2016, the 1974 Plan again requested that the Petitioners disclose documents related to discovery categories itemized by the 1974 Plan. The 1974 Plan further requested to examine for discovery Mr. Harvey.

32. The 1974 Plan subsequently brought an application seeking an order for targeted document discovery to allow it to meet the preliminary issues raised by the Petitioners' Summary Trial Application. The Petitioners opposed the 1974 Plan's application.

33. To date, the Petitioners have not disclosed any of the requested documents to the 1974 Plan or consented to allow the 1974 Plan to examine for discovery Mr. Harvey.

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

#### The Petitioners' Notice of Application is Unsuitable for Summary Trial

34. On an application heard before or at the same time as the hearing of a Summary Trial Application, the court may dismiss the Summary Trial Application where:

- (i) the issues raised by the Summary Trial Application are not suitable for disposition under Rule 9-7, or
- (ii) the Summary Trial Application will not assist in the efficient resolution of the proceeding.

#### ***Supreme Court Civil Rules, Rule 9-7(11)***

35. Further, on hearing an application for summary trial, the court may dismiss the application if the court is unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application.

#### ***Supreme Court Civil Rules, Rule 9-7(15)***

Discovery is required for the fair adjudication of the issues

36. The Petitioners have staked their Summary Trial Application on the contention that no facts are required to determine the preliminary issues raised in the application. In spite of this assertion, the Petitioners seek to rely on, amongst other things, a 35 page, 160 paragraph affidavit of Mr. Harvey and a 28-page document titled "Statement of Uncontested Facts" that lists 122 "facts", many of which are disputed. Indeed, the Petitioners' own expert says facts matter, as Mr. Abrams claims that the ultimate determination of the extraterritoriality issue depends upon whether the conduct relevant to ERISA's focus primarily occurred in the United States.

37. The Petitioners cannot have it both ways. They cannot say that no facts are required for this Court to adjudicate the preliminary issues in their Summary Trial Application while simultaneously seeking to rely on voluminous evidentiary materials and an expert report that says facts matter.

38. The Petitioners have repeatedly denied the 1974 Plan any form of pre-trial discovery. As a result, the 1974 Plan is unable to prove the facts it says are relevant to the preliminary issues raised in the Petitioners' Summary Trial Application and unable to challenge the untested "facts" the Petitioners say are relevant.

39. The Petitioners refusal to grant any discovery in this case leaves it unsuitable for determination by summary trial. It is also wholly unfair. The adversarial system is founded on the conception that the parties to a lawsuit will bring forward all relevant evidence available to support their case and will present their case in its best light. When the issues in dispute do not permit a litigant to rely solely on its own evidence, it may adduce necessary evidence from the opponent.

***Mayer v. Mayer, 2012 BCCA 77 at paras. 78-79***

40. 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.

***Mayer at para. 79***

41. Further, 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. Without the ability to ask questions of opposing witnesses, a party's opportunity to effectively present its case and to correct or contradict any relevant statement prejudicial to its view is significantly diminished.



**Mayer at paras. 79-82**

42. Where there is a real possibility that a party can bolster its claim by discovery of documents and examinations for discovery on triable issues before the court, it would be unjust to decide the issues on a Summary Trial Application.

**Mayer at para. 83; *Bank of British Columbia v. Anglo-American Cedar Products Ltd.* (1984), 57 B.C.L.R. 350 at 353 (S.C.)**

43. Based on the Petitioners' own materials, it is clear that preliminary issues raised in the Summary Trial Application cannot be adjudicated in the absence of evidence – evidence that can only be uncovered and challenged by the 1974 Plan through discovery.

44. The first issue raised in the Petitioners' Notice of Application involves identifying the proper law to apply to the 1974 Plan Claim – either the law of the United States or the law of Canada.

45. When a court is asked to determine if foreign law is applicable, the first step a court must take is to “characterize” the issue before it. The court will do so by reviewing the facts and determining the nature of the legal question those facts raise.

**Janet Walker, *Castel & Walker Canadian Conflict of Laws*, loose-leaf 6 ed (Toronto: LexisNexis, 2005) ch 3 at 3-1 [*Castel & Walker*]**

46. Once the issue is “characterized”, the court will apply the appropriate choice of law rule for that category of legal issue.

***Castel & Walker*, ch 3 at 3-1**

47. It is not always clear which choice of law rule applies, and even where it is some rules are quite fact-dependent. It will often not be possible for a judge to fully resolve the issue at an early stage of the proceedings.

***Douez v. Facebook, Inc.*, 2015 BCCA 279 at para. 83, leave to appeal granted 2016 CanLII 12162 (S.C.C.)**

48. The 1974 Plan submits that the Court will be required to undertake a contextual and fact-driven analysis to determine the proper law to apply to the 1974 Plan Claim. In particular, the 1974 Plan submits that relevant to the choice of law analysis is the degree of integration of the Canadian and U.S. arms of the Walter Group.

49. The degree of integration between the various entities in the Walter Group is a matter of dispute between the parties. The 1974 Plan has pleaded a number of facts, including the Unadmitted Facts, in its Amended Notice of Civil Claim respecting the

close relationship between all entities in the Walter Group. Many of the Unadmitted Facts can only be proved out of the mouths and through the documents of the Petitioners.

50. Discovery is also necessary for the Court to address other preliminary issues raised in the Summary Trial Application. For instance, the Petitioners seek an order that ERISA is unenforceable by Canadian courts because it conflicts with Canadian public policies. The Court should not be asked to make a final decision on this claim on the basis of public policy arguments without a solid factual foundation.

51. Further, on the Petitioners' view of the extraterritoriality issue, facts are key (see pages 21 and 22 of the Abrams Report). Mr. Abrams suggests that the Court must determine whether conduct relevant to ERISA's focus occurred inside the United States. Mr. Abrams' report suggests that this is a fact-dependent, conduct-driven analysis that would likely be influenced by the degree of integration between the Petitioners' and the other entities in the Walter Group.

52. It is not clear that the issue of whether conduct relevant to ERISA's focus occurred inside or outside of the United States is before the Court on the Petitioners' Summary Trial Application (as their application frames the second issue it appears directed only to the first part of the Abrams Report). If this issue is before the Court, the best source of evidence to address the matter is solely within the Petitioners' control. If it is not, then it accentuates the problem of litigating in slices discussed below.

53. As of the date of filing this application, the 1974 Plan has not received any document disclosure from the Petitioners, nor has it had the opportunity to examine for discovery Mr. Harvey. Absent discovery and examination for discovery of Mr. Harvey, the Court will be unable to find the facts necessary to adjudicate the preliminary issues raised by the application. Moreover, as the 1974 Plan should have the opportunity to develop its case by discovery of documents and examination for discovery, it would be unjust to decide the issues on the Petitioners' Summary Trial Application at this time.

The Petitioners are seeking to litigate in slices

54. The Petitioners' Summary Trial Application does not seek to resolve the 1974 Plan Claim finally. The application accordingly raises concerns about litigating in slices.

55. The question of suitability arises in every Summary Trial Application. It takes on particular significance when a party seeks a summary trial on only some of the issues in the proceeding.

***The Owners, Strata Plan BCS 1165 v. National Home Warranty Group Inc.,  
2015 BCSC 1122 at para. 17 [National Home Warranty]***

56. Where a summary trial application is brought in respect of only a portion of a case, the following factors are pertinent:

- (a) whether the court can find the facts necessary to decide the issues of fact or law;
- (b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
  - i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
    - (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
    - (2) the potential for multiple appeals; and
    - (3) the novelty of the issues to be determined;
  - ii. the amount involved;
  - iii. the complexity of the matter;
  - iv. urgency;
  - v. any prejudice likely to arise by reason of delay; and
  - vi. the cost of a conventional trial in relation to the amount involved.

***National Home Warranty at para. 19***

57. A consideration of these factors demonstrates that the preliminary issues raised by the Petitioners are not currently suitable for summary determination.

58. As set out above, the Court is not in a position to find the facts necessary to decide all issues of fact or law arising in the application. In particular, the Court is not in a position to determine the proper law of the 1974 Plan Claim. The Court is also not in a position to address the issue raised in the Abrams' Report regarding whether the relevant "conduct" occurred primarily in the United States (assuming that this issue is before the Court). The Court should not litigate in slices in a factual vacuum.

***Bison Properties Ltd. (Re), 2016 BCSC 507 at para. 60***

59. Many of the other factors listed above are also engaged and support the dismissal of the Petitioners' Summary Trial Application.

60. The amount of the claim – over \$1 billion – is clearly significant. If proven, the 1974 Plan Claim will be the most significant claim in these CCAA proceedings by a large margin, resulting in the 1974 Plan receiving almost all of the funds available for distribution to creditors.

61. This case is complex, highlighted by the voluminous materials filed by the Petitioners in support of their Summary Trial Application. The Petitioners have filed over six volumes of materials, including approximately 300 pages of affidavit evidence (inclusive of exhibits). The Petitioners "evidence" also includes the Petitioners' "Statement of Uncontested Facts", which contains 122 "facts" the Petitioners say are relevant to this application (many of which are disputed). 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.

62. The summary trial procedure should be confined to cases which are relatively straightforward on their facts, particularly when the application is brought by the defendant. This is not such a case.

***Cannaday v. Sun Peaks Resort Corp. (1998), 44 B.C.L.R. (3d) 195 at para. 53 (C.A.)***

63. There is also a risk that the findings reached on this summary trial will be irrelevant. The summary trial raises only preliminary issues and cannot result in a finding of liability against the Petitioners. If the 1974 Plan were to succeed on this Summary Trial Application but its claim were later to fail on its facts, the summary trial will have proved to be a waste of the parties' – and the Court's – time.

***Prevost v. Vetter, 2002 BCCA 202 at para. 25***

64. Of further concern to the efficient resolution of this proceeding is the prospect of an appeal from the Summary Trial Application. Indeed, counsel for the Petitioners submitted at the October Appearance that given the 1974 Plan Claim raises an important issue of law (*i.e.* the applicability of ERISA to the Petitioners) there is a high probability of appeal on either side. As the Summary Trial Application raises only 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, dramatically increase the costs and thus prejudice all parties in the CCAA proceedings.

***Bacchus Agents (1981) Ltd. v. Phillippe Dandurand Wines Ltd., 2002 BCCA 138 at para. 26 [Bacchus]; Coast Foundation Society (1974) v. John Currie Architect Inc., 2003 BCSC 1781 at para. 18***

65. Further, as the Court is not being asked to adjudicate the 1974 Plan Claim, the determination of the preliminary issues will of necessity be hypothetical. 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. 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.

***Bacchus at paras. 25 and 29***

66. The Petitioners should be required to demonstrate that the administration of justice, as it affects the parties and the orderly use of court time, will be enhanced by dealing with the issues on a summary trial.

***North Vancouver (District) v. Lunde (1998), 162 D.L.R. (4th) 402 at para. 33 (B.C.C.A.)***

67. In the circumstances of this case, the Petitioners' Summary Trial Application will not assist in the efficient resolution of the proceeding and should be dismissed.

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

1. Affidavit #6 of Miriam Dominguez, made 2/Dec/2016.
2. Expert Report of Marc Abrams.
3. Expert Report of Judith F. Mazo.
4. Notice of Application of the Petitioners filed on November 16, 2016.
5. Notice of Application of the 1974 Plan filed on November 24, 2016.
6. Pleadings and other materials filed herein.
7. Such other and additional material as counsel may advise and the Court may admit.

The applicant estimates that the application will take 1 day.

This matter is within the jurisdiction of a master.

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 in consultation with Madam Justice Fitzpatrick and 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 service 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).

Date: 02/Dec/2016



For \_\_\_\_\_  
Signature of lawyer for filing party

Craig P. Dennis, Q.C.  
Canadian counsel for United Mine Workers  
of America 1974 Pension Plan and Trust

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  Judge  Master

\_\_\_\_\_

**APPENDIX**

**THIS APPLICATION INVOLVES THE FOLLOWING:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial

- case plan orders: amend
- case plan orders: other
- experts



## 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"

## SERVICE LIST

<p><b>Osler, Hoskin &amp; Harcourt LLP</b> Box 50, 1 First Canadian Place Toronto, Ontario, Canada M5X 1B8</p> <p>Marc Wasserman Email: <a href="mailto:mwasserman@osler.com">mwasserman@osler.com</a> Tel: 416-862-4908</p> <p>Mary Paterson Email: <a href="mailto:mpaterson@osler.com">mpaterson@osler.com</a> Tel: (416) 862-4924</p> <p>Emmanuel Pressman Email: <a href="mailto:epressman@osler.com">epressman@osler.com</a></p> <p>Patrick Riesterer Email: <a href="mailto:priesterer@osler.com">priesterer@osler.com</a></p>	<p>Counsel for the Petitioners</p>
<p><b>Longview Communications Inc.</b> Suite 612 – 25 York Street Toronto, ON Canada M5J 2V5</p> <p>Joel Shaffer Email: <a href="mailto:jshaffer@longviewcomms.ca">jshaffer@longviewcomms.ca</a></p> <p>Suite 2028 – 1055 West Georgia Vancouver, BC Canada V6E 3P3</p> <p>Alan Bayless Email: <a href="mailto:abayless@longviewcomms.ca">abayless@longviewcomms.ca</a></p> <p>Robin Fraser Email: <a href="mailto:rfraser@longviewcomms.ca">rfraser@longviewcomms.ca</a></p>	<p>Communications Advisor to the Petitioners</p>

<p><b>DLA Piper (Canada) LLP</b> Suite 2800, Park Place 666 Burrard St Vancouver, British Columbia V6C 2Z7</p> <p>Mary Buttery Email: <a href="mailto:mary.buttery@dlapiper.com">mary.buttery@dlapiper.com</a> Tel: 604-643-6478</p> <p>Lance Williams Email: <a href="mailto:lance.williams@dlapiper.com">lance.williams@dlapiper.com</a> Tel: 604-643-6309</p> <p>Copy to: <a href="mailto:susan.wood@dlapiper.com">susan.wood@dlapiper.com</a> <a href="mailto:sue.danielisz@dlapiper.com">sue.danielisz@dlapiper.com</a></p>	<p>Counsel for the Petitioners</p>
<p><b>KPMG Inc.</b> 333 Bay Street, Suite 4600 Toronto, ON M5H 2S5</p> <p>Philip J. Reynolds Email: <a href="mailto:pjreynolds@kpmg.ca">pjreynolds@kpmg.ca</a></p> <p>Jorden Sleeth Email: <a href="mailto:jsleeth@kpmg.ca">jsleeth@kpmg.ca</a></p> <p>Mike Schwartzenruber Email: <a href="mailto:mikes@kpmg.ca">mikes@kpmg.ca</a></p> <p><b>KPMG Inc.</b> PO Box 10426 777 Dunsmuir Street Vancouver, BC V7Y 1K3 Canada</p> <p>Anthony Tillman Email: <a href="mailto:atillman@kpmg.ca">atillman@kpmg.ca</a></p> <p>Mark Kemp-Gee Email: <a href="mailto:mkempgee@kpmg.ca">mkempgee@kpmg.ca</a></p>	<p>Monitor</p>

<p><b>McMillan LLP</b> Royal Centre, 1055 West Georgia Street Suite 1500, PO Box 11117</p> <p>Wael Rostom Email: <a href="mailto:wael.rostom@mcmillan.ca">wael.rostom@mcmillan.ca</a> Tel. 416-865-7790</p> <p>Peter Reardon Email: <a href="mailto:peter.reardon@mcmillan.ca">peter.reardon@mcmillan.ca</a></p> <p>Caitlin Fell Email: <a href="mailto:caitlin.fell@mcmillan.ca">caitlin.fell@mcmillan.ca</a></p> <p>Copy to: Lori Viner Email: <a href="mailto:lori.viner@mcmillan.ca">lori.viner@mcmillan.ca</a></p>	<p>Counsel to KPMG Inc.</p>
<p><b>Walter Energy, Inc.</b> 3000 Riverchase Galleria Birmingham, AL 35244</p>	<p>Parent company of the Petitioners</p>
<p><b>Paul, Weiss, Rifkind, Wharton &amp; Garrison LLP</b> 1285 Avenue of the Americas New York, New York 10019</p> <p>Fax: 212-757-3990 Tel: 212-373-3000</p> <p>Stephen Shimshak, Email: <a href="mailto:sshimshak@paulweiss.com">sshimshak@paulweiss.com</a></p> <p>Kelly Cornish, Email: <a href="mailto:kcornish@paulweiss.com">kcornish@paulweiss.com</a></p> <p>Claudia Tobler Email: <a href="mailto:ctobler@paulweiss.com">ctobler@paulweiss.com</a></p> <p>Daniel Youngblut Email: <a href="mailto:dyoungblut@paulweiss.com">dyoungblut@paulweiss.com</a></p> <p>Michael Rudnick Email: <a href="mailto:mrudnick@paulweiss.com">mrudnick@paulweiss.com</a></p>	<p>Counsel to Walter Energy, Inc.</p>

<p><b>White &amp; Case LLP</b> 1155 Avenue of the Americas New York, New York 10036-2787</p> <p>Fax: 212.819.8200 Tel: 212.819.8567</p> <p>Scott Greissman Email: <a href="mailto:sgreissman@whitecase.com">sgreissman@whitecase.com</a></p> <p>Elizabeth Feld Email: <a href="mailto:efeld@whitecase.com">efeld@whitecase.com</a></p>	<p>US Counsel to Morgan Stanley Senior Funding, Inc., as Administrative Agent and Collateral Agent under the First Lien Credit Facility</p>
<p><b>Stikeman Elliott LLP</b> 199 Bay Street, Suite 4900 Toronto, Ontario M5L 1B9</p> <p>Tel: 416-869-6820 Fax: 416-947-9477</p> <p>Kathryn Esaw Email: <a href="mailto:kesaw@stikeman.com">kesaw@stikeman.com</a></p>	<p>Canadian Counsel to Morgan Stanley Senior Funding, Inc., as Administrative Agent and Collateral Agent under the First Lien Credit Facility</p>
<p><b>Akin Gump Strauss Hauer &amp; Feld LLP</b> One Bryant Park Bank of America Tower New York, New York 10036-6745</p> <p>Fax: 212-872-1002 Tel: 212-872-8076</p> <p>Ira Dizengoff, Email: <a href="mailto:idizengoff@akingump.com">idizengoff@akingump.com</a></p> <p>Lisa G. Beckerman, Email: <a href="mailto:lbeckerman@akingump.com">lbeckerman@akingump.com</a></p> <p>Maurice L. Brimmage Email: <a href="mailto:mbrimmage@akingump.com">mbrimmage@akingump.com</a></p> <p>James Savin Email: <a href="mailto:jsavin@akingump.com">jsavin@akingump.com</a></p>	<p>U.S. Counsel to the Steering Committee of First Lien Creditors of Walter Energy, Inc.</p>
<p><b>Cassels Brock &amp; Blackwell LLP</b> 2200 HSBC Building, 885 West Georgia Street, Vancouver, BC, V6C 3E8</p>	<p>Canadian Counsel to the Steering Committee of First Lien Creditors of Walter Energy, Inc.</p>

<p>Fax: 604 691 6120 Tel: 604 691 6121</p> <p>Steven Dvorak Email: <a href="mailto:sdvorak@casselsbrock.com">sdvorak@casselsbrock.com</a></p> <p>Ryan Jacobs Email: <a href="mailto:rjacobs@casselsbrock.com">rjacobs@casselsbrock.com</a></p> <p>Natalie Levine Email: <a href="mailto:nlevine@casselsbrock.com">nlevine@casselsbrock.com</a></p> <p>Matthew Nied Email : <a href="mailto:mnied@casselsbrock.com">mnied@casselsbrock.com</a></p>	
<p><b>Victory Square Law Office</b> 710 – 777 Hornby Street Vancouver, BC V6Z 1S4</p> <p>Craig Bavis Email: <a href="mailto:cbavis@vslo.bc.ca">cbavis@vslo.bc.ca</a> Tel: 604-684-8421 Fax : 604-684-8427</p>	<p>Canadian Counsel to the United Steelworkers, Local 1-424</p>
<p><b>Dentons Canada LLP</b> 20<sup>th</sup> Floor, 250 Howe Street Vancouver, BC Canada V6C 3R8</p> <p>John R. Sandrelli Email: <a href="mailto:john.sandrelli@dentons.com">john.sandrelli@dentons.com</a> Tel : 604-443-7132</p> <p>Craig Dennis Email : <a href="mailto:craig.dennis@dentons.com">craig.dennis@dentons.com</a> Tel : 604-648-6507</p> <p>Tevia Jeffries Email: <a href="mailto:tevia.jeffries@dentons.com">tevia.jeffries@dentons.com</a></p> <p>Miriam Dominguez Email: <a href="mailto:miriam.dominguez@dentons.com">miriam.dominguez@dentons.com</a></p>	<p>Canadian Counsel to the United Mine Workers of America 1974 Pension Plan and Trust</p>

<p><b>Morgan Lewis &amp; Bockius LLP</b> One Federal St. Boston, MA 02110-1726 United States</p> <p>Julia Frost-Davies Email: <a href="mailto:julia.frost-davies@morganlewis.com">julia.frost-davies@morganlewis.com</a></p> <p><b>Morgan Lewis &amp; Bockius LLP</b> 1701 Market St. Philadelphia, PA19103-2921 United States</p> <p>John C. Goodchild, III Email: <a href="mailto:john.goodchild@morganlewis.com">john.goodchild@morganlewis.com</a></p> <p>Rachel Jaffe Mauceri Email: <a href="mailto:rmauceri@morganlewis.com">rmauceri@morganlewis.com</a></p>	<p>US Counsel to the United Mine Workers of America 1974 Pension Plan and Trust</p>
<p><b>Mooney, Green, Saindon, Murphy &amp; Welch, P.C.</b> 1920 L Street, NW, Suite 400 Washington, DC 20036</p> <p>Paul Green Email: <a href="mailto:pgreen@mooneygreen.com">pgreen@mooneygreen.com</a></p> <p>John Mooney Email: <a href="mailto:jmooney@mooneygreen.com">jmooney@mooneygreen.com</a></p>	<p>US Co- counsel to the United Mine Workers of America 1974 Pension Plan and Trust</p>
<p><b>Ministry of Justice and Attorney General</b> Legal Services Branch P.O. Box 9289 Stn Prov Govt 4<sup>th</sup> Floor – 1675 Douglas Street Victoria, BC V8W 9J7</p> <p>Fax: 250-387-0700</p> <p>David Hatter Tel: 250-387-1274 Email: <a href="mailto:David.Hatter@gov.bc.ca">David.Hatter@gov.bc.ca</a> <a href="mailto:AGLSBRevTax@gov.bc.ca">AGLSBRevTax@gov.bc.ca</a></p> <p>Aaron Welch</p>	<p>Counsel to Her Majesty the Queen in right of the Province of British Columbia</p>

<p>Tel: 250-356-8589 Email: <a href="mailto:Aaron.Welch@gov.bc.ca">Aaron.Welch@gov.bc.ca</a> <a href="mailto:AGLSBRevTax@gov.bc.ca">AGLSBRevTax@gov.bc.ca</a></p>	
<p><b>Department of Justice</b> Government of Canada 900 – 840 Howe Street Vancouver, BC V6Z 2S9</p> <p>Neva Beckie Email: <a href="mailto:neva.beckie@justice.gc.ca">neva.beckie@justice.gc.ca</a></p>	<p>Counsel to Her Majesty the Queen in right of Canada</p>
<p><b>PJT Partners LP</b> 280 Park Ave. New York, NY 10017</p> <p>Steve Zelin Email: <a href="mailto:zelin@pjtpartners.com">zelin@pjtpartners.com</a></p>	<p>Financial Advisor</p>
<p><b>Blue Tree Advisors</b> 32 Shorewood Place Oakville, ON L6K 3Y4</p> <p>William E. Aziz Email: <a href="mailto:baziz@bluetreadvisors.com">baziz@bluetreadvisors.com</a></p>	<p>Chief Restructuring Officer</p>
<p><b>Miller Thomson LLP</b> Scotia Plaza 40 King Street West, Suite 5800 P.O. Box 1011 Toronto, ON M5H 3S1</p> <p>Jeffrey Carhart Email: <a href="mailto:jcarhart@millerthomson.com">jcarhart@millerthomson.com</a></p>	<p>Counsel to Mitsui Matsushima Co., Ltd.</p>
<p><b>Bull Housser &amp; Tupper LLP</b> 1800 – 510 W. Georgia Street Vancouver, BC V6B 0M3</p> <p>Kieran E. Siddall Email: <a href="mailto:kes@bht.com">kes@bht.com</a></p> <p>Scott M. Boucher Email: <a href="mailto:scb@bht.com">scb@bht.com</a></p>	<p>Counsel to Pine Valley Mining Corporation</p>
<p><b>Miller Thomson LLP</b> Barristers and Solicitors</p>	<p>Counsel to Kevin James</p>



<p>840 Howe Street, Suite 1000 Vancouver, BC V6Z 2M1</p> <p>Heather L. Jones Tel. 604-643-1231 (direct) Tel. 604-687-2242 (main) Email: <a href="mailto:hjones@millerthomson.com">hjones@millerthomson.com</a></p>	
<p><b>Caterpillar Financial Services Limited</b> 5575 North Service Road, Suite 600 Burlington, ON L7L 6M1</p> <p>c/o Caterpillar Financial Services Corporation (Global Headquarters) 2120 West End Avenue Nashville, TN 37207</p> <p>Fax: 615-341-8578 Main Phone Line: 1-800-651-0567</p>	
<p><b>Transportation Lease Systems Inc.</b> 205, 10458 Mayfield Road Edmonton AB T5P 4P4</p>	
<p><b>XEROX Canada Ltd.</b> 33 Bloor St. E., 3rd Floor Toronto, ON M4W 3H1</p> <p>Stephanie Grace Email: <a href="mailto:stephanie.grace@xerox.com">stephanie.grace@xerox.com</a></p>	
<p><b>Brandt Tractor Ltd.</b> 9500 190th ST. Surrey B.C. V4N 3S2</p>	
<p><b>Conuma Coal Resources Limited</b> 15 Appledore Lane, P.O. Box 87 Natural Bridge, Virginia 24578</p> <p>Tom Clarke Email: <a href="mailto:tom.clarke@kissito.org">tom.clarke@kissito.org</a></p> <p>Chuck Ebetino Email: <a href="mailto:cebetino@erpfuels.com">cebetino@erpfuels.com</a></p> <p>Jason McCoy Email: <a href="mailto:jmccoy@erpfuels.com">jmccoy@erpfuels.com</a></p>	Purchaser

<p>Bill Hunter Email: <a href="mailto:whunter1@optonline.net">whunter1@optonline.net</a></p> <p>Robert Carswell Email: <a href="mailto:bobcarswellus@outlook.com">bobcarswellus@outlook.com</a> Joe Bean (ERP Internal Counsel) Email: <a href="mailto:jowabean@gmail.com">jowabean@gmail.com</a></p> <p><b>Conuma Coal Resources Limited</b> P.O. Box 305 Madison, WV 25130</p> <p>Ken McCoy Email: <a href="mailto:kmccoy@erpfuels.com">kmccoy@erpfuels.com</a></p>	
<p><b>Dentons Canada LLP</b> 15<sup>th</sup> Floor, Bankers Court 850 – 2<sup>nd</sup> Street SW Calgary, Alberta T2P 0R8</p> <p>David Mann Email: <a href="mailto:david.mann@dentons.com">david.mann@dentons.com</a></p> <p>Leanne Krawchuk Email: <a href="mailto:Leanne.krawchuk@dentons.com">Leanne.krawchuk@dentons.com</a></p>	<p>Counsel for Conuma Coal Resources Limited (Purchaser) and Guarantors</p>
<p><b>Rose LLP</b> Suite 810, 333 – 5<sup>th</sup> Avenue SW Calgary, Alberta T2P 3B6</p> <p>Matthew R. Lindsay, Q.C. Tel.: (403) 776-0525 Email: <a href="mailto:matt.lindsay@RoseLLP.com">matt.lindsay@RoseLLP.com</a></p>	<p>Counsel for Conuma Coal Resources Limited (Purchaser)</p>
<p><b>ERP Compliant Fuels, LLC</b> <b>ERP Compliant Coke, LLC</b> <b>Seneca Coal Resources, LLC</b> <b>Seminole Coal Resources, LLC</b></p> <p>Tom Clarke Email: <a href="mailto:tom.clarke@kissito.org">tom.clarke@kissito.org</a></p>	<p>Gurantors</p>
<p><b>Lamarche &amp; Lang</b> 505 Lambert Street Whitehorse, Yukon Y1A 1Z8</p>	<p>Counsel for Pelly</p>

Murray J. Leitch Email: <a href="mailto:mleitch@lamarchelang.com">mleitch@lamarchelang.com</a>	
<b>Parkland Fuel Corporation</b> #5101, 333 – 96 <sup>th</sup> Avenue NE Calgary, Alberta T3K 0S3  Christy Elliott Email: <a href="mailto:Christy.elliott@parkland.ca">Christy.elliott@parkland.ca</a>	Legal Counsel for Parkland
<b>Canada Anglo American</b>  Federico G. Velásquez Email: <a href="mailto:Federico.velasquez@angloamerican.com">Federico.velasquez@angloamerican.com</a>  Jenny Yang Email: <a href="mailto:jenny.yang@angloamerican.com">jenny.yang@angloamerican.com</a>	
<b>Malaspina Consultants</b>  Marianna Pinter Email: <a href="mailto:Marianna@malaspinaconsultants.com">Marianna@malaspinaconsultants.com</a>	
<b>Boale Wood</b>  John McEown Email: <a href="mailto:jmceown@boalewood.ca">jmceown@boalewood.ca</a>	
<b>Fasken Martineau</b>  John Grieve Email: <a href="mailto:jgrieve@fasken.com">jgrieve@fasken.com</a>	Legal Counsel for Boale Wood
<b>Cavalon Capital Corp.</b> 436 Lands End Rd. North Saanich, BC V8L 5L9 Tel: 778-426-3329 Fax: 778-426-0544  <u>Managing Directors</u>  David Tonken Email: <a href="mailto:tonken@icrossroads.com">tonken@icrossroads.com</a>  Greg Matthews Email : <a href="mailto:gregmatthews@shaw.ca">gregmatthews@shaw.ca</a>	