Court of Appeal File No. CA44448

COURT OF APPEAL

ON APPEAL FROM the Order of the Honourable Madam Justice Fitzpatrick of the Supreme Court of British Columbia, pronounced the 1st day of May, 2017.

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)

REPLY OF THE APPELLANT,
UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST
("1974 PLAN")

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ARGUMENT

I. The respondents' reliance on the "status rule" is misplaced

1. The Walter Canada Group's assertion that the 1974 Plan's claim raises an issue of status is not supportable. Neither respondent can point to a choice of law case for the proposition that a direct claim against a corporate affiliate pursuant to a foreign statute is properly characterized as an issue of status. Nor have they cited authority for the proposition that choice of law rules dictate that claims against a partnership are governed by the place of organization. The Walter Canada Group is attempting in this case to use the "status rule" in a way that it has not been used before and which the authorities establishing and discussing it do not support.

2. The Walter Canada Group suggests that the 1974 Plan's formulation of the "status" rule is "narrow". It argues that the rule applies "broadly" and is applicable to the circumstances of this case. But resolving the issue in this case does not turn on whether the rule, so-called, is narrow or broad. Instead, the analysis rests on an understanding of how decided cases have and have not used the rule. It is only by reviewing those cases that the Court can determine whether it is appropriate that the issue in this case be governed by the same rule as the issues in those cases.

Walter Canada Group Factum ("**WF**"), paras. 60, 65-69; A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws*, vol. 1, 15th ed. (London: Sweet & Maxwell, 2012), paras. 2-038-2-039, p. 51.

3. *Dicey* provides a comprehensive analysis of the issues that properly are characterized as issues of status. These issues include: (a) whether a foreign entity has the capacity to sue or be sued; (b) whether a foreign entity is a corporation or partnership, and, if the latter, the legal incidents which attach to it; (c) whether a corporation has been dissolved; and (d) whether a corporation has been amalgamated with another corporation. Nowhere is it suggested that the status rule is applicable to the determination of the law that applies to a claim concerning the liability of a third party to a contract based on a foreign statute.

Dicey, paras. 30-010-30-011, pp. 1532-1535.

4. Both the Walter Canada Group and the Steelworkers cite a number of authorities as support for a broader application of the status rule. However, none of those cases supports characterizing the issue in this case as one of status.

5. *National Bank of Greece and Athens SA v. Metliss* is authority in England for the proposition that the court will apply the law of the place of incorporation to determine whether an amalgamated company succeeds to the assets and liabilities of its predecessors. *Cirque du Soleil Inc. v. Volvo Group Canada Inc*. is an example of the principle that the determination of whether an entity has the status to sue or be sued is determined by the law of its home jurisdiction. Neither of these cases is analogous to the case at bar, and the respondents offer no compelling argument for why the 1974 Plan's claim should be governed by the same conflicts rule.

Metliss v. National Bank of Greece and Athens, [1957] 2 Q.B. 33 at 46, 51, 53 (C.A.); *National Bank of Greece and Athens SA v. Metliss*, [1957] 3 All E.R. 608 at 527, 529, 531(H.L.); *Cirque du Soleil Inc. v. Volvo Group Canada Inc*., 2015 ONSC 2698 at paras. 11, 19-21, 23, 25, 26-27, 32.

6. The Walter Canada Group also purports to rely on *National Trust Co. v. Ebro Irrigation & Powar Co.*, [1954] CarswellOnt 61 (S.C.) [*Ebro*] and *Risdon Iron and Locomotive Works v. Furness*, [1905] 1 K.B. 49 (C.A.) [*Risdon*].

7. At issue in *Ebro* was the validity and effectiveness of corporate actions purportedly undertaken in Spain concerning several Canadian companies, including the issuance of new shares to replace original shares issued in Canada. Mr. Justice Shroeder granted the relief sought by the owner of the original shares. He concluded that the acts taken in Spain implicated the internal affairs and management of the company and thus had to comply with Canadian law, which they did not.

Ebro at paras. 54, 61-62, 70.

8. The analysis in *Ebro* is not relevant to the issue that was before the chambers judge. Unlike *Ebro*, this case does not concern the applicable law for the issuance of

shares and other internal issues of corporate management and governance. Rather, the issue in this case is determining the appropriate system of law to apply to statutory claims brought directly against partnerships and corporate affiliates of a contracting party. The court in *Ebro* says nothing about characterizing such a claim.

9. The Walter Canada Group's reliance on *Risdon* is similarly misplaced. Contrary to the Walter Canada Group's submission, the U.K. Court of Appeal in *Risdon* did not conclude that the "status rule governed claims made pursuant to a foreign law that imposed liability in a manner implicating legal personality". The court did not characterize the issue in the case as one of status. Indeed, the court did not engage in a characterization analysis at all. The court essentially assumed the application of English law to the question of whether a shareholder of an English company was liable for the contractual debt of the company. The appeal judgment says nothing about choice of law or how to characterize, for choice of law purposes, a claim such as the one in this case.

10. *Risdon* is of questionable assistance as a choice of law case. But regardless, it has no relevance in the circumstances of this case. The rationale offered in *Risdon* appears to be that limited liability is the legal basis of the shareholder's relation to the company. The company thus cannot alter the shareholder's limited liability and pledge his or her credit absent authority to do so. Unlike *Risdon*, the 1974 Plan's claim raises no such issue concerning the internal affairs of a corporate entity. The application of *ERISA* in the circumstances of this case does not implicate the internal relationship between the shareholder and the company premised upon the shareholder's limited liability. *Risdon* has no bearing on the facts of this case.

WF, para. 62; *Risdon* at pp. 87-88; *Risdon Iron and Locomotive Works v. Furness* (1905), 74 L.J.K.B. 243 at 249 (K.B.).

11. The chambers judge was unable to offer a principled basis to support her characterization of the issue in this case as one of status. And the respondents do not offer one here. The mere making of general assertions that the claim implicates "status" or "legal personality" does not advance the analysis. Those terms have no objectively

defined meanings which exist independently of the purpose for which they are used in the authorities. To take the "status rule", so described, as determining that the claim advanced in this case against all 12 entities in the Walter Canada Group (of various forms) should be governed by Canadian law is a leap that the authorities do not support.

Dicey, para. 2-038, p. 51.

II. The Walter Canada Group misconstrues the relevance of pleaded facts

12. The Walter Canada Group argues, without reference to authority, that a fact that ultimately has no bearing on liability cannot be a connecting factor. According to the Walter Canada Group, the only facts that are relevant are those facts which the 1974 Plan must prove to establish its claim.

WF, paras. 99-102.

13. The Walter Canada Group's argument is incorrect. The 1974 Plan's position is that the proper characterization of the issue in this case results in the application of the legal system with the closest and most real connection to the dispute. The authorities concerning that choice of law rule reveal that the factors relevant to the inquiry are broad and are not restricted to facts that are relevant to the ultimate adjudication of the dispute once the appropriate law is selected.

Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed. (Toronto: LexisNexis, 2005) (loose-leaf), pp. 31-12-31-13; *Minera Aqualine Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102 at para. 200.

III. The Walter Canada Group's analogy to a substantive consolidation is not apt

14. The 1974 Plan has a separate and direct claim against each and every Walter Canada Group entity. The 1974 Plan has no need to rely on the doctrine of substantive consolidation and is not seeking to do so. In this case, the impact on other creditors results from an appropriate application of the choice of law analysis and any references

to "equitable treatment" or "fairness" are misplaced. Public policy considerations were part of one of the other questions before the chambers judge that she did not decide.

WF, paras. 88-90; RJ, paras. 179-181, AR, p. 82.

IV. The Steelworkers mischaracterize the nature of the 1974 Plan's claim

15. This case is not about the "attachment of the US Order to Walter Canada", making "Walter Canada liable under the US Order for Walter US's debt" or attempting to "enforce that US Order against Walter Canada in Canadian legal proceedings". The 1974 Plan's claim is a direct claim against each individual Walter Canada Group entity.

Steelworkers Factum, paras. 21-23, 33, 49, 56, 78-81.

V. US case-law cited by the Steelworkers is irrelevant to the choice of law issue

16. At paragraphs 82-96 of its factum, the Steelworkers canvass a number of U.S. authorities presented to the chambers judge by the parties' expert witnesses. Those cases were provided to assist in the resolution of the second issue in the summary trial application, being whether ""controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* extend[s] extraterritorially".

Reasons for Judgment, paras. 12, 94; Appeal Record, pp. 37, 56.

17. The U.S. cases cited by the Steelworkers are not choice of law cases, but rather concern the U.S. courts' ability to take jurisdiction over claims against foreign control group members. The Steelworkers do not provide analysis of how the U.S. cases they cite are relevant to the choice of law issue that is under appeal. The 1974 Plan submits that they are not.

Dated at the City of Vancouver, Province of British Columbia, this 2nd day of August, 2017.

for Counsel for the Appellant
Craig P. Dennis, Q.C.

LIST OF AUTHORITIES

Authority	**Paragraph #**
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