



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 A PLAN OF COMPROMISE OR ARRANGEMENT OF
WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER
PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

APPLICATION RESPONSE

Application response of: Walter Energy Canada Holdings, Inc. and the other Petitioners listed on Schedule "A" (collectively with the partnerships listed on Schedule "A" hereto the "**application respondent**" or the "**Walter Canada Group**")

THIS IS A RESPONSE TO the notice of application of United Mine Workers of America 1974 Pension Plan and Trust ("**1974 Plan**") dated November 22, 2016.

PART 1 ORDERS CONSENTED TO

The application respondent consents to the granting of none of the orders set out in Part 1 of the notice of application.

PART 2 ORDERS OPPOSED

The application respondent opposes the granting of all of the orders set out in Part 1 of the notice of application.

PART 3 ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of none of the orders set out in Part 1 of the notice of application.

PART 4 FACTUAL BASIS

Overview

1. This Application raises two issues: (1) whether the 1974 Plan should be granted discovery on all issues raised in the Walter Canada Group's notice of application for a summary hearing (the "**Notice of Application**"); and (2) whether the expert report prepared by Mr Abrams of the law

firm Willkie Farr & Gallagher LLP and filed by the Walter Canada Group to support its Notice of Application should be struck.

Additional Discovery

2. 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's claim (the "**October Appearance**").
3. Pursuant to a consent case plan order entered on November 14, 2016 (the "**Case Plan Order**"), the Walter Canada Group filed its Notice of Application setting out four preliminary questions, each of which relates to whether or not *Employee Retirement Income Security Act of 1974, as amended*, 29 U.S.C. §§ 1001 *et seq.* ("**ERISA**") governs the 1974 Plan's claim against the Walter Canada Group.
4. If the Court decides any of the four questions in favour of the Walter Canada Group, there is no need for any further exchange of evidence and the material costs associated with doing so can be avoided. If however, the Court decides all four questions set out in the Notice of Application in favour of the 1974 Plan, then it may be necessary to exchange additional evidence to determine the remaining factual disputes.
5. The four questions set out in the Notice of Application were discussed among the parties prior to the October Appearance and set out in correspondence prior to the October Appearance. The two-stage process was raised in the October Appearance.
6. Despite the suggestions raised in the 1974 Plan's notice of application, nothing material has changed since the October Appearance that would warrant this Court revisiting its decision in the October Appearance. The issue is *res judicata*.
7. Both parties sought and have filed expert reports. Neither expert indicated that further facts are required. The 1974 Plan's expert, Ms Mazo, assumes 35 facts in her report. All but two of those facts are direct quotes from or paraphrase the Walter Canada Group's Statement of Uncontested Facts. The remaining two facts describe the 1974 Plan's claim and define the "Walter Canada Group".
8. The scope of discovery sought is neither "limited" nor "targeted" as suggested in the 1974 Plan's notice of application. For example, the 1974 Plan is seeking discovery on admitted facts.

Abrams Expert Report

9. Pursuant to the timelines set out in the Case Plan Order, the Petitioners served an expert report prepared by Mr Abrams of the law firm Willkie Farr & Gallagher LLP.
10. Mr Abrams has listed all of the materials that he relied upon in forming his expert opinion.
11. Mr Abrams and his firm are also US counsel to the Monitor in this matter.
12. The Monitor is an independent officer of the court and is not an advocate.
13. The Monitor is specifically authorised in paragraph 35 of the Claims Process Order granted in this matter to, in consultation with the Walter Canada Group, accept, review and disallow claims. This activity does not transform the Monitor into an advocate.
14. There is no evidence to suggest that the Monitor is not independent in this proceeding.

PART 5 LEGAL BASIS

Additional Discovery

1. The 1974 Plan seeks discovery in relation to the choice of law question in the Notice of Application.
2. The two cases cited by the 1974 Plan for the proposition that choice of law decisions are fact dependent do not support the conclusion that the choice of law question before this Court is fact dependent.
3. In *Douez v. Facebook, Inc.*, the Court states that some choice of law decisions are fact dependent. Some are not.

Douez v. Facebook, Inc., 2015 BCCA 279, leave to appeal granted 2016 CanLII 12162 (SCC)

4. In *Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.*, the Court considers the proper choice of law test in a claim for unjust enrichment and/or title to foreign land. The 1974 Plan does not assert any such claim. Although *Minera* provides an example of the careful analysis required to characterize claims in the choice of law analysis, it provides no guidance on the choice of law test to be applied to the 1974 Plan's claim.

Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A., 2006 BCSC 1102, aff'd 2007 BCCA 319, leave to appeal ref'd [2007] S.C.C.A. No. 424

5. As the Court stated in the October Appearance, if the Court finds that the Walter Canada Group's approach to the choice of law question is incorrect, then the estate may be required to undergo the costs of discovery. It is inequitable to require the creditors of the Walter Canada Group to incur that cost when the same may be irrelevant.
6. The 1974 Plan seeks discovery in relation to the question of extraterritoriality. Both parties have filed expert reports; neither expert indicated that more facts were required to provide an opinion on foreign law.
7. The 1974 Plan seeks discovery in relation to public policy. The 1974 Plan's expert opined on the public policy question without any discovery.

Abrams Expert Report

8. The Monitor is an officer of the Court and is obliged to act independently and to consider the interests of the Petitioners and the creditors. The Monitor is not an advocate.

Re United Used Auto & Truck Parts Ltd., 1999 CarswellBC 2673, 12 C.B.R. (4th) 144
Re Pine Valley Mining Corp., 2008 BCSC 446

9. Being impartial and the court's officer does not preclude the Monitor from independently reviewing material and then telling the Court the Monitor's conclusions. Doing so does not transform the Monitor into an advocate.

Re Slater Steel Inc., 2004 CarswellOnt 4573

10. As counsel to the independent Monitor and as an expert, Abrams is doubly required to be independent. The nature of Abrams relationship with the Monitor and his connection to the 1974 Plan's claim reinforces his quality as an independent expert.

White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23
Bier v. Continental Motors, Inc., 2016 BCSC 1393

11. In the CCAA context, it is prudent for the Court to benefit from the advice on foreign law provided to the Monitor in the course of the Monitor's assessment of claims as doing so is an efficient use of the estate's resources.

PART 6 MATERIAL TO BE RELIED ON

1. Affidavit #3 of Miriam Dominguez made November 23, 2016;
2. Affidavit #1 of Tijana Gavric made August 13, 2016;
3. Expert Report of Marc Abrams;
4. Expert Report of Judith F. Mazo;
5. Notice of Application of the Petitioners filed November 16, 2016;
6. Fourth Report of the Monitor dated August 11, 2016;
7. Affidavit #1 of Susan Danielisz sworn November 27, 2016; and
8. the pleadings and other materials filed in the within action.

The application respondent estimates that the application will take 2 hours.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

November 27, 2016
Dated _____



Signature of lawyer for application respondent

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

and

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

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

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APPLICATION RESPONSE

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