



This is the 6th affidavit of
Miriam Domínguez in this case
and was made on 2/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:

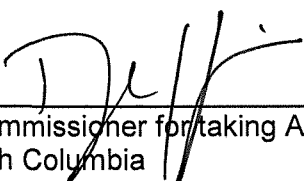
1. I am a legal assistant at Dentons Canada LLP, Canadian solicitors for the United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**"), a claimant in this proceeding, and as such I have personal knowledge of the facts and matters deposed to in this Affidavit except where I depose 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 an e-mail referenced on page 14 of the Transcript and dated October 4, 2016 from Craig Dennis, Q.C, Canadian counsel for 1974 Pension Plan to counsel for the Petitioners and the Monitor.
3. Attached hereto and marked as **Exhibit "B"** is a copy of a string of emails between counsel for Monitor, counsel for the Petitioners and Canadian counsel for the 1974 Plan.

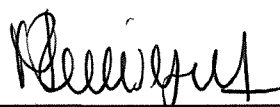
4. Attached hereto and marked as **Exhibit "C"** is a copy of the transcript of the proceedings in chambers in this Action held on October 26, 2016 (the "**Transcript**").

5. Attached hereto and marked as **Exhibit "D"** is a copy of the transcript of the Oral Reasons for Judgment in this Action rendered on October 26, 2016.

6. Attached hereto and marked as **Exhibit "E"** is a copy of a letter dated November 22, 2016 from Craig Dennis, Q.C, Canadian counsel for 1974 Pension Plan to counsel for the Petitioners and the Monitor.

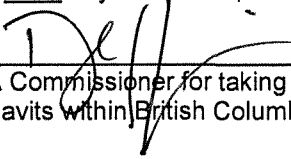
AFFIRMED BEFORE ME at Vancouver, BC,
on 2 / December / 2016.


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

This is Exhibit "A" referred to in the Affidavit of
Miriam Domínguez sworn before me at Vancouver
this 2 day December, 2016.



A Commissioner for taking
Affidavits within British Columbia

Dominguez, Miriam

Subject: FW: Scheduling for 1974 Plan Claim

From: Dennis, Craig

Sent: 4-Oct-16 11:24 AM

To: Peter Reardon; Sandrelli, John; Wasserman, Marc; Buttery, Mary; Rlesterer, Patrick; Paterson, Mary; Williams, Lance; baziz@bluetreeadvisors.com; Jeffries, Tevia; Wael Rostom; Anthony Tillman; pjreynolds@kpmg.ca; Caitlin Fell

Subject: RE: Scheduling for 1974 Plan Claim

All,

As to the exact timing of pre-hearing steps, we are waiting for a response to my email yesterday in order to help shape that.

In the interim, we wish to share some preliminary thinking we have done on a process leading up to a summary trial. We have included the possibility that we may be able to proceed with a summary trial during the week of January 9. But we also have considered a slightly longer timeline which would see the summary trial occur in February (subject to availability). You will see that the process differs slightly between the two scenarios. But both are contingent on the length of time required for discovery, which remains to be determined.

Our Proposal #1: Hearing during week of Feb. 20

- Discovery
 - Document production in response to targeted discovery requests
 - Examination for discovery – to be completed within 21 days after document production.
- Affidavits
 - Plan's affidavits –
 - Respondent's –
 - Plan reply –
- Expert evidence – expert reports –
- Cross-examination on affidavits -
- Written submissions
 - Plan –
 - Respondents –
 - Reply (if any) –
- Hearing
 - Week of February 20 (contingent on timing of steps above)

Our Proposal #2: Hearing during week of January 9

- Discovery
 - Document production in response to targeted discovery requests –
 - Examination for discovery – to be completed within 21 days after document production.

- Affidavits
 - Plan's affidavits –
 - Respondent's –
 - Plan reply –

- Expert evidence – expert reports – timing?

- Statement of legal points and list of authorities
 - Plan and Respondents – Dec 16 (contingent on timing of steps above, but this likely is latest date that would make Jan 9 hearing possible);

- Hearing
 - Week of January 9 (contingent on timing of steps above)

- Cross-examination on affidavits
 - Week of January 9 (during summary trial, as authorized by Rule 9-7(12)(b))



Craig P. Dennis, Q.C.
Partner

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craig.dennis@dentons.com
Bio | Website

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This is **Exhibit "B"** referred to in the Affidavit of
Miriam Domínguez sworn before me at Vancouver
this 2 day of December, 2016.


A Commissioner for taking
Affidavits within British Columbia

Jeffries, Tevia

From: Dennis, Craig <craig.dennis@dentons.com>
Sent: 25-Oct-16 4:08 PM
To: Buttery, Mary; Sandrelli, John
Cc: Paterson, Mary; Peter Reardon; Wael Rostom; Caitlin Fell; Wasserman, Marc
Subject: RE: Walter - MEPP Claim Litigation Plan

We thought it would be useful to circle back in advance of tomorrow morning's case management conference.

We each came away from our call on October 18 with some additional things to think about. Please let us know if there is anything additional you wish us to consider before tomorrow.

We know you have looked at an alternative to a summary trial. In particular, you have asked whether there may be one or more discrete points of law which can be determined without deciding disputed questions of fact and the determination of which would advance the litigation. Let us know if you have any further candidates in that regard for us to consider. As we discussed during our October 18 call, we do not see the list of questions in your October 14 email as falling within those terms.

We continue to support summary trial, preceded (as is customary) by discovery. We note that summary trial is the potential manner of disposition referred to in Madam Justice Fitzpatrick's September 23, 2016 reasons for judgment. As set out in our email of October 3, we are open to trying to expedite the process further by employing a targeted pre-trial discovery directed to the discrete subjects identified in our email.



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From: Buttery, Mary [<mailto:mary.buttery@dlapiper.com>]
Sent: 18-Oct-16 11:38 AM
To: Dennis, Craig; Sandrelli, John
Cc: Paterson, Mary; Peter Reardon; Wael Rostom; Caitlin Fell; Wasserman, Marc
Subject: RE: Walter - MEPP Claim Litigation Plan

Yes, that works Craig. Please use the following call in

Mary

DLA Piper (Canada) Conference Centre North American Dial-In Number:
866-214-9607

DLA Piper (Canada) Conference Centre International Dial-In Number:
+1-647-427-7523

Conference code # is 2299391556

Mary Buttery
Partner

T 604.643.6478
F 604.605.3768
E mary.buttery@dlapiper.com

From: Dennis, Craig [<mailto:craig.dennis@dentons.com>]
Sent: October-18-2016 11:25 AM
To: Buttery, Mary; Sandrelli, John
Cc: Paterson, Mary; Peter Reardon; Wael Rostom; Caitlin Fell; Wasserman, Marc
Subject: RE: Walter - MEPP Claim Litigation Plan

Can we start at 4? I'm available but only until 4:30. If we can do it in 15 minutes great. But it may be better to have a little more time available to us.



Craig P. Dennis, Q.C.
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From: Buttery, Mary [<mailto:mary.buttery@dlapiper.com>]
Sent: 18-Oct-16 10:42 AM
To: Dennis, Craig; Sandrelli, John
Cc: Paterson, Mary; Peter Reardon; Wael Rostom; Caitlin Fell; Wasserman, Marc
Subject: RE: Walter - MEPP Claim Litigation Plan

Thanks Craig.
Probably it's the most efficient if we just get on a call.
We are all free at 4:15 today. Does that work for you?

Mary

Mary Buttery
 Partner
 T 604.643.6478
 F 604.605.3768
 E mary.buttery@dlapiper.com

From: Dennis, Craig [<mailto:craig.dennis@dentons.com>]
Sent: October-17-2016 12:21 PM
To: Buttery, Mary; Sandrelli, John
Cc: Paterson, Mary; Peter Reardon; Wael Rostom; Caitlin Fell; Wasserman, Marc
Subject: RE: Walter - MEPP Claim Litigation Plan

Mary, thanks again for your email Friday, which we have considered. There are a couple of questions which come to mind, on which we thought it might be productive to invite clarification from you. While bearing in mind the court's concern about "litigating in slices", we have not formed a view against bifurcation. We take Peter's point that the court likely will try to work with us if we can agree on a procedure that makes sense in the circumstances and is fair to all concerned.

The two primary questions we have are as follows:

- Are all of the questions of law you listed questions of law alone? My impression on an initial read-through is that the answer to (a) depends on facts, and so it is a question of mixed fact and law, and (b), if it arises at all, is, from the standpoint of B.C., a question of fact alone.
- Is it possible to proceed on questions of law in circumstances which contemplate evidence and an agreed statement of facts? Added to that is that we don't know yet what facts, if any, we will reach agreement on or, therefore, where it would leave us if there are necessary facts which remain contested.

We do of course appreciate that in a CCAA matter, the Court has a fair amount of discretion in settling on the process for determination of claims. That said, there is usually some grounding in the Rules, the Court recognizing, amongst other reasons including fairness, that in significant disputes like this one an appeal is likely. The procedural rule that appears nearest to what you propose is Rule 9-4, proceedings on a point of law. Allowing that the court may give us a little latitude on procedure, there is still value in situating any procedure we consider within what we already are familiar with (*i.e.*, the *Supreme Court Civil Rules*). I was reviewing the principles applicable to Rule 9-4 as set out in *Alcan Smelters & Chemicals Ltd. v. Can. Assoc. of Smelters & Allied Workers, Local 1* (1977), 3 B.C.L.R. 161 at 165 (S.C.). My point for the moment is less about whether, strictly speaking, we meet the conditions listed in *Alcan* and more about whether, if we don't, that may suggest something about the efficacy of trying to proceed on that basis. Among the points stated in *Alcan* are:

1. The point of law to be decided must be raised and clearly defined in the pleadings...;
2. The rule is appropriate only to cases where, assuming allegations in a pleading of an opposite party are true, a question arises as to whether such allegations raise and support a claim or a defence in law...;
3. The facts relating to the point of law must not be in dispute and the point of law must be capable of being resolved without hearing evidence... .

I invite comments, and if it would be helpful to speak again then we're available to do so. Thanks.



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From: Buttery, Mary [<mailto:mary.buttery@dlapiper.com>]

Sent: 14-Oct-16 10:25 AM

To: Dennis, Craig; Sandrelli, John

Cc: Paterson, Mary; Peter Reardon; Wael Rostom; Caitlin Fell; Wasserman, Marc

Subject: FW: Walter - MEPP Claim Litigation Plan

Craig,

Further to our discussions and your proposals set out in your email of October 4, we have considered the various options and propose a bifurcated proceeding along the following lines:

1. *Stage 1:* Final determination of questions of law raised by 1974 Plan's Notice of Claim (Hearing, week of January 9). The questions of law to be decided in Stage 1 are:
 - a. Under Canadian conflict of laws rules, is 1974 Plan's claim against the Walter Petitioners governed by Canadian substantive law or U.S. substantive law (including ERISA)?
 - b. If the 1974 Plan's claim against the Walter Petitioners is governed by U.S. substantive law (including ERISA), as a matter of U.S. law does ERISA apply to corporations existing solely outside the territorial United States of America?
 - c. If the 1974 Plan's claim against the Walter Petitioners is governed by U.S. substantive law (including ERISA) and ERISA applies to corporations existing solely outside the territorial United States of America, 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 Walter Petitioners is governed by U.S. substantive law (including ERISA) and ERISA applies to corporations existing solely outside the territorial United States of America, is that law unenforceable by Canadian courts because it conflicts with Canadian public policy?
2. *Stage 2:* If the Court determines the questions of law in favour of the 1974 Plan, then the parties will exchange additional evidence to support a final determination of the factual questions raised by the 1974 Plan's Notice of Claim on a date to be set.

In Stage 1, the following timetable would ensure that the parties are able to complete the hearing in the week of January 9:

- By Oct. 18, the parties agree on the contents of a Joint Book of Evidence containing documents such as affidavits previously filed with the Court, Monitor's reports previously filed with the Court, other judicial documents (pleadings, the judgment obtained by the 1974 Plan in the US etc.).
- By Oct. 21, the parties will agree on an agreed statement of facts to be included in the Joint Book of Evidence. The Walter Petitioners will file the Joint Book of Evidence with the Court by Oct. 28.
- By Oct. 28, the parties will exchange expert reports on question of law b, as required.
- By Nov. 18, the parties will exchange reply expert reports on question of law b, as required.
- By Dec. 2, 1974 Plan will submit its written submissions (30 page limit).
- By Dec. 16, Walter Canada will submit its written submissions (35 page limit).
- By Dec. 23, 1974 Plan will submit any reply submissions (5 page limit).
- Week of January 9: legal argument before Fitzpatrick J.

In Stage 2, if it is necessary, the parties will agree to a timetable that contemplates the following:

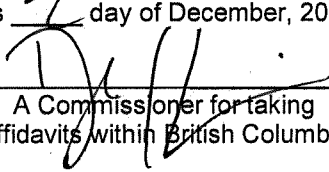
- Identification of the questions of fact to be resolved.
- Discussion of any additional facts that can be agreed beyond the agreed statement of facts from Stage 1.
- Document requests and exchanges of documents.
- Exchange of affidavit evidence specifically related to disputed facts.
- Cross-examinations.
- Argument.

Thanks,

Mary

This e-mail and any attachment(s) are confidential and may be privileged. If you are not the intended recipient, please notify me immediately by return e-mail, delete this e-mail and do not copy, use or disclose it.

This is **Exhibit "C"** referred to in the Affidavit of
Miriam Dominguez sworn before me at Vancouver
this 2 day of December, 2016.



A Commissioner for taking
Affidavits within British Columbia

1
Colloquy

October 26, 2016
Vancouver, BC

(CHAMBERS COMMENCED AT 9:06 A.M.)

1
2
3
4
5
6 THE CLERK: In the Supreme Court of British Columbia at
7 Vancouver, this 26th day of October, 2016, calling
8 the matter of Walter Energy Canada Holdings Inc.,
9 My Lady.
10 THE COURT: Yes.
11 MR. REARDON: My Lady, Peter Reardon, attorney for the
12 monitor. It is at least notionally my application.
13 THE COURT: Yes. All right. Thank you, Mr. Reardon.
14 Who's next? Ms. Buttery?
15 MS. BUTTERY: Good morning, My Lady. Mary Buttery,
16 counsel for the Walter entities, and on the phone
17 is Mary Paterson of the Osler firm in Toronto.
18 I'm not sure if Mr. Riesterer is on the phone as
19 well.
20 MS. PATERSON: Yes, My Lady, both Mary Paterson and Pat
21 Riesterer are here.
22 THE COURT: Okay.
23 MS. PATERSON: And if we could please request that
24 counsel speak close to a microphone that would be
25 great -- or closer to the phone, that would be
26 helpful. Thank you.
27 THE COURT: All right. Thank you. So that's
28 Ms. Paterson. Just let me -- not Mr. Wasserman,
29 he's not on it.
30 MS. BUTTERY: No.
31 THE COURT: Okay.
32 MS. BUTTERY: And Mr. Riesterer.
33 THE COURT: Mr. Riesterer. Yeah. Okay.
34 MR. BAVIS: Good morning, Craig Bavis, counsel for the
35 respondent United Steel Workers.
36 THE COURT: All right. Thank you.
37 MR. DENNIS: And, My Lady, surname is Dennis,
38 D-e-n-n-i-s, initial C. With me is John Sandrelli,
39 and we're here for the UMWA Pension Plan.
40 THE COURT: All right. All right. Now, Mr. Reardon,
41 it is your application, I believe.
42 MR. REARDON: It is, My Lady. And let me say first
43 that in the material we have included the
44 monitor's fifth report --
45 THE COURT: Yes.
46 MR. REARDON: -- which reports on a number of matters
47 that we're not going to be discussing today unless

2
Submissions for the monitor by Mr. Reardon

1 Your Ladyship wants to. But it reports on the
2 closing of the sale on September 9th --
3 THE COURT: M'mm-hmm.
4 MR. REARDON: -- and it includes a report -- a brief
5 report on the claims process. The claims' bar
6 date expired on October 5th --
7 THE COURT: Right.
8 MR. REARDON: -- and a few other matters.

9
10 **SUBMISSIONS FOR THE MONITOR BY MR REARDON:**

11
12 But the reason that we are here today --
13 THE COURT: M'mm-hmm.
14 MR. REARDON: -- is that the claims process order
15 dealing with the 1974 pension plan claim,
16 paragraph 31, says -- and this is in the monitor's
17 report but:

18
19 Promptly upon completion of the various other
20 matters --

21
22 Which is the filing of the claims, which has been
23 done.

24
25 -- the monitor shall, in consultation with
26 counsel for UMWA 1974 Pension Plan, seek a
27 scheduling appointment before the court on
28 notice to the service list to seek further
29 directions concerning procedure for
30 adjudicating the pension plan claim.

31
32 So that's what we're here for.

33 THE COURT: M'mm-hmm.

34 MR. REARDON: As disclosed briefly in the monitor's
35 report, the parties have had a number of
36 discussions about the scheduling and the
37 procedures to be followed. We haven't been able
38 to reach any agreement. The discussions of course
39 are always subject to Your Ladyship's directions,
40 but if I can -- I'm going to leave it to the --
41 these people to kind of duke it out, although it's
42 not a duking out situation, but see where we can
43 get to. But if I can say --

44 THE COURT: Well, it's easy -- the pleadings are. I
45 see that --

46 MR. REARDON: The pleadings are done.

47 THE COURT: -- those are all complete.

3
Submissions for the monitor by Mr. Reardon

1 MR. REARDON: They are.
2 THE COURT: Yes.
3 MR. REARDON: And so we had tentatively booked a date
4 before Your Ladyship for the week starting
5 January 9th. And so the schedules that had been
6 proposed were geared towards getting things done
7 by that date. On the one hand, I suppose the
8 simplest procedure that has been proposed -- and
9 it is certainly not as simple as I'm going to
10 state it is, and I also want to caution, I will
11 use certain phrases or contents from the rules of
12 court, but it has been my position all along that
13 we're not necessarily bound by the strict
14 compliance with the rules of court. We -- in a
15 way we'll get to make up some of our own rules
16 here subject to Your Ladyship's direction, but --
17 so on the one hand is determination of a point of
18 law. And without stating what it is because we
19 haven't arrived at that, is there some point that
20 could be determined that would put to rest the
21 claim. So for instance the application of ERISA
22 in Canada, that's simply stated. And there have
23 been some proposed questions, but they probably
24 all involve some findings of fact which means they
25 don't fit strictly into the rule 9-4, whatever it
26 is --
27 THE COURT: The special case.
28 MR. REARDON: -- determination on --
29 THE COURT: Special case or something like that.
30 MR. REARDON: -- a point of law or --
31 THE COURT: Yeah.
32 MR. REARDON: -- whatever. On the other hand, the
33 other end of the spectrum is a full blown -- not
34 full blown trial, nobody is suggesting that yet
35 but a summary trial. And as in Your Ladyship's
36 reasons for judgment back in August, you suggested
37 that perhaps a summary trial -- and I think we
38 could probably talk about those terms.
39 THE COURT: I suggested maybe a hybrid trial, or it
40 might be a combination of affidavit evidence and
41 live evidence, I think.
42 MR. REARDON: Yes.
43 THE COURT: Something like what they did --
44 MR. REARDON: Right.
45 THE COURT: -- in Nortel. Frankly, with --
46 MR. REARDON: And that's what we --
47 THE COURT: Yeah.

4

Submissions for the monitor by Mr. Reardon

1 MR. REARDON: -- have been discussing.
2 THE COURT: M'mm-hmm.
3 MR. REARDON: But we haven't gotten there in part
4 because we've -- we're trying to get to the
5 January 9th date, and if we have full blown
6 discoveries for instance, that's not going to
7 happen. So we have kind of gotten bogged down on
8 that. The January 9th date is -- there's no magic
9 to it other than Your Ladyship's availability, but
10 certainly the monitor and I think all the parties
11 want to get this done. It's a big matter, and
12 there are likely to be appeals, so before a
13 distribution can be made to creditors, this issue
14 has to be determined.
15 THE COURT: M'mm-hmm.
16 MR. REARDON: So that's where we are. There, as I say,
17 have been very fruitful discussions about how we
18 would go about this. All -- I said both sides.
19 All parties involved in those discussions have
20 tried to give and take, and we just haven't got
21 there. So given the provision in the claims
22 process order, the monitor decided, well, we
23 better get before Your Ladyship just to talk it
24 out a little bit and see if Your Ladyship has any
25 thoughts of directions that you can send us away
26 with, and we will get back to trying to figure out
27 how we can best determine this or have adjudicated
28 the claim.
29 THE COURT: Okay.
30 MR. REARDON: So that's the monitor's role here.
31 THE COURT: M'mm-hmm.
32 MR. REARDON: Unless Your Ladyship has any other role
33 for the monitor to take. We're setting up calls
34 and kind of trying to get the parties together, so
35 far without success.
36 THE COURT: Well, let's just park that for the moment,
37 Mr. Reardon, until I hear from the parties.
38 MR. REARDON: Yes.
39 THE COURT: I mean, I'll -- I mean, I'm somewhat --
40 well, I don't know about imposing procedures that
41 may not work from the parties' point of view
42 particularly those that bear the onus.
43 MR. REARDON: Yes.
44 THE COURT: So that's certainly an issue. So I think
45 what I'll do is I'll hear from you at the end of
46 it. But I'll hear from Mr. Bavis and
47 Mr. Sandrelli first because the onus will clearly

5
Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 rest on the plan.

2 MR. REARDON: Mr. Dennis?

3 THE COURT: Or Dennis. Sorry, Mr. Dennis to prove the
4 case against the estate.

5 Mr. Dennis.

6 MR. REARDON: Thank you, My Lady.

7 MR. DENNIS: Yes. Thank you, My Lady. I just -- it
8 will streamline things rather than lengthen things
9 if I can refer to a booklet that I prepared. I
10 provided it to my friends this morning.
11 Ms. Buttery quite clearly pointed out it would
12 have been nice for her to have had it earlier than
13 this morning. It doesn't have a lot of substance.
14 I would have got it to her sooner, but it only
15 reached my hands at 7:30 last night. But
16 certainly in future I'll endeavour to get her that
17 more quickly.

18
19 **SUBMISSIONS FOR THE UMWA 1974 PENSION PLAN BY MR. DENNIS:**

20
21 Mr. Reardon, I think, has very fairly
22 captured the position that, as I understand it
23 when the parties were before Your Ladyship in
24 August a summary trial was discussed as a possible
25 way of proceeding. That continues to be the
26 position of the '74 plan that this case is
27 suitable for disposition by summary trial, and we
28 have consistently expressed that view.

29 So let me just walk through the points in
30 this brief. But before I do that maybe to
31 encapsulate why we haven't just got on with it if
32 that's where we're at. The -- really the point, I
33 think, that has proved to be a sticking point is
34 the notion of some pre-summary trial discovery.

35 From our perspective as is customary with this --
36 THE COURT: Examination for discovery or document
37 discovery?

38 MR. DENNIS: Well, in the first instance document
39 discovery, potentially some examination for
40 discovery. And I'll say more about our position
41 because reflecting the desire to move this forward
42 expeditiously we've proposed a modification to the
43 usual discovery rules. We've said we're quite
44 content to proceed with just targeted discovery in
45 discrete subject areas that we've identified for
46 the company. And we've sent to them three and a
47 half weeks ago, October 3rd, a list of the

6
Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 discrete subjects on which we would like to have
2 discovery and invited the company to tell us what
3 the timeline would be for responding to that
4 discovery request.

5 The company is looking for ways to do this
6 without having to embark on any -- even that
7 targeted limited discovery. They would prefer to
8 have it presented as a question of law which they
9 say would obviate the need for any pre-hearing
10 discovery, documents or otherwise. The difficulty
11 coming to it that we have with that is that
12 they're -- so far nobody's been able to identify a
13 discrete question of law that isn't fact dependent
14 and indeed isn't dependent on what facts that are
15 in dispute on the pleadings. That's the
16 difficulty.

17 So let me just move through this very quickly
18 to give Your Ladyship a sense of where we are. At
19 point A I've simply -- on the first page of this
20 booklet, so under the very -- not tab but just
21 letter A on the left-hand side, which is just a
22 reference, I've just repeated the passage from
23 Your Ladyship's reasons for judgment last month
24 that addressed this claim. And I note in
25 paragraph 87 there, four lines from the bottom
26 Your Ladyship wrote:

27
28 The present thinking is that the issues are
29 likely suitable for disposition by summary
30 trial, although that remains to be seen.
31

32 As I say that continues to be our objective and
33 belief that we can do it.

34 I know that -- I wasn't here of course in
35 August -- that Your Ladyship characterized the
36 pension plan's claim as a unique claim. And I
37 might just take a moment on that from two
38 perspectives because it does feed into what we're
39 doing by way of process. And I appreciate that
40 comment would reflect the submissions that counsel
41 made at the time. But I wanted to look at that
42 from two perspectives, that is the description of
43 it as a unique claim.

44 First, at tab 1 -- and it's not particularly
45 critical, but at tab 1 is an order approving a
46 settlement in a CCAA matter that was brought in
47 Ontario. And it's interesting because this --

7

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 although procedurally the footing was slightly
2 different because the US Pension Benefit Guaranty
3 Corporation was directly involved in the case, but
4 substantively the idea of an ERISA claim in a
5 Canadian CCAA proceeding was in play. And if I
6 can ask Your Ladyship just to turn four pages in
7 under the tab. This is the final -- four pages in
8 would be the final page of the minutes of
9 settlement --

10 THE COURT: Yes.

11 MR. DENNIS: -- and there should be a paragraph 8 --

12 THE COURT: M'mm-hmm.

13 MR. DENNIS: -- at the top.

14 THE COURT: Yeah.

15 MR. DENNIS: What happened is that this case was
16 settled without the court determining the issue.
17 And so paragraph 8 says PBGC, the Pension Benefit
18 Guaranty Corporation, and the applicants agree and
19 confirm that the issue of whether PBGC claims
20 under the provisions of ERISA are enforceable in
21 Canada was not determined. So the claim was
22 brought, but the settlement obviated the need for
23 a determination of the point.

24 THE COURT: I think that's why I called it unique
25 because it was -- there's been no determination of
26 this type of claim on the merits.

27 MR. DENNIS: Absolutely. Absolutely.

28 THE COURT: I was aware that there had been some
29 Ontario cases.

30 MR. DENNIS: Correct. So at least in that case the
31 claim was potentially before but not determined.
32 This would, as far as I'm aware, be the first
33 occasion when the court would have to determine
34 the point.

35 But the other aspect of it that I wanted to
36 raise -- and this is really at letter B. Back to
37 the first page under the booklet. In a sense,
38 My Lady, the claim by the '74 Plan really is no
39 different from the claim of any other claimants
40 save and except that the '74 Plan's claim we say
41 is governed by US law on a proper choice of law
42 analysis, whereas the claims of the employees and
43 Mr. Bavis' clients is governed by BC law. Save --
44 and apart from that there's no difference between
45 the two claims, and that's the point of that
46 letter B in my booklet. This is just a passage
47 from Halsbury's that says:

8

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1
2 A creditor may prove for any debt due to him
3 from the bankrupt no matter whether the debt
4 is governed by English law or foreign law.
5 Of course it may be necessary to refer to
6 foreign law in order to discover whether a
7 debt governed by a foreign proper law is
8 valid by that law. But subject to this a
9 foreigner proving for a foreign debt stands
10 in the same position as an English creditor
11 proving for an English debt.
12

13 And so, My Lady, that in my respectful submission
14 is exactly the situation here. The '74 Plan's
15 claim is conceptually like any other claim. The
16 only difference is we say it arises under foreign
17 law, and Your Ladyship will have to determine on a
18 proper choice of law analysis whether the claim is
19 governed indeed by US law as we submit or it's not
20 governed by US law as others submit. And I'll say
21 for today's purposes, My Lady, if the proper law
22 governing this claim is British Columbia law then
23 it's unlikely our claim can succeed. Conversely,
24 if the proper law as we say it -- the *lex causae*,
25 to use the lexicon of conflicts of law, if the
26 *lex causae* is US law then in my respectful
27 submission it's unlikely the claim would fail.
28 That is the key differentiating point in relation
29 to this claim.

30 So that leads us then procedurally into what
31 we face and --

32 THE COURT: Well, but that's -- isn't that just sort of
33 one part of the analysis, though. I mean, it
34 seems to -- I have -- and again, I haven't looked
35 at this in any detail, but I thought that one of
36 the issues was whether under US law this was a
37 claim or not including issues of
38 extraterritoriality and all of that. But that
39 secondarily I thought that one of the issues being
40 raised by Walter Energy and perhaps the union --
41 the Canadian union, is whether in fact that -- if
42 it is a valid claim, whether as a matter of
43 committee or public policy it should even be
44 acknowledged by this court as a proper debt.

45 MR. DENNIS: Yes, but --

46 THE COURT: So it seems to me that the -- I thought
47 that was kind of the analysis, the decision tree,

9

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 if I can put it that way.
2 MR. DENNIS: I think that's fair, My Lady, but the
3 first issue is the choice of law analysis as
4 between US law and Canadian law.
5 THE COURT: M'mm-hmm.
6 MR. DENNIS: There are a series of questions that fall
7 under that analysis. There are a series of
8 questions and, as Your Ladyship says, a decision
9 tree that you'll have to go through --
10 THE COURT: M'mm-hmm.
11 MR. DENNIS: -- the first of which is, which country
12 has the closest and most real connection to the
13 claim. But if we pass that first point then
14 public policy type committee questions can arise.
15 THE COURT: M'mm-hmm.
16 MR. DENNIS: On Your Ladyship's comment about
17 extritoriality, I would say that it really isn't
18 an issue of extritoriality because it's not the
19 US that decides whether US law applies here. It's
20 Your Ladyship and Canadian domestic law that
21 decides on a proper choice of law analysis whether
22 the governing proper law is US law.
23 THE COURT: Well, I don't want to wade into all
24 these --
25 MR. DENNIS: Yeah.
26 THE COURT: -- very complicated issues, but I -- you
27 know, I think you and I are on the same page in
28 the sense that there are some US issues, but then
29 assuming you get over all those hurdles, there are
30 some Canadian issues --
31 MR. DENNIS: Right. But those Canadian issues of
32 course arise within a defined construct as
33 established by previous case law. So it's not a
34 free-ranging inquiry as described by case law.
35 THE COURT: Well, I'm not suggesting that --
36 MR. DENNIS: Yeah. So --
37 THE COURT: -- I know the whole landscape here,
38 Mr. Dennis.
39 MR. DENNIS: Yeah. So complicated, though, My Lady, is
40 the operative word. And that's why at letter C
41 I've referred to the recent decision from the
42 chief justice in the *Douez* case. And Chief
43 Justice Bauman said this:
44
45 More importantly, it will often not be
46 possible at the early stage of a stay
47 application to decide which law applies to

10

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 the merits. It is not always clear which
2 choice of law rule applies. Even when it is,
3 some rules are quite fact dependent. In
4 short, choice of law is complicated.
5

6 And that, My Lady, is really why we have taken the
7 position that proceeding on a point of law isn't
8 viable in this particular situation, why a summary
9 trial which allows the court to engage with
10 evidence and make findings as necessary is really
11 the only streamlined procedure that works in the
12 circumstances of this case.

13 At letter D I simply refer to the *Alcan* case,
14 and I shared this with my friends previously as
15 part of our discussions. These are -- it's now
16 rule 9-4. It used to be 34. But these are the
17 preconditions to being able to proceed under the
18 rules on a question of law. And 3 -- of course
19 the rule is appropriate only to cases where
20 assuming allegations in a pleading of an opposite
21 party are true, a question arises as to whether
22 they raise the supported claim. And 3, the facts
23 relating to the point of law must not be in
24 dispute, and the point of law must be capable of
25 being resolved without hearing evidence.

26 And on that, My Lady, if I could just turn to
27 tab 2 of the booklet.

28 THE COURT: M'mm-hmm.

29 MR. DENNIS: I have reproduced the notice of civil
30 claim, but I've added an annotation to indicate
31 the position in the response of the United Steel
32 Workers and Walter Canada [sic]. So a legend is
33 there at the top left-hand side. An X suggests
34 that the point has been denied. And so just by
35 way of example, My Lady, if I could ask you to
36 turn to page 5 of the pleading, paragraph 26. We
37 pleaded Walter Energy and its affiliates,
38 et cetera, comprise an integrated enterprise
39 group. And that has been denied in the response,
40 which is entirely fair for them to do so. But we
41 don't have agreement on the facts. Over the page
42 to paragraph 34, at all material times Walter
43 Energy directed and controlled the affairs of the
44 petitioner centrally from its headquarters in
45 Alabama, and that fact has been denied. Likewise,
46 continuing over to page 8 -- page 8, paragraph 53,
47 the western acquisition and hybrid piling

11

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 [indiscernible] drained funds from Walter Energy.
2 And paragraph 57, by reason of the western
3 acquisition, Walter Energy impaired its ability to
4 satisfy obligations of the '74 Plan. And again,
5 those are facts that have been denied, which is
6 entirely fair and legitimate position for the
7 company to take. But --

8 THE COURT: Well, I suppose what I saw from that,
9 though, is that you were painting a factual
10 picture if I can call it that. When I looked at
11 your pleadings about, you know, the fact that the
12 American pension plan deserves some sympathy
13 because all these funds were shipped up to Canada
14 and therefore the -- in other words, I'm getting
15 [indiscernible] question here which says -- like,
16 are those facts truly necessary for you to prove
17 your claim?

18 MR. DENNIS: In our submission they are. And harkening
19 back to the chief justice's comment that I
20 referred to a moment ago, the choice of law
21 analysis is quite fact dependent, and it's
22 necessary to understand how this enterprise, we
23 say an integrated enterprise, operated. How are
24 persons in positions of authority, decision making
25 responsibility put in place? How are decisions
26 made? All of those facts play into the very
27 contextual choice of law analysis that's involved.
28 Again, it's which country has the closest and most
29 real connection to the claim. And there's a
30 constellation of factors that the court can and
31 should consider in our submission in arriving at
32 that determination.

33 THE COURT: M'mm-hmm.

34 MR. DENNIS: And fundamentally, My Lady, what we're
35 faced with as the pension plan is the difference
36 between sufficient knowledge to plead and
37 admissible evidence to prove. We have enough
38 basis to plead the facts we've pleaded, but absent
39 discovery it's going to be more difficult for us
40 to have admissible evidence to prove of those
41 claims. And this is at tab 3 of the booklet.
42 Just by way of illustration, this is an excerpt
43 from the Harvey affidavit that Your Ladyship would
44 have seen earlier in the proceeding. This is the
45 file -- there was an affidavit from Mr. Harvey in
46 this proceeding from December, which exhibited an
47 affidavit or a declaration that he swore in the US

12

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 proceeding. This is, just to keep it simple, an
2 extract from that US declaration, which was
3 exhibit B to that affidavit. And at paragraph 47
4 on the first page Mr. Harvey declared that:

5
6 Walter Energy Canada is a direct subsidiary
7 of Walter Energy, the Canadian holding
8 company of the debtor's Canadian operations.
9

10 Then over the page to paragraph 66 under the
11 heading "Centralized Management."

12
13 Walter Energy manages its global operations
14 centrally from its headquarters in
15 Birmingham, Alabama.
16

17 And then over the page to 75, fourth line down in
18 the paragraph:

19
20 Among other things, the Walter Energy sales
21 and marketing personnel manage and oversee
22 the integration of sales and marketing
23 policies for the debtors, including
24 monitoring sales contracts, et cetera.
25

26 So we have some knowledge from Mr. Harvey himself
27 and other sources that enable us to plead, but
28 there's a difference between pleadings, Your
29 Ladyship appreciates, and having admissible proof
30 of facts. That's where discovery comes in. So if
31 I come back to the front of my booklet -- and I'm
32 just about done, on the second page there, I have
33 some pretty uncontroversial and trite comments
34 about the significance of discovery to a litigant.
35 At letter G, for example, and from Justice
36 La Forest in the *Hunt* case:
37

38 Discovery is a very important tool of civil
39 litigation. The ultimate plaintiff must have
40 a tool to access the internal documents
41 especially of large corporate monoliths.
42

43 That was said in the context of a product
44 liability case but in my submission applies here.
45 And letter H, the *Mayer* case from our court of
46 appeal:
47

1 Litigants do not always have access to all of
2 the relevant evidence bearing on the issues
3 raised. Often relevant documents are in the
4 sole possession or control of their
5 opponents. Document discovery requires the
6 deponents to disclose such documents, and it
7 enables the litigants to use them in support
8 of their case. Also oral discovery offers
9 the opportunity to learn of relevant evidence
10 otherwise not known to the examining party to
11 obtain and to helpful admissions ...
12

13 Et cetera. The D2 case -- and I won't read the
14 extract at letter I, but it's simply making the
15 point that it's no different for summary trial as
16 Your Ladyship appreciates. We will have the onus
17 of coming forward with admissible evidence to
18 prove our case. So that's really been where we've
19 been stuck. We have -- recognizing the necessity
20 of moving quickly and the ability in this
21 proceeding to not be handcuffed by the formality
22 of the rules, we've said let's work within the
23 summary trial process, but we'll -- we're content
24 to have a more targeted, streamlined discovery
25 process as I said earlier. We've identified half
26 a dozen -- six to eight discrete subject areas
27 where we would like discovery on those points.
28 We've invited the company to give us a time
29 estimate as to what the timing will be for
30 responding to that discovery request. We haven't
31 had a response to that because instead we've been
32 exploring whether a point of law type approach
33 would work. And we've, unfortunately, not been
34 able to identify a discrete question of law that
35 isn't tied to disputed facts and that would
36 meaningfully advance the case. And given the
37 posture we're in, it doesn't appear to us that
38 rule 9-4 is -- the conditions of rule 9-4 are
39 satisfied. And it's not just that they're not
40 satisfied, it's rather what the experience and
41 wisdom of working with those kinds of cases. Why
42 rule 9-4 doesn't work in situations where parties
43 have to lead evidence, and there are disputed
44 facts. If we embark on that process, I fear we're
45 going to end up causing more delay than progress.
46 THE COURT: M'mm-hmm. So you've asked for, I think you
47 said, six areas of document discovery.

14

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis
Submissions for the petitioners by Ms. Buttery

1 MR. DENNIS: Eight, sorry.
2 THE COURT: Eight, sorry.
3 MR. DENNIS: My -- I have it -- there's an October 3
4 emails to my friends --
5 THE COURT: Yeah. No. That's fine. And then what
6 about discovery? After you get the documents you
7 want to examine who --
8 MR. DENNIS: We would anticipate wanting to do a short
9 examination of Mr. Harvey.
10 THE COURT: Just Mr. Harvey?
11 MR. DENNIS: Yes.
12 THE COURT: Mr. Harvey's the US citizen, I believe? Is
13 he in Alabama still?
14 MR. DENNIS: I believe that's correct. But he of
15 course swore the affidavit in this proceeding.
16 THE COURT: M'mm-hmm. All right.
17 MR. DENNIS: And we would be anticipating it --
18 presumably that, you know, the usual seven hours
19 or less.
20 THE COURT: Okay.
21 MR. DENNIS: Thank you, My Lady.
22 THE COURT: Thank you, Mr. Dennis.
23 Ms. Buttery.

24
25 **SUBMISSIONS FOR THE PETITIONERS BY MS. BUTTERY:**

26
27 My Lady, I don't need to tell you that this
28 claim obviously will swamp -- well, has the
29 possibility of swamping any other claim.
30 THE COURT: M'mm-hmm.
31 MS. BUTTERY: And our claims process is in many ways
32 complete except for this claim. And it's
33 incredibly important to get it moving forward.
34 We've been in discussions with the 1974 Plan
35 claims since -- for over a month. And this is my
36 concern generally about leading into sure
37 litigation on this matter because there has to be
38 an expedited process, and there has to be a
39 recognition that this claim needs to be determined
40 quickly and summarily. And Your Ladyship and
41 Mr. Sandrelli and Mr. Reardon are all familiar
42 with very complicated points of law and facts that
43 are determined on an expedited basis. And,
44 unfortunately, we've lost a month already because
45 we frankly can't agree on how to proceed in this
46 matter. So I -- unfortunately, I do think we're
47 going to need Your Ladyship's direction in setting

15

Submissions for the petitioners by Ms. Buttery

1 this down because I don't frankly see a complete
2 common ground.
3 We have suggested that there be essentially a
4 two stage analysis of this issue. And the first
5 perceives -- I don't agree that it should be --
6 frankly, that we should compress it by the rules
7 because we can agree upon a process that works for
8 all the parties and having regard to the interest.
9 And I think it's artificial to have a claims
10 process all of a sudden required to fit within the
11 four corners of a rule in a BC court. And so in
12 our submission the basic issue is whether this
13 US law or the plan claimed against the Walter
14 entities applies to corporations existing solely
15 outside the territory of the US. And we propose
16 that we proceed by way of expert evidence and that
17 the basic facts --

18 THE COURT: Expert evidence on what issue?
19 MS. BUTTERY: Whether the US -- which law applies. As
20 a matter of US law does ERISA apply to
21 corporations existing solely outside the territory
22 of the US?

23 THE COURT: Is that that extraterritoriality issue? Or
24 is it some other issue?

25 MS. BUTTERY: It really is whether -- the issue, I
26 believe, is common control, and can common control
27 exist for corporations incorporated outside of
28 the US? And frankly for the -- when we told my
29 friend this for prepared -- for the purposes of
30 stage 1 --

31 THE COURT: Sorry, is common control a phrase under
32 ERISA? Is that --

33 MS. BUTTERY: I believe it is. Yes.

34 THE COURT: Okay.

35 MS. BUTTERY: So we told my friends that for the
36 purposes of stage 1 only and without prejudice to
37 stage 2, which is if we actually have to get into
38 full blown litigation. Essentially we need to
39 know if ERISA applies before we even get into the
40 legitimacy of the claim. And so what we told our
41 friends is we're prepared for the purposes of
42 stage 1 only to admit that the Walter Energy --
43 Walter entities were under common control under
44 ERISA with the caveat that if an expert says no,
45 common control can only apply if the companies are
46 incorporated in the US then that would be decided.
47 There can't be common control if there is -- there

16

Submissions for the petitioners by Ms. Buttery

1 are companies incorporated in Canada. And I think
2 that's an issue that would be determined by the
3 expert evidence based on the material already
4 provided or facts that we can agree upon.
5 THE COURT: Sorry, I've -- you've lost me there.
6 You're saying that you would concede the common
7 control issue, so the issue is only where the
8 place of incorporation is?
9 MS. BUTTERY: No. So we would concede common
10 control --
11 THE COURT: Yeah.
12 MS. BUTTERY: -- with the caveat that we don't think US
13 law provides that common control includes
14 corporations incorporated outside of the US.
15 THE COURT: And so that's a --
16 MS. BUTTERY: So that --
17 THE COURT: That's a US -- that's a US law issue.
18 MS. BUTTERY: That's a US law issue that will need to
19 be determined by the experts. And so we proposed
20 and exchanged expert evidence. We put forward a
21 timetable and an exchange of material such that we
22 can have a threshold issue in essence determined
23 before we needed to get into the conflicting
24 facts. Part of the problem of course is that the
25 Walter Energy -- Walter entities have been sold,
26 both in the US and in Canada, and it's -- these
27 aren't people who are necessarily readily
28 available or extremely concerned about the timing
29 and the delay. And, for example, Mr. Harvey's
30 affidavit that my friend just pointed to, just to
31 be clear, that was an affidavit sworn in the US
32 proceedings, and of course debtors doesn't include
33 the Canadian entities in the US proceeding, just
34 by way of example. Mr. Harvey may or may not be
35 prepared to provide that information. He did
36 swear an affidavit and attached it, his own
37 affidavit. But in that case just simply the
38 reference to debtors, for example, were the US
39 debtors not the Canadian debtors. And I apologize
40 I've just had a quick look through that. I did
41 receive it at 8:55. I'm a little bit frustrated
42 at not having a chance to review it at length, but
43 I think that is illustrative of the fact that I
44 don't think we're going to come to an agreement as
45 to procedure. We were offered dates in November,
46 December, January and February when we inquired in
47 mid September. And now we're at the end of

17

Submissions for the petitioners by Ms. Buttery

1 October. The November and probably December dates
2 are long gone. We're hopeful that we could
3 proceed to January. And if not, I believe Your
4 Ladyship might have some time in February. But
5 presumably given that this is an important issue
6 of law, there will -- there's a high probability
7 of appeal on either side, I would think. I don't
8 know. But I would think that even a determination
9 by Your Ladyship, which is going to be extremely
10 complicated and presumably take Your Ladyship some
11 time after your hear the submissions, we're
12 looking at months and months and months before the
13 Walter entities can make any distribution to the
14 creditors.

15 THE COURT: Let's go back to the discovery that
16 Mr. Dennis is looking for. Are you saying that --
17 is that just going to take too long? Or it's
18 you're not too -- it's not readily available or
19 what's the --

20 MS. BUTTERY: Two points. Two points, My Lady.

21 THE COURT: Yeah.

22 MS. BUTTERY: And my friend Ms. Paterson may speak up
23 because I know she's spoken with Mr. Aziz about
24 this.

25 THE COURT: M'mm-hmm.

26 MS. BUTTERY: But my submission on that is twofold.
27 The first is they described the areas that they
28 wanted to explore as discrete. And of course as
29 litigants do we don't agree that they are discrete
30 areas, and we think they're extremely broad and
31 not necessarily required for what we would urge
32 upon this court as a threshold issue. In addition
33 there is the difficulty of the fact that this is a
34 company -- companies that have been restructured
35 both and sold south of the border and here. And
36 so the availability of witnesses and documents is
37 uncertain. And we're afraid that if we proceed by
38 way of what my friends will urge upon you, which
39 is -- it seems to me a fairly significant
40 discovery process, that we could be months down
41 the road before we even get to setting a hearing
42 date.

43 So that -- those are my two concerns about
44 their documentary request, and I don't know,
45 Ms. Paterson, if you had any other comments about
46 that.

47 MS. PATERSON: Thank you, My Lady. Ms. Buttery has

18

Submissions for the petitioners by Ms. Paterson

1 articulated our position very eloquently. I would
2 add only two points. The first point, and if --
3 can I confirm can you hear me all right?

4 THE COURT: Yes.

5 MS. PATERSON: Thank you.

6
7 **SUBMISSIONS FOR THE PETITIONERS BY MS. PATERSON:**

8
9 The first point is that some of the documents
10 that our friends have requested are not in the
11 control of the Canadian entities, and it's not, as
12 you pointed out, a simple proposition to get US
13 citizens or US entities to cough up material when
14 they are not even really in the proceeding any
15 more themselves. The second point is that the
16 process that has been proposed by Walter we think
17 will work, but we recognize that our friends
18 disagree, and they may have concerns. Given that
19 this is an insolvency proceeding, we have great
20 faith that we'll be able to work out those
21 potential bumps in the road as we go through it.
22 And if it turns out at the end of the day that
23 there are no facts that My Lady requires then
24 we'll be done. But if My Lady indicates that some
25 facts are required then we will have much more
26 specific guidance around what evidence we are --
27 what evidence the court needs to make the
28 decision.

29 THE COURT: Well, Ms. Paterson --

30 MS. PATERSON: So we are urging upon the court a
31 flexible approach --

32 THE COURT: Ms. Paterson --

33 MS. PATERSON: -- that doesn't attempt to anticipate
34 all eventualities up front.

35 THE COURT: Ms. Paterson --

36 MS. PATERSON: Let's just get this going, and we'll
37 deal with problems when they arise.

38 THE COURT: Ms. Paterson. Ms. Paterson.

39 MS. PATERSON: Yes.

40 THE COURT: Mr. Dennis has pointed me to his claim and
41 his client's claim and pointed to some factual
42 denials by the Walter Energy group. Are -- and I
43 should have asked Ms. BATTERY the same question.
44 Are those matters -- are you prepared to concede
45 those factual allegations for the purpose of
46 proceeding in this two stage analysis that you're
47 talking about?

19

Submissions for the petitioners by Ms. Paterson

1 MS. PATERSON: My Lady, we thought long and hard about
2 that when we drafted the pleading ourselves. And
3 we looked at the provisions in ERISA to see what
4 are the facts that a court attempting to apply
5 ERISA would need, and those facts come out of the
6 definition of common control as Ms. Buttery
7 alluded to. That definition does not include any
8 of the language that was pointed to by my friend,
9 and so it was our view that not only do we -- you
10 know, there may be a dispute about those facts,
11 but it's not relevant or not necessary for the
12 court to determine that because it is not even
13 part of the definition of common control under
14 ERISA.

15 THE COURT: So is the question -- answer to my question
16 that if you could concede simply for the purpose
17 of proceeding this preliminary point, that you
18 could concede that? Is that the answer to my
19 question?

20 MS. PATERSON: My Lady, some of the language that was
21 pointed to is quite pejorative, and so I don't
22 know that I would want to concede in this
23 proceeding language that is pejorative
24 particularly when it's not necessary to do so on
25 the questions that the court's being asked to
26 consider. If that is something that would
27 facilitate this process, we would absolutely take
28 it back and look at it and think about it. We
29 have asked our friends to provide us with a list
30 of the facts that they think are necessary to
31 determine the specific questions in stage 1. And
32 we don't have an answer on that yet because
33 there's been a lot, I think, for both sides to
34 think about. And so in answer to your question,
35 My Lady, I don't know that I can give you that
36 concession today, but we're absolutely prepared to
37 consider whatever is necessary to move this
38 forward.

39 THE COURT: All right.

40 MS. BUTTERY: In short, My Lady, we propose -- as
41 you've heard my friend Ms. Paterson say, we don't
42 agree that there are any necessary facts that are
43 not in the pleadings and readily available and
44 that there are -- it is really a legal issue as
45 between the choice of law as a threshold issue
46 that can be determined through the use of experts.
47 I can't advise the court that we have an expert.

Submissions for the petitioners by Ms. Paterson

1 I've asked my friend point blank if they have an
2 expert. He declined to answer that question. And
3 so I don't know whether they do. I would assume
4 that they do. They probably have had one for the
5 purposes of preparing their claim, quite frankly.
6 We proposed a schedule -- a couple schedules that
7 got us through to the January 9th hearing date.
8 In fairness my friend has tried to work with those
9 dates but wants larger discovery. And it's just
10 something that A, we don't think is necessary, and
11 B, we think it will necessarily draw -- drag the
12 process down. It just can't be completed in that
13 time frame.

14 I believe that even though we proposed the
15 schedule probably two weeks ago now, that if we
16 were to push it back by two weeks, we could still
17 achieve the January 9th date, but I'm afraid that
18 my friends and I and Ms. Paterson are so far apart
19 as to how we should proceed that that is really
20 why we're in front of Your Ladyship for some
21 direction. Because I think we're all in
22 agreement -- and Mr. Bavis will speak in a moment
23 and probably is chomping at the bit to do so, it's
24 his clients who obviously are so affected by this
25 and its delay. And we urge upon Your Ladyship to
26 help us get to a January 9th hearing date in the
27 most expeditious manner possible.

28 I do have to speak to Your Ladyship about --
29 I'm just flagging this, so I don't forget. After
30 we're done this, just about another short hearing
31 regarding an assignment of contract. But
32 that's -- I'm just raising that, so I don't
33 forget.

34 THE COURT: Yeah. Okay. Well, let's -- I'll hear from
35 Mr. Bavis now.

36 MR. BAVIS: Thank you, My Lady. I'm in a difficult
37 position here because quite frankly, a lot of
38 what's been discussed today in terms of scheduling
39 and evidence in phase 1 and phase 2, I'm hearing
40 for the first time today. For whatever reason
41 despite the fact that my clients have a
42 \$12 million claim and have filed a response,
43 neither the monitor, the Walter Energy Group nor
44 the mine worker's pension plan have been including
45 us in any of the correspondence. So I haven't
46 seen any of these schedules.

47 THE COURT: Well, is it your intention to participate

21

Submissions for the United Steel Workers by Mr. Bavis

1 in this hearing --

2 MR. BAVIS: Oh. Absolutely.

3 THE COURT: -- in a substantive manner, Mr. Bavis?

4 MR. BAVIS: Absolutely. That's why we filed a
5 response.

6 THE COURT: Okay.

7

8

SUBMISSIONS FOR THE UNITED STEEL WORKERS BY MR. BAVIS:

9

10 In particular, I don't think my clients are
11 prepared to agree that Walter -- the Walter Energy
12 Group meets the test of a controlled group. Part
13 of the --

14 THE COURT: Well, I know. I'm assuming you disagree
15 with everything.

16 MR. BAVIS: Well, a lot of things we're not taking a
17 position on; right?

18 THE COURT: Oh, I see.

19 MR. BAVIS: Simply because we don't have knowledge
20 of -- but certainly the way the operations of
21 Walter Energy as it relates to one mine
22 underground certainly points to Canadian control
23 not national control. If you can appreciate I'm
24 speaking without instructions on this because I
25 wasn't aware of some of the issues. In my view
26 there is an important legal threshold issue to be
27 determined, and that's the extraterritorial
28 applicability of ERISA and whether or not the
29 claim out of Alabama was intended to have
30 extraterritorial effect. For my view it would make
31 sense to have a process whereby we would deal with
32 that legal threshold issue. Whether or not that
33 particular statute has extraterritorial effect
34 before we move to the factual issues looking --
35 including the controlled group. So if it's going
36 to be a -- you know, certainly we -- you had
37 advised the court -- the parties that you had the
38 first week of January free. We were expecting you
39 were keeping that free. Certainly unless there's
40 some requirement for expert evidence, we even
41 canvassed, we [indiscernible] looking at expert
42 evidence, but certainly we could probably deal
43 with that legal issue -- that threshold issue and
44 then deal with an issue later on.

45 Obviously it's a significant claim for us.
46 We want to move along, but maybe it is appropriate
47 then to seek direction from the court that keep

22

Submissions for the United Steel Workers by Mr. Bavis
Reply for the monitor by Mr. Reardon

1 the filed responses in this matter included in the
2 scheduling discussions. It's -- unfortunately, I
3 don't know if it was an oversight on the part of
4 the parties or an assumption that we wouldn't be
5 taking a role, but you can understand this is a
6 huge monetary claim, 300 miners at the Wolverine
7 Mine, \$12 million. Obviously my client wants to
8 have a role in it. So --

9 THE COURT: M'mm-hmm.

10 MR. BAVIS: -- in my view we deal with the legal issue
11 threshold first and might not need to get to the
12 other factual issues.

13 THE COURT: All right. Thank you, Mr. Bavis.

14 MS. BUTTERY: My Lady, I can advise, and I believe
15 speaking for Mr. Dennis too it was inadvertent to
16 not include Mr. Bavis, and we will endeavour to
17 include him. My sincere apologies and we will
18 include him going forward. We obviously recognize
19 his client's significant claim.

20 THE COURT: All right. Good.

21 Now, Mr. Reardon, do you have anything to add
22 to all of that?
23

24 **REPLY FOR THE MONITOR BY MR. REARDON:**
25

26 My Lady, my friends have given -- thought
27 about this in more detail than I have, but I must
28 say that I agree, I think, with what Mr. Bavis
29 said that this threshold issue I would have
30 thought could be dealt with without the necessity
31 of the fact finding that Mr. Dennis is talking
32 about. There's no question there will be -- it's
33 not a strict question of law because the expert
34 evidence of US law will be taken as fact. So it
35 probably doesn't -- having thought about this, it
36 probably doesn't fit into rule 9-4, but I would
37 say, so what?

38 THE COURT: It would be a summary trial application.

39 MR. REARDON: Well, it would be, I guess. I don't know
40 what we would call it, but it would be a
41 determination of --

42 THE COURT: Well, it would be a summary trial type of
43 process --

44 MR. REARDON: Yes.

45 THE COURT: -- where there would be some evidence.

46 MR. REARDON: Evidence on affidavit or expert report.

47 THE COURT: And necessary -- necessarily fact finding

23

Reply for the monitor by Mr. Reardon

1 by the court and the legal issue.
2 MR. REARDON: Right. And if Your Ladyship on that
3 hearing felt that there were actual facts in
4 dispute as opposed to foreign law issues then it
5 may not work.
6 THE COURT: M'mm-hmm.
7 MR. REARDON: But right now I don't know what those
8 actual fact issues would be on that discrete
9 question. So my view has been that that question
10 might work. And if it's determined one way, it
11 may be the end of the matter. If it's determined
12 the other way then we continue on with a more -- a
13 larger scale process. But I haven't attempted
14 really to phrase the question, and I certainly
15 haven't looked at what actual facts might have to
16 be proven. I've left that up to the actual
17 disputants. I must say I also apologize to
18 Mr. Bavis. I set up the calls. The order said --
19 and this isn't why we excluded him, the order said
20 that we would schedule on consultation with
21 the 1974 Plan --
22 THE COURT: Okay. Well, I don't want to spend time on
23 that. Everybody's acknowledged the problem, and
24 Mr. Bavis will be included in all discussions in
25 the future.
26 MR. REARDON: So my view, My Lady, is that it is quite
27 possible that we could proceed on what Ms. BATTERY
28 has called stage 1 with a question that may not
29 involve actual factual dispute. But if it does
30 then it may not work that way, and we have to
31 embark on a larger process with some discovery.
32 And I'll also say, though, that the list of
33 classes of documents that my friends have
34 suggested would be required would -- it may be
35 discrete issues, but in looking at the those lists
36 of eight classes, it's some heavy work, and they
37 may not be available as my friend has said,
38 Ms. Paterson, I think. Those documents may not be
39 in control at all.
40 THE COURT: Well, if that's the case then they're not
41 discoverable, in any event, from Walter Energy.
42 They'll have to be obtained --
43 MR. REARDON: Some other process.
44 THE COURT: -- if they can be at all, through other
45 means.
46 MR. REARDON: Right. But I only point that out because
47 it -- embarking on that process is maybe even

24

Reply for the UMWA 1974 Pension Plan by Mr. Dennis

1 longer than the schedule that we have been talking
2 about.

3 THE COURT: M'mm-hmm. All right. Thank you.

4 Mr. Dennis, a short reply?

5 MR. DENNIS: Thank you, My Lady.

6

7

REPLY FOR THE UMWA 1974 PENSION PLAN BY MR. DENNIS:

8

9

10 First, the legal issue that Mr. Bavis has
11 proposed, in my submission, the difficulty is it's
12 not a threshold issue. The answer to that
13 question isn't going to determine things. It may
14 be a question downstream in the analysis that the
15 court will take into account in assessing the
16 expectations of the parties, but a decision on
17 that issue isn't going to resolve matters.
18 Because as I said earlier, fundamentally it's not
19 a question of what was intended by the US. It's
20 not a question of whether congress intended
21 extraterritorial effect. Congress doesn't dictate
22 what law applies in this court. It's a
23 determination made by Your Ladyship under domestic
24 law. And that is the fact of an inquiry. The
25 other point, I guess -- major point, My Lady, is
26 that again, we're prepared to work with the rules
27 of court flexibly as we've identified with a more
28 targeted discovery process, but the rules are a
29 useful guide. They reflect experience. They
30 reflect wisdom. We have process. We have rules.
31 Where a party comes forward and says we don't
32 think the facts that are pleaded by the claimant
33 matter to our legal position, we can have a legal
34 point determined. The *quid pro quo* in that is the
35 party coming forward and making that argument
36 says, I will accept everything pleaded as true,
37 and on that footing I'm going to argue that in law
38 the claim can't succeed. That's not what's being
39 presented to Your Ladyship. It's a heads I win,
40 tails you lose proposal where we want just some
41 facts, just the facts that we on our side think
42 are important but not the facts that the other
43 side is saying to the court are important. And
44 finally, My Lady, discovery is not a vice to be
45 avoided. It is a necessary indispensable tool,
46 standard in civil litigation.

47

THE COURT: Well, this isn't civil litigation,
Mr. Dennis. I appreciate you're not in the --

25

Reasons for judgment

Discussion re scheduling and procedure

1 practicing in the insolvency area, but this isn't
2 civil litigation. This is a claims process.
3 MR. DENNIS: Absolutely fair, My Lady. And that's why
4 we have tried to come up with a more streamlined
5 fashion. But ultimately the court is still going
6 to make a very, very significant determination
7 that is tied to facts and is tied to law. And in
8 my respectful submission it would be a greater
9 cost for the court to embark on an analysis of
10 this important legal question without the benefit
11 of all of the facts that are necessary to that
12 determination, than simply to move ahead with a
13 process that the parties can't identify or root in
14 any previous procedure. That's the difficulty,
15 My Lady.

16
17 **(REASONS FOR JUDGMENT UNDER SEPARATE TRANSCRIPT)**
18

19 MS. BUTTERY: Thank you, My Lady, and are you or
20 Mr. Reardon -- maybe you're aware if the
21 January 9th date is still available? I believe
22 you did reserve it, but I don't know for sure that
23 that was --
24 THE COURT: Well, I -- I'm not -- that's -- now, how
25 many days are we talking about here? Because I
26 think we talked about there were going to be many
27 days.
28 MS. BUTTERY: I think we thought five.
29 THE COURT: So five. For the week, then.
30 MS. BUTTERY: For the week of January 9th is what we --
31 THE COURT: Mr. Dennis, do you have any thoughts on
32 timing? Or time estimate?
33 MR. DENNIS: Well, we certainly identified those as
34 available dates, but we haven't identified what
35 we're going to be doing on those days. So it's
36 difficult to assess timing without knowing what's
37 going to be going forward --
38 THE COURT: Well, assuming that Ms. Buttery is correct
39 and assuming you're going to make your argument
40 somewhat such -- somewhat along the lines of what
41 you just said this morning --
42 MR. DENNIS: Right.
43 THE COURT: -- how many days would you think?
44 MR. DENNIS: For summary trial of --
45 THE COURT: Well, a determination of the claims process
46 on somewhat of a summary trial type process.
47 MR. DENNIS: Yeah. Well, it wouldn't be less than five

26

Discussion re scheduling and procedure

1 days. There may be -- I think if we're faced with
2 a summary trial application, we would be bringing
3 an application ahead of that for document
4 production. And our position at the hearing
5 itself would obviously be influenced by the
6 determination of that preliminary application for
7 document disclosure. So --

8 THE COURT: Well, I thought that was the whole idea of
9 having this application here now. I'm saying that
10 I'm not going to order document production. I'm
11 going to allow this application to proceed on the
12 basis that Ms. BATTERY might be right in terms of
13 a threshold issue. If she's wrong and you jump up
14 in court on January 9th and say this is
15 inappropriate just as, frankly, a lot of summary
16 trial go, you know, there's usually a
17 corresponding application for a determination
18 that's not appropriate. The usual practice or at
19 least my usual practice is to say I'm going to
20 hear them all at the same time, and then I'll
21 decide.

22 MR. DENNIS: Right.

23 THE COURT: So the first issue, is it appropriate for
24 summary trial? If the answer to that is yes then
25 here's the decision on the summary trial.

26 MR. DENNIS: Right. Fair enough, My Lady. I hadn't
27 appreciated that it was intended to be that strict
28 a direction. I would -- our preference would be
29 to actually be in a position to have the summary
30 trial determined on the merits whether in January
31 or February or whatever the earliest possibility
32 is rather than, you know, have to go through the
33 preliminary of whether it's suitable. If we were
34 able to be in a position to be ready to proceed on
35 the merits, that would be the preference. But I
36 take Your Ladyship's comment. It's difficult in a
37 situation when you're dealing with suitability and
38 merits, but it wouldn't be less than five days.

39 THE COURT: Now, that's the way it usually works on
40 these summary trial applications.

41 MR. DENNIS: It does, but that's in a situation where
42 both parties have had an opportunity to put
43 forward all of the evidence they would want to.
44 In this particular instance we necessarily won't
45 have all of the evidence that we would need to
46 rely on at a summary trial.

47 THE COURT: Well, I -- that's usually how it goes. The

27

Discussion re scheduling and procedure

1 other party says, I've only discovered Joe Bloggs
2 for a day; I need more time with him, or I haven't
3 got these documents, so I can't proceed. I mean,
4 that's the way it goes. So --
5 MR. DENNIS: Yeah. That is one --
6 THE COURT: -- you can put forward what evidence you
7 have or what evidence you might be able to get
8 from these other parties that have the documents
9 that Walter Energy does not have. So if you're
10 going to make an argument that I don't have
11 documents and Walter Energy doesn't have the
12 documents, you might think about what response is
13 going to be made to that argument in the sense of,
14 well, have you gone and asked whoever has them?
15 In other words, that wouldn't be a discovery
16 issue, in any event, vis-à-vis Walter Energy.
17 MR. DENNIS: No. Quite right. This is the first we've
18 heard from them today that they don't have some of
19 the documents. But again, then that makes it
20 easy, they don't have to produce what they don't
21 have.
22 THE COURT: Exactly.
23 MR. DENNIS: Yeah.
24 THE COURT: So if -- you know, if you're going to stand
25 up and say you don't have the documents and
26 someone else has them then you're going to have to
27 think about that.
28 MR. DENNIS: Yeah. Fair enough.
29 THE COURT: So are we clear on my stream of
30 consciousness decision on that?
31 MR. DENNIS: Yes.
32 MS. BUTTERY: Yes, My Lady.
33 THE COURT: All right. So now, in terms of procedure I
34 think just the pleadings have got you all off on a
35 good starting point in terms of framing the
36 issues. So I'm thinking that we should continue
37 along those lines in the sense of having proper
38 documentation to -- just as we would a summary
39 trial, in terms of what the issue is,
40 Ms. Buttery --
41 MS. BUTTERY: M'mm-hmm.
42 THE COURT: -- and what evidence you intend to rely on.
43 You know, whether it'd be the expert opinion of
44 Suzy Q. or whoever it is and whatever affidavits
45 you want. So I'm expecting that that will be in
46 your case plan order in terms of delivery of all
47 of the evidence and then responding times from the

28
Discussion re scheduling and procedure

1 1974 people.
2 MS. BUTTERY: Yes, My Lady.
3 THE COURT: Just as you would in a summary trial.
4 MS. BUTTERY: Yes. Yes.
5 THE COURT: And then if there's any cross-examination
6 on affidavits, you know, you've -- I mean, think
7 of it as if you're doing a summary trial. I know
8 you're -- perhaps everybody, except Mr. Dennis who
9 doesn't do a lot of them, but think of it along
10 those lines in the sense of -- you know, because
11 the last thing you want if you're right,
12 Ms. Buttery, is you don't want any evidentiary
13 issues because those clearly derail a summary
14 trial and give more fodder to the argument that
15 it's not appropriate for summary trial.
16 MS. BUTTERY: Yes, My Lady. Thank you.
17 MR. REARDON: My Lady, just one point. The monitor did
18 file a form of response. We didn't take a
19 position on the points that they raised in the
20 pleadings. But what we did say was we're not
21 going to take any position unless Your Ladyship
22 wants anything of the monitor. So far I've heard
23 nothing here today that would indicate that you
24 would need anything from us. But if there's any
25 role other than trying to keep the parties moving
26 towards some agreement on facts or whatever, if
27 there's anything else you want of the monitor, you
28 just need ask and the monitor is available.
29 THE COURT: Yes. Well, I mean, I don't -- unless
30 there's something else going on that I don't know
31 about, I don't really see any need for the monitor
32 to spend time on the merits of the issue. You're
33 just doubling up on legal research and preparation
34 and all the rest of it.
35 MR. REARDON: Yes.
36 THE COURT: So I'm sort of -- I don't really know at
37 this point that there's any sort of independent
38 role in respect of this dispute, Mr. Reardon.
39 MR. REARDON: That's fine.
40 THE COURT: But again I'll leave you to monitor the
41 process going forward and make sure everybody's
42 feet to the fire -- or feet are kept to the fire,
43 to move things along. And so I think I'll just
44 have to leave it at that and leave it to your and
45 Mr. Tillman's judgement in terms of what value you
46 can add to the process.
47 MR. REARDON: Thank you, My Lady.

29

Discussion re scheduling and procedure

1 THE COURT: Okay.
2 MS. BUTTERY: My Lady. Sorry, this is why I made sure
3 I raised it, so I didn't forget.
4 THE COURT: Oh. Yes. Yes.
5 MS. BUTTERY: So we probably have an issue -- an
6 11-3 issue regarding the assignment of a contract,
7 a Belcourt-Saxon contract.
8 THE COURT: Oh.
9 MS. BUTTERY: And we need to have that determined
10 before November 9th. We probably need two hours.
11 THE COURT: November the 9th.
12 MS. BUTTERY: And I'm not sure -- we're really tight on
13 that, and Your Ladyship may be away next week, so
14 I'm not sure if you have some availability for
15 that or if --
16 THE COURT: Actually I think I'm sitting on the 8th,
17 aren't I? No. No. That's the court conference.
18 You know what? I think the only availability I
19 have is the 1st. Can you get ready for the 1st?
20 MS. BUTTERY: I -- the issue was just raised with me
21 today. Today is only Wednesday. So next Tuesday.
22 We may -- we don't even know if it will be
23 contested. It may not even be that long. Let me
24 speak to Mr. Riesterer, who's just back from
25 holiday and get back to you. But we would -- are
26 you available that -- you're available for two
27 hours that day?
28 THE COURT: Yes. I don't think I have anything booked
29 that day. Well, I'll tell you I'm sitting all
30 this week on another matter. Monday I'm in
31 Victoria, although maybe you could convince
32 Ms. Smolen to bring me back --
33 MS. BUTTERY: Okay.
34 THE COURT: -- for that. The 1st I don't think there's
35 anything booked. Wednesday, I'm heading east to
36 Bermuda.
37 MS. BUTTERY: Yes. Yes. As many of us in the room are.
38 THE COURT: As I'm sure some of you are. And then
39 Monday I'm -- I have -- I think Monday is -- I'm
40 not sitting that day, although I'm prepared to
41 come in if it's -- if that works.
42 MS. BUTTERY: Yes. Okay. That's the 7th, then.
43 THE COURT: The 7th. I can cancel my day off, then.
44 And then the 8th, 9th and 10th are the court
45 conference.
46 MS. BUTTERY: Okay. Okay. So we're looking at
47 probably the 1st or the 7th. And we'll try to

30

Discussion re scheduling and procedure

1 avoid your day off if we could.
2 THE COURT: 1st or the 7th. Yes. I think those are
3 the two options.
4 MS. BUTTERY: I'm just -- okay. I will -- as soon as
5 I -- November 8th is the deadline. Sorry, I'm
6 just getting an email -- that's why I'm checking.
7 I apologize -- from Mr. Riesterer. We have to do
8 it before the 9th. So the 8th would be the
9 deadline to be in court. So we will -- I'll see
10 if the 1st is possible. We'll try to avoid
11 bringing you in on your day off, if possible.
12 THE COURT: Yes. All right. And then -- so this is
13 that limited -- that joint venture in -- Belcourt
14 thing that I --
15 MS. BUTTERY: Yes.
16 THE COURT: And so -- I thought there were discussions
17 ongoing with the counter -- or the joint venture
18 partner.
19 MS. BUTTERY: I understand that there are, but we may
20 need to actually bring an 11-3 application. So I
21 will know more -- literally this was just raised
22 with me just before -- literally as I was almost
23 walking to court. So you now have as much
24 information as I do about it.
25 THE COURT: Oh, I see.
26 MS. BUTTERY: But I do know that we needed some time
27 potentially in front of Your Ladyship. So I
28 will --
29 THE COURT: Are there any issues with Mr. Siddall's
30 royalty agreement too in that?
31 MS. BUTTERY: I don't know. I don't believe that would
32 be an issue. But I will determine what we need
33 and when we need it by as soon as I get back to
34 the office, and I will coordinate with Ms. Smolen
35 this morning about it.
36 THE COURT: Yeah.
37 MS. BUTTERY: And then just -- sorry. Just one more
38 thing. So we had five days reserved January 9th.
39 THE COURT: Well --
40 MS. BUTTERY: I didn't get a straight answer from
41 Mr. Dennis if he needed more time.
42 THE COURT: Well, I think -- I think we'll go with five
43 days.
44 MS. BUTTERY: Okay.
45 THE COURT: I'm expecting most of this is going to be
46 focused legal argument, in any event; is that right?
47 MS. BUTTERY: I believe so and expert evidence. Yes.

31
Reporter's certification

1 THE COURT: And hopefully if there can be some exchange
2 of this information, including legal arguments
3 ahead of time --
4 MS. BUTTERY: Yes.
5 THE COURT: -- then that will streamline the matter
6 too, and people won't be taken by surprise.
7 MS. BUTTERY: Yes.
8 THE COURT: And so I'm expecting to see that in your
9 case plan proposal --
10 MS. BUTTERY: I understand.
11 THE COURT: -- case plan order also.
12 MS. BUTTERY: Understood, My Lady. Thank you.
13 THE COURT: Okay. And if you can just make sure the
14 registry knows to bring the case plan order to my
15 attention for signature.
16 MS. BUTTERY: Yeah. I will do. And I believe Ms. Wood
17 sent you a binder -- an updated binder yesterday.
18 THE COURT: Yes. I have all of that. Yes. Thank you.
19 MS. BUTTERY: Perfect.
20 THE COURT: Thank you.
21 MS. BUTTERY: Thank you.
22 THE COURT: All right. Good. We're adjourned, then.
23 Thank you.
24 THE CLERK: Order in chambers. Chambers is adjourned.
25

26 (CHAMBERS ADJOURNED AT 10:12 A.M.)
27

28 Reporter's Certification:
29

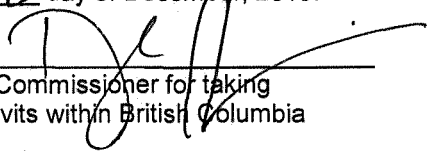
30 I, Christy L. Pratt, RCR, Official Reporter
31 in the Province of British Columbia, Canada, BCSRA
32 No. 535, do hereby certify:
33

34 That an excerpt from the proceedings was
35 transcribed by me from an audio recording provided
36 of recorded proceedings, and the same is a true
37 and accurate and complete transcript of said
38 recording to the best of my skill and ability.
39

40 IN WITNESS WHEREOF, I have hereunto subscribed
41 my name and seal this 10th day of November, 2016.
42

43
44
45
46 Christy L. Pratt, RCR
47 Official Reporter

This is Exhibit "D" referred to in the Affidavit of
Miriam Domínguez sworn before me at Vancouver
this 2 day of December, 2016.



A Commissioner for taking
Affidavits within British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20161026
 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"

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	M.I.A. Buttery P. Riesterer M. Paterson
Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	C. Dennis, Q.C. J.R. Sandrelli
Counsel for the United States Steel Workers, Local 1-424:	C.D. Bavis
Counsel for KPMG Inc., Monitor:	P.J. Reardon
Place and Date of Trial/Hearing:	Vancouver, B.C. October 26, 2016
Place and Date of Judgment:	Vancouver, B.C. October 26, 2016

[1] **THE COURT:** The Monitor has brought this application for directions concerning the procedure for the adjudication of the claim advanced against the petitioners (“Walter Energy”) by UMWA 1974 Pension Plan (the “1974 Plan”). In support, the Monitor has filed its Fifth Report dated October 20, 2016.

[2] This further application was anticipated given the Claims Process Order which I granted on August 16, 2016. In accordance with that Order, the parties have filed pleadings. In addition, as discussed in my earlier reasons (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at paras. 86, 87), a specific process was intended to address this claim given its uniqueness.

[3] Unfortunately, Walter Energy (supported by the United States Steel Workers, Local 1-424 (the “Union”)) and the 1974 Plan have been unable to reach an agreement on further procedures to be completed towards adjudicating the claim. All parties seem content to decide the issue by way of summary trial. However, the 1974 Plan seeks a level of discovery that Walter Energy says is unnecessary for the purposes of deciding certain issues which it says are determinative of the matter.

[4] Ultimately, it is up to one side or the other to bring forward what they think is a viable application. What Walter Energy is proposing is a summary trial on a discrete issue that it says will avoid what it describes as the extensive discovery sought by the 1974 Plan. It proposes proceeding on this “threshold” issue relating to whether the U.S. law relied upon by the 1974 Plan even applies to Walter Energy. In addition, Walter Energy states that the discovery sought will be difficult, if not impossible, to obtain and no doubt expensive and time-consuming to the extent that it is possible.

[5] We are all, of course, aware of the principles relating to summary trials, including the court’s often concern about litigating in slices. Other issues arise in relation to whether the court can find the facts necessary to decide the issues of fact or law or whether it is unjust to decide the issues on such an application (Supreme Court Civil Rule 9-7(15)).

[6] Even so, it is ultimately up to a party to decide to bring an application or not. Of course, the opposing party is open to say that the matter is not appropriate for summary trial for various reasons, including the lack of relevant discovery, such as is being suggested here by the 1974 Plan. That position will not usually prevent a party from bringing an application; however, it remains the case that if these objections are found to be warranted, that summary trial application may not succeed.

[7] 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. This is obviously a complicated matter, and counsel are, of course, more familiar with the issues and the relevant facts and law than the Court.

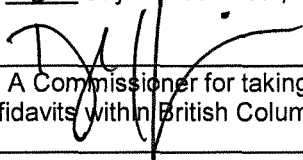
[8] Having said that, I am inclined to let Walter Energy, with the support of the Union, bring the matter forward if they think they can convince the Court that it is appropriate to determine these issues at summary trial in these circumstances. I am not in any position at this time to refuse to hear Walter Energy’s application and order the extensive discovery sought by the 1974 Plan. I expect that the parties will continue to discuss the matter and perhaps reach some level of agreement as matters progress. Needless to say, if there is evidence, documentary or otherwise, available to the 1974 Plan other than from Walter Energy, then that can be pursued as the 1974 Plan deems appropriate or necessary.

[9] 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.

[10] In conclusion, I am prepared to allow Walter Energy's proposed application to go forward. I will require that the parties negotiate and agree upon a case plan order, to establish reasonable deadlines for the steps to be completed before the hearing. The hearing has been tentatively scheduled for the week commencing January 9, 2017.

"Fitzpatrick J."

This is Exhibit "E" referred to in the Affidavit of
Miriam Domínguez sworn before me at Vancouver
this 2 day of December, 2016.



A Commissioner for taking
Affidavits within British Columbia

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November 22, 2016

File No.: 564818-1

SENT VIA E-MAIL: mpaterson@osler.com

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Toronto, ON M5X 1B8

Attention: Mary Paterson

**RE: In the Matter of the CCAA and in the Matter of the Plan of Compromise and Arrangement of Walter Energy Canada Holdings, Inc. and Other Petitioners
SCBC Action No. S-1510120 (Vancouver Registry)**

Dear Sirs/Mesdames:

We write on behalf of the UMWA 1974 Pension Plan (the "**1974 Plan**") regarding your notice of application for summary trial filed November 16, 2016 (the "**Notice of Application**").

We remain of the view that the Discovery Requests should be answered before a summary trial, including summary determination of the preliminary issues set out in the Notice of Application.

By this letter, we formally request that the Petitioners disclose to the 1974 Plan all documents that are or have been in the Petitioners' possession or control, including the US Records (as defined in our letter dated November 15, 2016) that could, if available, be used by any party of record to prove or disprove a material fact relevant to the issues outlined in the proceeding. In particular, we reiterate our request for documents responsive to the following list of subjects:

- (1) Managerial decision-making by the Petitioners, including without limitation the provision of managerial and administrative services by Walter Energy, Inc. or other affiliated U.S. entities (hereafter, collectively "**WE**"), after the date of the Western Acquisition;
- (2) Authorizations or protocols established by WE for the Petitioners with respect to the conduct of the business including without limitation strategic or investment decisions and the expenditure of funds;
- (3) The movement of funds between WE and the Petitioners as of and after the date of the Western Acquisition;
- (4) Actions taken by WE to support the business of the Petitioners;

- (5) The financial position of WE from and after the date of the Western Acquisition;
- (6) The withdrawal liability of WE; and
- (7) Corporate relationship between the Petitioners and WE, including without limitation shareholdings from and after the date of the Western Acquisition.

We also request documents evidencing the locality of the management team and key-decision makers of the Petitioners from the incorporation of Walter Energy Canada Holdings, Inc. to April 1, 2016.

Without limiting the generality of the foregoing categories, we request that the Petitioners disclose all board minutes and board resolutions of the Petitioners after the date of the Western Acquisition, management agreements and other intercompany agreements, financial records showing the transfer of funds between WE and the Petitioners, the share or unit register for WE and each of the Petitioners, and any agreement between any officer or director of any of the Petitioners relating to the provision of services to the company after the date of the Western Acquisition.

By this letter, we also advise that we wish to examine for discovery Mr. William G. Harvey on behalf of Walter Energy Canada Holdings, Inc. We propose to examine Mr. Harvey the week of December 12-16. We are open to discussing the timing and venue of the examination.

We ask that you respond to advise whether the Petitioners will be complying with our request for documents and which date during the week of December 12-16 is preferable for the examination for discovery.

Given the limited timeframe before the summary trial, we shortly will be filing a notice of application returnable November 28, 2016 for document discovery along the lines set out in this letter. We will be relying upon this letter in court to evidence our request.

Yours truly,
Dentons Canada LLP



Craig P. Dennis, Q.C.

CPD/md

cc: Attn.: Anthony Tillman, KPMG Inc. (atillman@kpmg.ca)
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