NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREEK COAL CORP., NEW WOLVERINE COAL CORP., AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS

WALTER CANADA GROUP'S REPLY SUMMARY HEARING WRITTEN SUBMISSIONS

1. Walter Canada Group provides this reply to highlight for the Court the two key differences between Walter Canada Group's and the 1974 Plan's positions. The 1974 Plan raises other issues that we submit are not material to this Court's analysis. If it becomes apparent that the Court would like to hear Walter Canada Group's response to such collateral issues, that response will be made during oral submissions. The issues covered in this reply submission are: (1) the 1974 Plan's choice of law analysis is flawed; and (2) this case is suitable for a summary hearing as the 1974 Plan's evidentiary objections are neither well-founded nor material.

PART I - 1974 PLAN'S CHOICE OF LAWS ANALYSIS IS FLAWED

2. The first key difference in the parties' positions relates to the choice of law analysis. The parties agree that this Court should apply BC choice of law principles to characterize the claim. The parties differ on how the 1974 Plan's ERISA claim should be characterized. As a result, the parties identify different connecting factors to select the proper law, which leads to difference choices of the proper law.

3. Relying on BC law (the *JTI-MacDonald* case in particular), Walter Canada Group submits that the essence of the 1974 Plan's claim is to ignore Walter Canada Group's separate corporate personalities, thereby imposing a foreign related company's withdrawal liability on Walter Canada Group. As such, Walter Canada Group views the proper choice of law as the law of corporations. In contrast, the 1974 Plan states that its withdrawal liability claim is contractual in nature, basing its argument on three UK shipping insurance cases. These UK shipping insurance cases do not assist this Court.

4. First, in each of the three cases there was a maritime catastrophe where various parties sought to recover from an insurer based on an insurance policy. Contrary to the 1974 Plan's submissions, in all of these cases a non-party was claiming against the insurer who was a party to the insurance contract. The 1974 Plan is simply wrong when it states at paragraphs 335 and 346 of its submissions that "In all three cases, the defendant was not a party to the contract" (para 346). In all three cases the insurer, who was being asked to make a payment, was a party to the contract. On this basis alone, the UK shipping insurance cases are factually distinguishable because Walter Canada Group, who is being asked to pay, has never been a party to the contract or other documents on which the 1974 Plan relies.

5. This factual distinction between the UK shipping insurance cases and the 1974 Plan's ERISA claim is material and supports distinguishing the cases. In the UK shipping insurance cases, an insurer evaluated the risk of an insurance contract, chose whether or not to accept the terms of the contract, entered into the contract, and received premiums based on that contract. That insurer was then required to deliver the insurance it contractually promised to deliver. The cases refer to and are informed by the broadly recognized principle of freedom of contract. In contrast, freedom of contract has no bearing on the 1974 Plan's ERISA claim: Walter Canada Group was not a party to anything with the 1974 Plan, did not receive any consideration from the 1974 Plan, and did not make any promises to the 1974 Plan. Walter Canada Group's employees also received nothing from the 1974 Plan. The facts of the UK shipping insurance cases and their underlying policy are not analogous to the 1974 Plan's ERISA claim.

6. Second, the legislation in each of the UK shipping insurance cases is worded and structured very differently from ERISA. In each case, a country connected with the dispute passed legislation allowing an entity that was not a party to the insurance contract to sue the insurer directly on the insurance contract. This legislation is referred to as "direct action" legislation. In particular:

(a) In *Youell*, after two ships collided, the owners of the innocent ship sued the insurer of the at-fault ship. The at-fault ship had loaded its cargo in Louisiana. The Louisiana Direct Action Statute allowed certain people to assert "a direct action against the insurer within the terms of the policy."[1]

(b) In *Through Transport*, an Indian merchant used a Finnish shipping company to move goods. The goods were lost. The Indian merchant's Indian insurer pursued a claim against the Finnish shipper's Finnish insurance directly. It relied on Finnish legislation permitting a claim "in accordance with the insurance contract direct from the insurer."[2]

(c) In *The London Steam-Ship*, an oil tanker sank near Spain causing an ecological disaster. The French and Spanish governments sued the insurer of the tanker based on the

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1 1999, UK Queen's Bench, 1974 Plan BOA, Vol 2, Tab 67 at para 52.

2 2004, UKCA, 1974 Plan BOA, Vol 2, Tab 66 at para 10.

> Spanish penal code, which provided "insurers that have underwritten the risk of monetary liabilities...shall have direct civil liability up to the limit of the legally established or contractually agreed compensation."[3]

In each case, the statutory language refers to the insurance contract in the same breath in which it allows a non-party to make a claim pursuant to that insurance contract. This express reference to the contract in the very language permitting the non-party to make a claim supports the UK courts characterizing the non-party's insurance claim as contractual in nature.

7. In contrast, the language in ERISA allegedly imposing liability on Walter Canada Group does not refer to the contract; it simply broadens the definition of employer to state that for the purposes Subchapter III of ERISA (which includes the withdrawal liability provisions) all "trades and businesses" "which are under common control" shall be treated "as a single employer".[4] Like the *Tobacco Damages Act* in BC, ERISA allegedly "imposes liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act".[5]

8. This difference between ERISA and the legislation in the UK shipping insurance cases – one deeming a non-party to be liable based on corporate affiliation, the other entitling a party to make a claim under the insurance contract – has two important consequences. In the shipping insurance context, non-party claimants are bound to all of the terms of the insurance policy, the helpful and the inconvenient alike. For example, in both *The London Steamship* and *Through Transport*, the Court held that the non-party claimant was bound by the arbitration agreement in the insurance contract and therefore could not sue in their chosen court. In contrast, because ERISA does not refer to the contract but simply deems the non-party to be liable, Walter Canada Group does not get the benefit or burden of other provisions in the collective bargaining agreement or other 1974 Plan documents.

9. The second consequence is that in the UK shipping insurance cases, the insurer was able to contest the claims against it on the merits. However, under the deeming approach taken by ERISA, Walter Canada Group is not granted the ability to contest the withdrawal liability claim on its merits. As the expert evidence makes clear, Walter Canada Group is not entitled to notice that a withdrawal liability claim is being advanced against an affiliate. According to the 1974 Plan, it can get a default judgment against an affiliate without notice to Walter Canada Group, and then seek to enforce that judgment against any member of the controlled group, depriving those members of the ability to advance any substantive defences.

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3 2013, UKCA, 1974 Plan BOA, Vol 2 Tab 63 at 17.

4 Abrams BOA Tab 9.

5 *JTI*, 2000 BCSC 312, Walter Written Submissions BOA Tab 9 at para 233.

10. These two differences, flowing from the different legislative language, explain why the claims in the UK shipping insurance cases were properly characterized as "contractual" in nature. They also explain why ERISA withdrawal liability is not a contractual claim against Walter Canada Group. In the UK shipping insurance claims, the insurers: had freedom of contract; were liable based on a contract they signed; the legislation expressly grounded their liability in the contract they signed; and they had the opportunity to contest the claim using all of the contractual defences.

11. None of these statements are true for Walter Canada Group. The Walter Canada Group is not a signatory to any 1974 Plan document. Liability is only extended to Walter Canada Group by ERISA's statutory controlled group provision allegedly deeming Walter Canada Group to be "a single employer" with the actual contracting party. A withdrawal liability claim against Walter Canada Group is only "contractual" if we accept that ERISA applies to Walter Canada Group. This is begging the choice of law question.[6]

12. Deeming Walter Canada Group to be a single employer with Walter Resources legislatively "[denies] the right to any separate corporate existence", like the legislation considered by the BC Court in *JTI*.[7] Although the 1974 Plan concedes that one possible characterization of a claim in the choice of law analysis is the "law of corporations", it does not give the "law of corporations" the liberal interpretation it urges this Court to give its contract theory. Rather, the 1974 Plan narrowly restricts the "law of corporations" category to the corporation's existence, capacity and governance.[8] This restriction is not supported by the authorities, which make it clear that the law of corporations also includes whether a corporation possesses the attributes of legal personality, including limited liability.[9]

13. The 1974 Plan's own authorities support the conclusion that the law of corporations includes questions of separate legal personality and the limited liability that flows from that personality. For example, in the paragraphs of Castel & Walker immediately following those cited by the 1974 Plan, the authors observe: "While the state, province or territory in which the foreign corporation intends to carry on business has the right to prescribe the extent to which the corporation may exercise its corporate powers and capacity, ***this does not mean that proceedings may be taken in that jurisdiction to affect its***

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6 Canadian courts have observed that it is a "basic rule that a corporation can enter into a contract that benefits its affiliate, but not one that binds its affiliate without the affiliate's consent." *SemCanada Crude Company (Re)*, 2009 ABQB 715 at para 17. Since no member of the Walter Canada Group is party to any contract with the 1974 Plan, the terms of the contract, the governing law of the contract, the language and subject matter of that contract and the transactions that were completed in relation to that contract have no bearing on the liability of Walter Canada Group. For this reason, the "non-exhaustive list of factors" the 1974 Plan suggests should be considered at para 350 does not help assess Walter *Canada* Group's connection to the claim. As an aside, this list of factors seem to be drawn from cases on unjust enrichment. See Castel & Walker, 1974 Plan BOA, Vol 3 Tab 111, ch. 32 at 32-1.

7 *JTI*, Walter Written Submissions BOA Tab 9 at para 218.

8 1974 Plan Submissions at para 365.

9 See 1974 Plan Submissions at para 368, quoting Castel & Walker.

status as a corporation." The authors continue: "There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. ***Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced***."[10]

14. Under BC law (as opposed to UK shipping insurance cases), when the only basis for imposing liability on a party is to deny its separate existence, it is appropriate to characterize the 1974 Plan's ERISA claim as one concerning the status and legal personality of corporations. The 1974 Plan attempts to distinguish the *JTI* decision on the basis that the claims were being characterized as part of a federal divisions of powers analysis rather than an international choice of laws analysis. Both consider the essential nature of the claim, its pith and substance. As the only BC case considering how to characterize a claim under a statute that imposes liability on a non-acting affiliate, *JTI* provides better guidance than the UK shipping insurance cases when this Court considers how to characterize the 1974 Plan's ERISA claim.

PART II - SUITABILITY & THE EVIDENCE

15. The second key difference between Walter Canada Group and the 1974 Plan relates to the parties' approaches to evidence and, as a result, the suitability of this hearing. In this proceeding, Walter Canada Group sought to abide by the goals of the CCAA and the BC Rules, aiming to achieve a "just, speedy and inexpensive determination" of disputes.[11] For this reason, as one of its first steps, Walter Canada Group prepared the Statement of Uncontested Facts (the "SUF") to identify facts that one or more of the parties might wish to rely on in making their various legal arguments. This SUF included facts that Walter Canada Group viewed as irrelevant but that other parties pleaded.

16. The 1974 Plan did not accept any part of the SUF. Instead, it raised a plethora of evidentiary objections to buttress its argument that this hearing is not suitable. The 1974 Plan's evidentiary objections (a) do not raise material issues, (b) ignore the fact that this hearing is convened within a CCAA proceeding, (c) have no merit, and (d) should be viewed with skepticism given the 1974 Plan's role in creating the very deficiencies about which they now complain.

17. The 1974 Plan's evidentiary objections do not raise material issues for two reasons. First, as is set out elsewhere, many of the purportedly contested facts are not relevant to the choice of law, foreign law or public policy questions before this Court. Evidentiary objections related to those facts are irrelevant.

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[10] 1974 Plan BOA, Vol 3, Tab 111, ch. 3 at 3-1 (emphasis added).

[11] *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 1-3.

18. Second, regardless of relevance, evidentiary objections should not be an academic exercise; they must raise a material concern. The standard of proof in any civil trial is balance of probabilities. For an evidentiary objection to matter, there must be a plausible potential for that fact to be disputed in a way that impacts the outcome of the trial. In the case of almost all of the 1974 Plan's evidentiary objections, the 1974 Plan does not allege that the fact sought to be proven is not true.

19. Three examples of facts that the 1974 Plan says cannot be accepted by this Court are that "Walter Energy Inc. is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama" (SUF, para 1); "Walter Energy did business in West Virginia and Alabama" (SUF, para 2); and "Walter Energy's board of directors and its management team operated out of Birmingham, Alabama" (SUF, para 3). The 1974 Plan does not suggest, in any serious way, that anyone could adduce evidence to disprove these facts that the 1974 Plan pleaded, that Walter Canada Group proposes to admit for the purposes of this hearing, and that have been accepted by Walter US and the US Court in the Chapter 11 proceeding. Such evidentiary objections are purely academic.

20. The 1974 Plan's evidentiary objections also ignore the fact that this hearing is convened within a CCAA proceeding. This is not a traditional trial where the first time the Court hears evidence is during the trial itself. The CCAA judge is seized of all aspects of the CCAA proceeding. It is inefficient, contrary to common sense, and contrary to the Supreme Court of Canada's description of a CCAA proceeding as a "single proceeding model"[12] to suggest that the CCAA Court and the parties to this hearing must ignore all evidence previously filed or facts found in this case, particularly when the 1974 Plan has participated in this CCAA proceeding almost from its inception.

21. The 1974 Plan's evidentiary objections have no merit. For example, the 1974 Plan refused to accept admissions of facts made by Walter Canada Group in SUF for the purposes of this hearing. All of these facts are facts that 1974 Plan pleaded that Walter Canada Group proposes to admit for the purposes of this hearing. The 1974 Plan refuses to accept Walter Canada Group's admissions for two reasons, both of which are flawed:

(a) First, the 1974 Plan suggests that the court can only proceed if both USW and the Walter Canada Group give the admissions.

(i) As a matter of fact, Walter Canada Group does admit, for the purposes of this hearing, all of the statements in the SUF. In its submissions, the USW states: "The Steelworkers agree with the facts set out in the Statement of Uncontested Facts" (para 15). The 1974 Plan's objection is unfounded in fact.

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[12] *Ted Leroy Trucking [Century Services] Ltd (Re)*, 2010 SCC 60, Walter Written Submissions BOA Tab 18 at para 22.

(ii) It is also unfounded in law. The 1974 Plan bases its submission that both parties' admissions are required on cases about co-defendants.[13] Walter Canada Group and USW are not co-defendants; USW is a respondent to both to the 1974 Plan Claim and to the Walter Canada Group's summary hearing application. We have not identified any material factual disputes between the Walter Canada Group and USW; this is not a situation where the 1974 Plan is faced with competing factual narratives. This Court can proceed based on admissions in the SUF.

(b) Second, the 1974 Plan argues that it is inappropriate for this court to proceed based on conditional admissions. However, BC Courts have affirmed that courts can make final determinations based on assumed facts.[14] For instance, parties made admissions only for the purpose of the summary proceeding in the cases of *Rizzuto v Fernie (City)*, *Jacobsen v Nike Canada Ltd*, and *Williamson v Ewachniuk*.[15] In all of these cases the court made a final determination of an issue based in part on facts that one party had assumed for the purposes of that hearing only. The 1974 Plan's authorities to the contrary are distinguishable. There are no issues of credibility (other than the expert evidence, where cross-examination will occur). Finally, as part of its choice of law argument, the 1974 Plan relies upon a UK Court of Appeal case in which the parties accepted, for the purposes of the appeal only, the facts as found by the court below, leaving open the possibility of appealing from those findings of fact once the proper legal test was clarified.[16]

22. The 1974 Plan's next evidentiary objection also has no merit. It objects to Walter Canada Group relying on findings previously made by this Court, arguing that ""facts stated in this Court's previous decisions are entitled to no weight."[17] First, Walter Canada Group notes that 1974 Plan objects to facts previously found by this Court that the 1974 Plan then relies on in its submissions, such as:

(a) SUF para 13: "Only one of the Walter US entities, Walter Resources, is a party to a collective bargaining agreement with the 1974 Plan". And see the 1974 Plan Submissions, para 25: "One of the employers that promised to contribute to the 1974 Plan is [Walter Resources]".

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13 1974 Plan submissions at para 172.

14 *Steyns v Manitoba Public Insurance Corp*, 1995 CarswellBC 282 (BCCA), Walter Reply BOA Tab 12 at para 46.

15 2012 BCPC 74, Walter Reply BOA Tab 10 at para 10; 1992 CarswellBC 2454 (BCSC), Walter Reply BOA Tab 5 at paras 8 and 28; and 1993 CarswellBC 3843 (BCSC), Walter Reply BOA Tab 14 at para 6.

16 *MacMillan Inc v Bishopsgate Investment Trust (No 3)*, [1995] EWCA Civ 55, [1996] 1 WLR 387, 1974 Plan BOA Tab 64.

17 1974 Plan Submissions at para 153.

(b) SUF para 15: "No member of the Walter Canada Group is or ever has been party to the CBA". And see 1974 Plan Submissions, para 336: "What ERISA grants to the 1974 Plan 'is essentially a right to enforce' against Walter Canada Group the contractual obligations to the 1974 Plan of Walter Resources".

23. The 1974 Plan also objects to findings of fact that no one reasonably expects could be displaced, such as SUF para 71: "The Canadian operations principally included the Brule and Willow Creek coal mines, located near Chetwynd, BC, and the Wolverine coal mine, near Tumbler Ridge, BC". These facts are not controversial. In the context of a CCAA proceeding, there is no possible benefit to this Court or the creditors to countenance evidentiary objections in respect of such facts.

24. Finally, jurisprudence firmly establishes that this Court is entitled to take judicial notice of its own decisions. As the Supreme Court of Canada has written in *Malik*, "The admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties."[18]

25. In *Malik*, the Supreme Court of Canada endorsed the decision of a chambers judge to accept a prior related decision into evidence and treat factual findings in that case as prima facie proof of their content. In doing so, the Supreme Court overturned the Court of Appeal's decision that such findings were not admissible to prove the truth of their contents.[19] In the words of the Supreme Court, the trial judge was "*not* required to proceed as if [the prior decisions] are of merely historical interest and of no probative value."[20] The Supreme Court also confirms that prior decisions may be used by a court making final determinations.[21] It is up to this Court to determine what weight should be placed on its own prior findings.[22]

26. The reasoning in *Malik* is particular apt in CCAA proceedings. In essence, the 1974 Plan argues that the debtor company is not entitled to rely on findings about that company made by a judge in the same CCAA proceeding. If this position is accepted, it would require a debtor company to file evidence to re-prove basic facts about itself in every successive hearing. This result runs contrary to the goals of fairness and efficiency that underlie the BC Civil Rules, as well as the CCAA.

27. The 1974 Plan's third main evidentiary objection, that statements in the SUF are based on inadmissible hearsay, also has no merit. In particular, the Harvey Affidavit is not hearsay. It is sworn evidence based on Mr. Harvey's personal knowledge, except for such statements as are expressly

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18 *British Columbia (Attorney General) v Malik* (2011 SCC 18) [*Malik*], 1974 Plan BOA Tab 10 at para 37.

19 *Malik* at paras 6-7 and 39

20 *Malik* at para 29; emphasis in original.

21 *Malik* at paras 46-47.

22 *Malik* at paras 42 and 47.

identified as being based on information and belief. Only two statements in the Harvey Affidavit are based on information and belief.[23] For both of these, the source is identified. Only one of these statements appears in the SUF ("In certain circumstances, directors and officers of the Walter Canada Group can be held liable for certain obligations owing to employees and government entities"[24]). The rest of the information in the Harvey Affidavit is personal knowledge obtained by virtue of Mr. Harvey's position as Executive Vice President of the Walter Canada Group.

28. A corporation can only speak through its authorized representatives. A deponent who is an executive of a corporation is entitled to rely on information provided by the employees, business documents, and systems of the corporation as falling within his personal knowledge.[25] This is so in respect of events that took place before the executive joined the corporation.[26] Courts have recognized that to hold otherwise would be wholly impractical.[27]

29. Nonetheless, the 1974 Plan suggests that Mr. Harvey's personal knowledge is not sufficiently personal for the purposes of this summary hearing. The 1974 Plan's formalistic understanding of personal knowledge has been repeatedly rejected by courts. For instance, in *Alberta Treasury Branches v Leahy*, the defendant unsuccessfully argued that the affidavit of a senior employee at Alberta Treasury Branches (ATB) was hearsay because she did not specify the source of each fact and described events that occurred before she joined ATB. Relying on a long line of similar cases, the court disagreed, holding that the deponent's position and access to ATB's records were sufficient to indicate the source of her information, and the material the deponent reviewed in ATB's records constituted personal knowledge.[28]

30. Similarly, as the Federal Court wrote in 1972, when rejecting the argument put forward by the 1974 Plan:

> some latitude must be allowed in interpreting what constitutes "personal knowledge" of the affiant, and consideration must be given to the position held by the affiant and the nature of the facts to be proved... To give too restrictive an interpretation to what constitutes the affiant's own

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23 Harvey Affidavit at paras 155 and 160.

24 Statement of Uncontested Facts at para 70; Harvey Affidavit at para 155.

25 *Metal World Inc v Pennecon Energy Ltd et al*, 2015 NLCA 12, Walter Reply BOA Tab 7 at paras 21-24. See also *Vapor Canada Ltd v MacDonald*, 1972 CarswellNat 526 (FCTD) [*Vapor Canada*] (aff'd 1972 CarswellNat 66 (FCA), rev'd on other grounds [1977] 2 SCR 134), Walter Reply BOA Tab 13 at para 10; *603262 B.C. Ltd. v. Eiyom Properties Ltd.*, 2014 BCSC 1155, Walter Reply Book of Authorities Tab 1 at para 10.

26 *Alberta Treasury Branches v Leahy*, 1999 ABQB 185 [*Alberta Treasury*], Walter Reply BOA Tab 2; *Re Indian Residential Schools*, 2002 ABQB 667 [*Residential Schools*] Walter Reply BOA Tab 4.

27 *Alberta Treasury*, Walter Reply BOA Tab 2 at para 58.

28 *Alberta Treasury*, Walter Reply BOA Tab 2 at paras 50-53. See also *Residential Schools*, Walter Reply BOA Tab 4 at paras 27 and 35, where the court accepted affidavits based on personal knowledge from senior persons within the Catholic Church about matters in which they had no firsthand involvement, and for which they relied on the Church's historical documents.

> knowledge and require him to go into great detail in his affidavit as to how he acquired this knowledge in connection with each and every statement he makes would defeat the whole purpose of Rule 332(1).[29]

31. The literalistic view of "personal knowledge" urged by the 1974 Plan risks hamstringing corporate parties' ability to access to summary proceedings. The rule that affidavit evidence on final motions must be within the deponent's personal knowledge, "if read literally, could prevent an application for summary judgment in some types of case. For example, in large organizations there is often no one person who has sufficient knowledge of all the facts to swear an affidavit in support of summary judgment based on personal knowledge. In some cases a multitude of affidavits from different representatives of the organization would be required. In some cases even this would not suffice, because it is necessary to extract the required information from the business records of the organization."[30] Denying corporate parties access to summary proceedings would run counter to the "just, speedy and inexpensive determination of every proceeding on its merits" that is the object of the Rules.[31]

32. In this same vein, the 1974 Plan objects to the admissibility of Form 8-K's filed by the Walter Canada Group with the US Securities and Exchange Commission, and attached as exhibits to the Sherwood Affidavit. This evidence is not inadmissible hearsay; Walter Canada Group is not proposing to rely on the exhibits for the truth of their contents – only for the fact that the statements were made. Furthermore, if the 1974 Plan's position with respect to the Sherwood Affidavit is correct, then much of its own evidence is inadmissible. The 1974 Plan puts before the Court in this hearing two affidavits of a legal assistant working at its Canadian law firm attaching copies of emails that she neither sent nor received (the 6th Dominguez Affidavit) and a copy of the Joint Proposal filed by KPMG in its capacity as trustee in bankruptcy of the Walter Canada Group (the 7th Dominguez Affidavit). Neither of the Dominguez affidavits identifies the source of her information and belief as to the identity of the documents.

33. In respect of this objection, Walter Canada Group notes that both the Harvey Affidavit and the Sherwood Affidavit have increased indicia of reliability. The Harvey Affidavit was sworn in support of an *ex parte* order in a CCAA proceeding, which attracts the heightened obligation to make full and frank disclosure of all material facts. The facts in the Harvey Affidavit have been subject to public scrutiny as well as ongoing oversight by a court-appointed Monitor. The exhibits filed with the Sherwood Affidavit are filings made by Walter US with the US SEC, and remain publicly available on the SEC's online EDGAR

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29 *Vapor Canada,* Walter Reply BOA Tab 13 at para 10. This passage has been approvingly cited by subsequent courts and tribunals.

30 *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655 (rev'd on other grounds 2006 ABCA 392), Walter Reply BOA Tab 8 at para 60.

31 *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 1-3.

system. In this context, the 1974 Plan cannot simply object to the facts; it must also suggest that there is a realistic possibility that the facts could be disproven on a balance of probabilities. It has not done so.[32]

34. Walter Canada Group's last point on 1974 Plan's evidentiary objections is this: the 1974 Plan's objections should be viewed with skepticism given the 1974 Plan's role in creating the very deficiencies about which they now complain. In particular:

(a) The 1974 Plan refused to admit the authenticity of affidavits and documents it previously filed with the CCAA Court. See Walter Canada Group's notice to admit the authenticity of the documents in Walter Canada Group's Book of Evidence and the 1974 Plan's response.

(b) The 1974 Plan refused to accept Walter Canada Group's admissions of the facts that 1974 Plan pleaded. See above.

(c) The 1974 Plan refused to admit uncontentious facts found by the Court in this CCAA proceeding even though the 1974 Plan participated in this proceeding from the near-beginning and has never previously objected to the veracity of the facts found by the Court. See above.

(d) The 1974 Plan raises objections to evidence that would equally apply to its own evidence.

(e) The 1974 Plan raises objections to facts that it does not intend to disprove. As one final example, the 1974 Plan objects to the statement that Walter US's acquisition was publicly disclosed. Nowhere does the 1974 Plan state that it had no knowledge of that acquisition.

35. Because the 1974 Plan's evidentiary objections are not material or supportable, they ought to be disregarded by this Court. As a result, there is no basis on which to conclude that this summary hearing is not a suitable way to determine the questions before the Court, particularly if the Court agrees with the Walter Canada Group's choice of law analysis. If the Court agrees with Walter Canada Group's analysis, the expense and time of the broad-ranging discovery requested by the 1974 Plan can be entirely avoided as unnecessary to this Court's determination. This summary hearing furthers the objects of the Civil Rules and respects the CCAA context in which this hearing arises. It is suitable.

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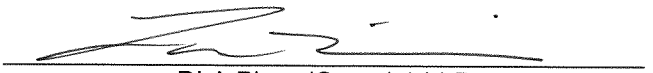
[32] Significantly, if the 1974 Plan relies upon admissions contained in the Harvey Affidavit at trial, then the entire Harvey Affidavit is admissible. The whole of a statement that is alleged to be an admission must be put into evidence, including parts thereof that are favourable to the maker of the statement. As the BCCA has endorsed, "The law seems quite settled that, if an admission is used by one party, it must be used in its entirety, that is, everything must be read that is necessary to the understanding and appreciation of the meaning and extent of the admission." – *R v Tyhurst*, 1996 CarswellBC 240 (BCCA), Walter Reply BOA Tab 9 at para 45, citing *Capital Trust Co v Fowler* (1921 CarswellOnt 274 (ONCA)). See also Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis Canada Inc., 2014), Walter Reply BOA Tab 16 at §6.412.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2017.



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LIST OF AUTHORITIES

Case Law

1 *603262 B.C. Ltd. v Eiyom Properties Ltd.*, 2014 BCSC 1155

2 *Alberta Treasury Branches v Leahy*, 1999 ABQB 185

3 *British Columbia (Attorney General) v Malik*, 2011 SCC 18

4 *Indian Residential Schools, Re,* 2002 ABQB 667

5 *Jacobsen v Nike Canada Ltd.,* 1992 CarswellBC 2454 (BCSC)

6 *JTI-MacDonald Corp. v British Columbia (Attorney General),* 2000 BCSC 312

7 *Metal World Inc. v Pennecon Energy Ltd.*, 2015 NLCA 12

8 *Papaschase Indian Band No. 136 v Canada (Attorney General),* 2004 ABQB 655

9 *R v Tyhurst,* 1996 CarswellBC 240 (BCCA)

10 *Rizzuto v Fernie (City),* 2012 BCPC 74

11 *SemCanada Crude Co., Re,* 2009 ABQB 715

12 *Steyns v Manitoba Public Insurance Corp,* 1995 Carswell BC 282 (BCCA)

13 *Vapor Canada Ltd v MacDonald,* 1972 CarswellNat 526 (FCTD)

14 *Williamson v Ewachniuk,* 1993 CarswellBC 3843 (BCSC)

Secondary Sources

15 Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, 6th ed (Toronto, On; LexisNexis, 2005)

16 Sopinka, Lederman & Bryant, *The Law of Evidence in Canada,* 4th ed (Markham: LexisNexis Canada Inc., 2014) at §6.412

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