



Supreme Court File No. S1510120
Supreme Court Registry Vancouver

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

NOTICE OF APPLICATION

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

To the respondent: Walter Canada Group

And to its solicitor: Marc Wasserman, Mary Paterson and
Patrick Riesterer
Osler, Hoskin & Harcourt LLP

To the respondent: The Monitor
KPMG Inc.
Anthony Tillman, Jordan Sleeth, and
Mike Schwartzentruber

And to its solicitor: Wael Rostom, Peter Reardon, and Caitlin
Fell
McMillan LLP

To the respondent: United Steelworkers, Local 1-424

And to its solicitor: Craig Bavis
Victory Square Law Office

To the service list:

See attached Schedule "A"

TAKE NOTICE that an application will be made by the 1974 Plan to the Honourable Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia on a date and time to be determined by the court or a registrar for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order that the parties bear their own costs of the application heard on January 9-13, 16, 18-20, 2017 (the "**Summary Hearing**");
2. In the alternative, an order that costs are to be paid from the estate;
3. In the further alternative, an order that the United Steelworkers, Local 1-424 are entitled to costs at Scale A.

Part 2: FACTUAL BASIS

The Judgment

4. On May 1, 2017, the Honourable Madam Justice Fitzpatrick released her reasons for judgment regarding the claim of the 1974 Plan (the "**1974 Plan Claim**") against the Petitioners.

Walter Energy Canada Holdings Inc.
(Re), 2017 BCSC 709 ["Reasons for Judgment"].

5. The Court granted the application of the Petitioners and declared that under Canadian conflict of laws rules, the 1974 Plan Claim is governed by Canadian substantive law and not U.S. substantive law.
6. In the Reasons for Judgment, Fitzpatrick J. awarded costs against the 1974 Plan to both the Petitioners and the Steelworkers at the usual scale. She allowed any party to file an application to seek a different order of costs if such party was so inclined, failing which the costs award would stand.

History of the Proceedings

7. The Petitioners commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [**CCAA**], in December 2015.

***Walter Energy Canada Holdings Inc.
(Re), (7 December 2015), Vancouver (S-1510120) ["Initial Order"]***.

The Claims Process

8. A claims process was implemented in August 2016.

***Walter Energy Canada Holdings Inc.
(Re), (16 August 2016), Vancouver (S-1510120) (B.C.S.C.) ["Claims Process Order"]***.

9. The Claims Process Order authorized the 1974 Plan to file a notice of civil claim under which its claim would be adjudicated by the Court.

Claims Process Order at para. 32

10. Pursuant to the Claims Process Order, pleadings and other materials were exchanged between the 1974 Plan, the Petitioners, and the Steelworkers over August and September of 2016. An amended notice of civil claim and amended responses to civil claim were similarly exchanged in November 2016.
11. The notice of application on which the Summary Hearing was heard was filed by the Petitioners on November 16, 2016 (the "**Summary Hearing Application**").
12. Materials addressing the Summary Hearing Application were exchanged in November and December 2016, culminating in the Summary Hearing.
13. Simultaneous to the proceedings between the Petitioners, the Steelworkers, and the 1974 Plan, the Monitor conducted the claims process as otherwise set out in the Claims Process Order.

14. To date, the total allowed claims are \$13.4 million. The remaining unresolved claims, excluding the 1974 Plan Claim, amount to approximately \$19.1 million.

**Tenth Report of the Monitor, KPMG Inc.,
filed May 24, 2017, at paras. 29 and 32
[“Monitor’s Tenth Report”]**

The Sales Process

15. A sales process was also implemented in August 2016.

***Walter Energy Canada Holdings Inc.
(Re), (16 August 2016), Vancouver (S-
1510120) (BCSC) [“Approval and Vesting
Order”]***

16. The Petitioners generated approximately \$83 million through the sales process.

**Eighth Report of the Monitor, KPMG Inc.,
filed January 13, 2017, at para. 48**

17. Two significant assets – the Belcourt Interest (as defined in the Monitor’s Tenth Report) and the Petitioners’ interest in the U.K. entities – have yet to be realized upon.

Monitor’s Tenth Report

18. Without the sale of the remaining assets, the Petitioners are projected to have approximately \$61 million in cash at the end of the current stay period of September 30, 2017. This projection reflects the payment of the fees of counsel to the Petitioners on a solicitor and client scale.

**Monitor’s Tenth Report at para. 54 and
Schedule “B”**

Part 3: LEGAL BASIS

Parties to Bear Their Own Costs

19. Costs in insolvency proceedings under the CCAA are “sparingly asked for and even more sparingly given”.

***Air Canada (Re) (2004), 47 C.B.R. (4th)
177 at para. 9 per Farley J.***

20. The usual rule in CCAA proceedings is that parties bear their own costs.

***Semcanada Crude Co. (Re), 2013 ABQB
102 at para. 5 per Romaine J.***

21. Consistent with this practice, neither the pleadings nor the written or oral submissions of the Petitioners or the Steelworkers sought costs.

22. Where ordered in the context of the adjudication of a claim, costs have been ordered to recognize misconduct on the part of the unsuccessful party or their disregard for the procedure outlined by the CCAA. Where so ordered, costs have further been set at a fixed amount well-below the usual scale.

23. In ***Air Canada (Re)***, Mr. Justice Farley ordered costs against the plaintiffs in a proposed class proceeding who re-sought without merit a lifting of the stay. The application was refused as there was no change in circumstances since the previous application. Mr. Justice Farley determined the issue was *res judicata*, or otherwise an abuse of process as a collateral attack on the previous decision.

Air Canada (Re) at para. 2

24. The successful parties were each awarded \$1,000. This order followed despite the fact that those parties requested costs of \$10,000 each, which amount was itself “nowhere near” the actual costs of the application.

Air Canada (Re) at para. 9

25. In ***Semcanada Crude Co (Re)***, Madam Justice Romaine awarded costs to the successful party in an application to strike an action filed after the expiry of the period set by the claims process order. The unsuccessful party was served with the plan of arrangement and the plan sanction order and was a sophisticated litigant represented by counsel, but nonetheless filed a statement of claim without leave of the Court. It was on this basis that “the usual practice with respect to

costs in insolvency matters” – that parties bear their own costs – was found not to apply.

Semcanada Crude Co. (Re) at para. 5

26. In these proceedings, the 1974 Plan brought its claim in good faith and in accordance with the process set by the Court in the Claims Process Order.
27. The 1974 Plan Claim was further brought forward for determination given the substantial importance to U.S. pensioners, as well as to both Canadian subsidiaries of U.S. entities and their stakeholders. The issues raised involved matters of first impression in Canada. These considerations traditionally justify the court making no award of costs to either party.

Brown v. Durham Regional Police Force (1998), 116 O.A.C. 126 at paras. 81-83

Canada 3000 Inc. (Re) (2004), 186 O.A.C. 116, 3 C.B.R. (5th) 288 at paras. 9-10

28. As the 1974 Plan abided by the Claims Process Order and the procedures of the CCAA to determine the 1974 Plan Claim, the Court should not order costs against it.

Costs to be Paid from the Estate

29. If the Petitioners and the Steelworkers receive costs, those costs are more properly paid from the sale proceeds of the estate in the CCAA proceedings.
30. As addressed above, the nature of 1974 Plan Claim is an issue of first impression. That fact, as well as the fact of it being brought in CCAA proceedings, militates against awarding costs against the 1974 Plan.

31. However, to the extent the Petitioners and the Steelworkers are to be indemnified for having preserved value in the estate, they should be entitled to look to the estate to satisfy their costs. Such a procedure is particularly appropriate where, as here, there is a surplus of proceeds even after the deduction of both the proven and remaining uncontested claims.

Monitor's Tenth Report

Reduction of Costs to the Steelworkers

32. A creditor who would be affected by the claim of another potential creditor may be granted standing to participate in the motion addressing the validity of the potential creditor's claim. If the claim is denied the affected creditor may be awarded costs. However, those costs will be reduced to recognize the fact of the duplication of efforts between the debtor or Monitor and the creditor to whom standing was granted.

Return on Innovation Capital Ltd. v. Gandhi Innovations Ltd., 2011 ONSC 7465 at paras. 16-17 per Newbould J.

33. The Steelworkers consented to every order sought by the Petitioners. Their materials were filed or provided after those of the Petitioners and they agreed with the Petitioners on every point at issue at the Summary Hearing. The content of their materials was almost entirely duplicative of that of the Petitioners. The Court recognized this final point in the Reasons for Judgment, stating:

While I have referred to the arguments below as that of the Walter Canada Group, I have considered the similar arguments advanced by the Union even if they are not specifically referenced as such.

Reasons for Judgment at para. 13

34. Accordingly, if an award of costs is to be made at all as against the 1974 Plan, the costs awarded to the Steelworkers ought to be awarded at Scale A in recognition of the duplication of efforts between them and the Petitioners.

Part 4: MATERIAL TO BE RELIED ON

35. The pleadings and materials filed herein.

The applicant estimates that the application will take 2 hours.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

The Honourable Madam Justice Fitzpatrick is seized of these proceedings.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days of service of this Notice of Application,

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed Application Response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 30/05/2017



 Signature of lawyer for filing party
 for Craig P. Dennis, Q.C.

To be completed by the court only:	
Order made	
<input type="checkbox"/>	in the terms requested in paragraphs _____ of Part 1 of this Notice of Application
<input type="checkbox"/>	with the following variations and additional terms:

Date:	_____
	Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

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

SCHEDULE "A"

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