COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Fawcett v. Western Canadian Coal Corp.*, 2010 BCCA 70

Date: 20100211
Docket: CA037084

Between:

David Fawcett

Respondent
(Petitioner)

And

Western Canadian Coal Corp.

Appellant
(Respondent)

And

Kevin James, Mark Gibson

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Low
The Honourable Madam Justice Kirkpatrick

On appeal from: Supreme Court of British Columbia, April 1, 2009
(*Fawcett v. Western Canadian Coal Corp.*, 2009 BCSC 446, Docket No. S070436)

Counsel for the Appellant:	J. Groia C. MacInnis
Counsel for the Respondent, David Fawcett:	J. Forstrom
Counsel for the Respondent, Kevin James:	G.B. Gomery
Place and Date of Hearing:	Vancouver, British Columbia December 17, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 11, 2010

This is Exhibit "D" referred to in the affidavit of Kevin James sworn before me at Van., B.C. this 25 day of Jan. 20 17

A Commissioner for taking Affidavits for British Columbia

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] It has been observed on many occasions that the "criminal interest" prohibition in the *Criminal Code*, s. 347, extends to transactions that bear little or no resemblance to street-level loan sharking, the original target of the provision. In this instance, a publicly-listed mining development company (the "Company") seeks to invoke s. 347 in order to free itself from obligations arising under a "Royalty Sharing Agreement" it entered into with three individuals, two of whom were then directors of the Company. They had expended their own funds and efforts to secure certain mining licenses when the Company was financially unable to do so. The terms under which each "Investor" did so differed from property to property, but for three of the four groups of licenses, they included the payment of a royalty of some kind on production, if and when the property was developed. Later, all three individuals agreed with the Company on a royalty pooling arrangement which 'rolled up' and rationalized all the existing agreements into one, and contemplated another, final, transaction. The Company agreed to reimburse the 'advances' the three had made, and to pay them a single royalty, in proportion to their respective advances, on production from three of the properties. In due course, the Company received the licenses and developed these properties and, thanks to improved coal prices since that time, has benefited enormously from them. The former directors also stand to benefit, possibly to the extent of hundreds of thousands of dollars, if the royalty continues to be payable. The amounts originally 'advanced' a total of $80,000 were either repaid or converted into shares in the Company long ago.

[2] A court has already ruled that the Royalty Sharing Agreement was "fair and reasonable" to the Company, despite non-compliance (which the Court attributed to a misapprehension on the part of the Company's solicitors) with the directors' disclosure requirements of s. 120 of the *Company Act*, R.S.B.C. 1996, c. 62. The Company appealed that ruling but later abandoned the appeal. However, it suspended royalty payments owing to the three Investors once the amount payable in a year exceeded 60% of their original 'advances', asserting that the royalty constituted a "charge paid or payable for the advancing of credit" and therefore came within the expanded definition of "interest" in s. 347 of the *Code*. This position did not prevail in the court below: for reasons indexed as 2009 BCSC 446, the chambers judge concluded that the royalty was not a cost incurred by the Company to "receive credit" and therefore did not violate the criminal interest prohibition. He granted a declaration to the petitioner, one of the two former directors, that the royalty was not "interest" for purposes of s. 347. For the reasons that follow, I conclude that the Company's appeal from his order must be allowed, but only in part.

Factual Background

[3] Since this appeal turns almost entirely on its specific facts, it is necessary to set out those facts in some detail in respect of each of the mining properties and each of the Investors, Messrs. Fawcett, James and Gibson. (A separate proceeding brought by Mr. Gibson was heard together with that brought by Mr. Fawcett, but it was settled before judgment was rendered. Thus it will not be necessary to determine the legality of the portion of the royalty owing to Gibson.)

[4] The Company, Western Canadian Coal Corp., was incorporated as a public company in late 1997 by a group of founders that included Mr. Fawcett and Mr. James. At all material times, they were directors and/or officers of the Company, Mr. Fawcett having primary responsibility for management and Mr. James (a professional geologist) having primary responsibility for geological and technical matters. The third director at the time was Mr. Austin.

[5] The Company carried out an IPO in 1999 primarily for the purpose of raising capital to explore and develop a group of coal licenses on property known as the "Belcourt" property; but due to declining coal prices between 1997 and 2000, that project proved not to be economically viable and was eventually abandoned. Various attempts by the Company to raise additional operating capital were unsuccessful. On the other hand, since larger mining companies were responding to the declining market by forfeiting or abandoning coal licenses in northern British Columbia, Messrs. Fawcett and James recognized that promising coal properties might become available to smaller developers.

The Burnt River Property

[6] In 1998, Mr. James identified a property known as Burnt River that had been explored by a large developer in the 1980s. Mr. James and Mr. Fawcett thought it had good potential and according to Mr. James' affidavit, "it was agreed that the licenses would be acquired for [the Company]." He and Mr. Fawcett personally advanced the funds to the Crown necessary to apply for the licenses, and Mr. James carried out certain work in connection with them. Once the licenses were issued in

his name, Mr. James and the Company entered into a "Coal Property Acquisition Agreement," prepared by the Company's solicitor, made as of April 30, 1999 under which he (as the "beneficial owner" of the "Burnt River coal interests") agreed to sell and transfer them to the Company (as "purchaser") in return for $22,758.32, his total out-of-pocket expenses and related costs. Although the agreement contemplated that Mr. James would be paid on closing, the Company was not able to pay the $22,758.32 and it remained outstanding until some time later. Certain consulting services rendered by Mr. James in connection with the Burnt River and Belcourt properties also went unremunerated for some time.

The West Brazion Licenses

[7] As found by the chambers judge, Messrs. James and Fawcett identified another promising set of licenses, in respect of the so-called "West Brazion" property, in the fall of 1999. The Company agreed that they were attractive, but in the words of Mr. Austin, "I did not feel that we could apply available cash (if any) to acquire new licenses, since this would place us at risk of forfeiting our existing licenses, or being unable to complete the ongoing feasibility work on the Belcourt property (the purpose for which the IPO funds were raised)." Messrs. James and Fawcett went ahead and acquired the licenses in their own names, to which the Company did not object. Again according to Mr. Austin, "[w]e were still discussing whether or not [the Company] could or should acquire these licenses, but I understood that Fawcett and James wanted to tie up the licenses in the meantime." The necessary applications were made in the name of Mr. James' wife, and the

license fees totalled approximately $13,000, half of which was contributed by Mr. Fawcett and half by Mr. James.

[8] The chambers judge accepted the evidence of Fawcett and James that in February 2000, they granted the Company an option to acquire the West Brazion licenses (presumably with Mrs. James' cooperation) from them in exchange for the amount of their out-of-pocket expenses plus a 1% royalty on any coal produced by the Company from the property. The Company denied that the option had been granted, but the chambers judge found on the evidence – a form of "consent resolution" signed by Messrs. Austin and James approving the option, and a press release issued by the Company on February 24, 2000 referring to the option – that it had in fact been granted. The resolution stated at the bottom that because of their material interest in the transaction, Fawcett and James had abstained from voting and had executed it "only to comply with s. 125(3) of the *Company Act*." Because Mr. Fawcett had not signed the consent resolution, the chambers judge stated that the option was not enforceable – a conclusion that, with due respect, is not necessarily correct. In any event, the chambers judge found that the events of February 2000 were relevant to show that the Company was interested in acquiring the West Brazion properties.

[9] As will be seen below, the option agreement was later superseded by the Royalty Sharing Agreement. Subsequently, in August 2000, the West Brazion licenses were issued to Mrs. James, who then assigned them to the Company. The $13,000 owed to Mr. James and Mr. Fawcett was paid in May 2001.

Mount Spieker

[10] A third group of promising coal properties was identified later in 1999 by Mr. James and Mr. Fawcett. These were referred to collectively as the "Wolverine" group, comprised of Mount Spieker, Perry Creek, and Hermann. Again, the Company lacked sufficient capital to pay the application fees and associated acquisition costs. This time, Mr. Austin identified Mr. Gibson, who held shares in the Company, as a person who might be willing to provide financial assistance. By agreement dated January 28, 2000, Mr. Gibson agreed to lend $20,000 to the Company to acquire the Mount Spieker licenses. The Company agreed to repay the loan by January 31, 2002 and to pay him a royalty of $.25 per tonne on the first 2.5 million tonnes of product sold from the Mount Spieker property. He was also given the right to "convert" the loan to a 20% working interest in that property at the time the coal licenses were granted. If he exercised that right, the Company would be entitled to acquire the working interest for fair market value.

[11] The Company applied for the Mount Spieker coal licenses on February 2, 2000 and received them on October 30, 2000.

[12] This left the Perry Creek and Hermann license applications, for which $30,000 was needed. Mr. Gibson was prepared to contribute $10,000 but was concerned that he had no control over the Company's development of other properties that involved the payment of royalties to James and Fawcett. As the latter recalled:

> I recall [Mr. Gibson's] saying he was concerned about having a separate interest in only some of the licenses that [the Company] was acquiring, when

> [the Company] would have unilateral control over which of the new properties might be explored and developed, when, or in what order. He felt it would be preferable to have a shared interest in all of the new licenses acquired or to be acquired by [the Company]. He suggested that in conjunction with any agreement to provide further funding to enable [the Company] to acquire the Perry Creek and Hermann licenses, we (Gibson, James and I) should be pooling our several interests in the West Brazion and Mount Spieker licenses, and creating a shared interest in all the licenses acquired or to be acquired.

This evidence was accepted by the chambers judge.

[13] Accordingly, the parties agreed orally in February 2000 on new terms which Mr. Fawcett described in an affidavit:

> Eventually we reached a new agreement (the "February Agreement"), under which Gibson and I agreed to provide a further $30,000 to be used by [the Company] to apply for the Perry Creek and Hermann licences. In addition to providing more money for new licence applications, Gibson gave up his royalty and right to acquire a working or joint venture interest in the Mt. Spieker licences under the Gibson Agreement. James and I gave up our right to acquire a separate royalty interest in the West Brazion licences if [the Company] exercised the option to acquire them. In return, [the Company] agreed to grant a 1% royalty which would apply to coal produced from any of the West Brazion or Wolverine licences which if acquired, and which would be shared between Gibson, James and me in properties to our respective contributions to the acquisition of these licences, once determined.
>
> Attached as exhibit "F" to this affidavit is a copy of a summary of the basic terms of the royalty we negotiated as part of the February Agreement. I prepared this document around the time the February Agreement was negotiated. The table at the top of this document details the basis upon which Gibson, James and I agreed to share the 1% royalty between us. For the purposes of allocating of the royalty, we agreed to recognize the following contributions:
>
> (a) The out of pocket expenses paid by James and me to apply for the West Brazion licences ($13,000 which would become payable if the licences were granted, and [the Company] exercised the option to acquire them);
>
> (b) a portion of the amounts paid by James and me to acquire the Burnt River licences ($6,000 to each of James and me, which was part of the amount [the Company] paid us when we assigned the Burnt River licences ...;
>
> (c) the $20,000 previously provided to [the Company] by Gibson to apply for the Mt. Spieker licences under the Gibson Agreement;

(d) the new amounts of $10,000 and $20,000 being provided by Gibson and myself, respectively, to apply for the Perry Creek and Hermann licences; and

(e) An amount of $5000 reflecting the value of the work James did to assist [the Company] in assessing and applying for the Wolverine licences.

[14] The terms of this arrangement were put down on a 'term sheet' by Mr. Fawcett, a copy of which I have attached to these reasons as Schedule 1. At the outset, it stated the parties' respective positions with respect to cash and work contributed:

James		Gibson		Fawcett	
West Brazion	$6,500	Mount Spieker	$20,000	Wolverine	$20,000
Burnt River	$6,000	Wolverine	$10,000	West Brazion	$6,500
Work (Wolverine)	$5,000			Burnt River	$6,000

James	$17,500	21.9%
Fawcett	$32,500	40.6%
Gibson	$30,000	37.5%
Total	$80,000	

The sheet referred to a 1% royalty to be paid by the Company to the three "Investors" for "advancing" the funds referred to – even though a good portion of the funds had already been expended on application fees paid to the government and related expenses.

[15] The Company's solicitor was instructed to prepare a formal document to reflect the term sheet. He prepared what he called the "Royalty Sharing Agreement" ("RSA"), which was dated as of March 31, 2000 (although the evidence indicates it

was actually signed in June). The chambers judge set forth the material terms of the RSA at para. 34 of his reasons. I attach as a schedule hereto those material terms and the respective proportions (which replicate those set forth in the term sheet) of the royalty to be paid to Messrs. Fawcett, James and Gibson thereunder, as stated in Schedule 2.1 to the RSA. It will be noted that the recitals refer to the Investors' having "assisted" the Company in acquiring various properties and to the Company's wishing to pay a "royalty to the Investors for the Investors' contributions", i.e., the $80,000 total mentioned in the term sheet. The opening clause of the Agreement used the terms "Purchaser" and "Vendors", but those terms were not defined and counsel for the Company suggests they may have been used in error.

[16] At para. 1.1, the Company acknowledged that each of the Investors had advanced funds to the Company in the amounts stated. Para. 2.1 then provided:

> As consideration for advancing the funds, the Company will pay a royalty (the "Royalty") of one percent (1%) of the price (FOBT at Port) for all product tonnes produced from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors as set out in Schedule "2.1" attached hereto and forming a material part hereof.

No 'end-date' for the payment of the royalties was specified. At para. 6.1, the Company covenanted to repay the Investors' advances (not including funds advanced for the Burnt River property, which had already been repaid) within two years. Paragraph 9.4 stated that the terms of the Agreement constituted the entire agreement between the parties and would supersede all previous oral or written communications between them.

[17] From the Company's point of view, the RSA made it possible "to acquire what has subsequently proven to be extremely valuable." In Mr. Austin's words:

> The transaction involved very little risk to [the Company], since no security was required, and there would be no cost of borrowing unless any of the properties acquired could be successfully developed into a producing mine. In that case, the transaction would be beneficial to [the Company], regardless of the royalty. As things have turned out, it appears the agreement will be beneficial to all parties. At the time [the RSA was signed], I considered any potential rewards that the royalty holders might realize in future to be reasonably proportional to the significant risks they were undertaking, and the substantial benefits which would accrue to [the Company] if any of these licenses could ever actually be brought into production.
>
> Later in the spring of 2000, we were able to arrange new private placement financing for [the Company]. In fact, I believe that our acquisition of the new properties under the royalty sharing agreement was instrumental to [the Company's] ability to raise new financing. [Emphasis added.]

[18] Finally in this narrative, I note that in May 2000, in connection with a new private placement, the Company decided it was desirable for balance-sheet purposes that various of its debts be exchanged for shares. As of June 19, 2000, the directors of the Company signed a "consent resolution" authorizing the issuance of shares to Mr. Gibson at a price of $.30 per share in full settlement of the $30,000 owing to him in connection with the Wolverine licenses; to Mr. James in settlement of outstanding consulting fees of $15,000; and to Mr. Fawcett in settlement of outstanding consulting fees of $15,000 and the $20,000 he had advanced in respect of the Wolverine licenses. This 'shares for debt' arrangement did not affect the $13,000 that Messrs. Fawcett and James had laid out in respect of the West Brazion licenses, which was reimbursed to them the following year.

Court Proceedings

[19] As mentioned earlier, the RSA was the subject of proceedings before the Supreme Court of British Columbia in 2006. By this time, the Company had different directors and officers. It alleged that the directors had not complied with the disclosure requirements of the *Company Act* at a meeting of directors or shareholders, in connection with the RSA. The Company's petition stated that it did not intend to seek shareholder ratification of the RSA, as it did not consider the Agreement to be in its best interests. It sought an order setting the Agreement aside pursuant to s. 150(2) of the *Business Corporations Act*, S.B.C. 2002, c. 57, which came into force on March 29, 2004. Section 150(2) provides:

> (2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148(2) , the court may, on an application by the company or by a director, senior officer, shareholder or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:
>
> (a) enjoin the company from entering into the proposed contract or transaction;
>
> (b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;
>
> (c) make any other order that the court considers appropriate. [Emphasis added.]

The Company also sought an accounting of all amounts received by the former directors James and Fawcett under the Agreement.

[20] Tysoe J., as he then was, dismissed the Company's petition for reasons indexed as 2006 BCSC 463. He noted that the question of whether the RSA was fair and reasonable had to be assessed at the time the parties had reached the

Agreement, and found that it was substantively fair and reasonable to the Company at that time. He relied in part on expert evidence adduced by the Investors that supported the fairness of the Agreement, including evidence to the effect that the amount of royalties thereunder was "in the low range of royalty payments for similar transactions in the Canadian mining industry." (Para. 44.) The expert opinions were not challenged on cross-examination or by contrary opinions from other experts.

[21] The Company did provide expert actuarial evidence to the Court to the effect that royalties payable under the RSA were likely to constitute a return in excess of 60% per annum by the beginning of 2007. In response to this argument, Tysoe J. stated:

> ... I am not persuaded by this submission for two reasons. First, the Royalty Sharing Agreement itself does not provide for payment of a return in excess of 60% per annum and s. 347 will only become engaged when and if interest in excess of 60% per annum is paid. If that occurs, the Petitioner will then be entitled to pursue a remedy to limit the payments which it is obliged to make under the Agreement. Second, it is not clear from the evidence that the royalty payments will constitute interest within the meaning of s. 347. While it does appear that some of the advances were in the form of loans to the Petitioner, it also appears that some of the advances were made by Messrs. Fawcett and James to initially acquire the licenses in their own names. [At para. 47.]

In the result, the Company's petition was dismissed.

[22] The Company brought the criminal interest issue to a head in March 2007 when it declined to pay to Messrs. Fawcett, James and Gibson the full amount of royalties owing under the RSA, on the basis that the effective annual rate of interest had exceeded 60% per annum. In respect of Mr. Fawcett, for example, the royalty accruing in the first quarter of 2007 under the RSA was $164,045.26, but the Company paid him only $22,605. As the chambers judge noted, Mr. Fawcett

responded by bringing this proceeding, seeking a declaration that *inter alia* "the royalty provided for in the Royalty Sharing Agreement ... does not constitute 'interest' within the meaning of s. 347 of the *Criminal Code*".

The Chambers Judge's Reasons

[23] The chambers judge began his analysis by reciting s. 347(1), the definitions of "credit advanced", "criminal rate" and "interest" in ss. (2), and ss. (4), which I reproduce here:

> 347(1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is
>
> (a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.
>
> (2) In this section,
>
> "credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under any agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;
>
> "criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;
>
> ...
>
> "interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required

> deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;
>
> ...
>
> (4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate. [At para. 51; emphasis added.]

He observed that since the RSA was not on its face an agreement for the payment of interest at a criminal rate (determined at the time the Agreement was made), the first offence created by s. 347(1) was not engaged. Instead, the second offence – the receipt of a payment or partial payment of interest at a criminal rate (determined at the time of receipt) – was at issue: see *Degelder Construction Co. v. Dancorp Developments Ltd.* [1998] 3 S.C.R. 90 at para. 34.

[24] The chambers judge noted the leading case on the interpretation of what was formerly s. 347(1)(b) of the *Code*, *Garland v. Consumers' Gas Co.* [1998] 3 S.C.R. 112. He summarized the principles stated by the Supreme Court of Canada in *Garland* as follows:

> (a) Although s. 347 was enacted to assist in the prosecution of loan sharks, it is clear from the language of the section that it was designed to have a much broader application. Section 347 is most often applied to commercial transactions in civil actions, where borrowers assert the doctrine of illegality in an attempt to avoid or recover interest payments. (paras. 24, 25);
>
> (b) The substance, rather than the form of a charge or expense determines whether it is governed by s. 347. (para. 28);
>
> (c) In order to constitute "interest" under s. 347 a charge must be "paid or payable for the advancing of credit under an agreement or arrangement". (para. 30);
>
> (d) The term "credit advanced" is broadly defined in s. 347(2) and includes not only money, but also the monetary value of any goods,

> services or benefits advanced, or to be advanced, under an agreement or arrangement. (para. 34);
>
> (e) Under s. 347(2) "an advance" of "the monetary value of any goods, services or benefits" means a deferral of payment. "A debt is deferred – and credit extended – when an agreement or arrangement permits a debtor to pay later than the time at which payment would otherwise have been due.... The substance of such "credit" is a determined amount of money which is payable over time." (para. 35);
>
> (f) Section 347 regulates the relationship between creditors and debtors rather than the relationship between commercial actors in the ordinary course of business. (para. 37);
>
> (g) In order for the deferral of the debt to constitute "credit advanced" there must be "a specified amount owing, and that amount must actually be due in the absence of an arrangement permitting later payment". (para. 39) [At para. 56.]

The chambers judge also noted the Court's "cautionary note" at para. 52 of *Garland*, where it described s. 347 as "a deeply problematic law" whose two facets "do not comfortably co-exist", and which has given rise to a large volume of civil litigation and interpretive difficulties.

[25] *Garland* was applied by this court in *Boyd v. International Utility Structures Inc.* 2002 BCCA 438, 216 D.L.R. (4th) 139, a case relied on heavily by the Company in this appeal. In *Boyd*, a borrower agreed to pay a royalty as part consideration for a loan. (Indeed, the royalty agreement expressly stated that "As further consideration for the Loan [the payor] has agreed to grant to Boyd the Royalty subject to the terms and upon the conditions hereinafter set forth.") This court upheld the chambers judge's conclusion that the substance of the royalty agreement was not to create a profit-sharing arrangement or a joint venture, but to "compensate Dr. Boyd for the use of his money to buy the technology to manufacture the poles on which the royalty is paid." In the result, the plaintiff could enforce the royalty only to the extent it did not exceed the criminal interest rate.

[26] At paras. 61-65 of his reasons, the chambers judge reviewed the relevant principles of contractual interpretation – that the goal of interpreting a commercial contract is to discover the objective intention of the parties at the time they entered into it; that evidence of the parties' subjective intentions is not relevant or admissible (see *Prenn v. Simmonds* [1971] 3 All. E.R. 237 (H.L.); *Eli Lilly & Co. v. Novopharm Ltd.* [1998] 2 S.C.R. 129); that if words in a contract are ambiguous, the court may consider extrinsic evidence; and that where the question of interpretation relates to consideration:

> ... extrinsic evidence is admissible to prove the actual consideration where no consideration, or nominal consideration is stated in the contract; where the consideration is ambiguous; or where substantial consideration is stated, but additional consideration exists. However, the additional consideration must not be inconsistent with the terms of the written contract: *Pao On v. Lau Yiu Long* [1979] 3 All E.R. 65 (Hong Kong P.C.) at p. 631; *Turner v. Forwood*, [1951] 1 All E.R. 746 (C.A.); *Cadinha v. Chamer Corp.* [1995] B.C.J. No. 755 (B.C.S.C.) at paras. 12-13. [At para. 64.]

Finally, the chambers judge noted, while the language of the contract may be informed by the factual matrix (see *ACLI Ltd. v. Cominco Ltd.* (1985) 61 B.C.L.R. 177 (C.A.) at 180; *Kingsway General Insurance Co. v. Lougheed Enterprises Ltd.* (2004) 32 B.C.L.R. (4th) 56 (C.A.), at para. 10), the words should not be "overwhelmed by a contextual analysis" (*Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996) 25 B.C.L.R. (3d) 285 (C.A.) at para. 19). None of these principles is controversial or challenged on this appeal.

[27] The chambers judge also referred to *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank* [1992] 3 S.C.R. 558 – not a criminal interest case but a bankruptcy contest in which the issue was whether an advance of funds made to a

failing bank pursuant to a highly complex agreement had been a loan or a capital investment. The Court described the "hybrid transaction" before it as involving elements of "both debt and equity investment" and observed that in searching for the substance of the transaction, one "should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement." (At 590.)

[28] Under the heading "The Language of the Contract", the chambers judge formulated the central question before him – whether the royalty under the RSA was consideration payable by the Company "for credit received" from Messrs. Fawcett, James and Gibson. (Para. 66.) He noted the references in the recitals to "contributions" by the Investors, which were not limited to amounts advanced to the Company, but included other forms of assistance provided to acquire and maintain the coal licenses. Although the Company emphasized the statement at para. 2.1 that "As consideration for advancing the funds", it would pay the 1% royalty to the three Investors, the chambers judge found these references, and particularly the word "advances", to be capable of more than one reasonable meaning. One was that the royalty was payable in consideration for loans totalling $80,000, to be repaid within two years but, the chambers judge reasoned:

> ... the nature of the funds advanced is not specified. None of the funds advanced are described anywhere in the RSA as a loan, nor is there any express provision for payment of interest on the funds advanced for the West Brazion, Wolverine and Mount Spieker properties during the period of up to two years within which the RSA contemplated repayment of those funds.
>
> An "advance" is not necessarily a loan. In *London Financial Association v. Kelk* (1884) 26 Ch. Div. 107, Bacon, V.C. held at p. 136:
>
> > The words "advancing" and "lending" may each have a different signification; money may be "advanced" without being

> "lent"; the relation of borrower and lender does not exist in a great variety of the transactions that are distinctly authorized.

Black's Law Dictionary, 7th Edition, defines "advance" as:

> Advance, n. 1. The furnishing of money or goods before any consideration is received in return. 2. The money or goods furnished. [At paras. 82-4; emphasis added.]

[29] Given this ambiguity, the chambers judge turned to consider "extrinsic evidence, including the factual matrix". (Para. 86; cf. *Kingsway General Insurance, supra,* at para. 10.) He reviewed the facts I have set out above, limiting his analysis to what the parties knew at the time they signed the RSA. These circumstances showed that when the Company agreed to pay the royalty in consideration of the Investors' "advancing the funds", the parties had not intended to "restrict the consideration for the royalty to any credit advanced to [the Company] by the Investors." Rather, the chambers judge said, "[t]he amounts contributed by each Investor as set out in paragraph 1.1 also included money expended, and in the case of Mr. James, work performed, in transactions which did not involve a loan by the Investors or a deferral of payment by [the Company]." (Para. 99.) He then examined the "contributions" comprising the "advanced funds" attributed to each Investor at para. 1.1 of the RSA. His findings are sufficiently detailed that they should be set out in full:

> Mr. James' contribution of $17,500 consisted of $6,500 for West Brazion, $6,000 for Burnt River and $5,000 for work related to Wolverine. Mr. Gibson's contribution of $30,000 consisted of $20,000 for Mount Spieker and $10,000 for Wolverine. Mr. Fawcett's contribution of $32,500 consisted of $20,000 for Wolverine, $6,500 for West Brazion and $6,000 for Burnt River.
>
> I have already found that the contributions of Mr. James and Mr. Fawcett for Burnt River did not constitute credit. In 1999, [the Company] had purchased the Burnt River coal licenses from Mr. James and paid to him a purchase price which included reimbursement of $12,000 for license application fees, which Messrs. James and Fawcett had previously paid to the government.

The $5,000 allocated to Mr. James for Wolverine was compensation for research and assessment work he performed in connection with the Wolverine properties. This amount formed part of the sum of $17,500, which determined Mr. James' proportionate share of the royalty. It was only after [the Company] had asserted that receipt by the investors of the royalty would violate s. 347 of the *Code* that the company tendered payment to Mr. James for the Wolverine work. In late December 2006, when [the Company] made the first royalty payment to Mr. James, it added the sum of $5,000 to Mr. James' proportionate share of the royalty, as payment for the Wolverine work. Mr. James refused to accept payment of the $5,000 on the basis that sum was not owed to him. The services which Mr. James had provided to [the Company] for the Wolverine properties were recognized and compensated through his proportionate share of the royalty. The $5,000 attributed to the Wolverine work formed part of the consideration provided by Mr. James to [the Company] in exchange for his share of the royalty, but involved no advance by him of credit to [the Company].

At the time the parties made the RSA, Messrs. Fawcett and James had not loaned any money and did not advance any credit to [the Company] in relation to the West Brazion property. The RSA contemplated the acquisition by [the Company] of the West Brazion property. However, [the Company's] acquisition of that property, and its obligation to pay back $6,500 both to Mr. Fawcett and to Mr. James, was contingent upon the government issuing the coal licenses to Mrs. James, and her assignment of those licenses to the company. Those events did not occur until November 2000. At that point, after [the Company] had acquired the West Brazion property, it was obliged to repay $6,500 to both Mr. Fawcett and Mr. James within two years of the date of the RSA under paragraph 6.1, as "funds advanced" by those Investors for the West Brazion property. In essence, [the Company], in consideration for its acquisition of the interests of Messrs. Fawcett and James in West Brazion, agreed to pay the royalty and to reimburse those Investors for the application costs they had previously incurred.

The language of the introductory paragraph to the RSA, which describes [the Company] as the "Purchaser" and refers to Messrs. Fawcett, James and Gibson as the "Vendors", must be given its plain, ordinary meaning, unless to do so would result in an absurdity. This language is consistent with the reality of the transaction governed by the RSA. The terms "Purchaser" and "Vendors" reflect the intention of the parties that [the Company] would acquire potentially valuable coal properties, including West Brazion, for "$1 and other good and valuable consideration". That consideration included payment by [the Company] to the Investors of the shared royalty.

Mr. Gibson had advanced $20,000 to [the Company] in January 2000 to fund [the Company's] application for the Mount Spieker licenses. Mr. Gibson acquired an option to convert his loan into a 20% working interest when the licenses were granted. [the Company] also agreed to pay a royalty to him from coal produced from the Mount Spieker property. Mr. Gibson advanced the $20,000 and [the Company] applied for the Mount Spieker licenses on February 2, 2000, before the parties made the RSA.

By the RSA, [the Company] and the investors agreed to a new royalty that would apply to the West Brazion, Mount Spieker and Wolverine properties, in

> which all of the investors would share in proportion to their total contributions, in the percentages set out in Schedule 2.1.
>
> By paragraph 9.4, the parties agreed that the terms and provisions of the RSA constituted their entire agreement and superseded all previous oral or written communications. Upon entering into the RSA, the Investors relinquished any rights they each had with respect to particular coal properties in exchange for their shared interest in the royalty payable under the RSA.
>
> Thus, Mr. Gibson gave up his option to acquire a 20% working interest in the Mount Spieker licenses and his former royalty interest in the Mount Spieker properties in exchange for the new shared royalty.
>
> The consideration provided by the investors in return for the shared royalty also included Mr. Fawcett's agreement to advance a further $20,000 to [the Company] to pay for its license applications for the Wolverine group, and Mr. Gibson's agreement to advance a further $10,000 to [the Company] for the same purpose.
>
> Finally, by virtue of paragraph 4.2 of the RSA, Messrs. Fawcett, James and Gibson agreed to share proportionately their respective interests in any part of the moneys which they had contributed and which might be returned by the government to [the Company] if any of the West Brazion, Mount Spieker and Wolverine license applications were withdrawn or not granted. [Paras. 101-11; emphasis added.]

[30] The chambers judge characterized the RSA as a "hybrid transaction" (para. 113), although one might better describe it as multi-faceted. Part of the benefit to the Company was the fact that Messrs. Fawcett and Gibson loaned the $30,000 in total that the Company needed to apply for the coal licenses at Perry Creek and Hermann. But there were other aspects to the Agreement referable to transactions that were already complete – Burnt River, West Brazion and Mount Spieker. Mr. Gibson surrendered his right to convert his "investment" to a 20% working interest in Mount Spieker and his royalty of $.25 per tonne described earlier; the 1% royalty contemplated by the West Brazion option agreement between the Company and Messrs. Fawcett and James was 'rolled in' to the royalty pool; and consulting services rendered on Wolverine by Mr. James were recognized. The chambers judge summarized its various effects:

> ... In addition to making provision in paragraph 6.1 for the advance of some credit to [the Company], the RSA also involved the acquisition by [the Company] of the Investors' interests in certain coal licenses, the provision of additional funds to [the Company] to assist it in acquiring the Wolverine licenses, and the agreement of the Investors to pool their interests and to accept a royalty they would share in proportion to their respective contributions. The RSA also had elements of a speculative investment. At the time when Messrs. Fawcett, James and Gibson entered into the RSA, they had no assurance that their contributions to [the Company's] acquisition of the West Brazion, Mount Spieker and Wolverine licenses would result in payment of the royalty provided in paragraph 2.1 of the RSA. Their receipt of the royalty was contingent upon [the Company] first acquiring the coal licenses, and then successfully developing a producing coal mine. [At para. 113.]

[31] Finally, the chambers judge turned to the central question of whether the royalty under the RSA was "paid or payable for the advancing of credit under an agreement" within the meaning of s. 347. In this regard, he referred to *Garland, supra,* and in particular the reasoning of the majority at paras. 37-39 where Major J. emphasized that for the deferral of a debt to constitute "credit advanced", there must be a specified amount owing which must "actually be due in the absence of an arrangement permitting later payment." Applying this reasoning to the RSA, the chambers judge observed that the only funds advanced to the Company at the time the RSA was made were the $30,000 contributed by Mr. Fawcett and Mr. Gibson to enable the Company to apply for the Perry Creek and Hermann licenses. The remainder of $50,000 had already been advanced.

[32] The only part of the RSA which the chambers judge regarded as "a provision for the extension of credit by the Investors to [the Company]" was para. 6.1. It stated that within two years of the Agreement or upon receiving adequate financing, whichever occurred first, the Company would pay back to the Investors "all funds advanced ... for the West Brazion, Wolverine and Mount Spieker properties". (My

emphasis.) The chambers judge reasoned that para. 6.1 could have no application to the contributions of Messrs. James and Fawcett in respect of Burnt River, since those amounts had already been repaid; nor did it apply to the value of work performed by Mr. James in connection with the Wolverine claims. He found that Mr. James "extended no credit" to the Company in connection with that work (para. 117). As it turned out, the Company decided to credit $5,000 to him as compensation, as the chambers judge had noted at para. 30 of his reasons.

[33] With respect to "sums advanced" in connection with West Brazion, Wolverine and Mount Spieker, any obligation on the part of the Company to repay such funds had been contingent upon its obtaining the respective licenses to mine those properties. In the chambers judge's analysis:

> ... All of the license applications were still pending when the parties executed the RSA in June 2000. Under paragraph 4.2, if any of the coal licenses were not granted, or if [the Company] withdrew any of the applications, the Investors were to be repaid proportionately upon the government returning the license application fees to [the Company]. If a coal license was not granted, or an application was withdrawn by [the Company], the amount advanced by an Investor to [the Company] for that license would not be repaid to the Investor under paragraph 6.1. Instead [the Company], upon receipt of the refunded application fees, was required to repay those fees to the Investors proportionately under paragraph 4.2 of the RSA.
>
> As counsel for the petitioner submits, this provision served to preserve the shared interest of the Investors, not only in the royalty, but also in the pooled value of their contributions toward [the Company's] acquisition of the coal licenses. [At paras. 118-19.]

[34] In fact, the licenses did issue by the fall of 2000, with the result that the repayment provision, para. 6.1, "kicked in". However, in July 2000, the "shares for debt" arrangement was implemented, thus extinguishing any debt obligation of the Company related to the advance of funds on the Mount Spieker and Wolverine licences. In the chambers judge's analysis, there was at most an extension of credit

under para. 6.1 for monies advanced on these properties from March 31, 2000 (the date of the RSA) to July 11, 2000 (the date of the shares for debt arrangement), and it was at least arguable that no credit was ever advanced by the Investors to the Company with respect to these properties, given the timing of the shares for debt arrangement.

[35] Similarly, the repayment of the $13,000 "advanced" by Messrs. Fawcett and James on the West Brazion licenses was a contingency at the time the RSA was entered into because the licenses had not yet been granted. Again in the chambers judge's analysis, the extension of credit in this scenario did not begin until November 20, 2000, the date Mrs. James assigned the licenses to the Company, and ended on May 28, 2001, the date the Company reimbursed the $13,000 owing to Messrs. James and Fawcett. (Para. 124.)

[36] The chambers judge concluded that in all the circumstances, the Investors' agreement to advance "credit" to the Company had been incidental to the main purpose of the RSA. In his words:

> ... In substance, the RSA was an agreement by which the Investors assisted [the Company] in acquiring potentially valuable coal licenses in consideration for a shared royalty interest in those licenses. The royalty was not in substance a cost paid by [the Company] in order to receive credit. Rather, the royalty was the principal consideration flowing from [the Company] to the Investors for their contributions to [the Company's] acquisition of the coal licenses. The Investors' contributions included their agreement to pool their interests, the transfer of the West Brazion coal licenses, the provision of funds to enable to apply for coal licenses, the payment of coal license application fees, and work relating to the assessment of the Wolverine properties.
>
> When the Investors contributed funds to assist [the Company] in acquiring coal licenses, they were taking the risk that the properties might never go into production. Although they stood to earn a handsome return in the event that [the Company] was able to develop producing coal mines, they had no

> assurance that any of the properties would go into production. This case is distinguishable from *Boyd v. International Utility Structures Inc.* 2002 BCCA 438, where there was no consideration for the royalty other than the loan, and where the royalty was expressly stated to be in furtherance of the loan. [At paras. 125-6; emphasis added.]

In the result, he ruled that in substance, the royalties payable under the RSA had not been incurred by the Company in consideration of the advancing of credit. Thus they did not constitute "interest" for purposes of s. 347 and Mr. Fawcett, the petitioner, was entitled to the declarations sought in his petition.

On Appeal

[37] In its factum the Company argued that the chambers judge had erred in two respects – in construing the RSA as more predominantly an equity than a debt transaction, and in his interpretation of the law regarding s. 347 and in particular the meaning of "credit advanced" and "interest" under the *Code*. In oral argument, Mr. Groia supplemented these two points with a submission that may be summarized as follows:

(a) The most important factor in construing a contract is the language used by the parties;

(b) In this case, the language of the RSA is clear and there is very little, if any, ambiguity in it;

(c) On its face, the RSA did not contemplate that the Company's obligation to repay the advances was contingent on the Company's being granted the coal licenses or that the Company would "acquire" the licenses from Messrs. Fawcett, James and

Gibson, but "rather that they [would] advance credit to [the Company] to purchase the licenses";

(d) The references in the RSA to each Investor's having "advanced" funds (or money's worth in the case of Mr. James' services) and to the obligation in para. 6.1 to repay the 'advances' in two years indicate that the substance of the Agreement was the advancing of credit to the Company – contrary to the chambers judge's finding that it was only incidental; and

(e) The chambers judge failed to analyze the true nature of the royalty payments "to determine if they operate more like interest on a debt or a return on equity". As in *Boyd*, the consideration for the royalty on a plain reading of the RSA "was and only was the advance of the funds", rather than payment to the Investors for their contributions to the Company's acquisition of the coal licenses as found by the chambers judge.

[38] It is notable that the Company did not contend that it had not been open to the chambers judge to consider the "factual matrix" or background of the various transactions between the Investors and the Company that took place prior to the negotiation and execution of the RSA. Indeed, the Company devoted a good deal of its written submission to the argument that because Messrs. Fawcett and James had been directors and officers of the Company, it would not have been "open to them" as fiduciaries to acquire the prospective mining opportunities for their own account (see generally *Canadian Metals Exploration v.* Wiese, 2007 BCCA 318 and the

cases cited therein). If this is so, the Company argued, the royalties payable under the RSA are more likely to be "on account of debt rather than equity."

[39] Counsel for Mr. Fawcett responded to the latter argument by characterizing it as "false to fact". Mr. Forstrom noted the evidence of Mr. Austin and Mr. Fawcett concerning the circumstances of Mrs. James' acquisition of the West Brazion licenses in late 1999, including the fact the Company did not have the funds to acquire them and still had not reached a decision when Fawcett and James decided to "tie up the licenses in the meantime". As has been seen, the Company agreed to purchase the West Brazion (and Burnt River) licences – it did not borrow the funds to do so. It has never been argued, as far as I am aware, that the West Brazion option agreement – or the Coal Property Acquisition Agreement regarding the Burnt River licences – was a sham or a nullity.

[40] Nor can it now be said that because Fawcett and James were directors, they somehow lacked the capacity to acquire the licences as they did, or to agree to sell and transfer them to the Company. The chambers judge suggested that because the purported consent resolution approving the West Brazion option agreement had not been signed by Mr. Fawcett, the option was unenforceable but, as is evident from Tysoe J.'s reasons in the related proceeding, nothing turned on the existence of a consent resolution, given the requirement that a meeting of the board be held where full disclosure was required to be made. The critical point is that Tysoe J. found the RSA to be fair and reasonable to the Company – a finding that extended to the previous transactions that were 'rolled up' into the RSA. As noted by Ryan J. (as she then was) in a slightly different context in *Rhyolite Resources Inc.*

v. CanQuest Resource Corp. [1990] B.C.J. No 1803, 50 B.L.R. 275 (S.C.), an order of the kind made by Tysoe J. effectively "absolves" a director from liability for what would otherwise be a breach of fiduciary duty in respect of transactions in which he or she had a personal interest. (In the case at bar, of course, those personal interests were obviously known to all three directors.)

[41] Equally important for purposes of this case is the fact that the Company did enter the option agreement, and the parties, having no reason to think otherwise, conducted themselves on the assumption it was valid. We must therefore proceed on the basis that this and the other pre-existing transactions are to be considered as part of the factual matrix in the usual way, regardless of what legal challenges are later advanced. If the facts indicate that the royalty was more in the nature of debt than equity, that fact must be considered; but if the facts are the other way, that must also be considered and weighed accordingly.

[42] Returning to Mr. Groia's main argument, there can be no doubt that the language used by the parties in their contract is the most important consideration in construing the meaning of the contract. I do not agree, however, that the language of the RSA is clear and unambiguous, particularly in its use of the word 'advance'. On this point, counsel for the Company relied on the observation of the Court in *Garland*, *supra*, at para. 35:

> The most plausible interpretation of s. 347(2) is that an "advance" of "the monetary value of any goods, services or benefits" means a deferral of payment for such items. A debt is deferred – and credit extended – when an agreement or arrangement permits a debtor to pay later than the time at which payment would otherwise have been due.

The Court in *Garland*, however, was construing s. 347, the prohibition on criminal interest, rather than a contract that might or might not provide for interest. As we have seen, the chambers judge quoted authority for the proposition that an "advance" is not necessarily a loan. In my view, this accords with the usage of the term in ordinary parlance.

[43] That the words "advances" and "advanced" were used as neutral terms is supported by the fact that not all the advances referred to had, prior to the execution of the RSA, represented loans, but that both the Burnt River and West Brazion transactions had been sale/purchase transactions. These licenses had originally been issued in the name of Mr. or Mrs. James and/or Mr. Fawcett, who then sold them to the Company. The use of the terms "Vendor" and "Purchaser" in the opening paragraph of the RSA gives some slight support to this conclusion. This is not true, on the other hand, of the Wolverine loan transactions involving Mr. Gibson (of which no more need be said given the settlement of his claims) and Mr. James, to which loans I shall return below.

[44] The chambers judge was of the view that para. 6.1 of the RSA was a "provision for the extension of credit by the Investors to [the Company]." With respect, I read para. 6.1 as a covenant for the repayment of all the advances, both those that had been loans and those arising from purchase transactions. The Company takes issue with the chambers judge's finding that the repayment obligation was contingent on its receiving the coal licenses, but whether or not this was correct in respect of some or all of the licenses is not in my view significant in law or in fact. As a matter of law, the question is whether the royalties were

consideration for the advancing of credit, regardless of when the loan became repayable, and regardless of the period over which the credit was outstanding. As observed in *Garland*, the "time factor" is not necessary to bring a payment within the ambit of s. 347, which applies even to one-time charges, whether payable at the outset or later, "after repayment (e.g., fines and penalties.)" (Para. 29.) *A fortiori,* the same must be true of charges that are contingent, if the contingency does in fact come to pass. Nor does the nature of a loan, or the 'advancing of credit', change by reason of the fact the loan was outstanding for only a short time.

[45] As a matter of fact, the Company's covenant to repay the "advances" was irrelevant in the case of Burnt River, since the expenses incurred by Messrs. James and Fawcett had already been reimbursed to them, as the Company acknowledged at para. 6.2 of the RSA. In the case of West Brazion, the covenant was merely confirmatory, given that under the terms of the option agreement, the Company had already obliged itself to reimburse the out-of-pocket costs of Messrs. Fawcett and James – and of course, to pay a royalty of 1% – upon the exercise of the option. Thus the purchase price payable by the Company for the property in this transaction was not a "fixed amount" and para. 6.1 of the RSA did not perform the function of providing for an extension of credit to the Company. Instead, it recorded and confirmed the Company's existing obligation to pay the purchase price (an "equity" payment, in Mr. Groia's parlance), consisting of (a) the royalty shares of Messrs. Fawcett and James plus (b) an amount equal to what they had originally advanced. With respect to Perry Creek and Hermann, on the other hand, the RSA was effectively a loan agreement, and para. 6.1 was the covenant for repayment. The

$30,000 required for the Perry Creek and Hermann licenses was the only "new money" advanced pursuant to the RSA, and it was an advance by way of loan. As in *Boyd*, the royalty was the consideration for the loan and therefore came within the definition of "interest" in s. 347 of the *Code*.

[46] Overall, the RSA was a commercial agreement. Its "substance" was to rationalize and bring together the pre-existing contracts and to pool the royalties payable thereunder, as required by Mr. Gibson as a condition of making his loan in connection with Perry Creek and Hermann. This made the royalty arrangements fairer as between the three Investors and simplified the hodgepodge of different terms in different agreements to which the Company was party. It did not, however, change the nature of the pre-existing transactions. What had been sale/purchase transactions remained so.

[47] Conversely, the loan made by Mr. Fawcett also remained a loan, and the royalty payable in consideration therefor comes within the extended definition of "interest" in s. 347(2) of the *Code*. This portion of the total royalty payable under the RSA can be easily severed from the non-interest portion by means of an order declaring that 20,000/32,500 of the share of the royalty payable to Mr. Fawcett will constitute illegal interest to the extent the 60% per annum limitation in s. 347 is exceeded each year. I would allow the appeal to this extent.

[48] The balance (12,500/32,500) of the royalty payable to Mr. Fawcett and the entire royalty payable to Mr. James would continue unaffected by s. 347, and the chambers judge's declaration would continue to apply thereto. I would so order. In

light of the settlement of Mr. Gibson's claim, the declaration would, I assume, not apply to him or his share of the royalty.

"The Honourable Madam Justice Newbury"

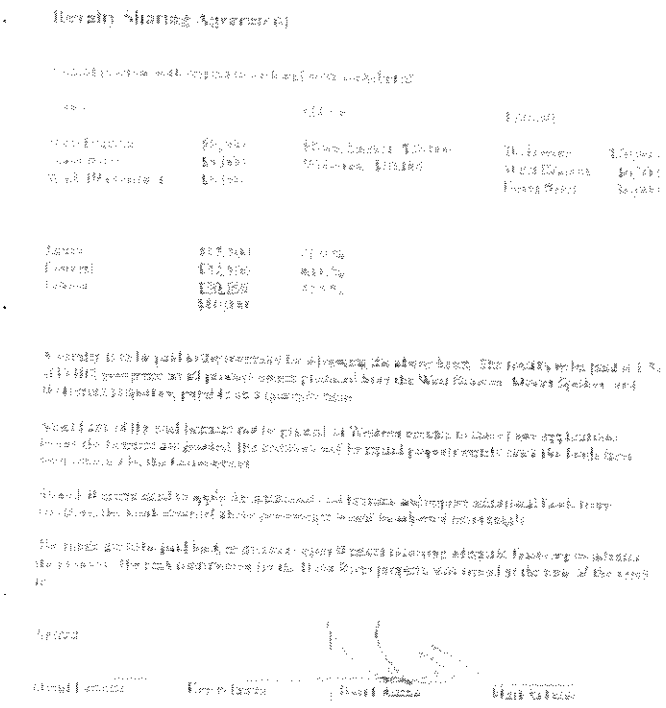
I Agree:

"The Honourable Mr. Justice Low"

I Agree:

"The Honourable Madam Justice Kirkpatrick"

Schedule 1



Schedule 2

The relevant provisions of the RSA are as follows:

WHEREAS:

A. The Company has made application for and expects to become the beneficial owner of a 100% interest in and to certain coal interests in the West Brazion, Burnt River, Wolverine and Mount Spieker properties set out in Schedule "A" (collectively, the "Properties"),

B. Each of the Investors have assisted the Company in acquiring and maintaining the Properties; and

C. The Company wishes to pay a royalty to the Investors for the Investors' contributions on the terms and conditions herein contained.

THIS AGREEMENT WITNESSETH THAT in consideration of the payment by the Purchaser to the Vendors of $1.00 and other good and valuable consideration, receipt of which is hereby acknowledged, the parties mutually covenant and agree as follows:

1. INVESTMENT

1.1 Each of the Investors represent and warrant to the Company that they have advanced funds to the Company for the Properties as follows:

Investor	Amount
Fawcett	$32,500
James	$17,500
Gibson	$30,000

2. CONSIDERATION

2.1 As consideration for advancing the funds, the Company will pay a royalty (the "Royalty") of one percent (1%) of the price (FOBT at Port) for all product tonnes produced from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors as set out in Schedule "2.1" attached hereto and forming a material part hereof.

...

4. COAL LICENSES

4.1 Upon the Coal Licenses being granted and recorded under the Company's name, the Company will maintain the Coal Licenses in good standing with the mining recorder, or such other entity with jurisdiction over such matters.

4.2 In the event that any of the Coal Licenses comprising the Properties are not granted or the Company decides to cancel any applications prior to the Coal Licenses being granted, the Investors will be repaid proportionately immediately upon the funds being returned by the government.

4.3 Any forfeiture of the Coal Licenses shall be by mutual consent of the Parties to this Agreement, and such consent shall not be unreasonably withheld. In the event that the Company forfeits the Coal Licenses, the Company will assign the Coal Licenses to the Investors for a minimum period of 30 days prior to the date the forfeiture is to become effective.

...

6. REPAYMENT OF FUNDS

6.1 Within two years from the date of this Agreement, or upon the Company receiving adequate financing, to be reasonably determined by the Company, whichever date is earlier, the Company will pay back to the Investors all funds advanced by the Investors for the West Brazion, Wolverine and Mount Spieker properties.

6.2The funds advanced for the Burnt River property have been repaid.

...

9. GENERAL

...

9.4 The terms and provisions herein contained constitute the entire agreement between the parties and will supersede all previous oral or written communications.

Schedule "2.1"

The Royalty will be divided among the parties as follows:

David Fawcett	40.6%
Kevin James	21.9%
Mark Gibson	37.5%

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746

Date: 20160923
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

Reasons for Judgment

In Chambers

Counsel for the Petitioners:	Marc Wasserman Mary I.A. Buttery Patrick Riesterer Lance Williams
Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	John Sandrelli Tevia Jeffries
Counsel for the United Steelworkers, Local 1-424:	Craig D. Bavis Stephanie Drake
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	Aaron Welch

This is Exhibit "E" referred to in the affidavit of Kevin James
sworn before me at Van., BC
this 25 day of Jan. 2017

A Commissioner for taking Affidavits for British Columbia

Counsel for Morgan Stanley Senior Funding, Inc.:	Kathryn Esaw Angela Crimeni
Counsel for KPMG Inc., Monitor:	Peter J. Reardon Wael Rostom
Counsel for Pine Valley Mining Corporation:	Kieran Siddall
Counsel for Kevin James:	Heather Jones
Counsel for Conuma Coal Resources Limited:	David Wachowich Leanne Krawchuk
Place and Date of Hearing:	Vancouver, B.C. August 15-16, 2016
Ruling Given to Parties with Written Reasons to Follow	Vancouver, B.C. August 16, 2016
Place and Date of Written Reasons:	Vancouver, B.C. September 23, 2016

[1] **THE COURT:** These are proceedings brought by the petitioners pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] The background of this matter is outlined in my earlier decisions, indexed as *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 and *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1413. I will not repeat the details in these reasons.

[3] In brief, the petitioners operate a number of significant mining properties in northeast British Columbia, all of which have been idle since early 2014. I granted an initial order in favour of the petitioners on December 7, 2015. In January 2016, I approved a sales and investment solicitation process ("SISP"), and appointed William Aziz as the chief restructuring officer ("CRO"). Finally, I approved the retainer of PJT Partners LP ("PJT"), to facilitate the sales process. In conjunction with the SISP, parallel efforts were also to be made by the CRO, with the assistance of the Monitor, to explore liquidation scenarios.

[4] There are a number of applications before me. The principal application is to approve a transaction which will see a going-concern sale of the mining properties of the petitioners to Conuma Coal Resources Limited ("Conuma"). Other applications of the petitioners that follow from the disposition of that application include an extension of the stay, approval of a claims process, and the granting of enhanced powers to the Monitor to allow matters to proceed smoothly after a conclusion of the sale to Conuma.

CONUMA SALE APPROVAL

The Evidence

[5] There are extensive materials before the Court relating to the proposed sale by the petitioners to Conuma in accordance with the asset purchase agreement dated August 8, 2016 (the "APA"). These include Mr. Aziz's affidavit #3 sworn August 9, 2016 and the Monitor's Fourth Report dated August 11, 2016.

[6] No stakeholder objects to the Conuma transaction, save for Kevin James. Mr. James is a party to a royalty agreement relating to coal licenses connected to the Wolverine mine of the petitioners.

[7] Before I address the specifics of the proposed transaction, it is important to note that financial details of the Conuma offer are confidential. A redacted form of the APA was circulated to the service list. Nevertheless, fulsome materials are before the Court in the form of Mr. Aziz's affidavit #4, sworn August 9, 2016, which attaches the un-redacted APA and PJT's report dated August 8, 2016 on the proposed sale. In addition, the Monitor's Supplementary Report to the Fourth Report dated August 11, 2016 also provides a confidential detailed financial analysis of the Conuma offer.

[8] As a preliminary matter, the petitioners and the Monitor sought to seal Mr. Aziz's affidavit #4 and the Monitor's Supplementary Report to the Fourth Report.

[9] Having heard submissions, I was satisfied that disclosure of the sensitive financial terms of the bids received as a result of the SISP, including that of Conuma, would pose a serious risk to the commercial interests of the stakeholders, particularly if the Conuma sale did not proceed. This conclusion also applied in relation to the detailed disclosure by the Monitor in its Supplementary Report as to the liquidation bids that had been received and how those bids compared to the recovery arising under the Conuma offer. Finally, I was satisfied that the salutary effects of the sealing order outweighed any prejudice to the stakeholders, given my conclusion that all stakeholders were able to fully consider the matter, given the clear statements of the Monitor as to benefits of the Conuma offer, as I will discuss below. See *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 and *Sahlin v. Nature Trust of British Columbia, Inc.*, 2010 BCCA 516.

[10] Accordingly, on August 15, 2016, I granted a sealing order in relation to Mr. Aziz's affidavit #4 and the Monitor's Supplementary Report to the Fourth Report.

The APA

[11] Not surprisingly, the APA is a comprehensive document addressing a myriad of issues that arise in the anticipated complex sale and purchase transaction relating to the petitioners' assets. I do not intend to address all terms of the transaction; I will highlight the most important aspects of the APA.

[12] The purchased assets relate to the three major mining properties owned by the petitioners, being the Brule, Willow Creek and Wolverine coal mines. The specific assets include certain real property, mineral tenures, buildings, equipment, current assets, water rights, intellectual property and cash collateral currently held by the secured creditor to secure certain letters of credit. Certain "Assigned Contracts" are to be assigned to Conuma and, if required, the petitioners will seek consent to such assignments from the counterparties. If any consent is not obtained, it is anticipated that the court may be asked to address any issues that arise.

[13] There are complex provisions in the APA in relation to the transfer of assets to Conuma. Pending Conuma obtaining the necessary permits and other government approvals to operate the coal mines, Conuma is to be granted the right to conduct mining operations under a contract mining agreement. Conuma is to provide an indemnity in respect of such operations that will be secured against the real property by a court-ordered charge.

[14] The "Assigned Contracts" include the petitioners' interest in Belcourt Saxon Limited Partnership ("BSLP"). The petitioners have the option of requiring Conuma to purchase their interest in BSLP. Both parties to the APA anticipate that there will be further negotiations between Conuma and the other joint venture partner, Peace River Coal Limited Partnership ("Peace River"), given that Peace River holds a right of first refusal and certain "tag-along" rights. Also, there are royalty agreements relating to the coal properties operated by BSLP, including an agreement with Pine Valley Mining Corporation ("PVM"). No specific issues arise in relation to these royalty agreements at this time. The petitioners and PVM have agreed that PVM has

reserved its rights in relation to its royalty agreement pending anticipated negotiations between PVM and Conuma.

[15] Assets which are not part of the APA include cash on hand and the interests of the petitioners in the U.K. Finally, there are certain "Excluded Contracts" which are not being assumed by Conuma. One of these is a royalty agreement with Mr. James relating to the Wolverine mine, which I will discuss in more detail below.

Relevant Factors

[16] I will discuss the Conuma offer in the context of the factors set out in the *CCAA*, s. 36(3):

> Factors to be considered
>
> In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[17] There are no issues arising from the process by which the bids were received under the SISP. As detailed in my earlier reasons, the SISP was a comprehensive process and substantial steps in Phase 1 were taken to invite non-binding letters of intent and allow potential purchasers to assess the assets. Phase 2 of the SISP began in March 2016, by which qualified bids were to be received by June. Bids were received by the later deadline of July 21, 2016.

[18] There has been substantial professional assistance in the conduct of the SISP, as provided by the CRO and PJT, with additional input and oversight by the

Monitor. The Monitor raises no issue with the process, noting that it has "been run as designed." The Monitor also confirms that the APA was rigorously negotiated between the petitioners and Conuma. By all accounts, the Monitor has been extensively involved throughout the SISP process leading to the Conuma bid being received and successfully negotiated.

[19] Both the CRO and the Monitor set out the reasons why the Conuma bid was selected:

a) the overall purchase price was the highest offer arising from the SISP;

b) the bid will produce higher value or net cash proceeds for the stakeholders than any other bid;

c) a substantial deposit of 10% of the purchase price has been received;

d) the bid will result in Conuma assuming substantial liabilities that would otherwise be borne by the estate, including reclamation obligations relating to the mines and obligations under the Assigned Contracts. In addition, current employees will be hired by Conuma, and Conuma is to assume the employment obligations relating to the re-hired employees. Finally, Conuma has agreed that it will be a successor employer in accordance with the relevant legislation and bound by the existing collective bargaining agreement;

e) Conuma has agreed to honour the petitioners' commitments to First Nations groups;

f) there will be substantial other benefits to the larger stakeholder group, given Conuma's stated intention to resume operations at certain of the mines in the future. Conuma is to assume the environmental stewardship of the mine properties which, understandably, has been of some concern to the environmental regulators as a result of the insolvency of the petitioners. In the event of a start-up of the mine(s), suppliers and

customers of the mine properties will be positively impacted. Local communities, including First Nation groups, will also see benefits from a recommencement of mining operations;

g) Conuma is a B.C. limited liability corporation created for this transaction; however, other corporations related to Conuma have provided guarantees for Conuma's obligations under the APA, including the indemnity under the contract mining agreement; and

h) the bid provides for a fairly short period before completion which is required to occur no later than September 15, 2016.

[20] In addition, the Monitor has done an extensive analysis of the Conuma bid in relation to the liquidation bids. The Conuma bid will realize a greater return than any liquidation scenario, principally arising from the greater holding costs in conducting a liquidation of the assets and the additional claims that would be advanced against the estate in that scenario.

[21] Having reviewed the matter, I unreservedly agree with the CRO and the Monitor that the Conuma transaction is the best transaction in the circumstances for the benefit of the petitioners and their stakeholders as a whole.

[22] It is also apparent that the petitioners have broadly consulted with the creditors or potential creditors. The Monitor reports that consultation has taken place with the United Steelworkers, Local 1-424 (the "Union"), and the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan"), both of whom advance substantial claims against the petitioners. In addition, discussions have taken place with certain regulators, key suppliers, and some counter-parties to key contracts.

[23] In summary, leaving aside the issues raised by Mr. James on this application, in my view, it is manifestly the case that the Conuma transaction is the best attainable in the circumstances and represents the best alternative available to the

stakeholders as a whole. I find that the consideration under the APA is fair and reasonable.

MR. JAMES' ROYALTY RIGHTS

[24] As stated above, the only opposition to the approval of the Conuma transaction is advanced by Mr. James. He takes the position that his royalty rights run with the land, such that the petitioners may not transfer the Wolverine coal licenses to Conuma without regard for those rights. Mr. James further says that any approval and vesting order relating to the Wolverine coal licenses cannot result in an extinguishment of his rights.

[25] During the hearing, Mr. James' counsel sought certain amendments to the draft approval and vesting order, including a declaration that Mr. James had an interest in the Wolverine coal properties, and that such interest took priority over the petitioners' interest in those properties. Other suggested wording was to the effect that the vesting of such properties in Conuma would be subject to his royalty interest.

[26] Mr. James also advances procedural arguments in opposition to approval of the Conuma transaction.

[27] The petitioners dispute that Mr. James holds an interest in land (i.e. the Wolverine coal licenses). They say that his interest is only a contractual one, being the right to receive certain monies in the event of production and sale of coal by the petitioners arising from the Wolverine coal licenses.

[28] Both the petitioners and Mr. James wish to decide the royalty issue at this time, given the need to determine whether the Conuma transaction will proceed, or not.

Background Facts

[29] Mr. James is a geologist and was a founding member, officer, and director of Western Canadian Coal Corporation ("WCC"). David Fawcett was another director of WCC.

[30] In the late 1990s, Mr. James and Mr. Fawcett identified certain coal licenses, which were eventually acquired in Mr. James' name. Some licenses (Burnt River/Brule) were sold to WCC after payment by WCC of Mr. James' out-of-pocket expenses; with respect to others (West Brazion), WCC did not have the funds to obtain the licenses, so Mr. James and Mr. Fawcett paid to acquire them. They then granted WCC an option to purchase the licenses in exchange for payment of out-of-pocket expenses and a 1% royalty on coal produced from those properties.

[31] In 1999, Mr. James and Mr. Fawcett identified further promising coal properties in the Wolverine area. Again, WCC lacked the funds to purchase them. A transaction was then structured such that Mr. James and Mr. Fawcett gave up their royalty interest in West Brazion if WCC exercised an option to acquire the Wolverine licenses. In consideration, WCC agreed to pay a 1% royalty on the West Brazion and Wolverine properties to be shared by Mr. James, Mr. Fawcett and another WCC investor, Mark Gibson.

[32] This agreement resulted in the execution of a royalty sharing agreement on March 31, 2000 (the "RSA"), by WCC (the "Company"), and Mr. James, Mr. Fawcett and Mr. Gibson (the "Investors"). In clause 1 of the RSA, the Investors confirm that they have advanced funds to WCC for the "Properties" (defined below), totalling $80,000, with Mr. James having advanced $17,500.

[33] The salient terms of the RSA are as follows:

> **WHEREAS:**
>
> A. The Company has made application for and expects to become the beneficial owner of a 100% interest in and to certain coal interests in the West Brazion, Burnt River, Wolverine and Mount Spieker properties... (the "Properties").

B. Each of the Investors have assisted the Company in acquiring and maintaining the Properties;

C. The Company wishes to pay a royalty to the Investors for the Investors' contributions on the terms and conditions herein contained.

THIS AGREEMENT WITNESSES THAT in consideration of the payment by the Purchaser to the vendors of $1.00 and other good and valuable consideration, receipt of which is hereby acknowledged, the parties mutually covenant and agree as follows:

...

2. CONSIDERATION

2.1 As consideration for advancing the funds, the Company will pay a royalty (the Royalty") of one percent (1%) of the price bracket (FOBT at Port) for all product tonnes produced from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors as set out in Schedule "2.1"... [Mr. James - 21.9%; Mr. Fawcett - 40.6%; Mr. Gibson - 37.5%]

3. THE COMPANY'S REPRESENTATIONS AND WARRANTIES

3.1 The Company represents and warrants to and covenants with the Investors as follows:

...

(c) the Company is or will be the beneficial owner of all of the coal licenses comprising the Properties (the "Coal Licenses"), free and clear of all liens, charges and claims of others and no taxes or rentals are or will be due in respect of any thereof;

...

4. COAL LICENSES

4.1 Upon the Coal Licenses being granted and recorded under it in the Company's name, the Company will maintain the Coal Licenses in good standing with the mining recorder, or such other entity with jurisdiction over such matters.

4.2 In the event that any of the Coal Licenses comprising the Properties are not granted or the Company decides to cancel any applications prior to the Coal Licenses being granted, the Investors will be repaid proportionately immediately upon the funds being returned by the government.

4.3 Any forfeiture of the Coal Licenses shall be by mutual consent of the Parties to this Agreement, and such consent shall not be unreasonably withheld. In the event that the Company forfeits the Coal Licenses, the Company will assign the Coal Licenses to the Investors for a minimum period of 30 days prior to the date the forfeiture is to become effective.

...

8. ASSIGNMENT

8.1 This agreement may not be assigned without the written consent of all the parties, which consent shall not be unreasonably withheld.

> **9. GENERAL**
>
> 9.1 This Agreement will enure to the benefit of and be binding upon the parties and their respective successors, heirs, executives, administrators and permitted assigns.

[34] The RSA confirms, in clause 6, that the funds for the Burnt River property had been repaid, but that all of the other funds advanced by the Investors for the other Properties would be repaid within two years.

[35] The RSA was prepared by WCC's corporate counsel, clearly upon the instructions of the directors, which included Mr. James. Mr. Fawcett was one of the authorized signatories signing on behalf of WCC.

[36] The above background facts are a summary of the important facts set out in Mr. James' affidavit filed in support of his position. A more detailed review of the circumstances leading to the execution of the RSA has been set out in various court decisions, as I will now describe.

[37] In 2006, WCC launched a court proceeding attacking the validity of the RSA. This proceeding addressed WCC's argument that there was lack of corporate compliance in the execution of the RSA by WCC under the relevant legislation. WCC's petition was dismissed by this Court: *Western Canadian Coal Corp. v. Fawcett*, 2006 BCSC 463.

[38] In March 2007, WCC suspended payments under the RSA on the basis that the royalty payments under the RSA constituted "interest" within the meaning of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46, such that it would result in the Investors receiving a criminal interest rate. As a result, Mr. Fawcett brought a proceeding before this Court in 2009 seeking a declaration that the royalty under the RSA did not offend the *Criminal Code* provision. Mr. James' counsel appeared at the hearing and supported Mr. Fawcett.

[39] In *Fawcett v. Western Canadian Coal Corp.*, 2009 BCSC 446 [*Fawcett 2009*], Pearlman J. considered the criminal interest rate issue. In deciding the interpretation issue arising from the RSA, he considered the terms of the RSA as a whole and also

the relevant factual matrix surrounding the execution of the RSA (para. 80). Both of these interpretation approaches are equally relevant now in relation to a determination of the nature of the rights acquired by Mr. James under the RSA.

[40] Justice Pearlman's comments on the substance of the RSA provisions are also relevant:

> [104] ... In essence, [WCC], in consideration for its acquisition of the interests of Messrs. Fawcett and James in West Brazion, agreed to pay the royalty and to reimburse those Investors for the application costs they had previously incurred.
>
> ...
>
> [108] By paragraph 9.4, the parties agreed that the terms and provisions of the RSA constituted their entire agreement and superseded all previous oral or written communications. Upon entering into the RSA, the Investors relinquished any rights they each had with respect to particular coal properties in exchange for their shared interest in the royalty payable under the RSA.
>
> ...
>
> [125] ... In substance, the RSA was an agreement by which the Investors assisted [WCC] in acquiring potentially valuable coal licenses in consideration for a shared royalty interest in those licenses. The royalty was not in substance a cost paid by [WCC] in order to receive credit. Rather, the royalty was the principal consideration flowing from [WCC] to the Investors for their contributions to [WCC]'s acquisition of the coal licenses. ...
>
> [Emphasis added]

[41] In *Fawcett v. Western Canadian Coal Corp.*, 2010 BCCA 70 [*Fawcett 2010*], Pearlman J.'s decision was largely upheld, in that only a portion of Mr. Fawcett's share of the royalty was found to be a criminal rate of interest. Mr. James' share of the royalty was not affected by the ruling: see paras. 47-48.

[42] On April 1, 2011, one of the petitioners, Walter Energy Canada Holdings, Inc. ("Walter Energy"), the general partner of Walter Canadian Coal Partnership, acquired all of the outstanding common shares of WCC. As such, it is acknowledged that Walter Energy is a successor to WCC as contemplated by clause 9.1 of the RSA.

[43] Until the Wolverine mine became idle in May 2014, Walter Energy paid royalties to Mr. James in accordance with the RSA arising from coal production from that mine.

[44] Despite these previous proceedings and court decisions, it is common ground that there has not been a determination as to the proper characterization of Mr. James' rights to the royalty under the RSA; specifically, there has not yet been a determination as to whether Mr. James holds an interest that runs with the Wolverine coal licenses that must be recognized in a transfer of those licenses by Walter Energy, such as to Conuma.

[45] At some point, Mr. Gibson sold his royalty rights under the RSA back to WCC. As present, Mr. James and Mr. Fawcett continue to retain rights under the RSA as to a 0.219% and 0.15% royalty respectively (total 0.369%).

[46] In April 2016, Mr. James' counsel notified petitioners' counsel of her view that the royalty due to Mr. James under the RSA "runs with the land", and should be part of any purchase and sale of the coal properties. Petitioners' counsel responded that it was yet undetermined how the RSA would be treated in the *CCAA* proceedings and, also, it was yet unknown how any potential purchaser would wish to deal with the matter.

[47] The application materials to approve the Conuma transaction were filed on August 11, 2016, and delivered to parties on the service list, including Mr. James. Mr. Aziz's affidavit and the Monitor's Fourth Report both confirmed that a "royalty agreement related to the Wolverine mine is not being assumed" by Conuma and that it is an "Excluded Liability". Everyone, including Mr. James, understands that this refers to the RSA. Petitioners' counsel anticipates that the RSA will be disclaimed by Walter Energy in the future, and any claims arising will be addressed in the claims process.

Discussion

[48] Walter Energy and Mr. James agree that the royalty due under the RSA is a "gross overriding royalty", in that the royalty amount is not tied to any profitability arising from mine production. In *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7 at para. 2, the Court described this as a "royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services ..."

[49] The Court in *Dynex* also confirmed earlier Canadian authorities to the effect that such a royalty interest *can be* an interest in land. Quoting *Vandergrift v. Coseka Resources Ltd.*, (1989), 67 Alta L.R. (2d) 17 (Q.B.) at 26, the Court, affirmed that:

> [22] ...it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

[50] Walter Energy agrees that the requirement in item 2 is met, in that its interests in the Wolverine coal licenses are themselves interests in land.

[51] The issue then becomes whether, on a proper interpretation of the RSA, it can be said that the parties intended Mr. James to have an interest in land, as opposed to a contractual right to the royalty stream from production under the Wolverine coal licenses.

[52] Mr. James points to various factors which he says supports the former interpretation: that he is to be paid based on product that is "produced" from the land (i.e. the Properties) (clause 2.1); that he was entitled to obtain the coal licenses back upon forfeiture (clause 4.3); that the royalty has no end date and therefore would last in perpetuity; and, that the RSA was binding on Walter Energy's successors and assigns (clause 9.1).

[53] I conclude that the first point, that Mr. James was to be paid the royalty based on what is "produced" from the coal licenses, is not compelling in terms of persuading me that he was granted an interest in the coal licenses.

[54] One of the early decisions on the issue is found in *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd. and H.W. Bass & Sons, Inc.*, [1963] S.C.R. 482. The Court was considering a participation agreement which provided, in clause 10b, that the participant would be paid a "percentage of net proceeds of production".

[55] The Court found, in *St. Lawrence*, at p. 488, that these rights were rights to receive money as a matter of contract, and not an interest in land:

> I have reviewed the contents of the two agreements of July 15, 1951, in some detail because clause 10b must be considered in relation to and as a part of each agreement considered as a whole. The essence of each agreement is that, by participating in the cost of drilling a producing well upon the lands in question to the extent of the stipulated percentage of cost, the Participant would become entitled to receive the stipulated percentage of the net proceeds of production of such well. "Net proceeds of production" as defined clearly refers to an amount of money. They are the proceeds from the sale of the Company's share of the production from the well after making those deductions which are provided for in clause 1(*c*). The Company's share of production referred to in this para. (*c*), is, obviously, the 25 per cent interest in production which it could earn under the terms of the Farm-out Agreement. The appellants are, therefore, entitled, as a matter of contract, to a percentage of certain monies to be obtained from the sale of the production from any well in respect of whose drilling costs they have contributed their required portions.

[56] This same interpretation exercise was before the Supreme Court of Canada in *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703. There, the Court was considering a royalty agreement which provided for a royalty per ton on all anhydrous salt "produced and sold from the said leasehold property". At 709, Martland J., for the majority, doubted that the use of the word "royalty"' implied any intention to create an interest in land. While not deciding the point, the majority thought the relevant provision was similar to what had been considered in *St. Lawrence* such that only a contractual right, and not an interest in the land, arose.

[57] Similarly, in *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (Alta. S.C.), the Court found that the language used - payment of a royalty based on production - was an obligation to pay money rather than an interest in the land. In this case, and others that followed *Vanguard*, an important factor was that the royalty was to be paid only once the substances had been removed from the lands.

[58] In *Vanguard*, the Court stated at p. 74:

> Clause (1) of the royalty agreement, Ex. 2, states that the owners (Westersunds) will pay to the grantee (Vanguard) a gross royalty of seven per cent of the proceeds of sale of the petroleum substances that may be produced, saved and marketed out of the said lands. This is an obligation to pay Vanguard a sum of money out of the proceeds of sale of the petroleum substances *after* they have been removed from the land. The wording in the royalty agreement herein cannot be construed as an interest in situ. In my view, the royalty herein is on the proceeds of the sale of the petroleum substances after removal from the land. In other words, the owner and the grantee agreed to share in the proceeds of the sale of mineral substances after removal. This amounts to an obligation to pay by the owner to the grantee a sum of money based on a percentage of the sale proceeds.
>
> [Emphasis added]

[59] This same reasoning was followed in *Vandergrift,* where the royalty was to be paid on petroleum substances "recovered" from the land. Again, the Court, at p. 28, found that the language used evidenced that the parties intended only a contractual right to the payment of the royalty, rather than a conveyance of, or reservation of, an interest in land:

> In reading the agreement one is struck by the fact that the first reference to the nature of the interest to be conveyed used the expression "royalty on all petroleum substances recovered from the lands", not petroleum within, upon and under the lands, but, those substances "recovered" from the lands. The next reference, in para. 2, is to a royalty on "petroleum substances found". Again, the reference is not to petroleum substances within, upon or under the lands, but to substances "found" within, upon or under the lands. The other references in agreement are to royalty in terms of "a share of production", "petroleum substances sold", "petroleum substances produced". Taken as a whole, I am of the view that the agreement conveys a contractual right to the payment of a royalty on petroleum substances produced from the lands, that is, a share of the petroleum after it has been removed, rather than on interest in land.

[60] This type of language is to be distinguished from that discussed in *Bensette and Campbell v. Reece*, [1973] 2 W.W.R. 497 (Sask. C.A.), a decision upon which Mr. James relies. In that case, at p. 500, the words "royalty in all the ... minerals ... which may be found in, under or upon the lands" were found to be sufficient to support the conclusion that there was a conveyance of an interest in the minerals themselves *in situ* and, therefore, an interest in the land.

[61] Various other decisions also consider the formality of the conveyancing language in relation to the land itself. In that respect, Mr. James refers to two other decisions, which I consider to be distinguishable from the circumstances here.

[62] In *Canco Oil & Gas Ltd. v. Saskatchewan*, [1991] 4 W.W.R. 316 (Sask. Q.B.), the Court found that the royalty was an interest in the land. That determination, however, was based on the use of the words "grant, assign, transfer and convey", and also the clear statement in the agreement that the interest conveyed was an interest in land and was to run with the land.

[63] Similar formal words of conveyance are found in *Blue Note Mining Inc. v. Merlin Group Securities Ltd.*, 2008 NBQB 310. There, the agreement provided:

> [7] ... East West Caribou Mining Limited ... hereby grants to East West Minerals N.L. ... a freely assignable 10% net profits interest in the mine....
>
> [Emphasis added]

The highlighted portions of the above agreement were found to evidence an intention to establish an interest in the land.

[64] As a further example, Walter Energy refers to *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, [1993] 4 W.W.R. 454 (ABQB); aff'd [1995] 1 W.W.R. 316 (Alta. C.A.). The lower court undertook an extensive review of the authorities, including the cases I have discussed above. The court referred to such formal language as establishing an interest in land:

> [102] In my opinion O'Leary J. did not give sufficient weight to some of the other words used in cl. 2. I refer in particular to the verbs "grant, bargain, sell, assign, transfer and set over"; to the descriptors "all the estate, right, title,

> interest, claim and demand whatsoever, both at law and equity"; the words "to have and to hold"; and the words "unto the Trustee, its successors and assigns forever". Taken together, these words seem to me more like words describing in perpetuity property rights than they do words describing a relatively temporary arrangement (such as a contractual right) which would be unenforceable against the Owner once he sold the property.

[65] The final case to which I will refer is *St. Andrew Goldfields Ltd. v. Newmont Canada Ltd.*, [2009] O.J. No. 3266; aff'd 2011 ONCA 377, where much of the above reasoning in the authorities was discussed and applied:

> [98] Royalty interests can be interests in land if the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the substances recovered from the land, and the interest, out of which the royalty is carved, is itself an interest in land. The intentions of the parties, judged by the language creating the royalty, determine whether the parties intended to create an interest in land or to create contractual rights only. (*Bank of Montreal v. Dynex Petroleum Ltd.*, [2002] 1 S.C.R. 146, at paras. 12, 14 and 22.)
>
> [99] Turning then to the language of the Barrick royalty agreement, Newmont "***covenants and agrees...to pay***...a net smelter return royalty...with respect to all valuable minerals ***produced*** from mining rights and surface leases known as the Holt-McDermott mining claims and leases" (my emphasis added).
>
> [100] While I agree with Newmont that there is no magical "incantation" that must be used to create an interest in land, it is trite to say that language used in an agreement is intended to have and does have a certain meaning. As all the witnesses at this hearing acknowledged, each royalty agreement is different. It is therefore necessary to examine the specific wording used by the parties to determine the meaning that they ascribed to the royalty in this case and the rights that they intended to create.
>
> [101] The use of the words "covenants and agrees to pay" and "produced" in the description of the Barrick royalty is the first indication that the parties intended to create only contractual rights to the payment of a royalty and not an interest in land.
>
> [102] The case law that the parties have submitted makes a valid distinction between the "granting" of royalties attached to or "in" the land or the minerals themselves, thus creating an interest in the land, and the payment of royalties attached to the minerals or revenues "produced" or "removed" from the land, resulting in the creation of contractual rights to the payment of a share of the revenue from the minerals after they have been extracted: see, for example, *Bensette and Campbell v. Reece*, [1973] 2 W.W.R. 497 (Sask.C.A.), at p. 500; *Vandergrift v. Coseka Resources Limited* (1989), 67 Alta. L.R. (2d) 17 (Alta.Q.B.), at pp. 26 to 28; *Guar. Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (Alta.Q.B.), at pp. 216 to 222 and 224; *St. Lawrence Petroleum Limited v. Bailey Selburn Oil & Gas Ltd. (No. 2)* (1963), 45 W.W.R. 26

> (S.C.C.), at pp. 31 to 33; and *Blue Note Mining Inc. v. Fern Trust (Trustee of)*, [2008] N.B.J. No. 360 (N.B.Q.B.), at paras. 34 and 40.
>
> [103] Other relevant factors to determine the parties' intention to create contractual rights or an interest in land are: whether the royalty holder retains a right to enter upon the lands to explore for and extract the minerals: *Vandergrift v. Coseka Resources Limited*, *supra*, at pp. 28 to 29; and whether the owner of the lands is in complete control of its interest in the lands acquired with the only right in the royalty holder being to share in the revenues produced from the minerals extracted from the lands: *St. Lawrence Petroleum Limited v. Bailey Selburn Oil & Gas Ltd. (No. 2)*, *supra*, at pp. 32 to 33.
>
> [104] Under the Barrick royalty agreement, the royalty holder retains no interest in or control over the kind of operations or activities that the owner of the property may carry out and, as an express condition or limitation of the royalty, the royalty holder has no right to claim a reversionary interest in any of the property should the owner seek to relinquish all or any portion of the property. The royalty holder's rights to re-enter upon the property are only for accounting and auditing purposes with respect to the protection of the royalty holder's contractual rights to payment of the royalty.
>
> ...
>
> [106] From my reading of the provisions of the Barrick royalty agreement, I cannot see that the parties intended by the royalty to create an interest in land. The provisions are consistent with the creation only of a contractual right to payment of the royalty. It would have been a very simple thing for the parties to have used specific language to create an interest in land. The effect of the Barrick royalty agreement is to create only a contractual right to the payment of the royalty.

[66] Based on the principles arising from the above authorities, and considering the RSA provisions as a whole, I conclude that the RSA was not intended to grant Mr. James an interest in the Wolverine coal licenses; rather, the RSA simply represented a contractual right to payment on the part of Mr. James as the consideration for which he transferred his rights in the Properties to Walter Energy.

[67] I rely upon the following:

a) Walter Energy is specifically stated to have "acquired" the licenses and to be the beneficial owner of them free of any "claims of others" (Recital B and clause 3.1(c));

b) I agree with Mr. James that he gave up valuable consideration for the royalty and that he shared the risk of recovery going forward. However, as Pearlman J. noted at para. 126 in *Fawcett 2009*, Mr. James had no direct

rights in respect of the coal licenses and he relinquished any further control in respect of them. Mr. James had no assurance that he would gain any consideration under the royalty if the Properties were never put into production;

c) clause 2.1 does not include any formal conveyancing language to, for example, "grant, assign, transfer or convey" any rights to Mr. James in relation to the coal licenses (*contra Canco*, *Blue Note* and *Scurry-Rainbow*). No such words, or similar words, are used; rather, it is simply an obligation to *pay* the royalty;

d) with Mr. James having some control over WCC at the time, it would have been a simple matter to have included clear language to the effect that Mr. James was to be granted a royalty that would "run with the land" (see *Canco*). As in *Vandergrift*, at p. 27, the choice of language was within his control but no such clear language was used;

e) the reference to the payment of the royalty being based on what is "produced" from the coal properties is simply the means by which the parties agreed to calculate the amount of the royalty. It is not a reference to a royalty *in* the "Properties" or coal licenses: see *St. Lawrence*, *Saskatchewan Minerals*, *Vanguard*, *Vandergrift* and *St. Andrew Goldfields*. I note that the parties disagree as to whether the royalty is due upon production (i.e. once removed from the land), or upon the coal being shipped to port and priced at that time for the purposes of calculating the 1% royalty. In my view, this is not a relevant distinction as, in any event, the coal would have been severed from the lands by that time;

f) clause 4.3 of the RSA indicates that the parties did consider what rights the Investors would have in relation to the coal licenses in the future. Those rights were specifically addressed in the context of a forfeiture of the Properties, likely under the *Coal Act*, R.S.B.C. 1996, c. 51 (since repealed in 2004), a circumstance which is not relevant here. Further, the RSA does anticipate that any assignment of the RSA by WCC would

require the consent of Mr. James (clauses 8.1/9.1). However, that circumstance is not what is happening here, since no one has sought to assign the RSA, let alone without Mr. James' consent; and

g) importantly, the RSA does not restrict the ability of Walter Energy to sell the Properties, and it also contains no obligation on the part of Walter Energy to require any purchaser of the Properties to assume its obligations under the RSA.

[68] As stated above, Mr. James also points to the perpetual obligation under the RSA although, presumably, the obligation to pay the royalty would be tied to the life of the mine in terms of its ability to produce coal. He also refers to the dissent of Laskin, J., as he then was, in *Saskatchewan Minerals* where he relied, to some extent, on a clause similar to clause 9.1 of the RSA, which stated that the agreement was to be binding on successors and assigns of the parties, at p. 716 and 726. A similar comment was made in *Scurry-Rainbow* at para. 88.

[69] In my view, however, these aspects of the RSA do not assist Mr. James. It is not entirely unusual that an agreement is perpetual in the sense of requiring payment with no set end date. Further, the clauses requiring Mr. James' consent to assignment, and that it is binding on permitted assigns, is also not unusual in a commercial context. These clauses do not detract from the essential nature of the right granted to Mr. James found in clause 2.1, nor do they enhance his ability (or lack of ability) to control the petitioners' disposition of the Properties after his transfer of them.

[70] As the petitioners argue, Mr. James had other means by which he could have obtained the right to control any further disposition of the Properties by WCC. For example, the PVM royalty agreement includes a restriction on the sale of the properties or interests subject to the royalty, and requires that any purchaser of the properties assume the royalty obligations to PVM.

[71] Further, paragraph 18 of PVM's royalty agreement requires the granting of a security interest to PVM in respect of certain mineral titles to secure the obligations

under that agreement. Mr. James could have obtained a security interest in relation to WCC's obligations to pay the royalty under the RSA; he chose not to do so despite having control of WCC at the time: see *Fawcett 2010* at para. 17.

[72] Further, these clauses relating to successors and assigns cannot be controlling in the context of the insolvency proceedings that are currently underway. The RSA is an executory contract, and as with other agreements to which the petitioners are parties, it is subject to being dealt with under the *CCAA* and court orders granted under that statutory jurisdiction. That includes the possibility that the petitioners may disclaim the RSA in accordance with s. 32 of the *CCAA*.

Procedural Issues

[73] Turning to the procedural issues, Mr. James asserts that he was not consulted regarding the Conuma transaction and that he does not understand why the RSA is not to be assumed. He argues that there is no persuasive reason as to why the RSA is not being assumed by Conuma, and that to exclude it from the APA is "improper, unjust and unfair".

[74] Despite Mr. James' assertions about a lack of transparency, I consider that the application materials clearly set out that Conuma does not intend to assume any obligations arising from the RSA. Mr. James' view is that he should be given some explanation as to why that decision was taken by Conuma, although I am not sure that that is either necessary or beneficial. If it was not already clear enough from the application materials, Conuma's counsel has now clearly stated, on the record, that it has no intention of assuming any obligations under the RSA. Clearly, Conuma has exercised its business judgment on a cost/benefit basis (as it would do in relation to any of the contracts held by the petitioners), and made a business decision that it is not in Conuma's interest to do so.

[75] Likewise, I see no concern arising from the BSLP transaction. Mr. James refers to a share purchase agreement dated October 31, 1997 by which he, and others, agreed to sell his shares in Western Coal Corp. to WCC. In consideration of those transfers, WCC agreed to pay a royalty of 0.75% of the selling price of coal

sales from certain Belcourt properties. The Belcourt put option has been described in the APA. It is an option in respect of the petitioners' interests in the BSLP joint venture. Mr. James has not put forward any evidence that he has an interest in BSLP and I see nothing in the APA that addresses, negatively or positively, this royalty agreement.

[76] In any event, it remains to be seen whether, and on what terms, Conuma may acquire the petitioners' interest in BSLP and how the royalty agreement may be affected.

Conclusion

[77] I find that, when read as a whole, the RSA and the rights to a royalty thereunder do not convey to Mr. James any interest in the coal licenses or Properties; rather, Mr. James was granted a contractual right to receive a payment of a royalty on coal products produced from the relevant coal licenses. Accordingly, as with any other contract held by an insolvent debtor who has sought protection under the *CCAA*, the RSA may be addressed by the petitioners in accordance with the *CCAA* and the orders granted in this proceeding.

[78] I also see no unfairness in the Conuma transaction being approved without reference to Mr. James' rights under the RSA. As in any such transaction, a purchaser will assess the cost/benefit of assuming any contracts held by the debtor and make a determination on that basis. While Mr. James has been on the losing end of that assessment by Conuma in relation to the RSA, that does not mean that the process was unfair or unreasonable.

[79] It certainly does not lead to the conclusion that the Conuma transaction is not supported by the *CCAA*, s. 36 factors, as alleged by Mr. James. I agree that the RSA is a consideration for the court in the context considering that transaction. However, in the overall context of the APA, and the admittedly overwhelming benefit to the entire stakeholder group (which includes Mr. James), Mr. James' disappointment in the outcome cannot rule the day.

[80] Accordingly, the proposed approval and vesting order in respect of the Conuma transaction, as sought by the petitioners, is granted.

OTHER ORDERS

[81] Given the impending sale of their major assets to Conuma, the petitioners also seek a claims process order. As was anticipated at the outset, determining the validity and quantum of claims in order to make a distribution to the creditors through such a claims process is important in liquidating *CCAA* proceedings: *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at para. 36; *Timminco Limited (Re)*, 2014 ONSC 3393 at para. 41.

[82] The proposed claims bar date is October 5, 2016. It is anticipated that if any disputes as to claims arise, these will be brought before the court on a *de novo* basis in the first week of January 2017.

[83] The claims process is to be implemented and run by the Monitor, with input from the CRO, and with assistance of certain soon-to-be former key employees of the petitioners. These key employees are to remain accessible to the petitioners and the Monitor even after the sale to Conuma closes under a transition services agreement.

[84] The proposed order is in fairly standard terms; however, specific processes are to be put in place for certain stakeholders.

[85] Claims of individual employees will be determined by the Monitor, and upon being notified of the amount of their claim, they need only respond if they dispute the amount. The Union will receive notice of the claims and may dispute the amount on behalf of any employee. As I anticipated in my earlier reasons from June 2016 (*Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 1413 at para. 33), this aspect of the claims process has arisen from fruitful discussions between the petitioners, the Monitor and the Union, with the latter providing input on the most efficient way of adjudicating these claims.

[86] The unique claim of the 1974 Pension Plan poses some procedural challenges for the parties. Again, this is a substantial claim (some $1.4 billion) which, if valid, has the potential to overwhelm most other claims against the estate. This claim is asserted as a liability of the petitioners based on the provisions of U.S. legislation, being the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. § 1001, as amended, (commonly referred to as "*ERISA*"). There has been some exchange of materials between the parties. As matters stand, the petitioners dispute that they are liable under U.S. law (or *ERISA*), and that this is a valid claim against the Canadian petitioners in any event.

[87] After some negotiations, it is intended that, rather than file a proof of claim, the 1974 Pension Plan will file a notice of civil claim in a separate proceeding in this court to assert the claim. Thereafter, the petitioners, and anyone else on the service list, will be entitled to file a response to that claim. Once the issues are framed, it is intended that the parties will come before the court to determine the procedures and timing by which the parties will develop and present their evidence and legal arguments and how the issues are best resolved. The present thinking is that the issues are likely suitable for disposition by summary trial, although that remains to be seen. The parties are cognizant of the need to adjudicate the issues as soon as possible so as not to delay any distribution to the creditors.

[88] I am satisfied that the proposed claims process order here treats all potential claim holders fairly and equally and is appropriate in the circumstances. In particular, the proposed timeline is reasonable and will afford claimants ample opportunity to formulate their materials and submit them to the Monitor.

[89] This process will also address any claim that may be advanced by Mr. James as a "Restructuring Claim" arising from any disclaimer of the RSA by Walter Energy. In the event of a disclaimer of the RSA, Mr. James will be provided with a proof of claim at the appropriate time in the claims process to give him an opportunity to prove his claim.

[90] Aside from Mr. James, there were no other objections to the proposed order. The claims process order is granted.

[91] Given the granting of the above orders, the petitioners apply for an extension of the stay of the proceedings to January 17, 2017. This date has been chosen to accommodate not only the closing of the Conuma transaction, but also to coincide with the anticipated time frame by which any disputed claims are to be resolved by the court, if necessary. During that time, the Monitor will continue with the claims process. The Monitor will also file a report within a reasonable time after the claims bar date of October 5, 2016 so that the stakeholders are updated not only on the results of the sale, but also on the results of the claims process (including inter-company claims). The CRO will remain involved over this period of time to assist the Monitor, as need be, and also to arrange for the sale of assets that are not being purchased by Conuma (such as the U.K. assets).

[92] The evidence confirms that the petitioners will have sufficient cash flow to continue operations, as currently conducted, to the extension date; although, of course, there will be substantially reduced operating expenditures upon the closing of the sale to Conuma.

[93] Despite the long extension period, the petitioners anticipate that there will continue to be oversight by the court in the interim period. At a minimum, the parties anticipate a further hearing in October to consider the procedural issues arising in relation to the 1974 Pension Plan claim. Obviously, if the Conuma sale has not closed by September, I would anticipate that a court application would be scheduled soon thereafter to consider next steps.

[94] Both Mr. Aziz and the Monitor, in its Fourth Report, confirm the unchallenged view that the petitioners are acting in good faith and with due diligence. Accordingly, I am satisfied that an extension of the stay to January 17, 2017 is appropriate at this time and that is granted: *CCAA*, s. 11.02(2) and (3).

[95] Finally, the petitioners apply for certain miscellaneous orders. The first order is approval of an amendment of the PJT engagement letter which was earlier approved. I am satisfied that the amendment accords with the intention of the parties as to PJT's compensation for their role in the SISP. The amendment reflects what was already determined to be a fair and reasonable compensation for PJT. The second order is to enhance the powers of the Monitor to not only implement the claims process, but to take control of certain of the petitioners' financial affairs. The latter powers are particularly appropriate given the anticipated transfer of the petitioners' employees to Conuma upon closing. The Monitor supports proceeding in this fashion so as to move as quickly and expeditiously as possible toward the monetization of the assets and a distribution to the creditors. Both orders are granted as sought.

"Fitzpatrick J."

FORM OF PROOF OF CLAIM

PROOF OF CLAIM
AGAINST WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

Please read the enclosed Instruction Letter carefully prior to completing this Proof of Claim. Defined terms not defined within this Proof of Claim form shall have the meaning ascribed thereto in the Claims Process Order dated August 16, 2016, as may be amended, restated or supplemented from time to time.

Particulars of Claimant

a. Please complete the following (Full legal name should be the name of the original Claimant, regardless of whether an assignment of a Claim, or a portion thereof, has occurred prior to or following the Commencement Date) and Full Mailing Address of the Claimant (the Original Claimant, not the Assignee.)

Full Legal Name:	Kevin James
Full Mailing Address:	147- 8400 Forest Grove Drive, Burnaby, BC V5A 4B7
Telephone Number:	604- 619-1262
Facsimile Number:	
Email Address:	Ktjames1@hotmail.com
Attention (Contact Person):	

b. Has the Claim been sold, transferred or assigned by the Claimant to another party (an Assignee")

Yes: [ ]

No: [✓]

Particulars of Assignee (if any)

a. Please complete the following if all or a portion of the Claim has been assigned, insert full legal name of assignee(s) of the Claim. If there is more than one assignee, please attach a separate sheet with the required information:

Full Legal Name of Assignee:	N/A
Full Mailing Address of Assignee:	
Telephone Number of Assignee:	
Facsimile Number of Assignee:	

This is Exhibit "F" referred to in the affidavit of Kevin James
sworn before me at Van., BC
this 25 day of Jan. 2017

A Commissioner for taking Affidavits for British Columbia

Email Address of Assignee:	
Attention (Contact Person):	

Proof of Claim

I, Kevin James ,(*name of individual Claimant or Representative of corporate Claimant*), of Burnaby, BC (*City, Province or State*) do hereby certify: that I [✓] am a Claimant; OR

that I [ ] am a Claimant; OR

[ ] am _____ (*state position or title*) of _____ _____(*name of corporate Claimant*) which is a Claimant;

that I have knowledge of all the circumstances connected with the Claim referred to below;

that Western Canadian Coal Corp (*name of applicable Walter Canada Group entity and/or Directors and/or Officers*) was and still is indebted to the Claimant as follows;

CLAIM (other than a Restructuring Claim):

$ 8,180,408 (*insert value of Claim*)

RESTRUCTURING CLAIM

$ _____ (*insert value of Claim arising after the Commencement Date resulting from the restructuring, disclaimer, resiliation, termination or breach after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral*);

that the Claimant's Claim and the Claimant's invoices, statements and/or supporting documents attached are denominated in:

[✓] Canadian Dollars

[ ] U.S. Dollars

[ ] Other _____ (*stipulate other currency referenced*)

A. TOTAL CLAIM(S): $ 8,180,408

Nature of Claim:

(*Check and complete appropriate category*)

[✓] A. UNSECURED CLAIM OFS 8,180,408. That in respect of this debt, no assets of any of the Walter Canada Group entities are pledged as security.

[ ] B. SECURED CLAIM OF $ _____. That in respect of this debt, assets of _____ (*insert name of applicable Walter Canada Group entity*) valued at $ _____ are pledged to me as security, particulars of which are as follows

(*Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents.*)

Particulars of Claims:

Other than as already set out herein, the particulars of the undersigned's total Claim and/or Restructuring Claim are attached

(Provide all particulars of the claims and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the claims, name of any guarantor which has guaranteed the claims, and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the Walter Canada Group entities to the Claimant and estimated value of such security Where a claim is advanced against any Directors or Officers, please provide either a reference to a statutory authority for your claim or enclose a draft Notice of Civil Claim)

Filing of Claims:

This Proof of Claim **must be received by the Monitor by no later than 5:00 p.m. (Vancouver Time) on October 5, 2016** (the "**Claims Bar Date**") unless your claim is a Restructuring Claim.

Proofs of Claim for Restructuring Claims arising after the Commencement Date resulting from a restructuring, disclaimer, resiliation, termination or breach after the Commencement Date of any contract, employment agreement, lease or other agreement, or arrangement of any nature whatsoever, whether written or oral, **must be received by the Monitor by the later of (a) the Claims Bar Date, and (b) by 5:00 p.m. (Vancouver Time) on the day which is twenty (20) Business Days after the date of the applicable Notice of Disclaimer or Resiliation** (the "**Restructuring Claims Bar Date**")

Failure to file your proof of claim as directed by the Claims Bar Date or Restructuring Claims Bar Date, as applicable, will result in your claim being forever barred and extinguished and you will be prohibited from making or enforcing a claim against any of the Walter Canada Group entities and/or any of their Directors and/or Officers.

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention	Mark Kemp-Gee/Mike Clark
Email:	mkempgee@kpmg.ca, maclark@kpmg.ca
Phone:	604-691-3397; 604-691-3468

DATED this 1st day of October, 2016

Witness: [illegible]

Per: [signature]
Print name of Claimant: KEVIN T. JAMES

If Claimant is not an individual, print name and title of authorised signatory.

Name: _____

Title: _____

9/29/2016

RSA Royalty Valuation For K James

Production Year	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13	Year 14	Year 15	Year 16	Year 17	Year 18	Total
Wolverine HCC Production Profile																			
Coal Property																			
Perry Creek (tonne)	500000	1000000	2000000	1750000	1500000	1250000	500000	327000	0	0	0	0	0	0	0	0	0	0	8827000
Mt. Spieker (EB Pit) (tonne)	0	0	0	250000	500000	750000	1500000	1673000	2000000	1750000	1500000	1250000	1250000	1000000	750000	500000	76000	0	14749000
Hermann (tonne)	0	0	0	0	0	0	0	0	0	250000	500000	750000	750000	1000000	1250000	1500000	1924000	1151000	9075000
Total (tonne)	500000	1000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	2000000	1151000	32651000
HCC Price ($US per tonne)	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	137.8	
HCC Price ($CDN per tonne)	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	180.5	
K James Royalty = 0.219 %																			
Royalty CDN$ per tonne	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	0.3954	
Royalty Payment (CDN$)	197682.3	395364 6	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	790729.2	455065	12909049

Discount Rate 5.0%

NPV @5% $8,180,408

ASSUMPTIONS

1. Coal Reserve - The total proven and probable recoverable coal reserve of 32.651 million tonnes from 3 properties.
2. Hard Coking Coal (HCC) Production Profile - 2 million tonne maximum per year of saleable metallurgical coal from 3 properties
3. Hard Coking Coal (HCC) Price - US$ 137.8 per tonne
4. Exchange Rate - 1.3101 CDN$/US$
5. Discount Rate - 5%

ASSUMPTIONS

1. Coal Reserves

Coal Reserves for the Wolverine Group properties are reported in Walter Energy's SEC Form 10K 2014 Annual Report pages 46 and 48. The coal reserves include defined reserves from the Perry Creek, EB, and Hermann coal properties. A copy of the SEC Form 10K pages 46 and 48 are attached. In total, the combined reserves for the 3 properties are 32.651 million tonnes of recoverable coal in the proven and probable categories. The EB area is also known as Mt. Spieker in older documents.

The attached Figure 7 from The Revised Technical Report on the EB Project completed by Marston Canada Ltd. In 2007 for Western Canadian Coal Corp shows the coal license outlines encompassing the EB and Perry Creek Coal Project proposed pits. Also Figure 4-4 from the Technical Report on the Wolverine Coal Project done by J. Perry P.Geo et al. for Western Canadian Coal Corp. in 2003 illustrates the Perry Creek and Mt. Spieker (EB) coal licenses. The coal licenses covering Perry Creek were ultimately converted to Coal Lease 414696. Figure 5 from the Technical Report on the Hermann Project Feasibility Study by Marston Canada Ltd in December 2007 for Western Canadian Coal Corp. illustrates the Hermann Project pit area in relation to the coal licenses that are subject to the coal royalty. (Note: I have penciled in the relative coal license numbers on both figures to illustrate which coal license areas are subject to the royalty. As shown, the licenses easily cover all three pit areas such that all reserves reported are subject to the royalty.)

2. Hard Coking Coal (HCC) Production Profile

According to the Technical Report completed by Marston Canada Ltd in 2005, the Perry Creek and EB areas were planned at an annual production rate of 2.7 million tonnes of saleable coal per year. The corresponding coal washplant has a design capacity of 2.7 million tonnes of saleable coal with an expansion capability to 3 million tonnes per year. A 2 million tonne per year saleable coal production can be easily supported by the present infrastructure.

The production profiles for the three properties were spread out over an 18 year life using a 2 million tonne annual maximum recoverable/saleable coal production. Production from the existing Perry Creek Mine comprises the bulk of the first four years allowing a production start and annual tonnage ramp up from EB Pit. Production from Perry Creek is initiated at 500,000 clean saleable tonnes in year one as metallurgical coal prices have rebounded to spot prices above US$205 per tonne in September 2016 as reported by http://www.bloomberg.com/news/articles/2016-09-23/goldman-says-higher-coking-coal-prices-are-here-to-stay . Coal production from the Hermann Coal property is estimated to start at Year 10. As Hermann already has an Environmental Assessment certificate, mine permit acceptance is estimated within 10 years of mine restart.

3. Hard Coking Coal (HCC) Price

Metallurgical coal prices have rebounded to spot prices above US$205 per tonne in September 2016 as reported by http://www.bloomberg.com/news/articles/2016-09-23/goldman-says-higher-coking-coal-prices-are-here-to-stay . The rebound is not expected to last long but Teck Resources expects coal

prices to range from US$100 to US$200 per tonne (http://www.mining.com/coal-rally-puts-the-breaks-on-asset-sales-in-sector/?utm_source=digest-en-mining-160928&utm_medium=ema). Goldman predicts respective contract coal prices for 2017 and 2018 of US$148.8 per tonne and US$137.8 per tonne. Given the recently reported coal prices, a price of US$137.8 per tonne is considered reasonable and is used for the valuation.

Bank/Mining Co.	Contract Price (US$) per ton	Contract Price (US$) per tonne
Goldman Sachs	135 (2017)	148.8
Goldman Sachs	125 (2018)	137.8
Teck Corporation		100 – 200 (150)

4. Exchange Rate

The Bank of Canada US$/CDN$ daily rate as of September 29, 2016 is 1.3101.

5. Discount Rate

Discount rates for NPV analysis of mine projects commonly range from 5% to 8% (see 2014 KPMG Insights into Mining, Lee Hodgkinson). Given that the Wolverine Project area is within British Columbia, Canada with excellent infrastructure, mine permit and Environmental Assessment certificates, and an idled mine operation, the 5 % discount rate is a reasonable estimate for NPV analysis. The project is located in a stable geopolitical country and the quality of the reserves is reflected in the various NI 43-101 and company reports.

The following table provides a summary of the quality of our reserves as of December 31, 2014:

ESTIMATED RECOVERABLE COAL RESERVES (Continued)
AS OF DECEMBER 31, 2014
(In Thousands of Metric Tons)

			Quality (Wet Basis)(3)			Average Coal Seam Thickness	Date Mine:	
Location/Mine	Reserves	Type(1)	% Ash	% Sulfur	BTU/lb.	(in Feet)	Acquired/ Opened	Ceased/Idled
Alabama:								
Jim Walter Resources, Inc.								
No. 4	46,440	M	9.00	0.80	13,909	4.84	1976	N/A
No. 7	67,591	M	9.00	0.75	13,952	4.13	1976	N/A
Blue Creek Energy, Inc.								
Blue Creek No. 1	74,882	M	9.00	0.69	13,791	4.70	N/A	N/A
Tuscaloosa Resources, Inc.								
Carter Swann's Crossing	2,804	M/T	11.75	1.25	12,489	9.93	May-11	Jul-13
Panther 3	262	T	8.93	4.21	13,636	1.99	Aug-07	2008
Taft Coal Sales & Associates								
Choctaw(2)	308	M/T	12.78	1.68	12,665	6.59	Sep-08	N/A
Gayosa South(2)	353	M/T	14.69	1.32	12,484	4.79	N/A	N/A
Robbins Road(2)	1,228	M/T	12.36	1.55	12,887	4.26	N/A	N/A
Walter Minerals, Inc.								
Beltona East	1,013	M/T	7.79	2.58	14,162	4.88	N/A	N/A
Morris	4,125	T	21.81	1.73	12,367	5.25	N/A	N/A
Total Alabama	199,003							
West Virginia:								
Atlantic Leasco								
Gauley Eagle underground (4)	7,102	M/T	7.45	1.04	12,944	3.80	Apr-11	Apr-12
Gauley Eagle surface (4)	6,619	M/T	12.22	1.09	12,450	18.56	Apr-11	May-12
Maple Coal Company								
Eagle underground	9,427	M	6.21	0.87	13,643	4.14	Apr-11	N/A
Peerless underground	6,406	T	5.15	2.08	13,333	3.59	Apr-11	N/A
Powellton underground	2,555	M	5.87	0.80	13,275	3.05	Apr-11	N/A
Maple surface	12,685	M/T	12.98	0.85	11,800	33.59	Apr-11	N/A
Total West Virginia	44,794							
Northeast B.C., Canada:								
Walter Canada								
Wolverine's Perry Creek	8,827	M	7.85	0.47	14,261	33.70	Apr-11	Apr-14
Wolverine's Mt. Spieker (EB)	14,749	M	8.72	0.49	13,116	39.80	Apr-11	N/A
Wolverine's Hermann	9,075	M	8.12	0.41	14,220	55.90	Apr-11	N/A
Brazion's Brule	10,645	P	7.15	0.51	14,242	36.80	Apr-11	June-14
Brazion's Willow Creek	10,645	M/P	7.50	0.58	13,500	32.50	Apr-11	June-14
Brazion's Willow South	14,252	P(2)	8.00	0.60	14,200	42.30	Apr-11	N/A
Brazion's Hudette	24,058	P(2)	8.00	0.60	14,250	55.30	Apr-11	N/A
Belcourt Saxon Properties	28,523	M	8.00	0.35	14,227	62.50	Apr-11	N/A
Total Canada	133,374							
South Wales, U.K.:								
Energybuild's Aberpergwm	15,481	M/T	5.80	0.80	14,428	9.29	Apr-11	N/A
Total Walter Energy	392,652							

(1) Coal Type: M—Metallurgical Hard Coking Coal, T—Thermal, P—Pulverized Coal Injection

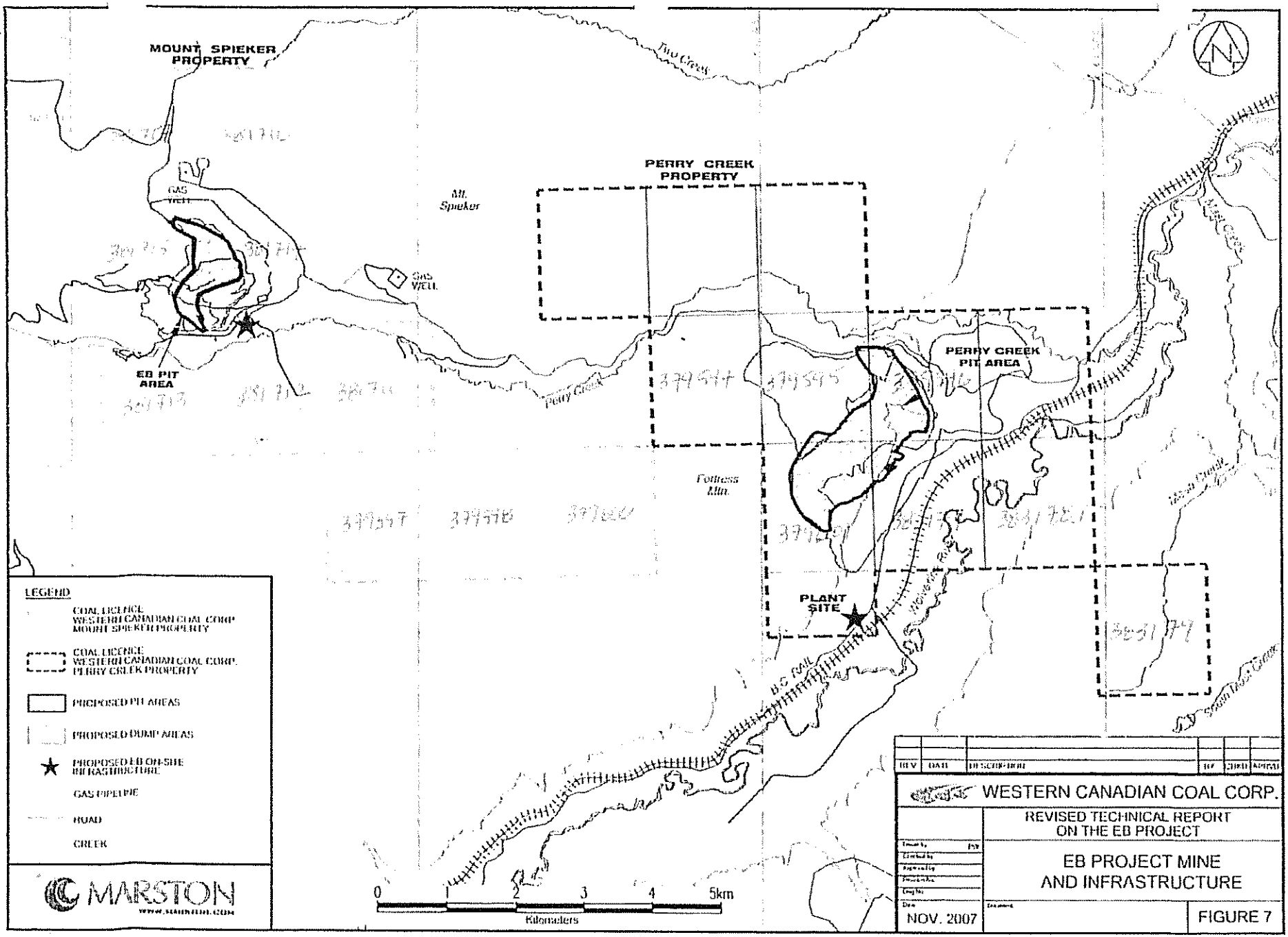
(2) Coals in this reserve area typically have metallurgical properties and, at a minimum, characterization of coal quality is sufficient to classify this reserve as Pulverized Coal Injection. Data suggests that a portion of this reserve may be metallurgical hard coking coal; however, additional sampling and analysis is necessary before a portion of the reserve can be reclassified as metallurgical hard coking coal

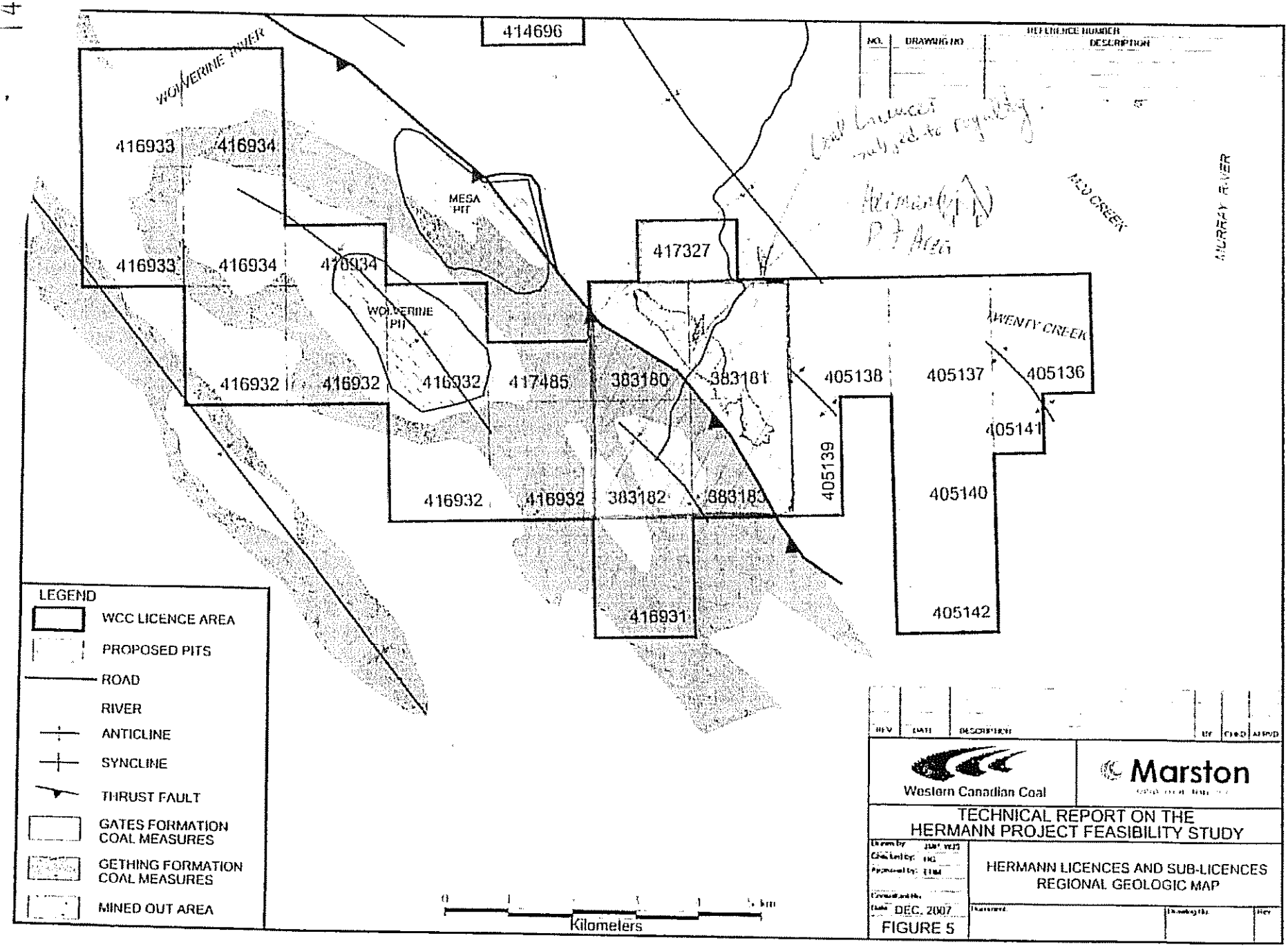
The following table provides the location and coal reserves associated with each mine or potential mine as of December 31, 2014:

ESTIMATED RECOVERABLE COAL RESERVES
AS OF DECEMBER 31, 2014
(In Thousands of Metric Tons)

Location/Mine	Type(8)	Status of Operation(5)	Coal Bed	Assigned/ Unassigned(3)	Recoverable Reserves(1)			Reserve Control(4)	
					Reserves(1)	Proven(2)	Probable(2)	Owned	Leased
Alabama:									
Jim Walter Resources, Inc.									
No. 4 (10)	U	Production	Mary Lee	Assigned	46,440	45,105	1,335	—	46,440
No. 7 (10)	U	Production	Mary Lee	Assigned	67,591	60,421	7,170	6,761	60,830
Blue Creek Energy, Inc.									
Blue Creek No. 1	U	Exploration	Mary Lee	Unassigned	74,882	71,789	3,093	—	74,882
Tuscaloosa Resources, Inc.									
Carter Swann's Crossing	S	Idled	Brookwood	Assigned	2,804	2,804	—	2,804	—
Panther 3	S	Idled	Brookwood	Assigned	262	262	—	262	—
Taft Coal Sales & Associates									
Choctaw	S	Production	Pratt	Assigned	308	308	—	—	308
Gayosa South	S	Development	Pratt	Assigned	353	353	—	—	353
Robbins Road	S	Development	Pratt	Assigned	1,225	1,225	—	—	1,225
Walter Minerals, Inc.									
Beltona East	S	Development	Black Creek	Unassigned	1,013	1,013	—	1,013	—
Morris	S	Development	Mary Lee	Unassigned	4,125	4,125	—	2,145	1,980
Total Alabama					199,003	187,405	11,598	12,985	186,018
West Virginia:									
Atlantic Leasco									
Gauley Eagle (9)	U	Idled	Allegheny, Kanawha	Assigned	7,102	6,267	835	—	7,102
Gauley Eagle (9)	S	Idled	Allegheny, Kanawha	Assigned	6,619	5,908	711	—	6,619
Maple Coal Company									
Eagle	U	Production	Allegheny, Kanawha	Assigned	9,427	7,027	2,400	—	9,427
Peerless	U	Exploration	Allegheny, Kanawha	Unassigned	6,406	4,769	1,637	—	6,406
Powellton	U	Exploration	Allegheny, Kanawha	Unassigned	2,555	2,530	25	—	2,555
Maple	S	Production	Allegheny Kanawha	Assigned	12,685	11,692	993	—	12,685
Total West Virginia					44,794	38,193	6,601	—	44,794
Northeast B.C., Canada:									
Walter Canada									
Wolverine's Perry Creek	S	Idled	Gates	Assigned	8,827	8,827	—	—	8,827
Wolverine's Mt. Spieker (EB)	S	Development	Gates	Unassigned	14,749	12,404	2,345	—	14,749
Wolverine's Hermann	S	Development	Gates	Unassigned	9,075	6,775	2,300	—	9,075
Brazion's Brule	S	Idled	Gething	Assigned	16,645	16,645	—	—	16,645
Brazion's Willow Creek	S	Idled	Gething	Assigned	16,645	15,365	1,280	—	16,645
Brazion's Willow South	S	Exploration	Gething	Unassigned	14,252	7,186	7,066	—	14,252
Brazion's Hudette	S	Exploration	Gething	Unassigned	24,658	24,193	465	—	24,658
Belcourt Saxon(6)	S	Exploration	Gates	Unassigned	28,523	28,273	250	—	28,523
Total Canada					133,374	119,668	13,706	—	133,374
South Wales, U.K.:									
Energybuild's Aberpergwm	U	Development	9' & 18(7)	Assigned	15,481	13,220	2,261	—	15,481
Total Walter Energy					392,652	358,486	34,166	12,985	379,667

(1) Reserves are that part of a mineral deposit which can be economically and legally extracted or produced at the time of the reserve determination. Recoverable reserves represent the amount of proven and probable reserves that can actually be recovered taking into account all mining and preparation losses involved in producing a saleable product using existing methods under current law.


MOUNT SPIEKER PROPERTY
PERRY CREEK PROPERTY
GAS WELL
Mt. Spieker
GAS WELL
EB PIT AREA
PERRY CREEK PIT AREA
Perry Creek
Fortress Mtn.
PLANT SITE
B.C. RAIL
LEGEND
COAL LICENCE WESTERN CANADIAN COAL CORP MOUNT SPIEKER PROPERTY
COAL LICENCE WESTERN CANADIAN COAL CORP. PERRY CREEK PROPERTY
PROPOSED PIT AREAS
PROPOSED DUMP AREAS
PROPOSED EB OFF-SITE INFRASTRUCTURE
GAS PIPELINE
ROAD
CREEK
MARSTON
www.marston.com
0 1 2 3 4 5km
Kilometers
REV DATE DESCRIPTION BY CHKD APPVD
WESTERN CANADIAN COAL CORP.
REVISED TECHNICAL REPORT ON THE EB PROJECT
EB PROJECT MINE AND INFRASTRUCTURE
Date NOV. 2007
FIGURE 7


414696
WOLVERINE RIVER
416933
416934
MESA PIT
417327
MUD CREEK
MURRAY RIVER
WOLVERINE PIT
TWENTY CREEK
416932
417485
383180
383181
405138
405137
405136
405141
405139
405140
383182
383183
416931
405142
LEGEND
WCC LICENCE AREA
PROPOSED PITS
ROAD
RIVER
ANTICLINE
SYNCLINE
THRUST FAULT
GATES FORMATION COAL MEASURES
GETHING FORMATION COAL MEASURES
MINED OUT AREA
Kilometers
Western Canadian Coal
Marston
TECHNICAL REPORT ON THE HERMANN PROJECT FEASIBILITY STUDY
HERMANN LICENCES AND SUB-LICENCES REGIONAL GEOLOGIC MAP
DEC. 2007
FIGURE 5

FORM 4

NOTICE BY DEBTOR COMPANY TO DISCLAIM OR RESILIATE AN AGREEMENT

TO: Kevin James
AND TO: KPMG Inc., in its capacity as Monitor of Walter Energy Canada Holdings Inc. and certain of its subsidiaries and affiliates (collectively, the "**Walter Canada Group**")

Take notice that:

1. Proceedings under the *Companies' Creditors Arrangement Act* ("**the Act**") in respect of the Walter Canada Group were commenced on the 7th day of December, 2015.

2. In accordance with subsection 32(1) of the Act, to the extent that the following agreement is legally enforceable, the debtor company gives you notice of its intention to disclaim or resiliate such agreement:

> Royalty Sharing Agreement dated March 31, 2000 among David Fawcett, Kevin James, Mark Gibson and Western Canadian Coal Corp. (and their successors and assigns and as may be amended, restated, supplemented or modified)

3. In accordance with subsection 32(2) of the Act, any party to the agreement may, within 15 days after the day on which this notice is given and with notice to the other parties to the agreement and to the monitor, apply to court for an order that the agreement is not to be disclaimed or resiliated.

4. In accordance with paragraph 32(5)(*a*) of the Act, if no application for an order is made in accordance with subsection 32(2) of the Act, the agreement is disclaimed or resiliated on the 13th day of November, 2016, being 30 days after the day on which this notice has been given.

Dated at Toronto, Ontario, on October 12, 2016.

William E. Aziz,
BlueTree Advisors Inc.,
in its capacity as Chief Restructuring Officer of
the Walter Canada Group

This is Exhibit "G" referred to in the affidavit of Kevin James sworn before me at Van. BC. this 25 day of Jan. 2017.

A Commissioner for taking Affidavits for British Columbia

The monitor approves the proposed disclaimer or resiliation.

Dated at Toronto, Ontario, on October 13, 2016.

Anthony Tillman, Senior Vice President
KPMG Inc., in its capacity as Monitor of
the Walter Canada Group

NOTICE OF REVISION OR DISALLOWANCE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER
(collectively, the "Walter Canada Group")

Full Legal Name of Claimant: James, Kevin

Pursuant to the order of the Supreme Court of British Columbia dated August 16, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), KPMG Inc., in its capacity as Monitor of the Walter Canada Group, hereby gives you notice that the Walter Canada Group, in consultation with the Monitor, have reviewed your Proof of Claim and have revised or disallowed your Claim as follows:

	Proof of Claim as Submitted ($CDN)	Revised Claim as accepted ($CDN)	Secured ($CDN)	Unsecured ($CDN)
	$6,747,203	$0	$0	$0
Total Claim	$0			

Reason for the Revision or Disallowance

Under the Royalty Sharing Agreement with Western Canadian Coal Corp. dated March 31, 2000, Mr. James was entitled to a royalty percentage for coal product tonnes produced from West Brazion, Mount Spieker and Wolverine coal properties.

Pursuant to the decision of Madam Justice Fitzpatrick of the British Colombia Supreme Court in the *Companies' Creditors Arrangement Act* ("CCAA") proceedings of Walter Energy Canada Holdings, Inc. ("WECH") and its affiliates, the court found that the rights to the royalty under the Royalty Sharing Agreement did not convey to Mr. James any interest in the coal licenses or the mines, rather Mr. James was granted a contractual right to receive a payment of a royalty on coal products produced from the coal licenses.

Pursuant to an Asset Purchase Agreement dated August 8, 2016, WECH sold its interest in substantially all of its property and assets, including its mining licenses at the Wolverine mine. Accordingly, from and after September 9, 2016, the closing of the sale transaction, WECH has no interest in the mines, the coal licenses or any product produced in connection therewith. Because the Royalty Sharing Agreement had no further purpose, on October 14, 2016, WECH disclaimed the Royalty Sharing Agreement. The Royalty Sharing Agreement does not require WECH to compensate Mr. James or otherwise pay value to him in circumstances where the mines are sold.

If you do not agree with this Notice of Revision or Disallowance, please take note of the following:

This is Exhibit "H" referred to in the
affidavit of Kevin James
sworn before me at Van. BC
this 25 day of Jan. 2017

A Commissioner for taking Affidavits
for British Columbia

If you intend to dispute a Notice of Revision or Disallowance, you must deliver a Notice of Dispute, in the form attached hereto, by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein so that such Notice of Dispute is received by the Monitor by the later of November 7, 2016 and the day that is twenty (20) Business Days after the date of this Notice of Revision or Disallowance, or such other date as may be agreed by the Monitor. The form of Notice of Dispute is attached to this Notice.

Where a Notice of Dispute is being submitted electronically, please submit one PDF file with the file named as follows: ***[legal name of Claimant]****pocdispute.pdf.*

If you do not deliver a Notice of Dispute by the time specified, the nature and amount of your Claim, if any, shall be as set out in this Notice of Revision or Disallowance for voting and/or distribution purposes.

Address for service of Notices of Dispute:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention:	Mark Kemp-Gee/Mike Clark
Email:	mkempgee@kpmg.ca, maclark@kpmg.ca
Phone:	604-691-3397; 604-691-3468

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED at Vancouver, British Columbia, Canada, this 7th day of November, 2016

KPMG INC.

In its capacity as Court-appointed Monitor of Walter Energy Canada Holdings, Inc. *et al.* and not in its personal or corporate capacity

Per: _____

Name: ANTHONY TILLMAN

Title: SENIOR VICE PRESIDENT

FORM OF NOTICE OF DISPUTE

NOTICE OF DISPUTE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER
(collectively, the "Walter Canada Group")

Pursuant to the order of the Supreme Court of British Columbia dated August 16, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), I/we hereby give you notice of my/our intention to dispute the Notice of Revision or Disallowance bearing Reference Number _____ and dated _____, 2016 issued by KPMG Inc., in its capacity as Monitor of the Walter Canada Group in respect of my/our Claim.

Full Legal Name of Claimant: _____

	Proof of Claim as Submitted ($CDN)	**Revised Claim as accepted** ($CDN)	**Secured** ($CDN)	**Unsecured** ($CDN)
Total Claim				

Reasons for Dispute (attach additional sheet and copies of supporting documentation if necessary):

_____

_____

_____

_____

_____

_____

Signature of Individual: _____

Date: _____

(Print name): _____

Telephone number: _____

Facsimile number: _____

Email address: _____

Mailing Address: _____

_____

_____

_____

This form and supporting documentation is to be returned by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein and is to be received by the Monitor by the later of December 6, 2016 and the day that is twenty (20) Business Days after the date of the Notice of Revision or Disallowance or such other date as may be agreed to by the Monitor.

Where this Notice of Dispute is being submitted electronically, please submit one PDF file with the file name as follows: **[legal name of Claimant]**pocdispute.pdf. If you submit your Notice of Dispute electronically and you do **not** receive an email confirming receipt of your Notice of Dispute within one (1) business day of submitting the Notice of Dispute, your Notice of Dispute has **not** been successfully received by the Monitor and you should submit your Notice of Dispute using an alternative method.

Address for service of Notices of Dispute:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

147

KPMG

PO BOX 10426 777 Dunsmuir Street
Vancouver, BC V7Y 1K3
Canada

Kevin James
c/o Heather Jones
Miller Thomson LLP
Robson Court
1000-840 Howe Street
Vancouver, BC V6Z 2M1

3:30

4696574.1

FORM OF NOTICE OF DISPUTE

NOTICE OF DISPUTE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER
(collectively, the "Walter Canada Group")

Pursuant to the order of the Supreme Court of British Columbia dated August 16, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"). I/we hereby give you notice of my/our intention to dispute the Notice of Revision or Disallowance bearing Reference Number N/A and dated November 7, 2016 issued by KPMG Inc., in its capacity as Monitor of the Walter Canada Group in respect of my/our Claim

Full Legal Name of Claimant: Kevin James

	Proof of Claim as Submitted ($CDN)	Revised Claim as accepted ($CDN)	Secured ($CDN)	Unsecured ($CDN)
	$6,747,203			
Total Claim	$6,747,203			

Reasons for Dispute (attach additional sheet and copies of supporting documentation if necessary):
See attached Schedule "A"

Signature of Individual: Kevin J. James

Date: 5/Dec/2016

(Print name): Kevin James

Telephone number: 604-643-1231

This is Exhibit "J" referred to in the
affidavit of Kevin James
sworn before me at Van. BC
this 25 day of Jan. 2017

A Commissioner for taking Affidavits
for British Columbia

Facsimile number:	604-643-1200
Email address:	hjones@millerthomson.com
Mailing Address:	c/o Miller Thomson LLP
	Attn: Heather Jones
	1000 - 840 Howe Street
	Vancouver, BC V6Z 2M1

This form and supporting documentation is to be returned by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein and is to be received by the Monitor by the later of December 6, 2016 and the day that is twenty (20) Business Days after the date of the Notice of Revision or Disallowance or such other date as may be agreed to by the Monitor.

Where this Notice of Dispute is being submitted electronically, please submit one PDF file with the file name as follows: **[legal name of Claimant]**pocdispute.pdf. If you submit your Notice of Dispute electronically and you do **not** receive an email confirming receipt of your Notice of Dispute within one (1) business day of submitting the Notice of Dispute, your Notice of Dispute has **not** been successfully received by the Monitor and you should submit your Notice of Dispute using an alternative method.

Address for service of Notices of Dispute:

KPMG Inc
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention:	Mark Kemp-Gee/Mike Clark
Email:	mkempgee@kpmg.ca,m aclark@kpmg.ca
Phone	604-691-3397; 604-691-3468

Schedule "A"

Mr. James entered into a Royalty Sharing Agreement with Western Coal Corp., an affiliate of Walter Energy Canada Holdings, Inc. ("WECH"), on March 31, 2000 (the "Royalty Sharing Agreement").

All of the property and assets of WECH and its affiliates, including the mine to which the Royalty Sharing Agreement applies, were sold in the CCAA proceedings herein. Thereafter, WECH disclaimed the Royalty Sharing Agreement.

Pursuant to s. 32(7), and the decision of WECH to disclaim its contract with Mr. James, Mr. James has a provable claim. The Monitor has no basis to deny Mr. James' claim pursuant to section 32(7) of the CCAA which provides as follows:

> Loss related to disclaimer or resiliation
>
> (7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Mr. James has suffered damage as a result of the sale of the mine in the CCAA proceedings and subsequent disclaimer of the Royalty Sharing Agreement. The Monitor is obliged to assess the damages suffered by Mr. James. The value of Mr. James' claim is based on a calculation utilizing Walter Canada Group's own data regarding the Coal Reserve, as reported in Walter Energy's SEC Form 10K 2014 Annual Report. Requisite discounts have been applied.

Mr. James disputes the Notice of Disallowance. Mr. James continues to rely upon the original materials filed in his Proof of Claim dated October 1, 2016.

We look forward to working with the Monitor to consensually resolve Mr. James' claim in consultation with WECH

151

This is Exhibit "J" referred to in the affidavit of Kevin Soares sworn before me at Yorkton, SK this 25 day of Jan. 2017

A Commissioner for taking Affidavits for British Columbia

Tumbler Ridge to ring in new year with return of mining jobs

Second coal mine restarting prompts hiring of 220 more people

By Andrew Kurjata, CBC News Posted: Dec 29, 2016 1:37 PM PT Last Updated: Dec 29, 2016 1:37 PM PT

Ami Strang was working as a lab technician at the Wolverine coal mine in Tumbler Ridge when it was shut down in April 2014.

"I moved back in with my parents, I put all my stuff back in storage," she said.

She later found work in Fort McMurray, but it involved being away from home for long stretches of time.

> We went to work one day and found out we weren't working. It was pretty rough."- *Ami Strang*

"Luckily for me I'm single and don't have any kids," she said.

"I know a lot of families here whose dads are gone to camp and aren't home very often. So it was very hard on the community."

Strang was one of more than 700 Tumbler Ridge residents to lose their jobs in 2014 and 2015 as dropping demand for coal led to a series of mine closures in the community of just under 3,000 people.

"We went to work one day and found out we weren't working," Strang recalled. "It was pretty rough."

'Things were feeling a little bit hopeless'

That sentiment is shared by Tumbler Ridge Chamber of Commerce executive director Jerrilyn Schembri.

"Things were feeling a little bit hopeless," she said. "Houses were going back to the banks, people didn't have a lot of extra money and people were really just holding on in the hopes that something would happen."

Something did happen earlier this year when Conuma Coal, a newly formed Canadian affiliate of West Virginia's ERP Compliant Fuels, purchased three Tumbler Ridge coal mines, including Wolverine.

- Tumbler Ridge coal mines sold to U.S. company brings hope to struggling town

"That really was a shot in the arm to Tumbler Ridge," Schembri said. "All of a sudden the whole mood seemed to change ... the feeling around town brightened."

Coal to be used for steel production

ERP Compliant Fuels CEO Ken McCoy told CBC that his company believes coal can still be profitable, if the right approach is taken.

"Our philosophy is to try to capitalize on this market where coal is out of favour by acquiring some of the best reserves that we can," he said.

"That's what interested us in Canadian coals."

McCoy said the coal available in the Tumbler Ridge region could be used in steel production, which is a less volatile market.

Environmental costs criticized

ERP Compliant Fuels bills itself as a fossil-fuel company interested in reducing global carbon emissions.

According to the company's website, ERP uses revenue from coal sales to purchase carbon offsets in an effort to reduce overall C02 levels worldwide.

Some environmental groups have criticized a business model that uses profits from fossil fuels to offset carbon levels.

"Finding ways to make coal more economical is not really in our long-term interest,"
said Kyrke Gaudreau, sustainability manager at the University of Northern British Columbia.

"We actually have to make the conscious choice to start transitioning [away from fossil fuels]."

However, McCoy said he thinks the business model can be profitable and benefit the environment by using coal sales to fund reforestation, for example.

According to its website, ERP has purchased thousands of acres of former mined land in the U.S. and plans to plant millions of trees.

"We are a for-profit company that mines coal," said McCoy. "But we are trying to have influence to offset the carbon through reforestation."

Local workers for local jobs

He also said they want to take a community-based approach, which includes hiring as many locals as possible.

"It is our intention, to the extent that we can, to fill every job by locals."

His company started by reopening the Brule mine, about 1.5 hours away from Tumbler Ridge, and hiring back 170 people — including Strang.

She said the company's community-based approach is evident in the way things are being run.

"Their outlook is to be able to run the mine at low-cost so when [a changing market] does happen again, they won't just lay everybody off ... which is super settling," she said.

"The company that I used to work for, you didn't know anything."

Conuma is now hiring an additional 220 people to restart the Wolverine mine on Jan. 2, with plans to reopen the third by summer 2017.

While Strang is happy to be working at Brule as a truck driver, she hopes to return to her original post at Wolverine because it would make for a shorter commute.

Either way, she's happy to once again be working in the community she calls home.

"It's awesome."

With files from George Baker.

For more stories from northern British Columbia, join the CBC Daybreak North community on Facebook.