Court of Appeal File No. CA44448
Supreme Court File No. S1510120
Supreme Court Registry Vancouver

COURT OF APPEAL

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

AND

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

AND

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

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

(APPELLANT)

MEMORANDUM OF ARGUMENT OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST FOR LEAVE TO APPEAL AND FOR A STAY OF PROCEEDINGS OR EXECUTION

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PART I: FACTS

A. OVERVIEW

1. This application for leave to appeal involves a discrete question of law: under Canadian conflict of law rules, does Canadian or U.S. substantive law apply to the claim of an American creditor against estate assets valued at approximately $63 million? The judge below held that Canadian law applies. For the reasons that follow, this question of law warrants appellate review.

2. The U.S. law in issue is the *Employee Retirement Income Security Act of 1974.*[1] As stated by the judge below, this case is "the first time that a Canadian court [has] considered whether ERISA applies in Canada and in these circumstances."[2] The same was recognized in the submission in the court below of the United Steelworkers of America, Local 1-424 (the "**Steelworkers**"). The written argument of the Steelworkers described this case as "an important case for the parties and for the legal system which raises [a] significant legal issue of first instance".[3]

3. The holding of the judge below rested on a conflict of law analysis. That analysis required her, at the first step, to characterize the claim at issue. As she acknowledged, there is no "case authority involving the type of characterization exercise involved here."[4] The judge distinguished the cases supporting the applicant's characterization, which would have characterized the claim under the law of obligations. This characterization recognizes that the essential nature of the claim is to enforce the terms of a contract. The chambers judge instead opted for the characterization proposed by the respondents, namely that the claim involved a challenge to the status and separate legal personalities of entities within the so-called Walter Canada Group. In so doing she was able to cite only one trial level decision in support, an authority which the judge herself described as "limited" since it arose "in the context of a constitutional challenge" and not a choice of law analysis.[5]

4. It is appropriate to grant leave to appeal for the following reasons:

(1) *The appeal is of significance to the practice*: As noted, the Steelworkers, a respondent to this application, described the case as important for the legal

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[1] *Employee Retirement Income Security Act of 1974*, as amended [**ERISA**], 29 U.S.C. §§ 1001 et seq.
[2] *Walter Canada Holdings, Inc. (Re)*, 2017 BCSC 709 at para. 4 ["**Reasons for Judgment**"].
[3] Written Submissions of the Steelworkers on Summary Trial Application, filed December 19, 2016, at para. 1 ["**Written Submissions of the Steelworkers**"].
[4] Reasons for Judgment at para. 140.
[5] Reasons for Judgment at para. 142.

system and as raising a significant legal issue of first impression. Academic and industry professionals likewise have identified the need for guidance on the issue.

(2) *The point raised is of significance to the action itself*: The extent of recovery by the applicant, on the one hand, or the Steelworkers and other creditors, on the other, turns on the outcome of these proceedings. As noted, the Steelworkers acknowledged in the court below the importance of the case to the parties.

(3) *The appeal is prima facie meritorious*: The appeal involves a question of law for which, as noted, there is no case authority on point. The only authority cited by the judge below in support of her characterization is one that she herself described as "limited." As detailed below, the chambers judge made errors in her legal analysis. In particular, the passage from *Castel & Walker* quoted by the judge in her reasons omitted the passage of most relevance to this case: "arguably, piercing the corporate veil should be characterized as a function of the dispute and not of the status of the corporation."[6] She otherwise failed to apply or misapplied core principles of the conflict of law analysis necessary to determine the issue.

(4) *The appeal will not unduly hinder the progress of the action*: The issue arose in the context of a proceeding under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceedings**").[7] However, there are ongoing matters in the CCAA Proceedings with which the appeal will not interfere. The applicant also seeks an order that the appeal be heard on an expedited basis". If such an order is granted, prejudice in delaying the distribution will be ameliorated.

B. ORDER UNDER APPEAL

5. The United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**") seeks leave to appeal the order of the Honourable Madam Justice Fitzpatrick. That order granted a declaration that the 1974 Plan's claim under ERISA (the "**1974 Plan Claim**") is governed by Canadian law and thus invalid (the "**Order**").

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[6] Janet Walker, *Castel & Walker: Canadian Conflict of Law,* 6 ed., (Toronto: LexisNexis, 2005) (loose-leaf Rel. 60-2/2017) at 3-1 ["***Castel & Walker***"].

[7] R.S.C. 1985, c. C-36 [**CCAA**]; *Walter Energy Canada Holdings Inc. (Re)*, (7 December 2016), Vancouver (S-1510120) ["**Initial Order**"].

6. The applicability of foreign law in a Canadian court is determined, *inter alia*, according to the characterization of the claim. Where facts exist such that U.S. law is the "proper law of the obligation", as the 1974 Plan submits they do here, a Canadian entity can be liable under a foreign law. Indeed, it is a basic principle of insolvency law that a foreigner with a proven foreign claim stands in the same position as a domestic creditor with a proven domestic claim.[8] However, the chambers judge refused to characterize the claim under the law of obligations, limiting the issue to one of corporate personality and finding that the law to be applied was that of the jurisdiction of the petitioners' incorporation, i.e. B.C. or Alberta.

c. THE PARTIES

7. The 1974 Plan is a multiemployer benefit plan.[9] Employer obligations to the 1974 Plan are governed by collective bargaining agreements (the "**CBAs**").[10] The 1974 Plan's beneficiaries include approximately 88,000 retired or disabled coal miners and their spouses and dependents, all of whom look to the 1974 Plan for pension benefits that the miners' employers promised to provide.[11]

8. A participating employer of the 1974 Plan was Jim Walter Resources Inc. ("**Walter Resources**"), an American company and wholly-owned subsidiary of Walter Energy, Inc. ("**Walter Energy**"), another American company.[12] Walter Resources was a party to a CBA, under which it assumed pension funding obligations towards the 1974 Plan in accordance with the pension documents and ERISA.[13] Prior to commencing proceedings under Chapter 11 of Title 11 of the United States Code (the "**Chapter 11 Proceedings**"), Walter Energy was the holding company of a group of companies which ran coal mining operations in the U.S., Canada and the U.K. (the "**Walter Group**").[14]

9. New Walter Energy Canada Holdings, Inc., New Walter Canadian Coal Corp., New Brule Coal Corp., New Willow Creek Coal Corp., New Wolverine Coal Corp., and Cambrian Energybuild Holdings ULC are the successors in interest to Walter Energy's wholly-

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[8] *Halsbury's Laws of England, Conflict of Laws,* vol. 8(1), 4th ed. (Reissue) (London, UK: Butterworths, 1996) at 710, para. 980.

[9] Reasons for Judgment at paras. 51-52.

[10] Reasons for Judgment at paras. 53-54.

[11] Reasons for Judgment at para. 55.

[12] Reasons for Judgment at paras. 41 and 57. Walter Resources is now known as NEW WEI 13, Inc. Walter Energy is now known as New WEI, Inc.

[13] Reasons for Judgment at paras. 54 and 57.

[14] Joint Proposal of the Walter Energy Canada Group, filed December 19, 2016: 7th Affidavit of Miriam Dominguez, sworn December 20, 2016, Exhibit "A".

owned Canadian subsidiaries (the "**Walter Canada Group**").[15] The 1974 Plan alleges, *inter alia*, that the Walter Canada Group is controlled by Walter Energy from Birmingham, Alabama, with the management team and key decision makers of the Walter Canada Group entities based there.[16]

D. THE 1974 PLAN CLAIM

10. On July 15, 2015, Walter Energy and certain U.S. affiliates (the "**U.S. Debtors**") commenced the Chapter 11 Proceedings. In the Chapter 11 Proceedings, the U.S. Bankruptcy Court granted the U.S. Debtors authority to reject the CBA.[17] Such rejection, *inter alia*, gave rise to withdrawal liability to Walter Resources for Walter Resources' proportionate share of the employer's unfunded vested pension liabilities.[18] By current estimates the withdrawal liability is in excess of US$933 million.[19]

11. Under ERISA, an employer's withdrawal liability extends to all entities that are at least 80% owned by a common parent corporation, wherever incorporated (i.e. the "controlled group").[20] The Walter Canada Group and the Steelworkers agreed that it could be assumed that the Walter Canada Group entities were within the "controlled group" of Walter Energy.[21] As a result, to the extent U.S. law is applicable to the 1974 Plan Claim, the 1974 Plan Claim is valid against each of the entities in the Walter Canada Group.

12. In Canada the Walter Canada Group commenced the CCAA Proceedings.[22] Through the CCAA Proceedings, the Walter Canada Group has sold its Canadian mining assets and is pursuing a sale of its U.K. mining assets in the short term. [23] The Walter Canada Group

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[15] ***Walter Energy Canada Holdings Inc. (Re)***, (7 December 2016), Vancouver (S-1510120) ["**New Walter Group Procedure Order**"]. The legal analysis below refers to the Walter Canada Group. To the extent the 1974 Plan Claim has been deemed to be against the "New Walter Canada Group", all references to the Walter Canada Group apply equally to the New Walter Canada Group.

[16] The Amended Notice of Civil Claim of the 1974 Plan, filed November 9, 2016 at paras. 34, 88 and 91.

[17] Reasons for Judgment at para. 76.

[18] Reasons for Judgment at para. 73.

[19] Reasons for Judgment at para. 80.

[20] Reasons for Judgment at para. 89, citing 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 414(b); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c).

[21] Reasons for Judgment at paras. 91-92.

[22] Initial Order.

[23] Eighth Report of the Monitor, KPMG Inc., dated January 12, 2017, at paras. 34, 57-60 and 62 ["**Eighth Monitor's Report**"]; Second Monitor's Certificate, dated March 17, 2017.

no longer owns or maintains an ongoing mining business in Canada and all claims of creditors have attached to the proceeds of sale. [24]

13. Together with the sales process, the Walter Canada Group implemented a claims process.[25] Under this claims process the 1974 Plan was authorized to file and serve a Notice of Civil Claim, which was followed by an exchange of pleadings. It was in these proceedings that Walter Canada Group filed their notice of application seeking a declaration, *inter alia*, that the 1974 Plan Claim is governed by Canadian substantive law (the "**Application**").

E. POSITIONS OF THE PARTIES AND THE ORDER

14. The first issue raised by the Walter Canada Group on the Application was whether the 1974 Plan Claim is governed by Canadian or U.S. substantive law. The core issue that presented was whether the 1974 Plan Claim is more appropriately characterized as a claim akin to contract than as an issue of corporate status or personality. The Walter Canada Group and the Steelworkers argued that the 1974 Plan Claim is properly characterized as an issue of legal corporate personality. The 1974 Plan argued that the 1974 Plan Claim concerned the law of obligations as it is essentially a right to enforce against the Walter Canada Group the legal obligations of Walter Resources to the 1974 Plan. ERISA, in the 1974 Plan's submissions, confers a right of action against entities that were not themselves parties to the contract to which the claim relates.

15. In reasons issued May 1, 2017, the chambers judge found that the 1974 Plan Claim was to be characterized as an issue of separate legal personality, that Canadian substantive law applied, and that the 1974 Plan Claim was thus invalid.[26]

PART II: POINTS IN ISSUE

16. The issues before the Court are:

(a) Whether the 1974 Plan should be granted leave to appeal the Order;

(b) If so, whether the Court should grant an order that the appeal be heard on an expedited basis; and

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

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

[26] Reasons for Judgment at paras. 145-46, 177 and 182.

(c) Whether proceedings upon or execution of the Order should be stayed pending the outcome of the appeal.

PART III: ARGUMENT

A. THE TEST FOR LEAVE TO APPEAL

17. Section 13 of the CCAA provides that an order made under the Act may be appealed on leave from, *inter alia*, a judge of the court to which the appeal lies.

18. Leave to appeal from the Order should be granted where the Court is satisfied that there exists "serious and arguable grounds that are of real and significant interest to the parties".[27] This Court has applied a four-pronged test when granting leave to appeal in CCAA matters, namely: (a) whether the point on appeal is of significance to the practice; (b) whether the point raised is of significance to the action itself; (c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (d) whether the appeal will unduly hinder the progress of the action.[28]

19. Procedurally the issue arises in the context of a CCAA proceeding. However, the legal issue raised by this appeal is one of general commercial law. It does not involve bankruptcy or insolvency. The Order determined the 1974 Plan's right to advance the 1974 Plan Claim as a matter of law. It was not discretionary and did not involve a balancing of interests. Further, there is no ongoing, dynamic restructuring of the Walter Canada Group to protect. The Walter Canada Group's business has been sold and the only issue remaining with respect to the 1974 Plan Claim is the distribution of the Walter Canada Group's sale proceeds.

20. Factors which sometimes militate against granting leave from CCAA orders thus do not apply in this case. [29] The resolution of the discrete point of law raised by this appeal – the choice of law between Canadian and American substantive law – did not involve a balancing of competing interests by the supervising judge or intimate knowledge of the reorganization process. Indeed, the result of the chambers judge's legal analysis was that the sole determinative fact was the place of incorporation or organization of certain entities – that fact was not in dispute and not affected by the procedural setting in which the legal issue arose (i.e. in CCAA proceedings).

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[27] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323 at para. 7.
[28] *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 17 [***Edgewater***].
[29] *Ibid* at para. 25.

(1) The Point on Appeal Is of Significance to the Practice

21. All counsel at the Application agreed that no court has considered whether ERISA applies in Canada in this context.[30] Given this absence of authority, and the substantial amounts of the claims, academics and industry professionals have recognized that claims like the 1974 Plan Claim place hurdles to restructuring negotiations.[31] The question of ERISA's enforceability in Canada is thus significant to the practice. The same was recognized by the Steelworkers who, as addressed above, wrote in their submissions that the proceedings addressed "an important case for the parties and for the legal system which raises [a] significant legal issue of first instance".[32]

(2) The Point on Appeal Is of Significance to the Parties

22. The 1974 Plan Claim is the largest third-party claim against the Walter Canada Group. If valid, most of the proceeds of sale of the business of the Walter Canada Group will be paid to the 1974 Plan. If invalid, it is anticipated that all unsecured claims against the Walter Canada Group filed by unrelated parties will be paid in full.[33] In addition, the successor to Walter Energy will be paid approximately $40 million pursuant to a hybrid debt transaction under which it transferred approximately $2 billion to Canada Holdings. Those funds were transferred from Walter Energy to purchase the companies which became the Walter Canada Group.[34]

23. The 1974 Plan Claim is the only opportunity that the 1974 Plan has to recover funds in respect of the nearly US$1 billion in withdrawal liability owed by the Walter Energy Group.[35] The inability of the Walter Group to satisfy its withdrawal liability obligation has resulted in a substantial loss of funding to the 1974 Plan.[36] Because of the impact of the 2008/2009 financial crisis and the severe downturn in the coal industry, the 1974 Plan is expected to become insolvent in six to seven years.[37] Recovering on its claim in these proceedings will ameliorate those difficulties.

24. Accordingly, the point in issue is significant to the 1974 Plan and to the Steelworkers as it will determine the extent of recovery for their members under their respective

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[30] Reasons for Judgment at para. 4; see also Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013) at 705-09.
[31] Janis P. Sarra, "Maneuvering through the Insolvency Maze -- Shifting Stakeholder Identities and Implications for CCAA Restructurings" (2011) 27 B.F.L.R. 155 at 175-76.
[32] Written Submissions of the Steelworkers at para. 1.
[33] Reasons for Judgment at para. 84.
[34] Reasons for Judgment at para. 84.
[35] Reasons for Judgment at para. 85.
[36] Stover Affidavit at paras. 95-96.
[37] Reasons for Judgment at para. 61; see also Stover Affidavit at paras. 50 and 72.

claims against the Walter Canada Group. The recovery for all other creditors is also directly affected.

(3) The Appeal Is *Prima Facie* Meritorious

25. Where leave to appeal is sought the proposed appeal must have sufficient merit to warrant scrutiny by a division of this Court. The question is not whether the appeal will succeed but whether the points raised are arguable or "not frivolous".[38]

26. Leave to appeal will also be more readily granted in CCAA proceedings where, as here, the dispute could have arisen outside of the CCAA context and the applicant would have had an appeal as of right.[39]

(a) The Chambers Judge Erred in Her Choice of Law Analysis

27. Where a court is asked to apply foreign law it must identify the most appropriate law to govern the issue. To do so the court follows a three-part process: (1) characterize the question or issue, (2) identify the appropriate choice of law rule based on that characterization, and (3) apply the connecting factor indicated by the appropriate choice of law rule.[40]

(i) The Chambers Judge Erred in Characterizing the 1974 Plan Claim as Concerning the Status and Legal Personality of the Entities within the Walter Canada Group

28. As noted above, a key dispute between the parties on the Application was the proper characterization of the 1974 Plan Claim. The 1974 Plan argued that the correct characterization of the claim for conflict of law purposes is as a claim in contract. The respondents, on the other hand, argued that the proper characterization of the claim is as a claim implicating the status and legal personalities of the entities within the Walter Canada Group.

29. The chambers judge adopted the characterization advanced by the respondents. The 1974 Plan submits that the chambers judge erred in this characterization.

30. The 1974 Plan Claim against the Walter Canada Group arises because Walter Resources was a contributing employer to the 1974 Plan under the terms of a CBA. The claim exists because Walter Resources is a signatory to that contract. What ERISA grants the 1974 Plan is essentially a right to enforce against the Walter Canada Group the contractual

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[38] *Edgewater* at para. 30.

[39] *Edgewater* at para. 30.

[40] Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* , 2nd ed. (Toronto: Irwin Law, 2016) at 221 [***"Pitel & Rafferty"***]; *Castel & Walker* at 3-1.

obligations to the 1974 Plan of Walter Resources. Accordingly, the true issue in this case is one of obligation under the contract. The 1974 Plan Claim therefore appropriately is characterized as a claim in contract for choice of law purposes.

31. As noted by the chambers judge, "there is no case authority from Canada that addresses ERISA, nor any case authority involving the type of characterization exercise involved here".[41] That said, the characterization of the 1974 Plan Claim as a claim in contract is supported by a number of recent authorities in the United Kingdom.[42] These cases all involved claims against a defendant for a liability arising under a combination of a contract and a statute from a jurisdiction other than the forum. In each case, the court concluded that the essential nature of the claim authorized by statute was to enforce the terms of a contract and characterized the claim as arising under contract for choice of law purposes. This was so notwithstanding the absence of privity of contract.

32. In contrast, neither the Walter Canada Group nor the Steelworkers was able to provide the chambers judge with a single choice of law case that supported their characterization of the 1974 Plan Claim as one implicating the legal personality of the Walter Canada Group.

33. The principal case cited by the respondents in support of their argument on characterization – and ultimately relied upon by the chambers judge – is *JTI-Macdonald Corp. v. British Columbia (Attorney General)*.[43] Although acknowledging that the result of this case is "limited" since it arose in the context of a constitutional challenge, the chambers judge went on to describe the case as "provid[ing] substantial support" for the respondents' position that the claim is properly characterized as concerning the status and legal personality of corporations".[44] Relying on the case at all fails to address that *JTI* involved a constitutional challenge to the extraterritorial effect of provincial legislation on federal or foreign corporations and did not involve a choice of law analysis.

34. The chambers judge also appears to have misapprehended other authorities before her. The chambers judge cited *Castel & Walker* at 30-1 to conclude that the law of corporations includes questions of the liability of a corporation for the obligations of a foreign

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[41] Reasons for Judgment at para. 140.

[42] See *Through Transport Mutual Assurance Association (Eurasia) Ltd. v. New India Assurance Association Co. Limited*, [2004] EWCA Civ 1598; *The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain*, [2013] EWHC 3188; *Youell v. Kara Mara Shipping Company Ltd.*, [2000] EWHC 220.

[43] 2000 BCSC 312 [***JTI***].

[44] Reasons for Judgment at paras. 143 and 145.

related entity.[45] The passage she cites provides that: "...the law applicable to the status and capacity of the [company] should determine whether its corporate veil can be pierced". The chambers judge did not quote, and apparently failed to consider, the remainder of the paragraph, which continues:

> For other matters, the law governing the contract or tort that gives rise to the litigation against the foreign subsidiary would determine whether its corporate veil should be pierced since, arguably, piercing the corporate veil should be characterized as a function of the dispute and not of the status of the corporation".[46]
>
> [Emphasis added.]

35. The chambers judge's conclusion that the 1974 Plan Claim should be characterized as concerning the status and legal personality of the entities in the Walter Canada Group was not grounded in authority. It appears rather to have been grounded in her consideration of the "effect" of ERISA.[47]

36. To characterize the issue or cause of action in a choice of law analysis, the court must consider the purpose of the substantive law to be characterized. [48] On this basis, the court can determine the foreign law's equivalent in the forum. The conflict rule for the characterization selected then determines the law to be applied. Considering the purpose of the substantive law to be characterized ensures that the characterization accepted and the legal questions it raises are addressed by the conflict rule.[49]

37. On the Application, the 1974 Plan argued that the purpose of ERISA is to ensure that employees who are promised retirement benefits actually receive those benefits. The chambers judge agreed that the purpose of ERISA is to ensure the goal of retirees' receiving contracted-for benefits.[50] However, the chambers judge continued to focus on the "effect" of ERISA, i.e. to "collapse the corporate structure" for this purpose.[51]

38. The chambers judge's focus on the mechanics and effects of ERISA contradicts a core principle of the characterization analysis. As provided by *Pitel & Rafferty*:

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[45] Reasons for Judgment at para. 151.
[46] *Castel & Walker* at 30-1-30-2.
[47] Reasons for Judgment at paras. 129-138.
[48] A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London: Sweet & Maxwell, 2012) at 51, para. 2-039 [***Dicey***].
[49] *Dicey* at 51, para. 2-039
[50] Reasons for Judgment at para. 129.
[51] Reasons for Judgment at para. 130.

> One of the hallmarks of the traditional process is that it chooses the applicable law without focusing on the content of that law or on the result it will reach when applied.[52]

The "controlled group" provisions are merely a means of protecting multi-employer pension plans and helping to ensure that contributing employers pay for the promised benefits.[53] This effect is not properly the focus of a characterization analysis.

39. The 1974 Plan submits that the chambers judge erred in failing to identify that withdrawal liability under ERISA arises by right of the employer's agreement to accept the contribution obligations. As the liability is ground in this agreement, the 1974 Plan Claim ought to be characterized as based on the law of obligations. For choice of law purposes -- as the authorities relied on by the 1974 Plan demonstrate -- it is no obstacle to characterizing the claim as contractual in nature that the parties to the dispute are not in privity of contract.

(ii) The Chambers Judge Erred in Identifying the Appropriate Choice of Law Rule

40. In the course of determining the applicable choice of law rule, the chambers judge determined that the "controlled group" provisions of ERISA disregard the "limited liability" of the Walter Canada Group entities.[54]

41. These comments fail to acknowledge that several entities in the Walter Canada Group do not enjoy limited liability, being unlimited liability corporations or partnerships. Indeed, shareholders of unlimited liability corporations may be liable to satisfy the debts and obligations of the company on its liquidation or dissolution.[55] Likewise, limited partners may be liable for the partnership's debts and obligations to the extent they contributed to it.[56]

42. The chambers judge thus failed to reconcile how the foundation of her analysis – the principles outlined in *Salomon v. Salomon & Co* – bears in any way on the characterization of a claim against entities that in law do not enjoy that limited liability.[57]

(iii) The Chambers Judge Misapplied the Connecting Factor Indicated by her Erroneous Characterization

43. At the third stage of the choice of law analysis the court is to apply the connecting factor indicated by the appropriate choice of law rule.

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[52] *Pitel & Rafferty* at 210.

[53] *Connolly v. P.B.G.C.*, 475 U.S. 211, 214 (1986); *P.B.G.C. v. Ouimet Corp.*, 711 F.2d 1085, 6 (1st Cir.1983), cited at Reasons for Judgment at para. 139.

[54] Reasons for Judgment at para. 143.

[55] *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 51.11 and 51.3(1).

[56] *Partnership Act*, R.S.B.C. 1996, c. 348, s. 57.

[57] [1897] A.C. 22 (H.L.), cited at Reasons for Judgment at para. 131.

44. As addressed above, the chambers judge characterized the issue as one of the status and separate legal personalities of corporations. She then found that the choice of law rule was that questions concerning the status of a corporation are governed by the law of the place of incorporation. The connecting factor was thus the corporation's domicile. However, if this analysis is accepted, the chambers judge nonetheless erred in applying the connecting factor from the perspective of the Canadian entities. If the issue in the characterization analysis is the status and separate legal personalities of corporations, the corporation whose veil was pierced was more accurately Walter Resources. If the issue is to be governed by the law of the place of incorporation, it should have been governed by U.S. law.

45. At this stage the chambers judge also based her decision, in part, on an argument raised by the Walter Canada Group that the 1974 Plan failed to include in its claim any allegations against the partnerships. Those partnerships were included in the Initial Order but not named as petitioners in the CCAA Proceedings.[58] Claims against the partnerships, by the Walter Canada Group's argument, were barred since the claims bar date had passed.

46. However, the Walter Canada Group abandoned this line of argument in its submissions and the chambers judge was advised not to rely on it at the Application.[59] While she did not rely on it "solely", relying on this argument at all is an error of process.

(b) The Chambers Judge Erred by Awarding Costs When Such Costs were Not Pleaded or Sought

47. The chambers judge awarded costs to the Walter Canada Group and the Steelworkers. However, neither the pleadings nor the written or oral submissions of the Walter Canada Group or the Steelworkers sought costs. The 1974 Plan submits this aspect of the Order was an error of law.

48. A court should not make an order on a matter that was not before it; the parties ought to have reasonable notice of the relief sought against them.[60] Furthering this prejudice, there is a practice in commercial insolvency applications that each party bears its own costs.[61] Accordingly, the 1974 Plan argues that it was not provided notice of this relief and was deprived of the opportunity to argue against the awarding of costs.

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[58] Reasons for Judgment at paras. 158-59.
[59] Submissions of the United Mine Workers of America 1974 Plan and Trust (the 1974 Plan"), dated December 30, 2016, at FN117.
[60] *Naderi v. Naderi*, 2012 BCCA 16 at paras. 20-22.
[61] *Indalex Ltd. (Re)*, 2011 ONCA 578 at para. 4, rev'd on other grounds 2013 SCC 6; *Calpine Canada Energy Ltd. (Re)*, 2008 ABQB 537 at para. 1; *Semcanada Crude Co (Re)*, 2013 ABQB 102 at para. 5.

(4) The Appeal Will Not Unduly Hinder the Progress of the Action

49. The appeal will not unduly hinder the progress of the CCAA Proceedings. Subject to the outcome of this application, October 19 has been set tentatively as the hearing date for the appeal (if leave is granted).

50. The CCAA Proceedings will be required to continue for reasons unrelated to an appeal concerning 1974 Plan Claim. An application is extant to extend the stay of proceedings to September 29, 2017.[62] The claims process is outstanding, with disputed claims (excluding the 1974 Plan Claim) of approximately $30.5 million yet to be determined.[63] No distribution order has been sought and there is no imminent distribution planned. Further, the Walter Canada Group's 50 percent interest in a mining joint venture has yet to be realized upon and the process to sell the U.K. entities is ongoing.[64]

51. As it concerns the 1974 Plan Claim, the only remaining step in the CCAA Proceedings is to distribute sale proceeds. Regardless of the result of these proceedings the Walter Canada Group will be in the same position – having distributed the proceeds from sale of its assets to its creditors.

52. To the extent that time constraints are present in this case, the 1974 Plan seeks an order that the appeal be heard on an expedited basis according to the appended Schedule "A". Prejudice in delaying a distribution will be ameliorated by this order. That prejudice is further ameliorated by the recent distribution of approximately $780,000 to the Steelworkers.[65] Any prejudice to the Steelworkers and other creditors thus does not justify denying leave to appeal. The pensioners of the 1974 Plan ought not have a claim of over US$900 million (which if allowed would amount to a recovery of approximately Can$63 million) denied without appellate review when that decision, by its own acknowledgement, is the first in Canada on the issue and for which there is no case authority for the conflict of laws issues raised.[66]

B. The Test for a Stay of Proceedings or Execution from the Order

53. To grant a stay the Court must analyse the application in three stages: (1) whether there is a serious question to be tried; (2) whether the appellant would suffer

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[62] 10th Affidavit of William E. Aziz, sworn May 18, 2017, at para. 28 ["**Tenth Aziz Affidavit**"].

[63] Eighth Monitor's Report at para. 35; Tenth Aziz Affidavit at para. 19.

[64] Tenth Aziz Affidavit at paras. 20 and 26.

[65] Ninth Report of the Monitor, KPMG Inc., dated March 10, 2017.

[66] Reasons for Judgment at para. 140.

irreparable harm if the application for a stay were dismissed; (3) which of the two parties would suffer the greater harm depending on whether it grants or refuses the stay pending a decision on the merits. [67]

(1) There is a Serious Question to be Tried

54. Whether there is a serious question to be tried is not an onerous test.[68] The motions judge need only be satisfied that the application is neither vexatious nor frivolous.

55. As addressed above, the issues raised in this appeal are matters of first instance to which the 1974 Plan's grounds of appeal are *prima facie* meritorious. It follows that there is a serious question to be tried.

(2) The 1974 Plan Would Suffer Irreparable Harm if the Application is Dismissed

56. The second branch of the test examines the potential harm to the party seeking the stay should the stay be refused. Irreparable harm can be found where "one party cannot collect damages from the other".[69]

57. The Walter Canada Group has entered bankruptcy proceedings and is no longer continuing as a going concern. The amount that may be recovered from it is limited to those funds generated by the sales process. If those funds are distributed pending the appeal, the 1974 Plan will be unable to recover any amount with respect to its claim. Accordingly, the 1974 Plan would suffer irreparable harm if the application for a stay were dismissed.

(3) The Balance of Interest Favours the 1974 Plan

58. This stage of the analysis involves a weighing of the interests of the parties and a balancing of the potential harm to each party.[70]

59. As addressed above, there is no prejudice to the Walter Canada Group in delaying the distribution of the sale proceeds. With respect to the other creditors, and to the extent that time constraints are present in this case, the 1974 Plan seeks an order that the appeal be heard on an expedited basis according to the appended Schedule "A". Again, if such an order is granted, prejudice in delaying the distribution will be ameliorated.

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[67] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) [***RJR-MacDonald***]
[68] *Peachland (District) v. Peachland Self Storage Ltd.*, 2013 BCCA 230 at para. 16 [***Peachland***].
[69] *RJR-MacDonald* at para. 59.
[70] *Peachland* at para. 18.

PART IV. ORDERS SOUGHT

60. The 1974 Plan seeks:

(d) an order granting leave to appeal from the Order;

(e) an order that the appeal be heard on an expedited basis;

(f) an order staying the execution of, or proceedings upon, the Order; and

(g) costs of this application in any event of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2017.

Craig P. Dennis, Q.C.
Solicitor for the Appellant

PART V. TABLE OF AUTHORITIES

CASE LAW

1 *Calpine Canada Energy Ltd. (Re)*, 2008 ABQB 537

2 *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323

3 *Edgewater Casino Inc. (Re)*, 2009 BCCA 40

4 *Indalex Ltd. (Re)*, 2011 ONCA 578

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

6 *Naderi v. Naderi*, 2012 BCCA 16

7 *Peachland (District) v. Peachland Self Storage Ltd.*, 2013 BCCA 230

8 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.)

9 *Semcanada Crude Co (Re)*, 2013 ABQB 102

10 *The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain*, [2013] EWHC 3188

11 *Through Transport Mutual Assurance Association (Eurasia) Ltd. v. New India Assurance Association Co. Limited*, [2004] EWCA Civ 1598

12 *Youell v. Kara Mara Shipping Company Ltd.*, [2000] EWHC 220.

SECONDARY SOURCES

13 A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws*, vol. 1, 15th ed. (London: Sweet & Maxwell, 2012) at 51, para. 2-039

14 *Halsbury's Laws of England, Conflict of Laws*, vol. 8(1), 4th ed. (Reissue) (London, UK: Butterworths, 1996)

15 Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* , 2nd ed. (Toronto: Irwin Law, 2016) at 221

16 Janis P. Sarra, "Maneuvering through the Insolvency Maze -- Shifting Stakeholder Identities and Implications for CCAA Restructurings" (2011) 27 B.F.L.R. 155

17 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013)

18 Janet Walker, *Castel & Walker: Canadian Conflict of Law*, 6 ed., (Toronto: LexisNexis, 2005) (loose-leaf Rel. 60-2/2017)

LEGISLATION

19 *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 51.11 and 51.3(1)

20 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13.

21 *Partnership Act*, R.S.B.C. 1996, c. 348, s. 57