

Characterization of Unfunded Pension Liability Claims

In *Re Walter Energy Canada Holdings, Inc.*, 2017 BCSC 709 (available [here](#)) the British Columbia Supreme Court had to consider the validity of a large claim (over \$1 billion) filed in restructuring proceedings underway in the province under federal legislation. The claim was for unfunded pension liabilities and was based on an American statute, the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. § 1001. So the court had to consider whether that statute could apply to a claim in British Columbia against entities organized in Canada (mostly in British Columbia).

Starting at para. 93 the court considered whether the claim against the entities being restructured was governed by Canadian or American law (in each case the relevant law was either federal rather than provincial or state or did not vary as between provinces). This is a choice of law question which raises the issue of the characterization of the claim. Canadian courts do not often analyze characterization in detail, but the court did so in this case, making the decision notable. The claimant argued that the claim was one in the law of obligations and sought to identify the proper law of the obligation. The entities being restructured in contrast argued the claim went to a point of corporate law, namely their separate existence from other entities in an international corporate group. The court referred to several of the main general authorities about the characterization process but considered the specific issue before it to be one of first instance. It sided with the entities being restructured – the claim went to the issue of separation of corporate personality and status. The American statute was imposing liability by “lifting the corporate veil” (paras. 137-38) between international corporate entities.

Having characterized the issue, the court then had to identify the connecting factor for the choice of law rule. It held:

[160] The issue as to whether the Walter Canada Group’s separate legal personalities can be ignored is subject to the Canadian choice of law rule that the status and legal personality of a corporation is governed by the law of the place in which it was incorporated, namely British Columbia and Alberta. Here,

as with the corporations within the Walter Canada Group, both with limited liability and unlimited liability, it is admitted that all of the partnerships were organized under British Columbia law. Accordingly, the choice of law analysis leads to the same result in relation to the partnerships, namely British Columbia law, including under the Partnership Act, R.S.B.C. 1996, c. 348.

[161] The place of incorporation or organization is a matter of public record and all persons who would do business with or otherwise deal with the Walter Canada Group entities would or should be well aware of that fact.

[162] I agree that, under Canadian choice of law rules, the place of incorporation or organization of the Walter Canada Group entities is the appropriate “connecting factor” in relation to the issue arising from the 1974 Plan’s claim. As a result, British Columbia and Alberta law determine whether the separate legal personalities of the Walter Canada Group entities can be ignored.

Given that the American statute is not part of British Columbia or Alberta law, the court concluded that the claim failed (paras. 177-78).

I want to reflect more on the decision, but at this point I am not certain I agree with the characterization analysis. It is true that the only way the American statute makes the Canadian entities liable is by imposing liability on others within a larger corporate group. But to me it does not follow that the statute is a matter of corporate status and not of obligation. The statute imposes an obligation and extends that obligation to various entities. I think there is room to debate that the primary element of the statute is the obligation it imposes.

However, support for the decision could lie in *Macmillan Inc v Bishopsgate Investment Trust (No 3)*, [1996] 1 WLR 387 (CA), which the court does mention (see for example para. 126), which stresses the possibility of characterizing a specific legal issue within the context of a broader claim. The analysis could be that there is a nested issue – that of corporate separation or status – within the broader question of liability for an unfunded pension.