This is the 1st affidavit
of Lori Viner in this case
and was made on March 9, 2017

NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

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

AND

IN THE MATTER OF THE 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

AFFIDAVIT

I, Lori Viner, Legal Administrative Assistant, of Suite 1500, 1055 West Georgia Street, Vancouver, British Columbia, SWEAR THAT:

1. I am a legal administrative assistant for Peter J. Reardon of McMillan LLP, counsel for the Monitor, KPMG Inc., and, as such, have personal knowledge of the facts and matters hereinafter deposed to except where they are stated to be based on information and belief, in which case I believe them to be true.

2. Attached hereto are the following exhibits:

Exhibit "A"	Decision of British Columbia Labour Relations Board in Wolverine Coal Partnership and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local No. 1-424, dated July 30, 2015
Exhibit "B"	Petition to the Court in BCSC Action No. S-151240, entered February 13, 2015

Exhibit "C"	Petition to the Court in BCSC Action No. S-159678, entered November 20, 2015
Exhibit "D"	Letter from Mary Paterson of Osler, Hoskin & Harcourt LLP to Craig Bavis, dated March 2, 2017
Exhibit "E"	Notice of Discontinuance in BCSC Action No. 151240, filed March 7, 2017
Exhibit "F"	Notice of Discontinuance in BCSC Action No. 159678, filed March 7, 2017

SWORN (OR AFFIRMED) BEFORE ME at Vancouver, British Columbia, on March 9, 2017.

A commissioner for taking affidavits for British Columbia

LORI VINER

Peter J. Reardon
Barrister and Solicitor
McMillan LLP
1500 – 1055 West Georgia Street
PO Box 11117
Vancouver, BC V6E 4N7
t 604.689.9111
f 604.685.7084

BRITISH COLUMBIA LABOUR RELATIONS BOARD

This is Exhibit" A "referred to in the affidavit of LORI WINTER sworn before me at Vancouver this 9th day of MARCH 2017

A Commissioner for taking affidavits Within British Columbia

WOLVERINE COAL PARTNERSHIP

(the "Employer")

-and-

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL NO. 1-424

(the "Union")

PANEL:	Jacquie de Aguayo, Vice-Chair
APPEARANCES:	Drew Demerse, for the Employer Stephanie Drake, for the Union
CASE NO.:	67987
DATE OF DECISION:	July 22, 2015
DATE OF REASONS:	July 30, 2015

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REASONS FOR THE BOARD'S DECISION

I. NATURE OF APPLICATION

1 On July 15, 2015, the Union applied to the Board for further remedial relief (the "Relief Request") in accordance with my retained jurisdiction in *Wolverine Coal Partnership*, BCLRB No. B106/2015 (the "Merits Decision").

2 In the Merits Decision, dated June 9, 2015, I found the Employer breached Section 54(1) of the *Labour Relations Code* (the "Code") when it failed to give 60 days' notice to, and consult with, the Union in the context of an indefinite layoff. One of the remedies for that contravention of the Code was for the Employer to pay 60 days' pay in lieu of notice to affected employees, subject to mitigation (the "Damages Remedy").

3 The Union's Relief Request is for the Employer to pay into trust an amount equal to the estimated amount of the Damages Remedy because Walter Energy Inc. (the "Company") recently filed for bankruptcy protection in respect of its US operations only. The Employer is a wholly owned subsidiary of the Company, but is part of its Canadian operations.

4 After having sought and considered the submissions of the parties, I issued a bottom line decision on July 22, 2015 (the "Interim Trust Payment") stating, in part:

> The Employer shall forthwith pay to the Union, in trust, $771,378.70, pending final disposition of this matter.
>
> I remain seized with respect to remedy.

II. BACKGROUND

PROCEDURAL HISTORY

5 The Merits Decision was remitted to me further to a decision of a Reconsideration Panel under Section 141 of the Code: *Western Coal Corp. (Wolverine Mine)*, BCLRB No. B216/2014 (Leave for Reconsideration of BCLRB No. B137/2014) 252 C.L.R.B.R. (2d) 83 allowed on December 11, 2014. The Original Panel in *Western Coal Corp. (Wolverine Mine)*, BCLRB No. B137/2014, 246 C.L.R.B.R. (2d) 282 ("B137/2014") also found the Employer breached Section 54(1) of the Code and ordered the Employer to pay damages equivalent to 60 days' pay in lieu of notice, subject to mitigation (the "Original Damages Remedy"). In *Western Coal Corp. (Wolverine Mine)*, BCLRB No. B186/2014, 251 C.L.R.B.R. (2d) 106 (the "Stay Application"), the Board granted a partial stay of the Original Panel's decision pending that reconsideration application. The Employer applied for reconsideration of the Merits

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Decision pursuant to Section 141 of the Code. It did not seek a stay pending that application. No decision has yet been rendered on reconsideration.

6 The Company is based in the US. The nature of the Employer's coal mining operation at the Wolverine Mine in Tumbler Ridge, BC, as well as the circumstances of the indefinite layoff of all the employees in the Union's bargaining unit (the "Layoff"), are set out in the Merits Decision. At the time of writing, over 300 employees remain on layoff and many have left the Tumbler Ridge area.

THE AMOUNT OWING PURSUANT TO THE DAMAGES REMEDY

7 As a result of the Merits Decision, the Union has been collecting information for the purposes of calculating the final amount owing under the Damages Remedy, including mitigation income earned by affected employees during the notice period. Both the Union and Employer had commenced that work in 2014 in accordance with the Board's decision on the Stay Application and pending reconsideration of B137/2014. For example, in its response to the Relief Request, the Employer attached a letter from December 9, 2014 that refers to earlier correspondence and provides its revised list of employees affected by the Layoff.

8 Both parties have said the process of calculating the Damages Remedy is time consuming. It includes locating affected employees, identifying the wages that would have been earned in the notice period, obtaining information of any mitigation income, and calculating and remitting appropriate statutory withholding amounts. For example, the Union included in its Relief Request a copy of the statutory declaration of Hugh Kingwell, Director of Human Resources for the Company's Canadian operations (the "Kingwell Declaration"). The Kingwell Declaration was filed by the Employer in support of its Stay Application. At paragraph six of the Kingwell Declaration, he sets out the administrative steps required to identify the amount of damages payable to affected employees. With respect to the Original Damages Remedy, he stated that "[c]omplying with the Board's order would mean payments to members of the bargaining [sic] of up to approximately four million dollars".

9 In its Remedial Request, the Union also included the statutory declaration of Frank Everitt, President of the Union. In it he attaches copies of the Union's working list of affected employees, including particulars of mitigation income from approximately half of the affected employees. He also identifies an estimate of the total amount of the Damages Remedy, including noting any assumptions made in its calculation where the Union lacked concrete information. This includes taking average earnings based on standard work schedules and assigning individuals an average amount of mitigation income based on the actual mitigation figures it has obtained.

10 The parties are in dispute with respect to the total amount of the Damages Remedy. In their submissions, the parties addressed a range of adjustments, corrections, and clarifications to the information provided by the Union. Both the Union

and Employer have identified areas where additional information is required, challenges to certain operating assumptions supporting each party's estimates, as well as other potential areas of ongoing dispute. The Employer has not yet made payments pursuant to the Damages Remedy.

11 After having made adjustments to its initial estimate based on information provided by the Employer in its response, the Union set out a revised estimate of the total of the Damages Remedy at approximately $1.96 million, subject to a possible gross-up for premiums and other benefits.

12 In the Kingwell Declaration, the Employer initially estimated the total amount owing under the Original Damages Remedy to be in the range of $4 million. In response to the Union's Relief Request, the Employer estimates the total damages owing to be $771,378.70.

13 The Employer's estimate excludes affected employees falling into three categories. First, those employees who were inactive during the notice period, such as those on short or long-term disability, workers' compensation benefits, maternity leave or sick leave. Second, those who worked for the Employer during the mitigation period. Third, those who refused recall or were otherwise unavailable to work during the mitigation period.

14 From the list of affected employees remaining, the Employer's estimate is based on the total wages owing minus the amount of actual mitigation income identified by the Union and minus $1.3 million being the total amount of damages owing for the 112 employees who have not yet responded to the Union's request for mitigation information. The Union disputes a number of the Employer's exclusions from the employee list as well as certain of its operating assumptions.

THE COMPANY FILED FOR BANKRUPTCY PROTECTION IN THE US

15 The Union's Relief Request was in response to the Company's decision to file for bankruptcy protection in the US. In an announcement dated July 15, 2015 (the "Announcement"), the Company's statement included the following:

> ...[I]t has entered into an agreement with certain of its senior lenders on the material terms of a restructuring. To implement this pre-negotiated restructuring, Walter Energy and its U.S. subsidiaries have filed for relief under chapter 11 of the U.S. Bankruptcy Code in the Bankruptcy Court for the Northern District of Alabama. Walter Energy's non-U.S. operations, including those in Canada and the U.K., are not included in the filings.

16 The Announcement describes the framework for a restructuring plan for its operations and states: "In the face of ongoing depressed conditions in the market for

[metallurgical] coal, we must do what is necessary to adapt to the new reality in our industry". 05

17 The stated reason for the Layoff was that the Company, not the Employer, decided that the global price for metallurgical coal had fallen to the point that it no longer made financial sense to continue the mining operation at the Wolverine Mine (Merits Decision, para. 29).

18 The Announcement concludes with a cautionary "Safe Harbor Statement". It identifies the Announcement as "forward-looking statements" as defined in the applicable legislation, and includes the following:

> [...] All forward-looking statements made by Walter Energy are predictions and not guarantees of future performance and are subject to various risks, uncertainties and factors relating to Walter Energy's operations and business environment, and the progress of its chapter 11 bankruptcy proceedings, all of which are difficult to predict and many of which are beyond Walter Energy's control, which could cause Walter Energy's actual results to differ materially from those matters expressed in or implied by these forward-looking statements. [...] In light of these risks and uncertainties, readers should keep in mind that any forward-looking statements made in this release may not occur and should not place undue reliance on any forward-looking statements.
>
> Walter Energy cautions that the trading in its securities during the pendency of chapter 11 proceedings is highly speculative and poses substantial risks. A joint plan of reorganization could result in Walter Energy's outstanding common stock being diluted or extinguished, and the holders of Walter Energy's common stock may not receive any distribution or other favorable treatment within the chapter 11 proceedings or pursuant to any confirmed plan of reorganization based on any securities held. Accordingly, Walter Energy's future performance and financial results may differ materially and/or adversely from those expressed or implied in any forward-looking statements made by Walter Energy in this release.

19 There is no dispute the Employer's operation is not included in the July 2015 bankruptcy filing, nor has a similar application been filed in Canada with respect to the Employer. The Employer points out its Canadian operations have separate bank accounts and are continuing to pay employees and vendors in the normal course of business.

20 Based on the information before me, I find the calculation of the final amount owing under the Damages Remedy is a work in progress. Given my decision to order an Interim Trust Payment, and for the reasons set out more fully below, I find the resolution

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of the parties' dispute over methodology, as well as any final agreement or adjudication setting the final amount owing are not material to my decision.

II. ANALYSIS AND DECISION

21 I do not intend to summarize the parties' positions. Rather, where I find they are relevant to the material issue(s) to be decided, I have addressed them in my reasons.

22 Based on the Announcement, the Union says it "is extremely concerned that the Employer may imminently file for protection in Canada under the *Companies' Creditors Arrangement Act* (*CCAA*)". The Union filed its Relief Request pursuant to the Board's retained jurisdiction in the Merits Decision, including with respect to the Damages Remedy. It seeks an order on an urgent basis that its estimate of the total damages owing pursuant to the Damages Remedy be placed in trust "to ensure that, if the Employer files for CCAA protection in Canada, the decision is able to be implemented at all".

23 The Employer questions the basis for the Union's application, indicating the Union failed to set out those sections of the Code it relies on for the relief it seeks. The Employer says this is in contravention of Labour Relations Board Rules. It says the Union's failure to do so is prejudicial to its ability to respond.

24 In the Merits Decision, I expressly retained jurisdiction over the implementation of the Damages Remedy. I find the Union's application is properly brought pursuant to that retained jurisdiction.

25 I have taken into account the following factors in concluding that the Announcement warrants the exercise of my discretion to require the Employer to make the Interim Trust Payment.

26 In compliance with the Merits Decision, the Employer is lawfully required to make payments to affected employees pursuant to the Damages Remedy. The information before me shows that arriving at a final figure for payments will take time. There may be disputes with respect to a range of issues. As such, identifying a final total for payment under the Damages Remedy is not imminent.

27 There is no dispute the Announcement does not establish that the Employer, or the Company, have filed for bankruptcy protection in Canada with respect to the Wolverine Mine. However, the Merits Decision sets out that the Company exercises a degree of decision-making authority over significant operational decisions of the Employer. It was the Senior Executives of the Company that decided to idle the Wolverine Mine, resulting in the Layoff. The Employer is a wholly owned subsidiary of the Company. The stated reason for the Layoff arose out of the drop in the global price for metallurgical coal. This is the same economic reality identified in the Announcement for the filing for bankruptcy protection and the restructuring proposal in the US.

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28 In the event a similar decision is made by the Employer and/or the Company for its Canadian operations, payments to affected employees lawfully owing pursuant to the Damages Remedy may be prejudiced by a filing for protection under the *CCAA*.

29 The Union says its Relief Request is urgent in light of the Announcement. The Employer says there is no urgency because the filing in the US does not affect its Canadian operations and, therefore, nothing has changed. I find it is not necessary to determine whether any such filing is imminent or that the Union has established urgency to support its Remedial Request. Given the potential prejudice to those employees affected by the Layoff, and the Employer's existing duty to make payments pursuant to the Damages Remedy, and taking into account the other factors summarized here, I find the balance of convenience warrants an exercise of my discretion in favour of securing some funds in trust.

30 In considering the amount to be placed in trust, the Union asks for an amount equal to its estimate of the total amount owing under the Damages Remedy. I have taken into account the Employer's position that the Board ought not to make any order for an interim payment as the issue of quantum remains in issue: *Celtic Pacific Contractors Ltd.*, BCLRB No. B22/98; *Community Social Services Employers' Association (Kamloops Community Support Society)*, BCLRB No. B468/2001; *Johnston International Services Inc.*, BCLRB No. B338/97.

31 In the circumstances of the present case, I find the Employer's concerns with respect to the dispute over the amounts owing under the Damages Remedy, its inability to review and verify the information provided by the Union, as well as the expedited nature of the submission process, are relevant to determining the amount ordered into trust.

32 As is set out, above, the calculation of the Damages Remedy is a work in progress. I accept the Employer has not had a full opportunity to review the Union's information in support of its request for placement into trust of its estimate of the full amount owing. The parties themselves have not had a full opportunity to exchange information and work cooperatively toward resolving any areas of dispute, some of which were identified in their submissions before me. On this basis, and having regard to my conclusions with respect to potential prejudice to affected employees, above, I ordered an Interim Trust Payment that reflects the Employer's estimated calculations.

33 Finally, the Employer says the Union delayed and withheld the information it disclosed in support of its Remedial Request. I find the evidence before me does not support a finding or an inference of fault on the part of the Union. Based on the amount of information obtained by the Union to date, taking into account the procedural history of the Merits Decision (including that it was issued on June 9, 2015), and noting the Union acted quickly upon learning of the Announcement and disclosed the information it had, I find the Union has not unreasonably delayed or withheld information from the Employer.

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III. CONCLUSION

34 For all these reasons, I grant the Union's Remedial Request, in part.

35 I find that the circumstances warrant the exercise of my discretion under my retained jurisdiction in the Merits Decision. As is set out in my decision of July 22, 2015, and for the reasons set out here, I direct that the Employer make an Interim Trust Payment as follows:

> The Employer shall forthwith pay to the Union, in trust, $771,378.70, pending final disposition of this matter.
>
> I remain seized with respect to remedy.

LABOUR RELATIONS BOARD

"JACQUIE DE AGUAYO"

JACQUIE DE AGUAYO
VICE-CHAIR

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

FEB 13 2015

This is Exhibit" B "referred to in the
affidavit of LORI WINTER
sworn before me at VANCOUVER
this 9th day of MARCH 2017

A Commissioner for taking affidavits
Within British Columbia

S-151240 09

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the *Judicial Review Procedure Act*, RSBC 1996, c. 241,
the *Administrative Tribunals Act*, SBC 2004, c. 45
and the *Labour Relations Code*, RSBC 1996, c. 244

BETWEEN:

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS' INTERNATIONAL UNION, LOCAL 1-424

Petitioner

AND:

WOLVERINE COAL PARTNERSHIP

Respondent

AND:

BRITISH COLUMBIA LABOUR RELATIONS BOARD

Respondent

PETITION TO THE COURT

ON NOTICE TO:

Wolverine Coal Partnership
PO Box 2140
Tumbler Ridge, BC V0C 2W0

Roper Greyell LLP
800 Park Place, 666 Burrard Street
Vancouver, BC V6C 3P3
Attention: Drew Demerse

Notice as required by ss. 15 and 16 of the *Judicial Review Procedure Act*, RSBC 1996, c. 241:

British Columbia Labour Relations Board
#600 - 1066 West Hastings
Vancouver, BC V6E 3X1
Attention: Ken Saunders

Attorney General of the Province of British Columbia
Ministry of Justice
Parliament Buildings, Room 234
PO BOX 9044 Stn Prov Govt
Victoria, BC V8W 9E2

This proceeding has been started by the petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must:

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below; and
(b) serve on the petitioner:
    (i) 2 copies of the filed response to petition, and
    (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner:

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,
(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
(c) if you were served with the petition anywhere else, within 49 days after that service, or
(d) if the time for response has been set by order of the court, within that time.

1.	The address of the registry is: 800 Smithe Street Vancouver, BC V6C 2E1
2.	The ADDRESS FOR SERVICE of the petitioner is: Victory Square Law Office 500 - 128 West Pender Street Vancouver, BC V6B 1R8 Fax number address for service of the petitioner: 604-684-8427 E-mail address for service of the petitioner: jrogers@vslo.ca
3.	The name and office address of the petitioner's lawyer is: John Rogers, QC Victory Square Law Office 500-128 West Pender Street Vancouver, BC V6B 1R8

CLAIM OF THE PETITIONER

Part 1: ORDER(S) SOUGHT

1. An Order that the decision of the Labour Relations Board in BCLRB No. B225/2014, dated December 18, 2014, be quashed.

2. An Order that the decision of the Labour Relations Board in BCLRB No. B204/2014, dated November 24, 2014, be quashed.

3. An Order remitting the matter back to the Labour Relations Board with directions from the Court for reconsideration on the merits.

4. In the Alternative, an Order that the decision of Arbitrator Julie Nichols dated August 18, 2014, be quashed, and that the matter be remitted to a new arbitrator with directions from the Court.

5. An Order for costs.

6. Such further Orders as the Court deems appropriate.

GROUNDS

The grounds upon which the application by the petitioner for the orders sought are:

7. That the decision of the Labour Relations Board in BCLRB No. B204/2014, dated November 24, 2014 (the "Original Panel Decision") is patently unreasonable because:

(i) it fails to establish and apply an intelligible standard of review of the arbitration award;

(ii) it does not undertake any legal analysis or give serious consideration to the Arbitrator's erroneous application of the balance of probabilities test and her application of burden of proof to an issue of contract interpretation;

(iii) it erroneously holds that an arbitrator is permitted to select and rely upon jurisprudence which is legally incompatible with collective agreement interpretation and, therefore, the decision is based entirely or predominantly on irrelevant factors.

8. That the decision of the Labour Relations Board in BCLRB No. B225/2014, dated December 18, 2014 (the " Reconsideration Decision") is inconsistent with principles of procedural fairness and natural justice for the reason that insufficient reasons for the decision were provided; and

9. That the Reconsideration Decision is patently unreasonable as it allows for the application of an arbitral approach which cannot be supported in law.

Part 2: FACTUAL BASIS

10. The Petitioner, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers' International Union Local 1-424 (the "Union") is a recognized trade union under the *Labour Relations Code*, RSBC 1996, c. 244 (the "*Code*").

11. The Respondent, Wolverine Coal Partnership (the "Employer"), operates the Wolverine Mine, a coal mine near Tumbler Ridge, British Columbia.

12. The Union was certified to represent employees at the Wolverine Mine in March 2011.

13. One of the objectives of the Union in collective bargaining was to obtain a northern living allowance for bargaining unit members for the new collective agreement.

14. The parties concluded collective bargaining and signed a memorandum of agreement for a renewal collective agreement for the term August 1, 2011 to July 31, 2015, (the "Collective Agreement") on February 24, 2012.

15. The parties agreed to a monthly payment intended to subsidize the higher costs of living in the north, which became Article 10 of Schedule A of the Collective Agreement (the "Northern Allowance").

16. During collective bargaining on monetary issues in February 2012, the parties mutually agreed that the Northern Allowance would be paid to all bargaining unit employees, whether or not they were actively working for the Employer.

17. In April 2014, the Employer advised that it was idling the mine through a temporary closure and issued temporary lay off notices to most of the bargaining unit.

18. Laid off employees retain recall rights for a two-year period under the Collective Agreement.

19. From May 2014 onwards, the Employer refused to pay the Northern Allowance to employees on temporary layoff and not actively at work.

20. The Union grieved the Employer's failure to pay the Northern Allowance per the terms of the Collective Agreement and the grievance went to arbitration pursuant to terms of the Collective Agreement.

21. In the Arbitration Decision, although the Arbitrator stated she agreed no special onus applied to the Union, she relied upon a discredited line of arbitral authority which states that there is an onus in contract interpretation cases.

22. The Union's position before the Arbitrator and the Labour Relations Board was that this line of authority is contrary to law, and has been rejected in the arbitral jurisprudence.

23. Despite these factors, the Arbitrator dismissed the grievance because she found that the Union had not met the onus of proving the parties had agreed in bargaining to the Union's interpretation that the Northern Allowance was payable to employees without restriction.

24. The Union's position was and is that the law regarding interpretation of collective agreements is as stated by A. Hope in *Pope and Talbot v. CEP, Local 1092*, [2006] B.C.C.A.A.A. No. 224 (at para 92):

> I pause to note that the onus on the party advancing a disputed interpretation is limited to proof of facts needed to sustain the interpretation. There is no burden of proof on either party with respect to the interpretative exercise itself. See: Gorsky, Evidence and Procedure in Canadian Labour Arbitration, (2001), p. 9-5 where the authors wrote in part, "[A]rbitrators now recognize that onus of proof has no application to the interpretation of the agreement". If the relevant facts are confined to the language itself, an unusual event in disputed interpretations, the task becomes an issue of law which involves giving the language meaning in the context of a disputed application. Here the question of meaning must be answered in a form which is equivalent to drafting the language in the first place.

25. In reliance on discredited arbitral authority, the Arbitrator erroneously imported the notion of "onus" and "balance of probabilities" into her interpretation of the language of the contract.

26. The legal reasoning in the Arbitration Decision constituted a clear and significant departure from well-established arbitral and judicial jurisprudence regarding burden of proof and standard of proof in contract interpretation cases, and as such, was inconsistent with principles expressed or implied in the *Code*.

27. The Union appealed the Arbitration Decision to the Labour Relations Board (the "Board") under s. 99 of the *Code*.

28. In the Original Panel Decision, the Board dismissed the s. 99 application.

29. Despite commenting extensively on possible standards of review of arbitral decisions, the Board in the Original Panel Decision did not identify which standard of review it applied in its review of the Arbitration Decision.

30. Further, the Original Panel Decision held that the Arbitrator's misapplication of legal tests was not evidence of systemic or structural problems with the arbitral system which could undermine the principles and values inherent in the arbitration system established under the *Code*.

31. Further, the Original Panel Decision characterised a discredited line of arbitral authority as a "competing" line of arbitral authority. The Original Panel Decision held that the Arbitrator was entitled to select between competing lines of arbitral authority regardless of whether the authorities selected had any legal merit.

32. The Original Panel Decision held that the Arbitrator's requirement of "clear and unequivocal" language to underpin a claim for a significant monetary benefit did not introduce an enhanced standard of proof into the analysis, and accepted that a standard of proof applies to issues

enhanced standard of proof into the analysis, and accepted that a standard of proof applies to issues of interpretation of a contract. The Original Panel Decision further held that it was not a reviewable error for an arbitrator to interpret a collective agreement using a balance of probabilities test.

33. Finally, the Original Panel Decision held that the Arbitrator did not impose a burden of proof on the Union that she did not impose on the Employer, and therefore that the Arbitrator did not misapply the legal test for onus.

34. The Union applied to the Board for reconsideration of the Original Panel Decision under s. 141 of the *Code*.

35. The Union made substantial submissions to the Board regarding the test for leave for reconsideration under s. 141 of the *Code,* including submissions which identified particular criteria that have been accepted in the jurisprudence as clearly meeting the test for leave to be granted.

36. Two such criteria identified in the Union's submissions were the importance of the decision to the labour relations community, and the presence of conflicting authorities, both of which were present in the Original Panel Decision.

37. Further, the Union made substantial submissions concerning the merits of the s. 141 application.

38. Less than one week after the Union filed its submissions, the Board released its decision that was one sentence long, and which denied leave for reconsideration.

39. The Board did not provide significant written reasons for its decision denying leave nor did it address any of the Unions submissions on the test for leave.

Part 3: LEGAL BASIS

1. The *Judicial Review Procedure Act*, RSBC 1996 c. 241.
2. The *Administrative Tribunals Act*, SBC 2004, c. 45.
3. The *Labour Relations Code*, RSBC 1996, c. 244.
4. The *Supreme Court Civil Rules*, BC Reg. 168/2009, and Rules 2-1(2) and 14 in particular.
5. The common law of procedural fairness and natural justice.
6. Established principles of contract interpretation.
7. The inherent jurisdiction of the Court.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Kelly Robinson made February 13, 2015.

The petitioner estimates that the hearing of the petition will take one day.

Dated: February 13, 2015

John Rogers, Counsel for the Petitioner

To be completed by the court only:

Order made:

[ ] in the terms requested in paragraphs _____ of Part 1 of this notice of application.

[ ] with the following variations and additional terms:

Date: _____
[dd/mmm/yyyy]

_____
Signature of [ ] Judge [ ] Master

No. S-159678
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN A MATTER OF THE *LABOUR RELATIONS CODE* RSBC 1996 c.244,
THE *JUDICIAL REVIEW PROCEDURE ACT*, RSBC 1996 c. 241, and
THE *ADMINISTRATIVE TRIBUNALS ACT*, SBC 2004, c. 45

BETWEEN:

WOLVERINE COAL PARTNERSHIP

PETITIONER

AND:

UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS' UNION, LOCAL 1-424

RESPONDENT

AND:

BRITISH COLUMBIA LABOUR RELATIONS BOARD

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

United Steel, Paper and Forestry, Rubber Manufacturing Energy, Allied Industrial and Service Workers' Union, Local 1-424
100-1777 Third Ave
Prince George, BC V2L 3G7
Attn: Dan Will

Victory Square Law Office
500-128 West Pender Street
Vancouver BC V6B 1R8
Attn: Craig Bavis and Stephanie Drake

This is Exhibit "C" referred to in the affidavit of LORI VINDER sworn before me at VANCOUVER this 9th day of MARCH 2017

A Commissioner for taking affidavits Within British Columbia

Notice as required by ss. 15 and 16 of the *Judicial Review Procedure Act*, RSBC c. 241:

British Columbia Labour Relations Board
600-1066 West Hastings Street
Vancouver BC V6E 3X1
Attn: Jacquie de Aguayo, Registrar

Attorney General of the Province of British Columbia
Ministry of Justice
Parliament Buildings, Room 234
PO Box 9044 Stn Prov Govt
Victoria BC V8W 9E2

20

This proceeding has been started by the Petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must:

a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below; and
b) serve on the petitioner:
    i. 2 copies of the filed response to petition; and
    ii. 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner:
a) if you were served with the petition anywhere in Canada, within 21 days after that service;
b) if you were served with the petition anywhere in the United States of America, within 35 days after that service;
c) if you were served with the petition anywhere else, within 49 days after that service; or
d) if the time for response has been set by order of the court, within that time.

1. The address of the registry is:
800 Smithe Street
Vancouver BC V6C 2E1

2. The ADDRESS FOR SERVICE of the petitioner is:
Roper Greyell LLP
800-666 Burrard Street
Vancouver BC V6C 3P3
Fax number address for service of the petitioner: 604-806-0933

3. The name and office address of the petitioner's lawyer is:

Thomas A. Roper, QC and Drew Demerse
Roper Greyell LLP
800-666 Burrard Street
Vancouver BC V6C 3P3

CLAIM OF THE PETITIONER

21

Part 1: ORDER(S) SOUGHT

1. An Order that the decision of the Labour Relations Board in BCLRB No. B185/2015, dated September 23, 2015, be quashed.

2. An Order that the decision of the Labour Relations Board in BCLRB No. B106/2015, dated June 8, 2015, be quashed.

3. An Order remitting the matter back to the Labour Relations Board with directions from the Court for reconsideration on the merits.

4. An Order for costs.

5. Such further Orders as the Court deems appropriate.

GROUNDS

The grounds upon which the petitioner applies for the orders sought are:

6. That the decisions of the Labour Relations Board in BCLRB No. B185/2015 and BCLRB No. B106/2015 are patently unreasonable because:

   (a) the Reconsideration Decision concluded that the Original Decision was inconsistent with the requirements of the statute, and in error, but did not overturn the Original Decision;

   (b) the Reconsideration Decision effectively requires section 54 notice to be provided if a change that would engage section 54 is "likely" to occur;

   (c) the Board arbitrarily ignored decades of labour relations history, and injected considerable uncertainty and unpredictability into the interpretation of section 54;

   (d) the Reconsideration Decision results in a requirement to provide section 54 notice in circumstances that are openly, clearly, and evidently unreasonable; and

   (e) the Reconsideration Decision's interpretation of "security of employment" is patently unreasonable.

Part 2: FACTUAL BASIS

7. This Petition is brought from the decision of the Respondent British Columbia Labour Relations Board (the "Board") in *Wolverine Coal Partnership*, BCLRB No. B185/2015 (the "Reconsideration Decision") to deny leave and reconsideration of the Board's decision in *Wolverine Coal Partnership*, BCLRB No. B106/2015 (the "Original Decision").

8. The Petitioner, Wolverine Coal Partnership (the "Employer"), owns and operates the Wolverine Mine, an open-pit coal mine near Tumbler Ridge, British Columbia (the "Mine"). 22

9. The Respondent, United Steel, Paper and Forestry, Rubber Manufacturing Energy, Allied Industrial and Service Workers' Union, Local 1-424 (the "Union") is certified pursuant to the *Labour Relations Code*, RSBC 1996, c. 244 (the "*Code*") to represent employees at the Wolverine Mine. The date of its certification is March 24, 2011. Prior to that time, a different union represented employees at the Mine.

10. This Petition concerns the interpretation of section 54 of the *Code*, which reads as follows:

Adjustment plan

54 (1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,

(a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and

(b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following:

(i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;

(ii) human resource planning and employee counselling and retraining;

(iii) notice of termination;

(iv) severance pay;

(v) entitlement to pension and other benefits including early retirement benefits;

(vi) a bipartite process for overseeing the implementation of the adjustment plan.

(2) If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.

(3) Subsections (1) and (2) do not apply to the termination of the employment of employees exempted by section 65 of the Employment Standards Act from the application of section 64 of that Act.

11. In what was a case of first-instance before the Board, the Board concluded that the Employer was obliged to provide notice pursuant to section 54 prior to implementing a temporary layoff of bargaining unit employees. In the context of this case, notice pursuant to section 54 would have required: 23

    (a) the employer to provide 60 days advance notice before the layoff was to occur; and

    (b) the employer and the union to meet in a good faith effort to develop an adjustment plan.

12. The Petitioner says that section 54 notice does not apply in the case of temporary layoffs, and that the Board's interpretation of section 54 was patently unreasonable. The evidence before the Board showed that both in the case of this employer, and in the case of other employers in this Province in similar industries, section 54 notice has never been provided in the case of temporary layoffs.

13. At all times material to this Petition, there were approximately 300 employees in the Union's bargaining unit. These employees performed mining functions at the Mine. The Union does not represent employees who perform coal processing, office or administrative functions.

14. In 2009, the Employer took over operations of the Mine from a previous employer. At the same time, the Employer temporarily reduced production by 40% and laid off 109 employees. The cause of the layoff was a downturn in global economic conditions.

15. The Employer did not provide notice to the then certified union under section 54 of the *Code* prior to implementing this temporary layoff. No complaint was filed with the Board about the lack of section 54 notice.

16. The Collective Agreement between the Employer and the Union includes provisions respecting the layoff and recall regime in place at the Mine. The Original Decision summarized the regime as follows:

> 7 The Union's first collective agreement with the Employer has a term from August 1, 2011 to July 31, 2015 (the "Collective Agreement"). The Collective Agreement includes, among other things, recognition of the Employer's general right to control its operations, including the right to lay off and recall employees (Articles 4.01, 10 and 11). Article 11.05 of the Collective Agreement confirms that employees are deemed to be terminated at the expiry of a 24-month recall period. Article 11.10 further provides that severance is payable in the case of a permanent layoff resulting in a termination of employment as that term is defined in the Employment Standards Act, R.S.B.C. 1996, c. 113 (the "ESA").
>
> 8 During collective bargaining in 2011, the Union sought and achieved an extension of the recall period originally negotiated by CLAC from 12 to the current 24 months. ...

17. It has been a common occurrence in British Columbia for employers, particularly those in resource-based industries such as mining and forestry, to implement temporary and indefinite layoffs due to market conditions.

18. For example, during the global financial crisis that began in 2008, there were many examples of sawmills and planer mills laying off employees for indefinite periods without a projected restart date. In many cases, those shut downs lasted for periods beyond the expiry date of employees' recall rights.

19. There was no evidence before the Original Panel or the Reconsideration Panel that an employer has ever provided section 54 notice to a union prior to implementing such a layoff. To the contrary, the evidence was that employers in the forest industry do not provide section 54 notice prior to implementing an indefinite layoff.

20. The Union was at all material times certified as the bargaining agent of these employers in the forest industry.

21. The Employer produces metallurgical coal, which is used in the production of steel. The price for metallurgical coal is a global one, and is adjusted on a quarterly basis. Coal producers make operational decisions, including whether to continue mining a particular mine, in response to quarterly coal prices and price forecasts.

22. In the fourth quarter of 2013, the price for metallurgical coal was US$150 per tonne. At the time, Wood Mackenzie, the world's leading authority on coal price projections, was projecting that the price would increase to an average of US$161 per tonne over the course of 2014 due to "stronger global economic performance in 2014 and a corresponding increase in steel, hot metal and coke demand."

23. Another reason that Wood Mackenzie was forecasting a price increase was the expectation that high cost producers would be forced to curtail or idle operations because the price of coal would remain below US$170 per tonne.

24. A price of US$170 per tonne is viewed in the industry as the equilibrium price. What this means is that at prices lower than US$170 per tonne, some producers curtail supply, which drives the price back up. At prices above US$170 per tonne, demand for coal will weaken due to high prices, which will push the price back down.

25. Wood Mackenzie was forecasting further price improvements into 2015, up to an average of US$178 per tonne.

26. The price for coal in January 2014 weakened slightly to US$143 per tonne. At this price, the Employer was still able to operate the Mine.

27. Higher cost mines, on the other hand, would be forced to curtail operations. According to the experts, this would cause the price to rebound back up towards its state of natural equilibrium – US$170 per tonne.

28. On or about April 2, 2014, the Q2 2014 price was released and the global price for metallurgical coal inexplicably plummeted to US$120 per tonne. This put the Employer "in the red", as the price was below the point where the Employer could earn enough from coal sales to cover its operating expenses.

29. As a consequence of the April 2, 2014, drop in the price of coal, the Employer decided to temporarily idle the mine, which meant that it would have to lay off the bargaining unit. 25

30. On April 15, 2014, the Employer announced a temporary layoff at the Mine. The Original Decision summarized the layoff as follows:

> 9 On April 15, 2014, the Employer announced and implemented an immediate shutdown of the Mine. It gave no advance notice to the Union or the employees of its decision. The decision was made by representatives of the Company. As is set out more fully below, the Company determined the global price for metallurgical coal had fallen to the point that it no longer made financial sense to continue Mine operations.
>
> 10 The layoff affected approximately 308 bargaining unit employees, as well as non- union employees. While virtually all the unionized employees were laid off effective on or around April 15, 2014, approximately 20 of them were temporarily retained to perform the functions of a Mine Rescue Crew as required under the Mines Act, R.S.B.C. 1996, c. 293 (the "Mines Act"). Some employees were also temporarily retained to perform some non-mining functions related to shipping coal and maintenance. Approximately six weeks after the layoff, the Employer advised the Union it needed to recall a handful of bargaining unit employees on a periodic basis to work a shift to maintain and "exercise" equipment at the Mine. Exercising equipment refers to periodically turning on and off the heavy equipment at the Mine. However, as of January 2015, the Employer had the equipment cylinders wrapped. This meant employees were no longer required to start and stop the equipment. As of January 2015, therefore, the layoff affected the entire bargaining unit.

31. As is noted above, the Employer kept the idled mine in a state of operational readiness, in order to facilitate a quick restart. At the time of the decision to idle the Mine, the Employer anticipated that the idling and layoff would bridge what was expected to be a 12 to 15 month slump in the price of coal.

32. The Employer did not provide the Union with notice under section 54 in respect of this temporary layoff, for the reason that section 54 notice has never before been required in the case of a temporary layoff.

33. On May 9, 2014, the Union filed an application to the Board alleging that the Employer breached section 54 of the *Code*.

34. On July 24, 2014, the Board issued its first decision in this case: BCLRB Decision No. B137/2014. The Employer applied for leave and reconsideration of this decision.

35. On December 11, 2014, a Reconsideration Panel of the Board overturned the decision, citing critical breaches of procedural fairness and natural justice in the manner in which the case was adjudicated: BCLRB Decision No. B216/2014. The Reconsideration Panel remitted the matter to a new Vice-Chair.

36. The Board then received supplementary submissions from the parties, and held an oral hearing on May 4 and 5, 2015.

37. On June 9, 2015, the Board issued the Original Decision and found that the Employer had breached section 54 of the *Code*. The Board ordered the parties to meet and consult with respect to any issues relating to the layoff, and ordered the Employer to pay damages equivalent to 60 days' pay for each affected employee, subject to mitigation. 26

38. The Employer applied for leave and reconsideration of the Original Decision. In the Reconsideration Decision, the Board held that part of the Original Decision was in error, and was inconsistent with the requirements of the *Code*, but did not overturn the Original Decision.

Part 3: LEGAL BASIS

39. This Petition is brought pursuant to the provisions of the *Judicial Review Procedure Act*, RSBC 1996 c. 241, the *Administrative Tribunals Act*, SBC 2004, c. 45.

40. The Petitioner will rely on the *Code*, the Supreme Court Civil Rules, and Rules 2-1, 14, 16, 21-3 and 22-1 in particular, and the inherent jurisdiction of this Court.

41. Pursuant to s. 115.1 of the *Code*, the standards of review in relation to the Board's decisions are legislated pursuant to s. 58 of the *ATA* which provides:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> > (a) is exercised arbitrarily or in bad faith,
> >
> > (b) is exercised for an improper purpose,
> >
> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.

27

A. The Board Failed to Overturn the Original Decision After Finding It To Be In Error

42. The Reconsideration Decision held that the Original Panel committed a reviewable error by incorrectly extending the application of section 54 to situations where a change was "likely". The Reconsideration Panel concluded that this was "clearly wrong", in part, due to important practical considerations. The Reconsideration Panel noted as follows:

> 25 Having reviewed the Remittal Decision and the parties' submissions we find that the conclusion to paragraph 141 above is in error. The conclusion to paragraph 141 is inconsistent with the requirements in the statute.
>
> 26 Paragraph 141 concludes, "The evidence does not establish the Employer was not in a position to advise the Union at some point prior to April 15, 2014, that an Indefinite Layoff was likely or would be implemented". The conclusion infers that Section 54 notice can be required in circumstances where it may be "likely" that the kind of measures or changes noted in the section may occur. That is clearly incorrect. It does not meet the statutory language requiring that the section is triggered only where an employer "introduces or intends to introduce" such a measure, policy, practice, or change.
>
> 27 This is apparent not only from a statutory interpretation perspective, but also important from a practical perspective. It is simply not reasonable or practical that an employer should be required to give Section 54 notice if a change, etc., is "likely". In industries with market volatility, such as in the present case, that could result in the need for ongoing, re-issued, rolling notices. That would make no practical sense, be unfairly onerous, and unhelpful to the parties overall, along with being inconsistent with the statutory language.
>
> [Emphasis added]

43. Despite finding that the Original Decision was "inconsistent with the statutory language", the Reconsideration Panel did not overturn the Original Decision. Its decision not to do so was patently unreasonable.

B. The Board's Interpretation Effectively Requires Notice of "Likely" Changes

44. The Reconsideration Panel correctly identified important practical considerations, set out above, but arbitrarily only applied those considerations to the narrow error committed in the Original Decision. In doing so, the Reconsideration Panel came to a conclusion that was both arbitrary in its effect, and openly, clearly, and evidently unreasonable.

45. The Board's conclusion that the Employer was obliged to provide section 54 notice does require the Employer to issue "ongoing, re-issued, rolling notices", which would "make no practical sense, be unfairly onerous, and unhelpful to the parties overall". This is the case because in "industries with market volatility, such as in the present case", the Employer is not able to predict the next quarter's benchmark price for metallurgical coal.

46. The evidence before the Board was that the Employer learned on April 2, 2015 that the price for metallurgical coal for Q2 of 2014 had dropped from $143 to $120, and that this put the Employer "in the red". This was not foreseeable. However, given the Board's interpretation of section 54, there is only one way for an Employer to either (a) avoid damaging the economic viability of its business by incurring an operating loss for the duration of the notice period; or (b) avoid paying damages equal to 60 days' pay instead. The only way to avoid these damaging outcomes is to provide "ongoing, re-issued, rolling notices" that the continued operation of the Mine in the following quarter is entirely dependent upon future unforeseeable market conditions. Providing "ongoing, re-issued, rolling notices" is the only way an Employer can insure itself against a surprise drop in the market price for its commodity. 28

47. Put another way, while the Reconsideration Panel rightly concluded that the Original Panel erred in requiring notice of a "likely" change, the Reconsideration Panel's alternative interpretation has the same practical effect. It requires an employer to give rolling notices if there is any likelihood of a layoff becoming necessary, or else risk suffering potentially ruinous legal liability for breach of section 54.

48. In this case the Union estimates damages for breach of section 54 of the Code, unabated by mitigation, to be in the range of $3,669,291.36.

49. Such a result is openly, clearly, and evidently unreasonable, and is therefore patently unreasonable. It also fails to take into account the Board's duty under section 2(b) of the *Code* to "foster the employment of workers in economically viable businesses".

C. The Board's Interpretation of Section 54 Arbitrarily Ignores Industry History

50. Further and in the alternative, the Reconsideration Decision is patently unreasonable because it gave no consideration to decades of history in resource-based industries in this Province interpreting and applying section 54 in a manner that accords with the practical realities of employment in those industries.

51. The Employer made the following arguments to this effect before the Reconsideration Panel:

> 82 In concluding that some temporary layoffs will attract section 54 notice, and some will not, the Original Panel has ignored the expectations of the labour relations community, developed over the 20 years since the enactment of section 54, and has begun to develop a framework for interpreting section 54 that will lead to significant uncertainty for employers, for unions, and for employees.
>
> 83 In concluding that section 54 applies to temporary layoffs, the Original Panel has created considerable uncertainty in the law. Is section 54 triggered if the layoff is for six months, a year, two years? Does section 54 apply if there have not been layoffs within the past two years? Or is the line drawn closer to four, six, or eight years?
>
> 84. Legislation should not be interpreted in a way that creates uncertainty and unpredictability.

...

29

86. The message from the Chair's reasons in *Gateway* is that labour relations parties deserve clarity and certainty. The Original Panel's Decision does not give parties any measure of predictability as to whether or when section 54 notice is required.

87. It is of fundamental importance to the labour relations community in British Columbia that the Board clearly confirm that section 54 has no application to a temporary layoff and would only apply where there is a permanent layoff or termination of employment. The evidence before the Original Panel, which was undisputed, was that employers and unions in the resource industry in B.C. (and including this Union) have not applied section 54 to temporary layoffs: see Decision, paras. 13-17. Mr. Everitt claims the Union has never agreed that section 54 notice does not apply to temporary and indefinite layoffs, but 22 years of history in the industry speaks for itself. There has not been a single case before the Board since the introduction of section 54 about its applicability to temporary and indefinite layoffs, and yet there have been innumerable such layoffs that have occurred without section 54 notice having been given.

88. The labour relations community has clearly understood section 54 to apply to permanent closures, but not to temporary layoffs. As Chair Mullin held in the *Gateway Casinos* (at para. 116):

116 Having said that, however, this is not an invitation to attempt to disrupt or undo established, functional relationships. As noted above, the Board needs to be practical, as well as clear and consistent, in dealing with this issue. Part of that practicality is to respect parties' or an industry's existing, functional relationships. Along with practicality, there is an element of respect for the parties' or industry's self-governance inherent in this. In my view, this approach would include respect for the existing, functional relationships parties or an industry have reached in respect to security guards.

89. As a case of first instance, it is particularly important for the Board to interpret section 54 in a workable manner that is in harmony with the objects of that section and of the statutory regime the *Code* creates. ...

52. In adjudicating this issue, the Reconsideration Panel emphasized the Board's obligation to provide labour relations parties with clarity and certainty, and to be practically oriented. The Reconsideration Decision concluded:

16 In support of that position the Employer cites comments at paragraphs 88-90 of *Gateway Casinos & Entertainment Inc.*, BCLRB No. B81/2010 (Leave for Reconsideration of BCLRB No. B210/2009) ("*Gateway Casinos*"). Those comments confirm "the need for the Board to provide the parties in the workplaces of British Columbia with as much clarity and certainty as possible" and thus the need for the Board "to be as clear and practically oriented as possible". (paras. 88-90) Those comments in effect deal with the three evils of litigation -- cost, delay and complexity -- in regard to Board proceedings. Of those three, complexity can be argued to be a driver or enabler of the other two, cost and delay. In turn, uncertainty and unpredictability can be seen to be contributors to complexity. The concerns are real and of general application.

53. Despite noting its duty to provide certainty and clarity, the Reconsideration Decision does none of the things the Board said it was obliged to do. To the contrary, the Reconsideration Decision creates considerable uncertainty with respect to the applicability of section 54 of the *Code*. Employers now have no means of knowing whether they have a statutory obligation to delay a layoff by 60 days in order to serve section 54 notice, or whether they may immediately implement a temporary layoff subject only to whatever notice requirements are in their collective agreement. 30

54. The undisputed evidence before the Board was that in the forest industry, temporary and layoffs of indefinite duration have occurred due to market conditions, and that employers in those situations have never provided section 54 notice. Further, in the over 20 years since section 54's enactment, there had never been a complaint to the Board about this state of affairs until the Union filed its application in this case.

55. The Reconsideration Decision destroyed the predictability employers had in this Province, and injected uncertainty and unpredictability as to the application of section 54 of the *Code*.

D. The Board's Interpretation Creates Absurd Interpretive Results

56. The Reconsideration Panel's interpretation of section 54 results in a requirement to provide section 54 notice in circumstances that are openly, clearly, and evidently unreasonable.

57. The Board has expanded section 54 to require an employer to give 60 days advance notice of future events outside an employer's control. In this case, the Board has required the Employer to accurately predict that the global price of coal was going to plummet in April 2014, despite that the world's foremost experts were forecasting a price increase. It is absurd to impose an obligation on the Employer to provide 60 days advance notice when neither the Employer nor industry experts were able to accurately forecast the price of coal more than 60 days in advance.

58. As a result of the Board's interpretation, industrial employers such as mines and lumber mills will be required to give 60 days notice before the occurrence of all manner of emergent conditions beyond their control that precipitate a temporary curtailment, and which cannot be predicted. As we argued before the Reconsideration Panel:

> 80. An industrial employer such as a mine or a mill would be required to give 60 days' notice before taking temporary downtime caused by all sorts of events outside the employer's control such a rail, trucking, or port strike, a maintenance issue requiring immediate downtime, or the temporary shortage of a raw material used in the production process. An employer would be obliged to give 60 days' notice before announcing a curtailment and layoff in order to effect emergency repairs to a production line. An employer would have to give 60 days' notice to layoff a second shift, or to curtail production. It would be absurd for an employer to have to give 60 days' notice of any of these events, many of which are entirely unforeseeable or outside the employer's control.

59. It cannot have been the Legislature's intent in enacting section 54 that such events would require 60 days advance notice to the Union. The Board's conclusion that temporary layoffs, including those of indefinite duration, now require section 54 notice is therefore openly, clearly, and evidently unreasonable, and is patently unreasonable. 31

60. In the Original Decision, the Board correctly concluded that volatile market conditions require quick decision making. This is incompatible with the expansion of the circumstances requiring section 54 notice to include temporary layoffs. The Original Panel concluded:

> 90 In the present case, the Employer points to the pressures inherent in the relationship between the global price of metallurgical coal and the ongoing economic viability of its mining operation in the short, medium and long-term. However, I find this evidence speaks largely to the bona fide reasons that underlie the decision to implement the Indefinite Layoff. There is no dispute before me that the Indefinite Layoff was a valid response to these market conditions. <u>There is also no dispute before me that a range of layoffs can and do arise due to market conditions. Those market conditions can be volatile and may require quick decisions or make it difficult to identify a fixed date for recall with precision.</u>
>
> [Emphasis added]

61. However, in expanding section 54 to include temporary layoffs, the Board has made "quick decisions" due to volatile markets, or due to unforeseeable events, impossible. This is inconsistent with the purposes of the *Code*, and in particular sections 2(b) and 2(d).

62. In this case, the Board heard evidence of various scenarios that the Employer studied between the price announcement on April 2, 2014, and the layoff announcement on April 15, 2014. Many of these options sought to avoid the necessity of a layoff. The Board accepted that the best scenario for the long-term viability of the Mine was to defer any further mining at the Mine, because deferring further mining until prices improved would provide a ready source of revenue to facilitate a restart and further mine development.

63. In other words, the Board accepted that the Employer's decision to lay off the bargaining unit when it did, rather than continuing to mine coal at a substantial loss for 60 days, was in fact the best way to protect employees' security of employment.

64. The Board's ultimate conclusion that the Employer ought to have provided 60 days notice pursuant to section 54 was therefore patently unreasonable because it actually damages both the employees' security of employment, and the economic viability of the Mine.

65. A further irrationality in applying section 54 to temporary layoffs, including temporary layoffs of indefinite duration, is that the Board's decision provides no parameters to determine which temporary layoffs require section 54 notice, and which do not. This invokes important public policy considerations of uncertainty and predictability in statutory interpretation.

66. The layoff in this case was expected to last 12 to 15 months. Would a temporary layoff of 6 months require section 54 notice? Would a layoff of 3 months, or 3 weeks, require notice? If, at the time of the layoff, an employer provides a fixed date of recall 12 months later, is that sufficient to avoid the requirement to provide notice, even if that date of recall is subsequently changed? 32

67. If the Board's Decision were to stand, the result is that the Board will have to read temporal or other limitations into section 54 that do not exist on a plain reading of the statute. Had the legislature intended to create such arbitrary limitations, it would have done so. The only interpretation that avoids all of the absurd and arbitrary outcomes is that the Legislature did not intend section 54 to include temporary layoffs at all.

68. The Board's interpretation and application of section 54 of the *Code* is therefore openly, clearly, and evidently unreasonable..

E. Market Forces Affect "Security of Employment"; Layoffs Do Not

69. Further and in the alternative, the Reconsideration Panel's conclusion that an employee's "security of employment" is detrimentally affected by a temporary layoff is patently unreasonable. A person's employment status determines their job security. Their status as an employee is unchanged during a layoff where, as here, the employee has recall rights. An employee's job security is no different during a layoff than it was before a layoff. In either case, both under the *Code* and the collective agreement, their employment cannot be terminated except for just and reasonable cause.

70. On the other hand, it is the commodity price of the product they are producing that affects an employee's security of employment. In the coal mining business, the coal price that is published on a quarterly basis has a direct effect on job security. In this case, the employees' job security was no different two days before the layoff than it was two days after the layoff. The "change" that affected their job security was the drop in coal prices, which occurred on April 2, 2014. The Employer did not "introduce" that "change", and therefore section 54 cannot have been engaged.

71. The Board's conclusion that a temporary layoff detrimentally affects an employee's job security is patently unreasonable. It is an arbitrary distinction to conclude that the date upon which an employee's job security is detrimentally affected is the date of the layoff.

Part 4: MATERIAL TO BE RELIED ON

33

1. Affidavit #1 of Susan Holm, made November 20, 2015

The petitioner estimates that the hearing of the petition will take one day.

Dated: November 20, 2015

Thomas A. Roper, QC

Drew Demerse

Lawyers for Petitioner

To be completed by the court only: 34

Order made:

[ ] in the terms requested in paragraphs _____of Part 1 of the notice of this application.

[ ] with the following variations and additional terms:

Date_____

_____
Signature of [ ] Judge [ ] Master

Osler, Hoskin & Harcourt LLP
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416.362.2111 MAIN
416.862.6666 FACSIMILE

OSLER

This is Exhibit "D" referred to in the affidavit of LORI WINTER sworn before me at VANCOUVER this 9th day of MARCH, 20 17

A Commissioner for taking affidavits Within British Columbia

Toronto
Montréal
Calgary
Ottawa
Vancouver
New York

March 2, 2017

Mary Paterson
Direct Dial: 416.862.4924
MPaterson@osler.com
Our Matter: 1164807

SENT BY ELECTRONIC MAIL

Craig Bavis
710-777 Hornby St.
Vancouver, BC
V6Z 1S4

Dear Craig:

RE: ***Companies' Creditors Arrangement Act*** **proceedings of New Walter Energy Canada Holdings, Inc. and certain other entities; Court File No. S-1510120 (the "CCAA Proceedings")**

AND RE: ***United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 1-424 v. Wolverine Coal Partnership -and- BC Labour Relations Board*** **(British Columbia Supreme Court – Vancouver Registry No. S-151240) (the "Northern Allowance Judicial Review")**

AND RE: ***Wolverine Coal Partnership v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 -and- BC Labour Relations Board*** **(British Columbia Supreme Court – Vancouver Registry No. S-159678) (the "Adjustment Plan Judicial Review")**

We are counsel to 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 (collectively, the "**New Walter Group**") in the CCAA Proceedings. Pursuant to orders made by the Supreme Court of British Columbia (the "**Court**") on December 7, 2015 (as amended and restated from time to time, the "**Initial Order**") and December 7, 2016 (the "**New Walter Order**"), the New Walter Group was granted protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**") and KPMG Inc. was appointed as Monitor of the New Walter Group (the "**Monitor**") in the CCAA Proceedings.

Pursuant to an order of the Court dated December 21, 2016 (the "**CCAA Continuity & Vesting Order**"), all of Wolverine Coal Partnership's rights and obligations related to the Northern Allowance Judicial Review, the Adjustment Plan Judicial Review (collectively, the "**Judicial Reviews**"), and all claims were transferred to New Wolverine Coal Corp. upon the filing of a Monitor's certificate, and such certificate was filed on December 28, 2016.

Pursuant to paragraphs 18 of the Initial Order and 9 of the New Walter Order, no action, suit or proceeding in any court or tribunal (each, a "**Proceeding**") against or in respect of the Wolverine Coal Partnership or its partners or any member of the New Walter Group or affecting the Business or the Property (as both are defined in the Initial Order) shall be commenced or continued except with the written consent of the New Walter Group and the Monitor or with leave of the Court pending further order of the Court (the "**Stay of Proceedings**"). Pursuant to subsequent orders of the Court, the Stay of Proceedings has been extended to May 31, 2017. For your convenience, a copy of the Initial Order and the New Walter Order are enclosed herewith.

We are writing to advise you of the Monitor's and the New Walter Group's consent to lifting the Stay of Proceedings in connection with the Judicial Reviews for the sole purpose of obtaining consent dismissals or consent discontinuances, as the case may be, provided that there shall be no costs assessed against any member of the New Walter Group, Wolverine Coal Partnership, or any of Wolverine Coal Partnership's partners in relation to the dismissals or discontinuances or any other matter, all as agreed in the Monitor's letter dated February 22, 2017 and as consented to by the Labour Relations Board in a letter also dated February 22, 2017.

For greater certainty, the New Walter Group and the Monitor do not consent to any action being taken against any member of the New Walter Group, the directors of the New Walter Group, the chief restructuring officer of the New Walter Group or the Monitor in respect the Judicial Reviews or otherwise.

Please sign and return a copy of this letter to acknowledge your agreement regarding the effect of the Stay of Proceedings with respect to the Judicial Reviews. Once fully executed, we intend to file this letter with the Court with the consent dismissals or consent discontinuances, as the case may be.

OSLER

We are available to discuss at your convenience.

Yours very truly,

Mary Paterson

c: William E. Aziz, *BlueTree Advisors Inc.*
Phil Reynolds, Anthony Tillman and Michael Clark, *KPMG Inc.*
Patrick Riesterer, *Osler, Hoskin & Harcourt LLP*

I hereby agree to the terms of the foregoing this ____ day of March, 2017.

Peter Reardon
Partner, *McMillan LLP*
Counsel to the Monitor

I hereby agree to the terms of the foregoing this 6 day of March, 2017.

United Steelworkers Local 1-424

Per: _____
Name: CRAIG BAIRS
Title: COUNSEL, USW

This is Exhibit "E" referred to in the affidavit of LORI UNGER sworn before me at VANCOUVER this 9th day of MARCH 2017

A Commissioner for taking affidavits Within British Columbia

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No. S-151240
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the *Judicial Review Procedure Act*, RSBC 1996, c. 241,
the *Administrative Tribunals Act*, SBC 2004, c. 45
and the *Labour Relations Code*, RSBC 1996, c. 244

BETWEEN:

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS' INTERNATIONAL UNION, LOCAL 1-424

Petitioner

AND:

WOLVERINE COAL PARTNERSHIP

Respondent

AND:

BRITISH COLUMBIA LABOUR RELATIONS BOARD

Respondent

NOTICE OF DISCONTINUANCE

FILED BY: THE PETITIONER

TAKE NOTICE that the Petitioner discontinues this proceeding in its entirety against the Respondents.

A Notice of Hearing has not been filed.

This discontinuance is filed with the consent of all parties of record and is without costs to any party.

Dated: March 1, 2017.

John Rogers, Q.C., Counsel for the Petitioner

Mary Paterson, Counsel for the Respondent Wolverine Coal Partnership

David Garner, Counsel for the Respondent BC Labour Relations Board

This NOTICE OF DISCONTINUANCE is filed by: Victory Square Law Office LLP, #710 - 777 Hornby Street, Vancouver, BC, V6Z 1S4, P: 604-684-8421, F: 604-684-8427, Email: cbavis@vslo.bc.ca.

This is Exhibit "F" "referred to in the affidavit of LORI WALKER sworn before me at Vancouver this 9th day of MARCH, 2017

A Commissioner for taking affidavits Within British Columbia

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No. S-159678
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN AN MATTER OF THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244
THE *JUDICIAL REVIEW PROCEDURE ACT*, RSBC 1996 c. 241 and
THE *ADMINISTRATIVE TRIBUNALS ACT*, SBC 2004 c. 45

BETWEEN:

WOLVERINE COAL LIMITED

PETITIONER

AND:

UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS' UNION, LOCAL 1-424

RESPONDENT

AND:

BRITISH COLUMBIA LABOUR RELATIONS BOARD

RESPONDENT

NOTICE OF DISCONTINUANCE

Filed By: The Respondent, United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers' Union, Local 1-424 (the "Respondent Union")

TAKE NOTICE that the Petitioner discontinues this proceeding in its entirety against the Respondents.

A Notice of Hearing has not been filed.

This discontinuance is filed with the consent of all parties of record and is without costs to any party.

Dated: March 1, 2017.

Mary Paterson, Counsel for the Petitioner, Wolverine Coal Partnership

Craig Bavis, Counsel for the Respondent, United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers' Union, Local 1-424

David Garner, Counsel for the Respondent, BC Labour Relations Board

This NOTICE OF DISCONTINUANCE is filed by: Victory Square Law Office LLP, #710 - 777 Hornby Street, Vancouver, BC, V6Z 1S4, P: 604-684-8421, F: 604-684-8427, Email: cbavis@vslo.bc.ca.

No. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

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

AND

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

PETITIONERS

AFFIDAVIT

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