**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

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")

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| PANEL: | Jacquie de Aguayo, Vice-Chair |
| APPEARANCES: | Thomas A. Roper, Q.C. and Drew Demerse, for the Employer<br>Craig Bavis and Stephanie Drake, for the Union |
| CASE NO.: | 67987 |
| DATES OF HEARING: | May 4 and 5, 2015 |
| DATE OF DECISION: | June 9, 2015 |

## DECISION OF THE BOARD

### I. NATURE OF APPLICATION

1 The Union alleges the Employer has breached Section 54 of the *Labour Relations Code* (the "Code") by failing to give the Union 60 days' notice before it idled its coal mining operation at the Wolverine Mine. The idling of the mine resulted in the immediate layoff of the vast majority of bargaining unit employees. The Employer says it intends to reopen its mining operation within the recall period and, as such, the layoff is temporary. It submits temporary layoffs do not trigger the notice and consultation requirements in Section 54 of the Code and asks that the application be dismissed.

### II. BACKGROUND

2 This matter 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 allowed. Together with their submissions on the original application, the parties filed statutory declarations and further written submissions upon remittal. The majority of the facts are not in dispute. However, a hearing was convened by the Board on May 4 and 5, 2015. The parties called evidence on those facts identified as being in dispute, and provided additional written and oral arguments on the matters at issue.

3 The following is not intended to be a complete recitation of the evidence. Rather, I have set out the facts I find to be material to, or provide relevant context for, the issues to be decided in the application.

4 The Employer owns and operates the Wolverine Mine (the "Mine"), an open-pit coal mine located near Tumbler Ridge, BC. The Employer is a wholly owned subsidiary of Walter Energy, Inc. (the "Company") and is the second largest metallurgical coal producer in Canada. The Company is based in Birmingham, Alabama. For the purposes of this decision, I have distinguished between the Company and the Employer to indicate the different organizational levels of decision-making.

5 The Mine opened in 2006 and was operated under contract by Ledcor CMI Ltd. However, since May 2009, the Mine has been operated directly by the Employer. On March 24, 2011, the Union was certified as the exclusive bargaining agent for a bargaining unit of over 300 employees of the Employer performing mining functions at the Mine. The Union does not represent employees who perform coal processing, office or administrative functions. The Union displaced the previous bargaining agent, the Construction and Allied Workers' Union, Local 68 ("CLAC").

6 At the time the Employer took over operations at the Mine in 2009, it temporarily reduced production by 40% and reduced the workforce by 109 employees (the "2009 Layoff"). It did so on the basis of the impacts of the, then, global economic downturn.

The Union says the Employer gave over 60 days' notice of its decision. However, the Employer says, and the Union does not dispute, that it was not characterized as formal notice under Section 54 of the Code.

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. The Employer says the change was in response to the 2009 Layoff. The Union says this is not an accurate statement of its bargaining position, indicating the Union's general priority in bargaining is to negotiate enhanced recall rights. I find nothing material turns on the reasons for the negotiation of an extended recall period.

THE 2014 LAYOFF

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.

11 Many of the laid-off employees no longer reside in Tumbler Ridge due to the general unavailability of work in that community.

INDUSTRY CONTEXT

12 It is not disputed that in resource-based industries, such as forestry and metallurgical coal mining, market conditions such as commodity prices, supply, and demand impact on an employer's ongoing operational decisions. At the risk of oversimplification of what is a complex sector of the Canadian economy, as commodity prices decrease, producers with high operating costs tend to be the first to idle or permanently shut down operations. However, the larger the decreases and the longer the price remains low, the more operations may idle or permanently shut down production.

FORESTRY

13 With respect to the forestry sector, the Employer submitted Natural Resources Canada's forestry reports, The State of Canada's Forests, for the years 2010 and 2011 (the "Forestry Reports"). The Forestry Reports reflect the "intense pressures" on the forestry industry resulting from global economic downturn, as well as other economic, social and environmental factors.

14 The Employer emphasized those parts of the Forestry Reports that set out the acquisitions, investments and curtailments by industry employers for the reporting year. Curtailments refer to reductions in production capacity, indefinite and permanent closures. For example, the 2010 Forestry Report shows that, in 2009, Canada saw roughly 52 forestry industry employers curtail operations, including 17 in BC. The 2011 Forestry Report sets out that, in 2010, there were 22 employers that restarted their mills, including 13 in BC. Also in 2010, 15 employers curtailed mill operations, including 6 employers in BC.

15 Statutory declarations from Greg Wishart ("Wishart") and Michael Bryce ("Bryce") were also entered into evidence. Both have significant experience in the forestry industry. Wishart is the President of the Interior Forest Labour Relations Association ("IFLRA"). The IFLRA represents member companies in collective bargaining with three other locals of the United Steelworkers (the "USW"). Bryce is the Executive Director of the Council on Northern Interior Forest Employment Relations (Conifer) ("Conifer"). The USW is certified as bargaining agent for all but one of Conifer's member employers. With respect to the matters at issue, the thrust of their evidence is that temporary shutdowns and layoffs regularly occur in the forestry industry due to market conditions. Neither is aware of Section 54 notice having been given, or of the USW taking the position that Section 54 notice was required. No evidence was called to identify the length or scope of the curtailments that resulted in layoffs or whether notice of any kind was provided in advance of their implementation.

16 The Union filed the statutory declaration of Frank Everitt ("Everitt"). Everitt is the President of the Union. He has worked in the forestry industry since 1971 and has extensive experience representing employees in that industry. As a result of his experience, he was appointed as a Member of the Forestry Roundtable by the

provincial government in 2008. The Roundtable was formed to identify issues and opportunities in the BC forestry sector.

17 Generally speaking, there are two sides to the forestry industry; logging and processing. The logging side is more seasonal, with temporary shutdowns occurring during the freeze-up and thaw cycles. The processing side of the industry includes the production of lumber products, pulp, paper, panels and newsprint. Again, with respect to the matters at issue, the thrust of Everitt's evidence is that the Union has never said Section 54 of the Code does not apply in the case of layoffs arising from curtailments on the processing side of the industry. Everitt says curtailments can occur under a variety of circumstances, but it is unusual that they occur with no notice to the union and involve the layoff of all or substantially all of a bargaining unit on an indefinite basis.

COAL MINING

18 The price for metallurgical coal is a global one, adjusted on a quarterly basis. Producers have regard to these quarterly benchmark prices, as well as interim price fluctuations referred to as "spot pricing", to make a range of operational decisions, including whether to continue a particular mining operation in the short, medium or long-term.

19 In making these complex assessments, the Company relies on reports from a range of experts. For example, the Employer submitted into evidence a report prepared by Wood Mackenzie in November 2013 (the "Wood Mackenzie Report"). Wood Mackenzie is a consulting firm and is viewed as the world's leading authority on projections for metallurgical coal pricing and steel output. Among other things, the Wood Mackenzie Report offers an extensive analysis of pressures, challenges and forecasts in the short, medium and long-term for global metallurgical coal producers.

20 The forecasting of the global price of metallurgical coal takes into account a range of factors, including overall global supply and demand, exchange rate risks, environmental events such as floods, transport costs, port facilities, and factors affecting steel production. The Executive Summary includes the following general forecast for 2014 and beyond:

> The combination of plentiful supply and somewhat dreary demand has resulted in a very low price setting environment for the current market. Spot prices reached a low of around US $130/t in July 2013, rose to over US $150 in September (largely on Chinese restocking) and have fallen into the mid-US$130s/t since. However, we anticipate stronger global economic performance in 2014 and a corresponding increase in steel, hot metal and coke demand. Due to these improvements, we expect the price for the benchmark low-volatile coal to modestly increase to an average of US $161/t for full-year 2014 and surpassing US $200/t by 2021;
>
> [...]

> We maintain our view that prices will recover to 2015, after another year of weak prices in 2014. We forecast HCC [hard coking coal] contract prices to average US $161/t in 2014 and US $178/t in 2015. The catalyst for change will be improved global economic performance, as well as a slowdown in supply growth. Current prices – and those forecast for 2014 – are insufficient to enable many current producers to make sustainable margins and will inhibit investment in new capacity. (emphasis added)

21 The Company makes ongoing assessments of the economic viability of its coal mining operations based on, among other things, the existing and forecasted quarterly benchmark price for metallurgical coal. The degree to which the price affects the Company's decision-making is underscored by the evidence of Dan Cartwright ("Cartwright"). He is the President of the Company's Canadian operations, a position he held from January 2012 until his retirement at the end of July 2014. Prior to that, he held a variety of senior management and executive positions in a number of mining companies. He has more than 40 years' experience in the mining industry.

22 Cartwright testified as to the Company's state of mind in 2014. In the second quarter of 2013 ("Q2 2013"), the price of coal was US$170 per tonne. This is a price that he and most experts believe is a sustainable balance point for metallurgical coal. By balance point, Cartwright explained that a higher price would negatively impact the cost of steel, while a lower price impacts on the profitability of the mining of the coal resource. As such, the Company is typically looking for a price in the range of US$170.

23 When the Q3 2013 price was set at the beginning of July, the price had dropped to about US$140. Cartwright said this drop in price was "shocking" because of its "magnitude", and created a lot of concern within the Company about how to improve its standing in light of that price. By October, the Q4 2013 price for metallurgical coal had climbed back to US$150 but was still below what the Company considered to be a sustainable price.

24 Having regard to available information, including the Wood Mackenzie Report, Cartwright testified indicators pointed to an increase in price for 2014 and a sustainable price by 2015. The Wood Mackenzie Report's forecast for 2014 prices, as noted above, remained below the level Cartwright identified as sustainable. However, the Q1 2014 price set at the beginning of January 2014 dropped to US$143.

25 As such, by January 2014 the benchmark price for metallurgical coal was still at or near the price that Cartwright testified "created a lot of concern" within the Company. Its concerns were echoed in the Wood Mackenzie Report's 2014 forecast. It reports that "[c]urrent prices – and those forecast for 2014 – are insufficient to enable many current producers to make sustainable margins and will inhibit investment in new capacity". I find that as of July 2013 and continuing into 2014, the magnitude of the drop in price of metallurgical coal shocked the Company and the price remained at a level the Company indicated raised a lot of concern about the ongoing viability of the operation.

26 The Union is also aware of the market conditions in which the Employer operates. For example, the Union's Business Agent, Dan Will ("Will"), has extensive experience representing unionized workers in the mining industry. He contacted the Director of Human Resources for the Mine, Hugh Kingwell ("Kingwell"), by email on March 14, 2014, to request a meeting. Will testified that he wanted to talk about the future of the Mine as the price of coal had dropped, the Employer's stock price had dropped, and the Employer had stopped mining in an area referred to as Phase 4B. Scheduling conflicts meant that Kingwell and Will did not have an opportunity to meet further to the Union's March 2014 request.

27 Also in March 2014, at a "toolbox meeting" with Union members, a manager for the Employer indicated in response to a question that he was not aware of any plan for layoffs. The Union maintains employees were told there would not be any layoffs. I find nothing material turns on whether the manager indicated he was not aware of any pending layoffs or stated affirmatively that there would be none. I find the evidence shows, however, that by March 2014 the Employer was aware that the Union and employees were growing concerned given the market conditions.

28 Several weeks later, on or about April 2, 2014, the Q2 2014 price was released and the global price for metallurgical coal had now dropped to US$120. Cartwright testified that the US$120 price put the Company below the point it felt it could operate in a "cash positive" position, as the cash it was taking in was less than its expenses. He said the US$120 price "put us in the red" and continued operations would result in the burning of reserves. As such, the period of time where the price for metallurgical coal "alarmed" the Company and caused it "a lot of concern" to the point where the Company was "in the red" was a period of nine months (from Q3 2013 to Q2 2014).

THE DECISION TO IDLE THE MINE

29 The decision to idle the Mine was made in early April 2014 by senior executives of the Company, including Cartwright and Anthony Meyers ("Meyers") on behalf of the Company's Canadian operations. Meyers is the Vice President, Canadian Operations, for the Company. The decision "was not widely known by management at the Mine" and remained with its senior executive team until about five days before the layoffs. The Company is publicly traded and the decision to idle the Mine was "material information" around which there are securities exchange rules about disclosure. No authority was cited for this proposition, nor was evidence presented that elaborated on the nature of the exchange rules or what limitations they placed on the Company's ability to communicate its decision. Accordingly, I find the evidence establishes that from the time the decision to idle the Mine was made by the Company to the date it was publicly announced, the Company viewed its ability to communicate the decision as constrained.

30 The decision to idle the Mine was communicated to employees and the Union on April 15, 2014, the same day crews were advised not to report for shifts and the process for stopping production and idling equipment began. Accordingly, the release of the Q2 2014 coal price, the Company's decision to idle the Mine, the disclosure of that decision

to Mine management, and the layoff of almost the entire bargaining unit occurred within a two-week time frame.

31 The statutory declaration of Meyers, and Cartwright's evidence, set out the range of options for the Mine that were considered by the Company's senior executive team when they met. In general, mining at an open-pit coal mine begins with the logging and removal of trees from the site. Small trees, shrubs or grasses that remain are then burned off. Workers then use heavy equipment to remove the remaining organic matter and the soil below (referred to as overburden) to the depth required to expose the seam of coal to be mined. Workers then excavate the raw coal from the coal seam, process it, and prepare it for shipping.

32 By April 2014, workers at the Mine had already completed the work to expose the seam of raw coal in what is referred to as Phase 4A of the Mine. The Employer also had some raw coal stock ready for processing and shipping.

33 In this context, one option the Company considered was to sell its existing coal stocks. The Company decided this was not an option given the low price at which it could be sold. Cartwright testified that doing so would also make it harder to bear expenses while restarting the mining operation. In other words, having some coal ready to sell and ship on restart would allow the Employer to take advantage of a higher coal price and generate revenue quickly.

34 The Company also considered continuing the mining operation using less equipment and a smaller crew. This option was referred to as operating on a "single shovel" basis. At the time the Mine was idled, it was operating with four shovels. However, the Company concluded this option would raise its expenses on a cost per tonne basis and it was rejected.

35 The next option considered was to idle the Mine and defer mining and processing the exposed coal. In deciding to idle the Mine, the Company nevertheless elected to maintain it in a "ready state" for a quick restart. This involved maintaining equipment, periodically exercising heavy equipment (meaning to start and run it), keeping permits and licenses current, maintaining its tax status as an active mining operation despite the significantly lower tax rate available to nonproducing mines, and keeping a number of excluded and non-union personnel employed performing functions such as environmental monitoring/reporting, mine planning and engineering. The Employer negotiated terms with third party contractors for services such as blasting crews. Finally, the Employer continues to bear the cost of maintaining the Mine in this ready state at a cost of approximately $500,000 per month. At the time of the decision, Kingwell testified that the Company anticipated the layoff would bridge what it anticipated would be a 12 to 15 month slump in the price of metallurgical coal.

36 Kingwell and Cartwright say the Employer intends to recall all bargaining unit employees under two possible scenarios: Once a more sustainable coal price is reached; or, in the event the price does not increase to a sustainable level before expiry of the recall period, employees will be recalled to complete the mining of Phase 4A.

Meyers says this option would involve about 6 to 12 months of work. Cartwright testified that one of the reasons this second option is economically viable for the Company is that a recall of the bargaining unit would avoid the payout of the approximately $11.6 million in severance that is due at the expiry of the 24-month recall period.

37 At the time it implemented the layoff, the Employer circulated a Q&A to the Union and employees to address anticipated questions. Among other things, the Employer said idling the Mine was temporary "until we see coal prices and positive future indicators strong enough to continue sustainable operations". It also indicated that "[a]t this present time, there are no indications this will happen within the next year". With respect to the Employer's intentions, it said "[w]e are leaving the best part of 4a in place to provide favorable costs when we resume. This will improve our chances to develop 4b or EB when we can resume operations. If we did not intend to resume, we would finish mining 4a now".

38 The Union and the Employer met informally on a few occasions soon after the layoff. The Union wanted to discuss a range of issues relating to work opportunities, seniority and recall for those who were kept on to assist in the shut down and equipment maintenance, and whether some form of financial assistance might be available for affected employees. The Union also filed a number of grievances under the Collective Agreement.

39 One such meeting occurred on May 1, 2014. It was convened at the Union's request and present were Kingwell, Will and another Union officer, George Rowe. The parties agree the meeting was an informal one. The main reason for the meeting was that the Union wanted to see if the Employer was prepared to do anything financially for laid-off employees such as maintaining a northern living allowance. Kingwell indicated he did not think so but would check with the Company. Kingwell did not get back to Will on this issue.

40 The layoff and potential for recall were also discussed. Kingwell says that, at the meeting, he told Will of the two possible recall scenarios, referred to above. Will's recollection differs from that of Kingwell. Will says Kingwell identified 3 options for the Mine: The recall of the bargaining unit if coal prices increased; a recall of only about 80 employees for approximately 6 to 8 months to mine the exposed coal in Phase 4A; or a permanent shutdown of the Mine.

41 Kingwell says he would not have said this to Will. He says he did discuss the options considered by the Employer prior to deciding to idle the Mine. This would have been the single shovel option Kingwell says would have resulted in a recall of only 80-100 employees. However, Kingwell says he told Will that this option was not one the Employer was prepared to implement. In cross-examination, Will agreed that he may have had this discussion with Kingwell but could not recall it.

42 I find the evidence of both Will and Kingwell to have been thoughtful and credible. However, on the evidence before me, I find it more likely than not that Kingwell did discuss the single shovel option with Will in the context of one of the scenarios

considered, but rejected, prior to the decision to idle the Mine. Kingwell testified that at that meeting he was "trying to explain as best [he] could" why the decision to idle the Mine was made, how it was "not an easy decision to make" and that he talked about "the different configurations to bridge what was felt was a 12-15 month" slump in the market. His evidence is consistent with the evidence of both Cartwright and Meyers with respect to the Company's discussion in early April 2014, as well as the higher cost of extracting coal under the single shovel scenario.

43 I also find that at the time of the layoffs, and in the Employer's subsequent discussions with the Union, the Employer did not tell the Union it would, definitively, recall employees within the 24-month recall period regardless of market conditions.

44 Will testified the Employer never made that concrete commitment. He also testified that Kingwell has never identified what price would lead the Employer to restart the mining operation. Will says the Employer only indicated an intention to reopen the Mine in the event of a few scenarios. In cross-examination, Kingwell confirmed there is a distinction between an intention and a commitment. The evidence is the Employer tied its intention to recall on what it "felt" would be a price slump lasting 12 to 15 months. Kingwell also confirmed in cross-examination it was a possibility that the price of coal could remain so low that it would be cheaper to pay severance. However, he did state that such a possibility stands in contrast to industry predictions.

45 The Q&A document is the only written communication from the Employer to employees or the Union about the reasons for the layoff. In it, the Employer ties the restart of the mining operations directly to coal prices (market conditions), with the reason for leaving the exposed coal in Phase 4A being "to provide favorable costs when we resume". Cartwright also testified that, when he attended at the Mine to talk to employees on April 15, 2014, he talked about the impact of the price of coal and that the Mine "couldn't weather the storm and needed to idle until pricing improved". The fact the Mine was maintained in a ready state is consistent with the Employer's goal of putting itself in a good position for a quick restart in the event of more favourable market conditions.

46 Kingwell said that, in discussions with the Union on April 15, 2014, he "discussed briefly" but made the definitive point that employees would be recalled within 24 months to mine Phase 4A regardless of market conditions. I find that the preponderance of the evidence before me demonstrates only that this was the Employer's subjective intention, an option under consideration at the time of the decision to idle the Mine or at some later date, or a concrete decision made by the Employer after the fact. However, I find it was not an intention that was clearly communicated to employees or the Union in and around the time it implemented the layoff.

47 I find the layoff was intended to be lengthy, lasting at least 12 to 15 months. I further find that at the time the layoff was implemented, the recall of employees was contingent on, and subject to, an increase in the global price for coal. As such, I find the layoff in the present case was of a long-term and indefinite nature (the "Indefinite Layoff").

48 As of the hearing dates in May 2015, the Mine remains idled.

## III. POSITIONS OF THE PARTIES

49 The parties filed thorough written submissions supplemented by oral argument at the hearing. The central issues in the present case are whether Section 54 of the Code applies only to terminations of employment and, if not, was Notice required for the Indefinite Layoff. The following is intended only as a summary of those positions I find to be materially relevant to my determination of these issues.

### THE UNION

50 The Union submits that whether the requirement for notice and consultation set out in Section 54 of the Code ("Notice") is engaged is to be decided on a case-by-case basis and applying four interpretive approaches.

51 First, the Board must be guided by the principles and duties set out in Section 2 of the Code and, in particular, the encouragement of cooperative participation and consultation between employers and unions over issues that affect the workplace.

52 Second, the modern approach to statutory interpretation requires that the Code be given a fair, large and liberal construction and an interpretation that best ensures the attainment of its objects: *Pacific Press, A Division of Southam Inc.*, BCLRB No. B374/96 ("*Pacific Press*") at paras. 111-112; and *Health Employers Association of British Columbia*, BCLRB No. B393/2004 (Leave for Reconsideration of BCLRB No. B415/2003), 109 C.L.R.B.R. (2d) 28 ("*HEABC*") at para. 46.

53 Third, the Board must interpret and apply the Code having regard to values set out in the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The Union submits the right to freedom of association guaranteed by Section 2(d) of the *Charter* includes the right to meaningful collective negotiations on workplace matters: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 64; and *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 24. The Board's interpretation of Section 54 of the Code, therefore, should be consistent with this fundamental *Charter* value.

54 Fourth, the Board's approach to Section 54 of the Code should be consistent with its express language and with achieving its statutory objective – being to foster employer consultation with unions over a wide range of issues affecting the workplace and the working lives of employees: *University of British Columbia*, BCLRB No. B371/94, 26 C.L.R.B.R. (2d) 33 ("*UBC*") at paras. 46-47.

55 Based on these approaches, the Union submits there is no basis in the language or policy of the Code to exclude all temporary layoffs from the application of Section 54 of the Code. It says it may be that some temporary layoffs do not require Notice. However, it submits the only question for the Board is whether, in the circumstances of the present case, Notice was required. The Union says the decision to idle the Mine and lay off over 300 bargaining unit employees constitutes a measure or change that

affects "the terms, conditions or security of employment of a significant number of employees" within the meaning of Section 54. The Union submits this language is broad enough to include changes to employees' continuity of gainful employment and is not limited to the conclusive termination of the employment relationship. As a result of the Indefinite Layoff, the Union says many employees have left the Tumbler Ridge area in search of other employment. Employees were given no commitment by the Employer they would be recalled, or a date they were expected to be recalled to work. This is so regardless of what the Union acknowledges is a decision to lay off employees that was made in good faith by the Employer due to market conditions.

56 The Union submits it was open to the Legislature to use language in Section 54 that would restrict its application in the manner advocated by the Employer, but it did not. Applying a broad and liberal approach to the language in Section 54(1) of the Code, the Union submits there is no basis for concluding that a "change" that affects the terms and conditions of employment of a significant number of employees excludes this Indefinite Layoff.

57 It further submits that, given the objects of Section 54 of the Code, Notice would have allowed the Union to discuss a range of issues, including ensuring seniority was a factor in retaining some of the employees who were kept on, whether those who could not financially remain in Tumbler Ridge could elect to waive recall rights, and a range of other matters. The Union submits there is no evidence that warrants a finding the Employer could not have discussed these options with the Union prior to idling the Mine, particularly given the Employer was in a position upon receiving the Wood Mackenzie Report to reasonably anticipate that layoffs may be required in 2014.

58 With respect to the exception in Section 54(3) of the Code, the Union submits it does not apply here. The exemption from the Notice requirement applies to specific categories of workers exempted under Section 65 of the *ESA* from the group termination pay provisions in Section 64 of that Act. The Union submits that the employees affected in the present case do not fall within any of the exemptions. A temporary layoff such as the one in the present case is not a termination of employment and, as such, temporary layoffs are not statutorily excluded from the application of Section 54(1) of the Code. The Union says to read in that exclusion in the manner suggested by the Employer is inconsistent with the four principles of statutory construction referred to above.

59 The Union further submits a case-by-case approach does not result in a lack of clarity of certainty in the law, or lead to absurd results. It says its position reflects the reality that the application of Section 54 of the Code is necessarily context-specific.

60 With respect to industry context, the Union submits it is not determinative of whether Notice was required in the present case. The Employer's evidence does not set out what measures were in place for curtailments in the forestry industry. It may be that sufficient measures were in place such that no application to the Board was required. Moreover, the Union says it has neither implicitly nor expressly conceded by its conduct that Notice is not required in the face of a temporary or indefinite layoff in the

forestry industry or elsewhere. Even if it had, the Union says there can be no estoppel to relieve against a statutory duty such as Notice under the Code.

61 By way of remedy, in its final written and oral submissions, the Union is requesting an Order that the Employer meet with the Union to discuss issues related to the viability of the Mine, an Order that the Employer pay wages for 60 days for all bargaining unit employees laid off, and an Order requiring the Employer to pay the Union damages for the lost opportunity to consult prior to the shutdown of the Mine: *Money's Mushrooms Ltd.*, BCLRB No. B82/2005, 110 C.L.R.B.R. (2d) 100 ("*Money's Mushrooms*") at para. 50; *Pacific Pool Water Products Ltd.*, BCLRB No. B43/2000 ("*Pacific Pool*") at para. 59; and *Board of School Trustees, School District No. 60 (Peace River North)*, BCLRB No. B94/2003 ("*Peace River North*").

THE EMPLOYER

62 The Employer submits temporary layoffs do not trigger Section 54 of the Code. In support of its position, the Employer identifies the interpretive approaches it says should govern the Board's analysis.

63 It says the Board must interpret Section 54 in a manner that is consistent and coherent within the section itself, with respect to other provisions of the Code, with respect to the purposes of Section 2, and with respect to established labour relations policy: *Compass Group Canada (Health Services) Ltd./Groupe Compass Canada (Services de Sante) Ltee*, BCLRB No. B193/2009 (Leave for Reconsideration of BCLRB No. B72/2009), 171 C.L.R.B.R. (2d) 101; and *Office and Professional Employees' International Union, Local 378 v. British Columbia (Labour Relations Board)*, 2001 BCCA 433 ("*OPEIU*").

64 In addition, the Board should avoid an interpretation that leads to absurd, unjust or unreasonable results: Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 57-58, 105; Ruth Sullivan, *Halsbury's Laws of Canada - Legislation*, Chapter VIII (3)(2).

65 The Board's interpretation must also harmonize with the provisions of the *ESA*, incorporated by reference in Section 54(3) of the Code, the terms of the collective agreement, industry practice, and the market-based realities facing employers in resource-based industries.

66 Applying these principles, the Employer submits the exemption in Section 54(3) of the Code leads to the conclusion that Section 54 was intended to only apply to terminations of employment, not temporary layoffs. Having regard to the language of Section 54 of the Code, the Employer states as follows:

> Section 54(3) reads as follows:
>
> > (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*.
>
> There are two points to be drawn from the wording of section 54. First, subsection (3) informs the interpretation of subsections (1) and (2). Subsection (3) assumes that section 54 is dealing with "termination" of employment and not a temporary layoff as it makes an exception for termination of employment which otherwise would trigger section 54.
>
> Second, subsection (3) links to the *Employment Standards Act*, and exempts those "terminations" identified in section 65. Other "terminations" are covered by section 54. A "termination" under the *Employment Standards Act* is defined as a layoff that exceeds a "temporary layoff" which by definition only occurs once recall rights have expired. (emphasis in original)

67 Based on the language in Section 54(3), the Employer says "[t]he point is that the premise of section 54(1) is its application to the 'termination' of a significant number of employees, with subsection (3) excepting the 'termination' of employees 'exempted by Section 65 of the [*ESA*] from the application of section 64 of that Act'".

68 The Employer further submits that, having regard to the specific exemptions in Section 65 of the *ESA*, one must conclude that the statutory obligation to give Notice arises only in the context of terminations from employment, not temporary layoffs. Specifically, one of the exemptions in the *ESA* is for employees who are laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation (Section 65(4)(b) of the *ESA*). If Section 54 of the Code applies to temporary layoffs, Notice would be required for a seasonal layoff but not for a termination. The Employer says the only way to avoid this absurdity is to conclude that Notice is required only in the face of a termination of employment and not temporary layoffs.

69 The Employer also says that Part 8 of the *ESA* also provides for the establishment of an adjustment committee but one is not required for a temporary layoff. Accordingly, a harmonized reading of the Code would also lead to the conclusion that it was not the Legislature's intention to require a consultation process and an adjustment committee under the Code in what the Employer argues are the same circumstances.

70 With respect to the Collective Agreement, the Employer has a right to lay off and recall employees. With respect to the parties' understanding of employees' "security of employment" it should be characterized as the right to recall for 24 months. As such, Section 54(1) of the Code ought not to apply to a temporary layoff because, during the life of the recall period, the employees' security of employment is not affected by a decision to idle the Mine and implement the Indefinite Layoff.

71 The Employer says the parties' understanding is also consistent with its position that a temporary layoff does not affect "the terms, conditions or security of employment" of a group of employees, while a termination does. It says that the Board has found

Section 54 will apply to a termination of a significant number of employees: *0910196 B.C. Ltd.*, BCLRB No. B52/2012, 207 C.L.R.B.R. (2d) 192 ("*0910196 B.C. Ltd.*"). However, it has found it does not apply to a temporary reduction in the hours of work of part-time employees, with the Board emphasizing the temporary nature of the reduction: *Renew Crew Foundation*, BCLRB No. B18/2009, 174 C.L.R.B.R. (2d) 276 ("*Renew Crew*").

72 The Employer also refers to arbitral and Board decisions that address the question of whether a temporary layoff is, in fact, a termination arising from a permanent shutdown: *Carrier Lumber Ltd. v. United Steelworkers of America, Local 1-417*, Ministry No. A-009/10, [2010] B.C.C.A.A.A. No. 10 (McConchie) ("*Carrier Lumber*"); and *Valemount Forest Products Ltd.*, BCLRB No. B146/2010 (Leave for Reconsideration Denied, BCLRB No. B204/2010). It says that if an employer's stated intent is to terminate employment, Notice must be given. However, if an employer's stated intent is not known or is to maintain operations and employment, the Board should consider that intention in the context of the objective facts to determine whether a termination has in fact occurred. In this way, it may be that the Board could be called upon to determine, during the recall period, that a termination of employment requiring Notice has in fact occurred.

73 With respect to industry context, the Employer submits its position is consistent with Section 2 of the Code. It says:

> Perhaps the simplest way to explain why a temporary layoff cannot trigger section 54 obligations is to consider what it would mean for labour relations if section 54 did in fact apply to temporary layoffs. The absurd result would be that an employer would be obliged to give section 54 notice irrespective of the length of the temporary layoff.
>
> As a result, 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 as 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. A sawmill would be obliged to give 60 days' notice before announcing a two week curtailment and layoff in order to effect emergency repairs to a production line. Or it 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.
>
> It cannot have been the Legislature's intent in enacting section 54 that such events would require 60 days advance notice to the Union, yet the consequence of the Union's position is that any temporary layoff would trigger section 54 obligations. A plain

> reading of section 54(1) and (3) does not support the Union's interpretation.

74 With respect to consistency with other Code provisions, the Employer points to the freeze provisions in Sections 32 and 45 of the Code. During the freeze, an employer is prohibited from altering "a" (Section 32) or "any" (Section 45) "term or condition of employment". However, both Sections 32 and 45 of the Code provide that the freeze must not be construed as affecting the right of an employer to suspend, transfer, layoff, discharge or otherwise discipline an employee for proper cause. The Employer submits this supports its position that a temporary layoff is not treated under the Code as "being an alteration of a term of employment".

75 The Employer says its position supports the principle of consistency and labour relations expectations. The Board should interpret the Code in a manner that provides clarity and guidance for parties as to their rights and obligations under the Code: *Gateway Casinos & Entertainment Inc. carrying on business as Lake City Casinos*, BCLRB No. B81/2010 (Leave for Reconsideration of BCLRB No. B210/2009), 179 C.L.R.B.R. (2d) 134; and *Ecodyne Limited*, BCLRB No. B187/2012 (Leave for Reconsideration of BCLRB No. B81/2012), 218 C.L.R.B.R. (2d) 1 ("*Ecodyne Limited*"). It follows, therefore, that the Code ought not to be interpreted in a way that creates uncertainty and unpredictability.

76 The Employer submits the Board has never required employers to give Notice before implementing temporary layoffs. It says:

> The fact this is the first case in over 20 years on this issue shows that the labour relations community understands how section 54 was intended to operate. Policy statements and statutory interpretation from the Board ought to accord with this experience, and the authorities above provide the Board guidance and the jurisdiction to interpret section 54 in such a way that it does not create absurd results, does not create disharmony within the provision, and does not undo decades of labour relations experience in this Province.

77 The Employer points to the 2009 Layoff at the Mine, forestry industry practice, and the Union's failure to point to a single example of a temporary shutdown in the forestry industry in which it maintained Notice was required, as evidence of this common understanding. The Employer says this common understanding reflects labour relations expectations and this should inform the Board's analysis of Section 54 of the Code in the present case. It says "[c]larity and certainty were built into the Code by a decision not to include temporary layoffs within the scope of events which could trigger section 54 in the first place".

78 The Employer also says, due to market conditions, it is typical that no proposed date of recall is provided as a precise date is largely outside an employer's control as it is determined by the date of a market rebound. Markets can be volatile. As such, if and

when Section 54 of the Code may apply to a particular layoff gives rise to a lack of clarity in the application of the Code and, thus, arbitrary outcomes.

79 The Employer rejects the case-by-case approach advocated by the Union. The Employer says:

> Such an approach would do employers, employees, and unions a great disservice. It would lead to uncertainty about which temporary layoffs trigger section 54 notice, and which do not. The jurisprudence would need to develop some temporal threshold with which the application of section 54 would be decided. Section 54 notice would not be necessary if a temporary layoff was of a lesser duration than this threshold. For layoffs of a longer duration than the threshold, notice would be necessary. Would the threshold be a layoff of a day, a week, a month, a year? And all of these determinations would be made by the Board after the fact, eliminating the opportunity for the employer to provide working notice if the Board ultimately determined that [section] 54 applied.
>
> The answer to this problem is not that section 54 applies to some temporary layoffs, but not to others. The simple answer, and the correct one, is that the Legislature did not intend for section 54 to cover temporary layoffs at all.

80 At the hearing, the Employer confirmed it does not take the position that the meetings held with the Union after the April 15, 2014 layoffs constitute compliance with the requirement to hold adjustment plan meetings under Section 54(1)(b) of the Code, should the Board conclude Section 54 of the Code applies. It also confirmed that, in the event I conclude the Employer's duty to give Notice was breached in the present case, damages are the appropriate remedy subject to the employees' duty to mitigate.

UNION REPLY

81 The Union agrees this is a case of first instance in the sense the jurisprudence of the Board has not yet directly addressed whether an indefinite or temporary layoff triggers the duty to give Notice. However, it maintains the absence of a demand for Notice by the Union in the past does not demonstrate that there were understandings, discussions or agreement by the Union that Notice did not apply.

82 The Union submits, however, it is not asserting that all temporary layoffs trigger Section 54 of the Code. The Union says the interpretive issue before the Board is whether the layoffs in the present case fall within the ambit of Section 54 of the Code. It says the Employer's reliance on hypothetical scenarios, industry practice or an interest in certainty do not warrant an undue narrowing of the language in the Code. The Union says that reading in an exception for temporary layoffs would import restrictive language into Section 54 of the Code.

## IV. ANALYSIS AND DECISION

83 Section 54 of the Code provides as follows:

> **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.

84 In interpreting and applying the Code, Section 2 provides, in part:

> 2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

> (b) fosters the employment of workers in economically viable businesses,
>
> [...]
>
> (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
>
> [...]

THE GENERAL APPROACH TO SECTION 54 OF THE CODE

85 It is well-established that Section 54 of the Code is a substantive provision designed to advance the purposes in Section 2. As such, it is to be given a broad and liberal interpretation: *Pacific Press*; *UBC*; and *HEABC*.

86 The language in Section 54(1) of the Code is broadly crafted but includes a number of elements that must be satisfied in order to trigger the duty to give Notice and consult. Section 54 applies 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". As the Board stated in *UBC*:

> The section requires the parties to engage in bargaining on a wide range of issues. The section contemplates a cooperative model of labour relations, which recognizes the valuable contribution which unions and employees may make to the decision-making processes which affect their working lives. The section is a companion to Section 53 and is in furtherance of a purpose of the Code which is to "encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity". (p. 53)

87 Fostering cooperation between employers and unions in adapting to changes in the economy is one of the purposes of Section 2 of the Code. Under Section 54 of the Code, the mechanism that fosters this cooperative model of labour relations is the mandatory duty to give notice and consult: *0910196 B.C. Ltd.* Its focus is to encourage the broadest scope of good faith discussions between employers and unions: *0910196 B.C. Ltd.* at paras. 33-34. Its objective is to allow both parties to consider each other's perspectives and interests in an effort to mitigate the effects of, or develop alternatives to, a policy, practice or change falling within its scope: *UBC*; and *HEABC* at paras. 60-62.

88 As the Board stated in *Pacific Press Limited*, BCLRB No. B52/95, 26 C.L.R.B.R. (2d) 127 at para. 51:

> Another point needs to be made. Collective bargaining is a process we all understand. It involves discussion and proposals, alternatives to those proposals, and some give and take. It also involves timing, attitude and bargaining power. The relative ability to conduct a strike or lockout reflect the ultimate bargaining power of each party. Section 54 does not bring these concepts to a mid-contract meeting. The intention behind Section 54 is to remove the parties from this process and to compel them to engage in serious discussion of issues. All concerns can be raised and alternatives should be examined. While an employer is entitled to conduct its business, Section 54 mandates it to discuss the impact of its decisions and to discuss with the union alternatives that ease the negative impact of its decisions. (emphasis added)

89 As such, Section 54 of the Code requires that an employer account for the duty to give Notice when making business decisions. However, an employer is not required to justify or account for the valid business reasons that underpin these decisions. For example, employers are not required to consider alternatives to, reverse, or explain their decisions (although they may choose to do so): *HEABC* at paras. 50-51, 60-62. Nor are employers required to reach agreement with the union on an adjustment plan. They must endeavour in good faith to do so.

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. 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.

91 Consistent with Section 2(b) of the Code and the Board's existing approach under Section 54, the Employer's decision to implement the Indefinite Layoff in response to market conditions was the Employer's to make.

92 However, the Employer also relies on these same market conditions to support its position that a bright line exclusion of all temporary layoffs from Section 54(1) is necessary to avoid arbitrary or absurd outcomes. It submits the exemption in Section 54(3), the purposes in Section 2, and certain principles of statutory construction all lead to the conclusion that temporary layoffs never trigger Section 54 of the Code, only terminations of employment do. It says industry practice reflects and supports this approach. Applying this bright line, the Employer says it was not required to give Notice when it implemented the Indefinite Layoff in the present case.

THE EXEMPTION IN SECTION 54(3) OF THE CODE

93 I turn first to the Employer's position with respect to the exemption in Section 54(3) of the Code. In construing the language of the exemption, I have had particular regard to a number of principles of statutory construction.

94 First, it is well-established that applying the modern approach to statutory construction the Board will construe the words in Section 54 of the Code in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Code, the objects and policy of the Code and the intention of the Legislature: *Ecodyne Limited* at para. 29; and *OPEIU* at paras. 15-16.

95 Second, the Legislature is presumed to avoid superfluous or meaningless words. Every word in a statute is presumed to have meaning and a specific role to play in advancing the legislative purpose. Words that are precise and unambiguous are to be understood in their grammatical and ordinary sense: *Nanaimo-Ladysmith School No. 68 v. Dean (Litigation guardian of)*, 2015 BCSC 11 at paras. 32-33.

96 Third, as an exception to a broad and liberal reading of Section 54(1) of the Code, the exemption in Section 54(3) will be construed narrowly: *Zero Downtime Inc. and Others*, BCLRB No. B374/2004 at para. 65.

97 In interpreting the scope of the exemption in Section 54(3) of the Code, the Board must also have regard to the provisions of the *ESA*. They are incorporated by reference as follows:

> **54** (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. (emphasis added)

98 The *ESA* is benefits-conferring legislation. It establishes minimum standards for both unionized and non-unionized employment relationships. As such, it is given a broad and remedial construction: *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 36.

99 I find the language of the exemption in Section 54(3) of the Code is unambiguous. The exemption applies only to "the termination of the employment of employees" and, more importantly, only to a specific subset of terminations exempted by Section 65 of the *ESA*.

100 A termination of employment is a defined term in Section 1 of the *ESA* as follows:

> "termination of employment" includes a layoff other than a temporary layoff (emphasis added)

101 A temporary layoff is also a defined term in Section 1 of the *ESA* as follows:

> "temporary layoff" means
>
> (a) in the case of an employee who has a right of recall, a layoff that exceeds* the specified period within which the employee is entitled to be recalled to employment, and
>
> (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks; (emphasis added)

*I note the definition in (a) contains a drafting error that was corrected by the *Employment Standards Regulation*, B.C. Reg. 396/95, as amended, as follows:

> 1(2) In section 1 of the Act, in the definition of "temporary layoff", "**exceeds**" means exceeds by not more than 24 hours. (emphasis in original)

102 There is no dispute the layoff in the present case falls within the definition of "temporary layoff" in the *ESA* and, as such, does not constitute a termination of employment. I find this is sufficient to conclude that temporary layoffs are not expressly exempted from the application of Section 54 of the Code.

103 However, the Employer argues that because only subsets of terminations of employment are exempted under Section 54(3), it necessarily follows that the general obligation to give Notice is limited to terminations of employment. I find limiting the scope of Section 54 of the Code in the manner suggested by the Employer frustrates, rather than furthers, its objects and purposes.

104 Every word in a statute is presumed to have meaning and a specific role to play in advancing the legislative purpose. Had the Legislature intended Section 54 to apply only where an employer terminates the employment of employees, it could have said so expressly. This is particularly the case given the use of the phrase "termination of the employment of employees" in the exemption in Section 54(3) of the Code. However it did not. The Legislature's choice of different, broader language in Section 54(1) of the Code runs counter to the interpretation advocated by the Employer. It would require that the Board interpret the language chosen more narrowly than its plain and ordinary meaning.

105 The Employer urges the Board to look deeper into the specific class of exemptions in the *ESA* in order to reveal the absurd consequences of this conclusion. However, I find no disharmony or absurdity arises when one has due regard to the distinct language and objects of Part 8 of the *ESA* and those of Section 54 of the Code.

106 Part 8 of the *ESA* deals with terminations from employment and includes Sections 63 to 65. Generally speaking, where a termination has occurred, Section 63 of the *ESA* sets out an employer's duty to provide notice, or pay in lieu of notice, to individual employees based on their length of service. Section 64 of the *ESA* is a group

termination provision that requires notice, or pay in lieu of notice, where an employer intends to terminate the employment of 50 or more employees. Under Section 64, the amount of notice, or pay in lieu thereof, is based not on an employee's length of service but on the number of employees affected. The obligations under Section 64 of the *ESA* are in addition to any other severance obligations under a collective agreement, or the obligations to give notice, or pay in lieu of notice, to individual employees set out in Section 63 of the *ESA*.

107 Section 65(1) of the *ESA* provides exemptions from the application of both Sections 63 and 64 for employees employed in circumstances where the cessation of the employment relationship is contemplated by the employment contract, there is an employment contract that is impossible to perform due to unforeseeable events, or employees are offered but refuse reasonable alternative employment. With respect to the former, the *ESA* identifies contracts of a definite term, employment on a temporary basis, or employment at a construction site by an employer whose principal business is construction.

108 I find no incongruence between an exemption for employment of a finite or temporary nature and the objects of Section 54 of the Code. As the Employer points out, these subsets of termination are, by their nature, "predetermined or predictable" and are properly exempted from the application of Section 54 of the Code. For reasons set out more fully later in this decision, events that are predetermined or predictable may not fall within the language in Section 54(1) of the Code that requires Notice where an employer "introduces" a "measure, policy, practice or change".

109 Section 65(3) also exempts certain additional forms of employment, such as seasonal work, from the application of Section 63 of the *ESA*. This exemption is not captured by Section 54(3) of the Code, however, a related provision is.

110 Section 65(4) provides exemptions from the application of Section 64 of the *ESA* in the following circumstances: where employees are offered and refuse alternative work or employment made available to the employees through a seniority system; employees who are laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation; or employees who are laid off and do not return to work within a reasonable time period after being requested to do so by the employer.

111 Two of these exemptions relate to employees who refuse alternate work or fail to return to work after recall. The third exemption, on which the Employer places particular reliance, ensures that the duty to give notice, or pay in lieu, is not triggered in the face of a seasonal layoff or termination ("Seasonal Layoff").

112 The Employer argues that, unless Section 54(1) only applies to terminations, the duty to give notice and consult will arise where employees are "laid off" due to a Seasonal Layoff, but not if they are "terminated" in respect of it. Notwithstanding the fact a Seasonal Layoff did not occur in this case, the Employer maintains this outcome demonstrates an absurd result that can only be resolved by limiting Section 54 of the Code to terminations. However, with respect to a Seasonal Layoff, an inherent

characteristic is its normal and seasonal recurrence. A layoff in these circumstances is, by its very nature, predictable.

113 I find the Employer's argument with respect to absurdity is based on the following false premise: If the Indefinite Layoff in the present case triggers Section 54(1) of the Code then all temporary layoffs trigger Section 54(1) of the Code.

114 There is nothing inherent to *all* layoffs that make them inconsistent with the purposes of Section 54(1) of the Code. Similarly, there is nothing about a duty to give notice and consult with a union in the circumstances of *some* layoffs that is inherently inconsistent with the objects of fostering the employment of workers in economically viable businesses.

115 Accordingly, I find it that, as a matter of statutory construction, a bright line approach that limits Section 54(1) to terminations of employment is not necessary to avoid absurd or arbitrary consequences. I find the language of Section 54(1) of the Code, read together with the exemption in Section 54(3), contemplates that a layoff *may* constitute a workplace event falling within its scope.

116 I now turn to the Employer's submissions concerning a harmonized reading of the Code and the *ESA*. For the reasons set out, I do not find those submissions sufficient to overcome the clear language and purpose of Section 54 of the Code. In any event, I would also add the following, additional observations concerning the Employer's arguments in this regard.

117 The purposes of the *ESA* termination provisions and Section 54 of the Code are distinct. In the context of Part 8 of the *ESA*, the exemptions apply to certain types of employment and breaks in service, such as seasonal or temporary layoffs. This ensures, among other things, that such breaks in service do not negatively impact the calculation of an employee's length of service in determining the notice, or pay in lieu of notice, owing when their employment is terminated within the meaning of that Act: *Daniel Salvas*, BC EST # D115/11 at paras. 18-31. By corollary, the exemptions relieve an employer of the duty to provide notice, or pay in lieu of notice, in the circumstances set out.

118 While adjustment committees are contemplated by the *ESA* with respect to group terminations under Section 64 of the *ESA*, they are contingent on a discretionary direction by the Minister. Under Section 54 of the Code, the duties to consult and endeavour to reach an adjustment plan are mandatory.

119 Finally, under Section 54 of the Code, the focus is not on whether the employment relationship is, in fact, at an end for the purposes of determining whether notice, or pay in lieu, is owed. The focus is on encouraging cooperation between unions and employers with respect to a decision falling within its scope. On this basis, I do not find the Employer's arguments with respect to *Carrier Lumber* and *Valemount*, *supra*, to be persuasive.

DOES SECTION 54(1) OF THE CODE APPLY TO THE INDEFINITE LAYOFF AT THE MINE

120 I now turn to the question of whether the Indefinite Layoff at the Mine was, in fact, 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" within the meaning of Section 54(1) of the Code.

121 As of April 15, 2014, the vast majority of bargaining unit employees were laid off. Only a few remained to temporarily assist in the shutdown, to meet the Mine Rescue Crew requirements of the *Mines Act*, and, until January 2015, to periodically exercise heavy equipment. I find that the Employer's decision affected "a significant number of employees to whom a collective agreement applies".

122 I also find that the Indefinite Layoff was the introduction by the Employer of a measure, policy, practice or change that affects the employees' security of employment within the meaning of Section 54(1) of the Code.

123 The Employer submits the Collective Agreement shows the parties have turned their minds to and defined "security of employment" as being a 24-month recall period. Since the Indefinite Layoff is intended to have effect within that recall period, the Employer says it did not affect employees' security of employment.

124 I do not accept that recognition in the Collective Agreement of the Employer's right to lay off and/or recall supports a finding that the parties have defined what constitutes "security of employment" for the purposes of Section 54(1) of the Code. In any event, it is well-established that Section 54 of the Code operates independently from, and notwithstanding, collective agreement language that contemplates the actual "measure, policy, practice or change". The Board has found that the plain meaning of "introduce" is to "bring in to use or practice" and, as such, it is the bringing into practice of a decision that otherwise meets the requirements of Section 54(1) of the Code that will trigger the duty to give notice and consult: *Pacific Press* at paras. 115-119 and *0910196 B.C. Ltd.* at paras. 27-33, 39.

125 I find the Employer's decision to implement the Indefinite Layoff was a "change" within the meaning of Section 54(1) of the Code. Unlike the exemptions incorporated in Section 54(3) of the Code, including Seasonal Layoffs, the decision in the present case was neither a predetermined nor predictable feature of the employment relationship.

126 With respect to the effect on employees' "security of employment", the Employer's decision ended a period of gainful employment for employees in the bargaining unit for an indefinite period of time. For many employees, they left the community of Tumbler Ridge to find work. The employees ceased to be employed in a manner that would allow them to provide for themselves and/or their families for the foreseeable future. As such, I find that in the present case, the Indefinite Layoff was a change that affected employees' "security of employment".

127 For all these reasons, I find the Indefinite Layoff was the introduction by the Employer of a change that affected the security of employment of a significant number of employees to whom the Collective Agreement applies. As such, having regard to the language in Section 54(1) of the Code and the facts in the present case, I find the Employer failed to give Notice in violation of Section 54(1)(a).

ADDITIONAL ARGUMENTS

128 The Employer makes a number of arguments to show that, having regard to the Code as a whole, this conclusion leads to absurd and arbitrary outcomes. I address them below.

129 I find the facts in the present case are distinguishable from those in *Renew Crew*. The Employer says *Renew Crew* supports its position that decisions of a temporary nature do not affect employees' "terms, conditions or security of employment". However, in *Renew Crew*, the Board found Section 54 notice was not required where an employer temporarily reduced the hours of work of part-time employees from 35 hours per week to 25 hours per week and affecting 25% of the workforce. It did not rely exclusively on the temporary nature of the employer's decision. The Board looked at a range of factors on which it placed particular importance: The reduction in hours for part-time staff was temporary; no employees were laid off or had their employment terminated; the reduction in hours was still within the range of hours part-time employees were hired for; and there was no impact on other employees in the bargaining unit (See *Renew Crew* at para. 31). I note, in contrast, the Board in *Money's Mushrooms* at paragraphs 49-50, contemplates that the duties under Section 54(1) may arise in the circumstances of a "significant layoff or termination".

130 With respect to the freeze provisions of the Code, I find the purposes and approach under Section 54 are distinguishable from those of Sections 32 and 45. The Employer says the freeze shows the Legislature did not intend a temporary layoff to be an alteration to a term or condition of employment. I disagree. Sections 32 and 45 of the Code ensure that an employer does not alter a term or condition of employment if doing so would constitute a violation of the freeze. However, the prohibition expressly provides that a layoff for proper cause would not constitute a violation of that prohibition. The clear language of the Code is, alone, a full answer to the Employer's submission on this issue.

131 Moreover, among the purposes of the freeze is to provide a period of calm and stability "and avoid the chilling effect that unregulated employer action could have on the representation of employees by a union" while a certification application is pending or during the negotiation of a collective agreement: *Viva Pharmaceutical Inc.*, BCLRB No. B167/2002 ("*Viva Pharmaceutical*") at para. 41. In this way, the freeze provisions are similar to Section 54 of the Code to the extent that Sections 32 and 45 expressly preserve an employer's right to effect changes to the conduct of its business, and that economic circumstances may constitute "proper cause" that justify a change. However, under the freeze provisions, the Board retains the ability to authorize those changes and may attach conditions: *Viva Pharmaceutical* at para. 43. No such similar prohibition

exists under Section 54 of the Code. The focus is on whether, having effected a change, the duty to give Notice is triggered.

132 Finally, the Employer says temporary layoffs are inherently variable in that they take many different forms (removing a single shift to a layoff of the entire bargaining unit), they cover many different time frames (one day, one week, several months or several years), and arise out of many triggering events (foreseen and unforeseen, predictable and unpredictable). It says the labour relations community requires clarity from the Board. On this basis, the Employer submits the only way to read Section 54(1) in a manner that avoids absurdities and arbitrariness is to conclude that all temporary layoffs are excluded from the application of Section 54 of the Code. Thus, it again urges a bright line approach.

133 For the reasons already set out, I do not accept that my conclusion in the present case sweeps all temporary layoffs under Section 54(1) of the Code. Moreover, clarity is an important principle in the Board's approach to the Code. However, the existing jurisprudence of the Board already provides significant guidance to labour relations parties.

134 It is well-established that whether Section 54 is engaged may involve a number of considerations, all of which are assessed by the Board based on the particular circumstances before it: *Pacific Press* at para. 112. It is clear to labour relations parties, therefore, that the Board does not favour a bright line approach such as the one advanced by the Employer in the present case. On the contrary, the Board's approach under Section 54 of the Code is flexible to allow it to take into account the range of workplaces, industries, and circumstances in which it may apply. Accordingly, it is because of the variety of circumstances in which the duties under Section 54(1) of the Code may arise that it is not amenable to a bright line approach.

135 It is also well-established that the duties under Section 54 of the Code must factor into an employer's decision-making process. Employers must take into account the requirement for 60 days' notice. For example, a negotiated closing date for a sale of business should ensure the 60-day notice requirement can be met. A failure to do so will not render the notice provision inapplicable. See *Pacific Pool* at para. 45, citing *Pacific Press* and *Canada Safeway Limited (MacDonald's Consolidated Division)*, BCLRB No. B75/97.

136 Moreover, an employer may wish to maintain secrecy with respect to its decision for a number of valid business reasons. Notwithstanding this, an employer must nevertheless comply with the notice and consultation requirements of the Code before it implements its decision. A failure to do so will not render the notice provisions inapplicable. In such circumstances, the union has a related duty to ensure the confidentiality of sensitive information provided in the context of these discussions: *Pacific Pool* at paras. 45-46.

137 The Board's existing approach under Section 54 of the Code also accounts for those circumstances in which an employer is not able to meet the 60 days' notice

requirement. Again, applying a case-by-case approach, the Board will first examine the circumstances before it to determine whether an employer was nevertheless in a position to advise the union that a decision was likely and to discuss the possible effects of the decision on the affected employees: *The Brewster Healthcare Group Inc.*, BCLRB No. B154/2012, 218 C.L.R.B.R. (2d) 142 at paras. 36-37.

138 As a result of actions or circumstances completely outside the control of an employer, if an employer is unable to provide the required notice, the Board may relieve against all or part of the notice period. However, such relief will be the exception. Where notice is possible, it must be provided: *UBC* at p. 56; *Pacific Pool* at paras. 40-41.

139 Finally, the Board will have regard to the practical requirements and consequences of Section 54(1) of the Code to take into account a wide variety of workplace arrangements. As the Court of Appeal recognized in *OPEIU* at paragraph 16, this can involve a delicate balancing between different constituencies with different and competing interests.

140 The Employer says requiring notice for a temporary layoff requires that an employer predict, 60 days in advance, what markets will be like, or else must risk paying 60 days' wages to produce a product that cannot be sold. It says the viability of a business is put at risk by such an interpretation. It further states that, once it reached the point of losing money in April 2014, it should not be required to continue its operations because of the 60 days' Notice requirements in the Code.

141 The only issue before me is whether in the circumstances of the present case Notice was required. The Employer accepts that, if so, damages are appropriate. Having adopted a bright line approach, the Employer did not advance arguments that it could not have given the Union Notice in advance of implementing its decision. On the contrary, it relies on what it asserts are the difficulties arising from its failure to do so. For example, the evidence in the present case was that the Employer knew over a period of nine months that the global price for metallurgical coal was at a level that created a lot of concern for the Company and it was "shocked" by the drop in the coal price in July 2013. These conditions remained relatively constant and were well below what the Employer considered sustainable. The Union and employees voiced their own concerns in March 2014. 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.

142 Similarly, I find the evidence does not establish that giving Notice to the Union beginning in April 2014 would have put the Employer in the position of being required to "produce a product that cannot be sold". First, the Employer was required to factor into its decision-making its potential obligations under Section 54(1) of the Code. This is particularly so given its knowledge of the long-term nature of the layoff. Among the factors to be taken into account would have been the cost of operating during the notice period and consulting with the Union. As the evidence before me establishes, the Employer was already called upon to make a series of difficult decisions, including maintaining the Mine in a ready state at a cost of $500,000 a month, idling the Mine on

an indefinite basis and avoiding a payout of $11.6 million in severance, among a range of other factors. It had existing coal stock that it decided it would not sell until the price went up. Moreover, the existence of coal reserves ready for quick sale once the price went up was identified in the evidence before me as key in that it provided for a quick infusion of funds during any restart of the mining operation.

143 As the Board stated in *Pacific Pool*:

> [...] The Employer did not bring an application to the Board seeking relief from the Section 54 obligation and in doing so provide evidence of the impossibility of complying with the notice provisions. Instead, the Employer balanced its interest in maximizing its ability to sell its assets by keeping the discussions secret, against the notice requirements under Section 54, which it saw as potentially jeopardizing any sale, choosing the first. Put another way, the Employer balanced the potential costs associated with providing notice against the costs associated with not providing notice, preferring the latter. (para. 43)

144 The Employer also did not argue exceptional circumstances exist in the present case such as to relieve against all or part of the Notice requirements. While market conditions may be volatile and fluctuating, the evidence before me shows the Employer and the Company were closely monitoring it for nine months while it was within a price range it characterized as raising a lot of concern.

145 With respect to industry practice, I find the 2009 Layoff does not establish a practice of implementing layoffs without notice under Section 54(1) of the Code for this Employer or within the industry itself. I note some form of notice was provided with respect to the 2009 Layoff. Yet, with respect to the Indefinite Layoff, the layoff was immediate and without Notice.

146 Finally, I find that the evidence of forestry industry practice is not material to my decision with respect to the Indefinite Layoff at the Mine in the present case. The evidence does not establish a clear practice or understanding in the forestry industry with respect to whether notice (whether under Section 54 of the Code or otherwise) is given, or the nature, frequency and length of the curtailments. Based on the reasons given here, it is not the case that each such curtailment will necessarily trigger Section 54(1) of the Code. This is a matter for a future panel to decide, having regard to whether in all the circumstances before it, the layoff falls within the language, objects and purposes of the Code.

## V. REMEDY

147 For all of the reasons set out, I find the Employer violated its duty under Section 54(1) of the Code to give notice to, and consult with, the Union when it idled the Mine and implemented the Indefinite Layoff.

148 I hereby order the Employer and the Union to meet forthwith and consult with respect to any issues relating to the Indefinite Layoff.

149 The Employer agrees that damages in lieu of notice are the appropriate remedy in the face of a violation of the duty to give 60 days' notice under Section 54(1) of the Code. Accordingly, I order damages equivalent to 60 days' pay for each of the affected employees, subject to mitigation: *Pacific Pool* at para. 61.

150 The Union seeks additional damages for the lost opportunity to consult. The right to notice and to be consulted is a substantive right under Section 54 of the Code. As such, the lost opportunity to do so is compensable: *Pacific Pool* at para. 59; and *Peace River North* at para. 22. The Union points to the fact it advanced a number of grievances arising out of the Indefinite Layoff. However, I find this evidence is not sufficient to establish a basis for damages to the Union in addition to the real, not nominal, damages award to the affected employees in the bargaining unit. For this reason, I find the Union is not entitled to damages for the lost opportunity to consult.

151 I remain seized with respect with the implementation of this decision.

## VI. CONCLUSION

152 For all the reasons set out, I find there is no basis in the Code for adopting a bright line approach under Section 54(1) of the Code that limits its application to terminations of employment. I find the Indefinite Layoff in the present case triggered Section 54 of the Code: *Pacific Press*. I further find the examples of absurd or arbitrary outcomes relied on by the Employer are not necessary consequences of my conclusion that the Indefinite Layoff gave rise to the Employer's duty to give Notice to the Union.

153 As such, I find the Indefinite Layoff in the present case gave rise to the duty to give notice to, and consult with, the Union. Having failed to give Notice to the Union, I find the Employer has violated Section 54(1) of the Code.

LABOUR RELATIONS BOARD

JACQUIE DE AGUAYO
VICE-CHAIR