This is the 1st affidavit
of Avic Arenas in this case
and was made on 28 / 11 / 2013

No. B131400
Estate No. 11-1806986
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PROPOSAL OF
EASTCOAL INC.

AFFIDAVIT

I, **AVIC ARENAS**, of 250 Howe Street, 20th Floor, Vancouver, British Columbia, Legal Assistant, AFFIRM THAT:

1. I am employed with the law firm of Dentons Canada LLP, solicitors for EastCoal Inc. in this proceeding ("**Dentons**"), and as such have personal knowledge of the facts and matters hereinafter deposed to by me except where stated to be made upon information and belief and where so stated I verily believe the same to be true.

2. Now shown to me and attached hereto as **Exhibit "A"** is a copy of a garnishing order before judgment, entered June 5, 2013, in Supreme Court of British Columbia Action Number S134107, Vancouver Registry (the "**Lawton Action**").

3. Now shown to me and attached hereto as **Exhibit "B"** is a copy of the oral reasons for judgment issued by Master Muir on August 1, 2013 in the above noted proceeding.

4. Now shown to me and attached hereto as **Exhibit "C"** is a copy of a letter from Dentons to Harris & Company, solicitors for Mr. George Lawton in the Lawton Action ("**Harris**"), dated November 12, 2013.

5. Now shown to me and attached hereto as **Exhibit "D"** is a copy of a letter from Dentons to The Law Courts, Trial Division, dated November 20, 2013.

6. Now shown to me and attached hereto as **Exhibit "E"** is a copy of a letter from Harris to The Law Courts, Trial Division, dated November 21, 2013.

7. Now shown to me and attached hereto as **Exhibit "F"** is a copy of a letter from Dentons to The Law Courts, Trial Division, dated November 26, 2013.

8. Now shown to me and attached hereto as **Exhibit "G"** is a copy of an email from The Law Courts to Dentons and Harris, dated November 26, 2013.

SWORN BEFORE ME at Vancouver, B.C., on 28 / 11 / 2013.

A Commissioner for taking Affidavits within British Columbia

AVIC ARENAS

JEFFREY A. BASTIEN
Barrister & Solicitor
DENTONS CANADA LLP
20th Floor, 250 Howe Street
Vancouver, B.C. V6C 3R8
Telephone (604) 687-4460

This is **Exhibit "A"** referred to in the Affidavit of
Avic Arenas sworn this 28 day
of November, 2013.

A Commissioner for taking
Affidavits within British Columbia

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
JUN 05 2013

When making payment into Court
this action number must be quoted
No. S134107
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BEFORE:

District Registrar

BETWEEN:

GEORGE LAWTON

PLAINTIFF

AND:

EASTCOAL INC.

DEFENDANT

AND:

BANK OF MONTREAL

GARNISHEE

Garnishing Order Before Judgment

On reading the Affidavit of George Lawton, sworn June 5, 2013, and on it appearing that the indebtedness, obligation or liability of the garnishee is not for wages or salary, I order that all debts obligations and liabilities owing, payable or accruing due from the garnishee to the above-named Defendant, Eastcoal Inc., other than for wages or salary, be attached to the total amount set out below and paid into Court.

Dated: JUN 05 2013

original signed by
M.S. NIVEN
Registrar Deputy District Registrar

To the Defendant:

Eastcoal Inc.
20th Floor, 250 Howe Street
Vancouver, BC V6C 3R8

To the Garnishee:

Bank of Montreal
595 Burrard Street
Vancouver, BC V7X 1L7

Amount due on the Judgment (or balance as the case may be)	$240,000.00
Cost of attachment proceedings	706.50
Total amount attached	$240,706.50

NOTICE TO GARNISHEE

If you do not pay into court at once the amount of your indebtedness to the defendant, an order may be made against you for the payment of the full amount with costs.

If you dispute your liability you should at once file a dispute note.

NOTICE TO DEFENDANT

You may apply to the registrar or the court and, if considered just in all the circumstances, an order may be made releasing all or part of this garnishment.

Cost of Attachment Proceedings

GEORGE LAWTON V. EASTCOAL INC.
SCBC, Vancouver Registry, Action No. S134107

$185.00	Basic Fee
200.00	To issue Notice of Civil Claim
80.00	To issue Garnishing Order
100.00	To serve Defendant with Notice of Civil Claim
100.00	To serve Defendant with Garnishing Order, not served with Notice of Civil Claim
30.00	To serve Garnishee with Garnishing Order
11.50	GST on service costs [$100 + 100 + 30 = $230; $230 x 0.05 = $11.50]
$706.50	Cost of Attachment Proceedings

This is **Exhibit "B"** referred to in the Affidavit of
Avic Arenas sworn this 28 day
of November, 2013.

A Commissioner for taking
Affidavits within British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20130801
Docket: S134107
Registry: Vancouver

Between:

George Lawton

Plaintiff

And:

Eastcoal Inc.

Defendant

Before: Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	C. R. Wardell
Counsel for the Defendant:	D. F. Hooker J. A. Bastien
Place and Date of Hearing:	Vancouver, B.C. July 25 and August 1, 2013
Place and Date of Judgment:	Vancouver, B.C. August 1, 2013

[1] This is an application by Eastcoal Inc. for an order that the garnishing order before judgment dated June 5, 2013 be set aside and that the funds paid into court in the amount of $240,706.50 pursuant to that garnishing order before judgment be paid out to the defendant forthwith together with interest and costs.

[2] Eastcoal says that the plaintiff failed to disclose material facts in his application for the garnishing order before judgment and that failure requires that the garnishing order be set aside.

[3] In addition, Eastcoal relies upon s.5 of the *Court Order Enforcement Act* that allows relief if it is just in all of the circumstances that the garnishing order be set aside.

[4] Eastcoal concedes that there is no issue that the amount sought is a liquidated amount; nor is there any issue as to just discounts.

[5] The background of this matter is that Eastcoal Inc. is a mineral exploration and development company engaged in the acquisition, exploration, and development of mineral resource coal properties. Eastcoal is listed on the TSX Venture Exchange and is listed and posted for trading on the AIM market of the London Stock Exchange PLC.

[6] Since 2009, Eastcoal has been engaged in the development of significant coal mining interests in the Ukraine.

[7] Eastcoal's subsidiary, Eastcoal Company LLC, holds the licence for the Verticalnaya mine in the Ukraine. The mine is currently Eastcoal's only material operation and it is actively being developed in order to try to bring it into commercial production during the third quarter of 2013.

[8] The plaintiff was appointed as the chief financial officer of Eastcoal effective May 1, 2012. His employment with Eastcoal was subject to the terms and conditions of a written employment agreement and a code of conduct.

[9] The plaintiff was terminated by Eastcoal on or about April 22, 2013.

[10] Eastcoal alleges many issues that it says amount to just cause for Mr. Lawton's termination. These allegations include that in the fall of 2012 the plaintiff engaged in inappropriate communications with a female member of Eastcoal's external audit team at PricewaterhouseCoopers. The plaintiff's wife subsequently learned of the incident, which the defendant says affected the plaintiff's marriage. Thereafter, the plaintiff was unresponsive to critical business matters, could not travel on business unless accompanied by his spouse, and could not be available after what the plaintiff deemed normal business hours, which resulted in his failure to fulfill material and significant responsibilities.

[11] The defendant continues that during the period February 2013 to April 2013 additional concerns arose with respect to the plaintiff's conduct and failure to adequately perform his duties as CFO of Eastcoal and Eastcoal communicated these and previous concerns to the plaintiff.

[12] It is said that on April 18, 2013 the plaintiff advised Eastcoal that he would not be able to meet Eastcoal's expectations of him as a CFO and that he was resigning. On April 19 the plaintiff purported to retract his resignation or denied that he had resigned.

[13] There are additional incidences alleged as well. They are not particularly relevant for the present purposes; suffice it to say that Eastcoal alleges just cause.

[14] In addition, prior to the plaintiff's claim Eastcoal had been experiencing financial difficulties, including insufficient working capital to sustain operations and inability to pay its debts when they became due, all of which the plaintiff was allegedly aware. Development work had halted on the mine. However, on June 3, 2013 Eastcoal announced a private placement which raised $6.35 million in net proceeds for Eastcoal.

[15] In that June 3rd, 2013 news release, Eastcoal's board of directors indicated that Eastcoal would allocate the whole of the private placement's net proceeds as follows: $1.76 million on capital expenditure and development costs at the mine;

$3.1 million to fund operating losses until the operation became cash flow positive; and $1.49 million in general working capital, which included approximately $365,000 repayment of corporate creditors and a $350,000 repayment of a loan.

[16] With the proceeds Eastcoal believes the mine could reach the point of commercial production in the third quarter of 2013.

[17] On June 3rd, 2013 the plaintiff filed a notice of civil claim alleging that he had been terminated without cause and claiming damages pursuant to the employment agreement of $257,596.38.

[18] On June 5, 2013 the plaintiff obtained a garnishing order before judgment in the amount of $240,706.50 which is said to be the liquidated amount calculated in accordance with the employment agreement. As I said previously, there is no dispute that the amount is a liquidated amount.

[19] The application was based on Mr. Lawton's affidavit alleging termination without cause and the calculation of the liquidated amount provided for in his employment contract. A copy of the notice of civil claim was appended as an exhibit to his affidavit.

[20] As some of the proceeds of the private placement had already been deposited into Eastcoal's account, the plaintiff was successful in attaching the full amount under the garnishing order.

[21] The defendant alleges that the plaintiff failed in his obligation of full and frank disclosure in his garnishing order application. The defendant says that the plaintiff failed to disclose the full context of whether the severance amount he claimed was justly due and owing by failing to provide any facts whatsoever with respect to the circumstances of his resignation, his particular knowledge of the account as CFO, or the fact that Eastcoal alleged cause for the termination of his employment.

[22] But Eastcoal goes further. They say any fact which supports an application under s.5 of the *Court Order Enforcement Act* is material and must also be

disclosed, particularly here where the defendant says that attaching funds from the private placement, which funds were totally earmarked for resolving its financial difficulties and development of the Ukraine mine, amounts to significant hardship.

[23] Thus, counsel submitted that the plaintiff should have disclosed the dispute as to his performance as well as a complete description of the defendant's financial position. As he knew of the private placement and knew what the proceeds were going to be used for it was incumbent on him to disclose that. The defendant says the registrar should have been told that the money from the private placement was needed to be fully deployed for the financial plan of getting the mine up and running.

[24] Eastcoal relies largely on the decision of *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857 and its consideration in the Court of Appeal decision of *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 342.

[25] In para. 17 of *Key* the propositions established from the case law with respect to garnishing orders before judgment are set out:

> a) A garnishing order before judgment is an extraordinary remedy which creates an exception to the normal rule that there is to be no execution before judgment: *Alce v. Purtzki*, [1986] B.C.J. No. 1991 (Co. Ct.); *Harvey v. Legacy Properties Corp.*, [1992] B.C.J. No. 2953 at para. 43 (S.C.); *Ocean Floors Ltd. v. Crocan Construction Limited*, 2010 BCSC 409 (CanLII), 2010 BCSC 409 at para. 16.
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> b) The principal object of the remedy is to provide a plaintiff with security for the claim being advanced: *Webster v. Webster* 1979 CanLII 744 (BC CA), (1979), 12 B.C.L.R. 172 (S.C.), aff' d (1979), 1979 CanLII 744 (BC CA), (1980) 101 D.L.R. (3d) 248 (C.A.). Webster has been referred to and relied on extensively including in *Min-en Laboratories Ltd. v. Westley Mines Ltd.* (1983), 1983 CanLII 177 (BC CA), (1985) 57 B.C.L.R. 259 (C.A.) at 261 and in *Flintstone Concrete v. Peace River*, 2003 BCSC 1137 (CanLII), 2003 BCSC 1137 at paras. 19-23. In *Webster* at 177, Mr. Justice Bouck said:
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> > ... A salutary purpose is to give a plaintiff security for his claim when he begins the action. In some instances defendants may dispose of assets or abscond from the province when served with a writ. The eventual judgment which a plaintiff recovers some months later is of little value. The legislature in its wisdom has thus seen fit to allow plaintiffs who have claims for liquidated sums to protect themselves from these eventualities by garnisheeing before judgment.

c) The remedy requires strict and technical compliance with statutory requirements. In practice, this requirement has more recently been relaxed: Flintstone at para. 92.

d) The amount being garnished must be a liquidated amount. What constitutes a liquidated amount has been clearly defined: *Flintstone* at para. 49; *Newport Diving & Marine Contracting Ltd. v. A. & R. Canvas Inc.* (1980), reflex, (1981) 25 B.C.L.R. 295 at 297-298 (Co. Ct.); *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78 (CanLII), 1999 BCCA 78 at paras. 8-9; *Rubin v. Metrakos*, 2002 BCSC 1787 (CanLII), 2002 BCSC 1787 at para. 39; *Eaglecrest Explorations Ltd. v. Consolidated Madison Holdings Ltd.* (1995), 1995 CanLII 1363 (BC SC), (1996) 14 B.C.L.R. (3d) 336 at para. 16 (S.C.).

e) The plaintiff must recognize and make adjustment for "all just discounts, which has been defined as a liquidated claim advanced by way of set-off or counterclaim: *Eaglecrest* at para. 19

f) The standard required of a defendant to set aside a garnishing order which fails to recognize an alleged just discount is set out in *Eaglecrest* at para. 19: "If the defendant alleges a liquidated claim by way of set-off or counterclaim and provides evidence which, if ultimately accepted at trial, will establish that some or at least some part of it is due to defendant, that will be sufficient to set aside the plaintiffs garnishing order unless the plaintiff has taken it into account and given an allowance for it."

g) An error in failing to adjust for all just discounts results in the garnishing order being set aside in its entirety: *Ridgeway-Pacific Construction Limited v. United Contractors Ltd.* (1975), [1976] W.W.R. 285 at 288 (B.C.C.A.); *Pe Ben Industries Company Ltd. v. Chinook Construction & Engineering Ltd.*, [1977] 3 W.W.R. 48 (B.C.C.A.); *Flintstone* at paras. 92-94; *Stafford Frey v. Image Finders*, 2002 BCSC 1662 (CanLII), 2002 BCSC 1662 at para. 30.

h) Section 3(2) of the *Act* allows a garnishing order, which is unjust in the circumstances, to be set aside.

i) What constitutes such "unjustness" was described by Bouck J. in *Webster* at 177:

> One can only assume s.3B was intended to provide a remedy where there is undue hardship, abuse, or the order is unnecessary. I do not mean these examples to be exhaustive; rather they are tests which may help in deciding what is just in all the circumstances.

j) For a further discussion of "unjustness, see: *Eaglecrest* at para. 21; *Helicraft Enterprises Ltd. v. Quasar Helicopters Ltd.*, [1986] B.C.J. No. 2863 (Co. Ct.); *Bhattacharjee v. Strong Western Holdings Ltd.*, [1993] 1 G.T.C. 6051 at 6053 (S.C.); *Harvey v. Legacy Properties Corp.*, [1992] B.C.J. No. 2953 at paras. 62-74 (S.C.).

> k) The court can, in considering the circumstances, consider the apparent strength of the parties' respective cases. The issues raised are not, however, to be determined: *Min-en Laboratories* at 260.

[26] As to hardship and the facts which must be disclosed in contemplation of an application under s.5 of the *Court Order Enforcement Act*, the decision of Mr. Justice Voith in *Key* at paras. 65 through 68 says as follows:

> [65] The presumption against absurdity devolves into a series of further subcategories. Among the various potential categories of "absurdity" Sullivan includes both a) hardship and inconvenience and b) interference with the efficient administration of justice. In relation to the former category, Sullivan says at 314:
>
> > Another recurring ground on which outcomes judged to be absurd is pointless inconvenience or disproportionate hardship. While the legislature often imposes burdens and obligations on persons as part of the means by which its objects are achieved, when these seem greatly disproportionate to any advantages to be gained, and still more when these appear to serve no purpose at all, they may be judged absurd.
>
> [66] In this case, the *Act* provides for an extreme remedy. The remedy has the prospect of creating disproportionate and unnecessary hardship if an applicant, who is aware of facts which are relevant to the grant of the remedy, fails to make disclosure of those facts. Nothing is achieved and the defendant is put through " pointless inconvenience" if a defendant whose funds have been garnished is required to come to court and to now provide the court with facts, known from the outset to both parties, which were inconsistent with the initial grant of the remedy and which result in the order being set aside.
>
> [67] The second category of absurdity relates to interference with the efficient administration of justice and includes " interpretations that encourage litigation or unduly tax the resources of the court: Sullivan at 316. Once again, an order initially obtained on the basis of incomplete disclosure of material facts, which is thereafter set aside when such facts are revealed, achieves nothing positive. Let us assume the applicant for a garnishing order is aware that the defendant is an established business. It has extensive holdings which include land. The obligations of the defendant may, as in this case, be further secured by manifestly solvent third party guarantors or through other covenants. None of this is disclosed when the original application is made. It is again important to recall that a principal underlying object of a garnishing order is to secure monies which, absent the order, the plaintiff fears it may not be able to recover. No such concerns are realistically engaged in the example I have

> provided. In addition, the applicant is likely aware that an application by the defendant under s. 5 of the *Act* has the real prospect of the garnishing orders being set aside. Under such circumstances, it cannot be said that the garnishing order is necessary - a relevant consideration identified in each of *Webster*, *Flintstone* and *Helicraft*. There would be no suggestion the plaintiffs judgment would go unsatisfied if it were successful at trial: *Flintstone* at para. 21; *Eaglecrest* at para. 21.
>
> [68] The applicant, who is aware of such facts and does not disclose them, is not legitimately or properly seeking to secure a potential judgment. Instead, non-disclosure has the prospect of promoting abuse or mischief. It has the further prospect of allowing the remedy to be transformed into an *in terrorem* measure.

[27] The Court of Appeal considered the *Key* decision in *Environmental Packaging*. The background to that claim is set out in paras. 6 and 7:

> [6] In January 2009, Mr. Rudjuk terminated his employment with EUT. He subsequently brought an action in Russia against EUT for non-payment of salary and holiday pay and obtained judgment in June 2009. There appears to be some dispute as to what sum presently is owing to him; a Russian court found that EUT had falsified documents to show that part of the judgment had been paid, but this decision was under appeal as of May 2011.
>
> [7] On June 29, 2009, the appellants commenced an action against the respondents for breach of contract and breach of fiduciary duty, alleging that during his employment, unbeknownst to them, Mr. Rudjuk had been acting as the principal of a Russian competitor company, Europac Ltd., and that he had wrongfully used confidential information to further Europac's interests. On the same date, the appellants applied for a garnishing order before action, which was rejected by the Registrar of the Supreme Court on the grounds that their claim was not for a liquidated amount. The garnished amount sought was for $205,000, being the total employment compensation paid to Mr. Rudjuk.

[28] And at paras. 14 to 16 dealing with the decision below:

> [14] The judge set out s. 3(2) of the *Act*, which provides for the content of an affidavit made in support of an application for a garnishing order and which includes in subsection (2)(d)(v) a statement that the debt claim or demand "is justly due and owing, after making all just discounts. Having reviewed the relevant case law, and accepting the reasoning of Skipp L.J.S.C. in *First Ave. Research Corp. v. Donar Chem. Ltd.* 1987 CanLII 2687 (BC SC), (1987), 11 B.C.L.R. (2d) 136 at 142, the judge concluded that she was not persuaded that the Russian claim constituted a just discount.
>
> [15] She held that the existence of the Russian proceedings should have been disclosed on the initial application because parties have an obligation on *ex parte* applications to make full disclosure and to inform the court of any points of fact or law known to them which favour the other side.

> [16] On the issue of the non-disclosure of the Russian claim, the judge stated at paras. 29 and 30:
>
> > ... Mr. Rudjuk's claim in the Russian proceedings and the Russian proceedings themselves should have been disclosed on the initial application. The parties have an obligation on *ex parte* applications to make full disclosure, to inform the court of any points of fact or law known to it which favour the other side: *U.S.A. v. Friedland*, 1996 O.J. No. 4399.
> >
> > The Russian proceedings and Mr. Rudjuk's claim were relevant and material to the decision to be made. Although I am not persuaded that Mr. Rudjuk's claim is a just discount within the *Act*, I am able to do so because it has now been disclosed. The information is clearly relevant to the issue of just discount.

[29] Thus, it appears that even where the facts do not convince the judge that the garnishing order should be set aside, if they are facts that are material to that decision they must be disclosed.

[30] Dealing first with the facts surrounding the termination of the plaintiff. Eastcoal says essentially the plaintiff should have disclosed that Eastcoal was alleging just cause in terminating him. I am of the view that that position is simply wrong.

[31] The plaintiff relied on *Wake v. Habitat for Humanity Society of Greater Vancouver,* 2013 BCSC 702, a decision of Mr. Justice Joyce. He clearly had the *Key* Insurance decision before him, but, regardless, held at paras. 18 and 19:

> [18] The defendant says that para. 3 of the plaintiffs affidavit in support of the garnishing order is incorrect and misleading when it says that it was an express term of the contract that upon termination without notice the defendant would pay salary and benefits in lieu of three months' notice. The defendant says that the contract provided for the payment of three months' notice or pay in lieu of notice if the employment was terminated without cause. The defendant says the plaintiff failed to state in the affidavit that the defendant alleged just cause when it terminated the employment. It says that this omission is misleading.
>
> [19] I do not accept that submission. The body of the affidavit must be read in conjunction with the notice of claim that was attached as an exhibit. Paragraph 4(e) of the notice of claim clearly and correctly states that the defendant could terminate the employment without cause by providing three months' notice or pay in lieu of notice and para. 7 alleges that the termination was without cause and without notice. In my opinion, it is clear that when the affidavit is read as a whole the nature of the claim is clearly stated. It is a claim based on the defendant's failure to perform its obligation under a term

> of the contract that provides for payment of a fixed amount in the event of termination without cause and without notice. In my view, no one reading the affidavit in its entirely would be misled as to the nature of the claim or that the plaintiffs allegation was that he was terminated without cause and without notice.

[32] That is consistent with decisions prior to *Key Insurance* being decided such as *Dynagen Technologies Inc.*, 2008 BCSC 494.

[33] The combination of the affidavit of Mr. Lawton and the notice of civil claim in this case show clearly that the claim here is for termination without cause which triggers the liquidated sum under the employment contract. That the claim is disputed is both obvious as an action had to be commenced and irrelevant unless the factual circumstances could weigh in a judge's consideration of whether it was just to issue a garnishing order.

[34] The failure to disclose the Russian judgment in *Environmental Packaging* was held to be fatal even though ultimately the judge decided it did not represent a just discount. Here, the existence of a defence to the plaintiff's claim would only be relevant if it was material to an argument as to just discounts having been taken or if it could be said to affect the claim of undue hardship.

[35] In my view, that is simply not the case here. As in other employment termination cases, as long as the nature of the claim is fairly stated and shows a liquidated claim, that there may be a defence raised of just cause has no bearing on whether a garnishing order will be granted. One presumes that the parties are aware of this when incorporating such severance terms into employment contracts.

[36] As for the facts showing the financial situation of the defendant, the plaintiff says these, too, had to be disclosed to allow a judge to consider whether it was just in all the circumstances to grant the garnishing order.

[37] Mr. Justice Joyce considered an application under s.5 of the *Court Order Enforcement Act* in *Wake*. He noted at paras. 25 and 26:

> [25] Under sections 5(1) and (2) the court has a discretion to set aside a garnishing order before judgment if it would be just in all the circumstances to do so. As Mr. Justice Bouck said in *Webster*, hardship, abuse and necessity are tests that the court may consider under sections 5(1) and (2) (as they are currently numbered) in determining whether a garnishing order is unjust in all the circumstances. In *Min-en Laboratories Ltd., supra*, Seaton J.A. emphasized at para. 10, that the examples given by Bouck J. do not limit the court in deciding what is just in all the circumstances.
>
> [26] In considering all of the circumstances, the court can also consider the apparent strengths of the plaintiffs claim and the defendants defence. In *Min-en Laboratories Ltd.*, at para. 5, Seaton J.A. said:
>
> > [5] ... While I think, under the *Court Order Enforcement Act* application, it is not appropriate to decide a case, I think it is open to the chambers judge to consider whether the plaintiffs case is a strong one, or a weak one, or something in between; whether the defences raised are strong, or weak, or something in between; and whether the plaintiffs case or the defendants' case is in part weak or strong or something else. I would not require the chambers judge to blind himself to those considerations.

[38] And at paras. 32 through 34:

> [32] While it is not for me on this application to purport to try the case, it is my view that the plaintiff has a strong case. I do not say there is no merit to the defendants position, but I am satisfied that this is not a case of a plaintiff with a flimsy case only obtaining a garnishing order before judgment simply as an *in terrorem* measure. The plaintiff, in my view, has not engaged in an abusive action by resorting to the *Act*.
>
> [33] With regard to hardship, the defendant deposes that the funds were taken from a build fund that will limit its ability to complete a construction project. Given its evidence with regard to the issue of necessity, which I will discuss shortly, and the modest amount of the garnishing order, I do not accept that there would be any real hardship if the defendant were deprived of the funds until this case is tried.
>
> [34] I turn then to the question whether the garnishing order was necessary. The principal object of a garnishing order before judgment is to provide the plaintiff with security for the liquidated claim for which he sues (*Key Insurance Services Partnership*, at para. 17). The defendant says that there is no evidence that the plaintiff, if successful in the action, would be unable to recover the full amount of his judgment and it would therefore be appropriate to set aside the garnishing order on this basis alone.

[39] In the case before me, the defendant says that the evidence as to its financial situation and the private placement go to a consideration of the hardship it alleges will be suffered if the garnishing order is allowed to stand. Factually, I disagree. The

evidence is that the company was in terrible financial shape and was not able to retire its debts as they became due. The private placement financing alleviated that financial pressure and allowed them to plan to bring the Ukraine mine to full production.

[40] With respect to that, Mr. Lawton in his affidavit says as follows:

> Eastcoal has just received funding from their private placement with a total of 7.7 million...

[41] I think that number might be wrong, but, in any event it is irrelevant for present purposes.

> The amount Eastcoal owes me is approximately three per cent of this. Eastcoal was well aware of my claim while it arranged this private placement. Eastcoal has outlined that 3.1 million of the private placement proceeds are allocated to fund operating losses until the mine becomes profitable but has not outlined what these operating losses are or will be, how it has estimated these operating losses, or even when it expects the mine to become profitable, which must drive its estimate of these losses.
>
> Eastcoal has stated that this funding is critically needed by August of this year but has not explained the reason for this urgency. Eastcoal has also stated that the funding it secured is intended to help them get their mine to production in the third quarter of 2013 and to bridge the gap until that mine becomes cash flow positive.
>
> Although I do not know how long it will take Eastcoal's mine to become cash flow positive, I think it is reasonable to expect that this will be sometime after it commences production in the third quarter of this year. If Eastcoal is successful at trial in December of this year it could have its money returned to it prior to that time.

[42] I agree with Mr. Lawton there is no evidence as to when the operation is expected to become cash flow positive, but it is obviously not immediate. $3.1 million of the financing is earmarked to carry the company to that point. Given that the action is presently fast-tracked and there are trial dates set in December of this year, I am of the view that financial hardship is not shown by this evidence.

[43] Further, the precarious financial state of the company and the fact that its only asset of any significance is in the Ukraine are facts that militate in favour of the granting of the garnishing order. The obligation on the plaintiff as set out in

paragraph 15 of *Environmental Packaging* is to make full disclosure and inform the court of any points of fact or law known to them which favour the other side. The facts that the defendant says should have been disclosed either do not favour the defendant or they actually favour the plaintiff.

[44] Having found that there is no evidence of financial hardship, I consider the other factors which are to be weighed in determining whether the garnishing order should be set aside. I am satisfied, as Mr. Justice Joyce said in *Wake,* this is not a case of a plaintiff with a flimsy case only obtaining a garnishing order before judgment simply as an *in terrorem* measure.

[45] The plaintiff, in my view, has not engaged in an abusive action by resorting to the *Act*. There is evidence that the garnishing order is necessary to secure any judgment obtained by the plaintiff due to the company's problematic financial history, the fact that the one asset of any significance is in the Ukraine, and that asset is not predicted to be cash flow positive for some length of time that is not disclosed in the evidence.

[46] Thus, I find that there was no material nondisclosure in the plaintiff's application for the garnishing order before judgment and, further, that no circumstances have been shown such that it would be just in all of the circumstances to set aside the garnishing order.

[47] The application is, therefore, dismissed, with costs to the plaintiff in the cause.

Master Muir

This is **Exhibit "C"** referred to in the Affidavit of
Avic Arenas sworn this 28 day
of November, 2013.

A Commissioner for taking
Affidavits within British Columbia

DENTONS

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November 12, 2013

File No.: 520211-30

DELIVERED VIA COURIER
SENT VIA E-MAIL

Harris & Company
14th Floor, 550 Burrard Street
Vancouver BC V6C 2B5

Attention: Matthew Cooperwilliams

Dear Sir:

Re: George Lawton v. EastCoal Inc.
S.C.B.C. Action No. S-134107, Vancouver Registry

We confirm that we are restructuring counsel for EastCoal Inc. and are writing to you in regards to the above referenced matter, and what we understand to be a trial which is scheduled to commence on December 3, 2013.

As we believe you are aware, EastCoal Inc. filed a Notice of Intention to Make a Proposal under the provisions of the *Bankruptcy & Insolvency Act*, RSC 1985, c.B-3, as amended (the "**BIA**") on November 5, 2013. Attached hereto please find a copy of the Certificate of Filing under the provisions of the BIA.

In accordance with subsection 69(1) of the BIA, all proceedings as against EastCoal Inc. are automatically stayed, which would include the action currently scheduled to proceed to trial on December 2. Accordingly, it is our intention to advise the Trial Co-ordinator of the filing of the Notice of Intention to Make a Proposal of EastCoal Inc. under the BIA and that the matter can therefore not proceed. Please confirm that no further steps will be taken by your client in respect of the matter.

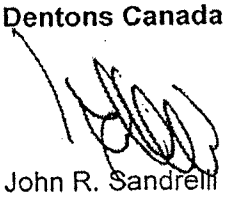
At this point of time, we can advise that we are working with EastCoal Inc. in relation to the development of a possible Proposal to be filed. Any Proposal will likely include an offer to all creditors with valid proven claims as against EastCoal Inc. and such, in that circumstance, there will be a claims process that will be overseen by Deloitte Restructuring Inc. Mr. Huey Lee is the contact person at Deloitte. Should you wish to discuss that process with him and how your client's alleged claim might be addressed, please feel free to contact him.

Finally, given the filing under the BIA, the funds currently held in Court pursuant to a Garnishing Order Before Judgment are properly part of the assets of EastCoal Inc. to be dealt with in accordance with the provisions of the BIA. Accordingly, it is our intention to make the necessary application before the Bankruptcy Court to have those funds released and returned to EastCoal Inc. to be used in accordance with the provisions of the BIA in the context of its Proposal proceedings. We would be pleased to discuss a suitable hearing date for that application at your convenience and would ask for you to advise whether

your client is prepared to consent to that Order as, in our view, there is no legal basis for your client to assert priority to such funds.

Should you have any questions with respect to this matter, please do not hesitate to contact the undersigned.

Yours truly,
Dentons Canada LLP



John R. Sandrelli

lz

c.c. Ms. Andrea Raso, Dentons Canada LLP
Mr. Abraham Jonker, EastCoal Inc.
Mr. Huey Lee, Deloitte Restructuring Inc.

Industry Canada | Industrie Canada

Office of the Superintendent of Bankruptcy Canada | **Bureau du surintendant des faillites Canada**

District of British Columbia
Division No. 03 - Vancouver
Court No. 11-1806986
Estate No. 11-1806986

In the Matter of the Notice of Intention to make a proposal of:

EastCoal Inc.
Insolvent Person

DELOITTE RESTRUCTURING INC/RESTRUCTURATION DELOITTE INC
Trustee

Date of the Notice of Intention: November 05, 2013

CERTIFICATE OF FILING OF A NOTICE OF INTENTION TO MAKE A PROPOSAL
Subsection 50.4 (1)

I, the undersigned, Official Receiver in and for this bankruptcy district, do hereby certify that the aforenamed insolvent person filed a Notice of Intention to Make a Proposal under subsection 50.4 (1) of the *Bankruptcy and Insolvency Act.*

Pursuant to subsection 69(1) of the Act, all proceedings against the aforenamed insolvent person are stayed as of the date of filing of the Notice of Intention.

Date: November 05, 2013, 18:40

E-File/Dépôt Electronique

Official Receiver

#2000 - 300 W. Georgia St., Vancouver, British Columbia, Canada, V6B6E1, (877)376-9902

Canada

This is **Exhibit "D"** referred to in the Affidavit of
Avic Arenas sworn this 28 day
of November, 2013.

A Commissioner for taking
Affidavits within British Columbia

DENTONS

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November 20, 2013

SENT VIA E-MAIL AND COURIER

The Law Courts
Trial Division
800 Smithe Street
Vancouver BC V6Z 2E1

Attention: Trial Co-ordinator

Dear Sirs/Mesdames,

RE: George Lawton v. Eastcoal Inc.
B.C.S.C. Vancouver Registry No. S134107

We are writing with respect to the above referenced matter which we understand is currently set down for trial for four days commencing December 2, 2013.

We are restructuring counsel for Eastcoal Inc. On November 5, 2013, Eastcoal Inc. filed a Notice of Intention to Make a Proposal under the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, As Amended (the "BIA"). Attached hereto, please find a copy of the Certificate of Filing under the provisions of the BIA.

In accordance with subsection 69(1) of the BIA, all proceedings as against Eastcoal Inc. are automatically stayed, which includes the action referenced above currently scheduled to proceed to trial on December 2, 2013. By our letter dated November 12, 2013, a copy of which is enclosed, we wrote to counsel for the Plaintiff advising of the filing of the Notice of Intention to make a proposal under the BIA and requested confirmation that no further steps would be taken in respect of the matter. We have not received a response.

Accordingly, we are writing to confirm that the action is stayed by the provisions of the BIA and cannot proceed. We have made further inquiries of counsel for the Plaintiff by way of telephone messages as to what his position is and we have not heard back. Given the timing, we thought it appropriate to write to advise of the filing under the BIA.

Should you have any questions with respect to this matter, please do not hesitate to contact the undersigned.

Yours truly,
Dentons Canada LLP

John R. Sandrelli

JS/rap
Enc.
cc: Harris & Company: Attn: Matthew Cooperwilliams
(By email: mcooperwilliams@harrisco.com)

This is **Exhibit "E"** referred to in the Affidavit of
Avic Arenas sworn this 28 day
of November, 2013.

A Commissioner for taking
Affidavits within British Columbia

HARRIS

Harris & Company LLP
14th Floor, 550 Burrard Street
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Canada V6C 2B5

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F/ 604 684 6632
harrisco.com
info@harrisco.com

Matthew Cooperwilliams
D/ 604 891 2239

mcooperwilliams@harrisco.com
Our file 006760.001

Workplace Law

November 21, 2013

By EMail
Private & Confidential

The Law Courts
Trial Division
800 Smithe Street
Vancouver, BC V6Z 2E1

Attention: Trial Co-ordinator

Dear Sirs and Mesdames:

Re: George Lawton v. Eastcoal Inc.
B.C.S.C. Vancouver Registry No. S134107

We are counsel for the plaintiff, Mr. Lawton, in this matter. We have the letter dated November 20, 2013 from Mr. Sandrelli, restructuring counsel for the defendant, to the Trial Division.

This matter is currently set for trial on December 3 to 6, 2013 (it is not scheduled to begin on December 2, 2013 as reported by Mr. Sandrelli in his letter). We understand that pursuant to the *Bankruptcy and Insolvency Act*, a 30 day stay of proceedings is currently in effect as against EastCoal Inc. It is our understanding that that stay of proceedings will expire on December 5, 2013.

We respectfully request that the Trial Division keep this matter on the trial list for December 6, 2013 (that is, after expiry of the stay of proceedings) in case some steps can be taken in Court then to address it.

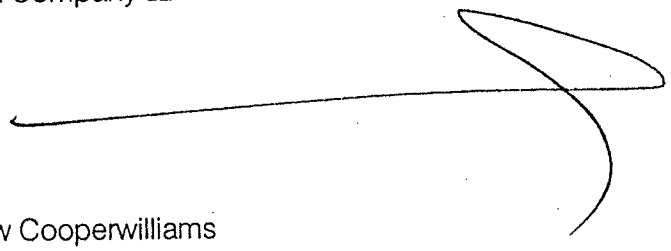
This is a wrongful dismissal matter and Mr. Lawton has been unemployed since the termination of his employment by the Defendant in April, 2013. It is very important to him that he have the opportunity to do whatever he can to advance his claim as soon as possible. He has pursued his claim diligently and at some considerable expense to date, and he should be allowed the opportunity to do whatever he can in Court on December 6 to advance his position. There may be issues then as to whether he can advance his claim given EastCoal's bankruptcy proceedings, but the parties should have the opportunity to address those issues and they should not be determined *de facto* simply because Court time is not available for their resolution.

21

We request, therefore, that this matter remain on the Trial List for December 6, 2013.

Yours very truly,
Harris & Company LLP

Per:



Matthew Cooperwilliams

MC/ycc

cc Client
John Sandrelli, Dentons Canada LLP

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This is **Exhibit "F"** referred to in the Affidavit of
Avic Arenas sworn this 28 day
of November, 2013.

A Commissioner for taking
Affidavits within British Columbia

DENTONS

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dentons.com

November 26, 2013

SENT VIA E-MAIL AND COURIER

The Law Courts
Trial Division
800 Smithe Street
Vancouver BC V6Z 2E1

Attention: Trial Coordinator

Dear Sirs/Mesdames,

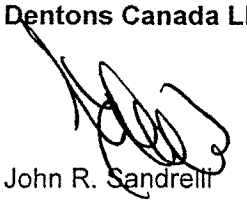
RE: George Lawton v. Eastcoal Inc.
B.C.S.C. Vancouver Registry No. S134107

We are writing further to our letter dated November 20, 2013 and Mr. Cooperwilliams' letter to you of November 21, 2013.

The purpose of our letter was to make the Trial Coordinator aware of the automatic stay of proceedings which exists in light of scheduling challenges that your office may have. While we do not have a strong view as to whether or not the matter should remain on the Trial List on December 6, 2013 as requested by Mr. Cooperwilliams, we do note that the stay of proceedings will either be extended beyond December 5, 2013 (due to an extension granted by the Bankruptcy Court) or if it is not extended, there will be a deemed assignment in bankruptcy of Eastcoal Inc. with the result that a stay of proceedings under section 69.3 of the *Bankruptcy and Insolvency Act* will apply. In other words, in either event, there will be an ongoing stay of proceedings meaning that the matter cannot proceed on December 6, 2013.

As we said, it is up to the Trial Coordinator as to whether or not the matter remains on the Trial List but we thought it advisable and prudent to advise of the automatic stay of proceedings that exists and will continue to exist as of the proposed trial dates so the matter cannot proceed as against Eastcoal Inc. in any event.

Yours truly,
Dentons Canada LLP



John R. Sandrelli

JS/kt
cc: Harris & Company: Attn: Matthew Cooperwilliams
(By email: mcooperwilliams@harrisco.com)

5431240_1|NATDOCS

This is **Exhibit "G"** referred to in the Affidavit of
Avic Arenas sworn this 28 day
of November, 2013.

A Commissioner for taking
Affidavits within British Columbia

Sandrelli, John

From: Smolen, Sue <sue.smolen@courts.gov.bc.ca>
Sent: 26-Nov-13 3:43 PM
To: Sandrelli, John; mcooperwilliams@harrisco.com
Cc: Smolen, Sue
Subject: RE: George Lawton v. Eastcoal Inc. | BCSC Vancouver Registry No. S134107

The Chief Justice has reviewed the correspondence from counsel and advises that the trial scheduled to commence on December 3, 2013 is to be adjourned. The last day of trial, December 6 has been set aside as a chambers hearing in the event the plaintiff wishes to make an application to the Court.

From: Tsang, Kelly [mailto:kelly.tsang@dentons.com] **On Behalf Of** Sandrelli, John
Sent: Tuesday, November 26, 2013 10:05 AM
To: Smolen, Sue
Subject: George Lawton v. Eastcoal Inc. | BCSC Vancouver Registry No. S134107

Attached please find our letter of today's date.

DENTONS

John R. Sandrelli
Partner
Dentons Canada LLP

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john.sandrelli@dentons.com