Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

Applicants

FACTUM OF THE APPLICANTS

(CCAA Application)

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PART I - INTRODUCTION

1. Cline Mining Corporation ("**Cline**"), New Elk Coal Company LLC ("**New Elk**") and North Central Energy Company ("**North Central**" and, together with Cline and New Elk, the "**Applicants**") are in the business of locating, exploring and developing mineral resource properties, with a particular focus on gold and metallurgical coal (the "**Cline Business**"). The Applicants, along with their wholly-owned subsidiary, Raton Basin Analytical LLC ("**Raton Basin**" and, together with the Applicants, the "**Cline Group**") have interests in resource properties in Canada, the United States and Madagascar.

2. As described further below and in the Goldfarb Affidavit,[1] the Cline Group has experienced financial challenges that have necessitated a recapitalization of the Applicants under the CCAA. The performance of the Cline Business has been adversely affected by broader industry-wide challenges, particularly the protracted downtown in prevailing prices for metallurgical coal. Operations at the New Elk metallurgical coal mine in Colorado (the "**New Elk Mine**"), which commenced in December 2010, were

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[1] Any capitalized terms that are not defined herein shall have the meanings ascribed to them in the Affidavit of Matthew Goldfarb sworn on December 2, 2014 (the "**Goldfarb Affidavit**"). All dollar amounts expressed herein, unless otherwise noted, are in Canadian currency.

largely suspended in July 2012 because the mine could not operate profitably as a result of a steep decline in the market price of metallurgical coal. This suspension of mining activities was intended to be temporary. However, market conditions in the coal industry have not sufficiently recovered and the suspension of full-scale mining activities is still in effect.

3. Since the Cline Group's other resource investments remain at the feasibility, exploration and/or development stages, the Cline Group's current inability to derive profit from the New Elk Mine has rendered the Applicants unable to meet their financial obligations as they become due. Cline is in default of its 2011 series 10% senior secured notes (the "**2011 Notes**") as well as its 2013 series 10% senior secured notes (the "**2013 Notes**", and collectively with the 2011 Notes, the "**Secured Notes**"). As at December 1, 2014, total obligations of $110,173,897 are owed in respect of the Secured Notes, which matured on June 15, 2014. The Secured Notes were subject to forbearance agreements that expired on November 28, 2014, and the Applicants do not have the ability to repay the Secured Notes.

4. The Secured Notes are issued by Cline and guaranteed by New Elk and North Central. The indenture trustee in respect of the Secured Notes (the "**Trustee**") holds a first-ranking security interest over substantially all of the assets of Cline, New Elk and North Central. At this time, the amounts owing under the Secured Notes exceed the value of the Cline Business, meaning there would be no recovery for unsecured creditors if the Trustee was to enforce its security against the Applicants in respect of the Secured Notes.

5. All of the Secured Notes are held by beneficial owners whose investments are managed by Marret Asset Management Inc. ("**Marret**"). Accordingly, Marret exercises all discretion and authority in respect of the holders of the Secured Notes (the "**Secured Noteholders**"). With the assistance of its professional advisors, Cline has engaged in discussions with representatives of Marret regarding a consensual recapitalization of the Applicants. These discussions have ultimately resulted in a proposed recapitalization transaction that is supported by Marret, on behalf of the Secured Noteholders (the "**Recapitalization**"). If implemented, the Recapitalization would:

(a) maintain the Cline Group as a unified corporate enterprise;

(b) reduce the Applicants' secured indebtedness by more than $55 million;

(c) reduce the Applicants' annual interest expense in the near term;

(d) preserve certain tax attributes within the restructured companies; and

(e) effectuate a reduced debt structure to enable the Cline Group to better withstand prolonged weakness in the price of metallurgical coal.

6. The Recapitalization would also provide a limited recovery for the Applicants' unsecured creditors, who would otherwise receive no recovery in a security enforcement or asset sale scenario. It is contemplated that the Recapitalization would be implemented pursuant to a plan of compromise and arrangement under the CCAA (the "**CCAA Plan**") that is recognized in the United States under Chapter 15, Title 11 of the United States Code ("**Chapter 15**").

7. Cline and Marret (on behalf of the Secured Noteholders) have entered into a Support Agreement dated December 2, 2014, which sets forth the principal terms of the proposed Recapitalization. Based on Marret's agreement to the Recapitalization (on behalf of the Secured Noteholders), the Applicants have achieved support from their senior-ranking creditors, which hold the remaining economic interest in the Applicants and which represent in excess of 95% of the Applicants' total indebtedness.

8. The Applicants believe that the Recapitalization is the optimum value-maximizing transaction in the circumstances, and that it is preferable for the Applicants and their stakeholders to proceed with the Recapitalization rather than for the Applicants to become subject to an involuntary debt and security enforcement process.

9. The Applicants are seeking the Initial Order to stabilize their financial situation and to proceed with the Recapitalization as efficiently as possible. To this end, if this Court grants an Initial Order, the Applicants request that this Court hear the motion for the Claims Procedure Order and the Meetings Order immediately following the granting of the Initial Order.

10. Having reviewed and considered the alternatives, the Applicants and their boards of directors have determined that it is necessary for the Applicants to seek protection under the CCAA and to move forward with the Recapitalization.

PART II - THE FACTS

A. THE APPLICANTS

11. Cline is a public company incorporated under the laws of British Columbia, with its registered head office located in Vancouver, British Columbia. Cline commenced business under the laws of Ontario in 2003 and its principal office, which serves as the head office and nerve centre of the Cline Group, is located in Toronto, Ontario.

Goldfarb Affidavit at para. 20; Application Record, Tab 4.

12. Cline is the direct or indirect parent company of New Elk, North Central and Raton Basin. A copy of the Cline Group's corporate organization chart is attached as Exhibit "A" to the Goldfarb Affidavit. Cline also holds minority interests in Iron Ore Corporation of Madagascar SARL, Strike Minerals Inc., and UMC Energy plc, all of which are resource exploration companies.

Goldfarb Affidavit at paras. 24 and 27; Application Record, Tab 4.

13. Cline is the sole shareholder of New Elk, which is a limited liability company incorporated pursuant to the laws of the State of Colorado. New Elk holds mining rights in the New Elk Mine and maintains a Canadian bank account with the Bank of Montreal in Toronto, Ontario.

Goldfarb Affidavit at para. 28, 47(p) and 60; Application Record, Tab 4.

14. New Elk is the sole shareholder of North Central and Raton Basin, both of which are corporations incorporated pursuant to the laws of the State of Colorado. North Central holds a fee simple interest in certain coal parcels on which the New Elk Mine is situated and maintains a Canadian bank account with the Bank of Montreal in Toronto, Ontario. Raton Basin is inactive and is not an applicant in these proceedings.

Goldfarb Affidavit at paras. 29-30, 47(p) and 60; Application Record, Tab 4.

15. The Cline Group prepares its financial statements on a consolidated basis. As at August 31, 2014, the Cline Group's liabilities were approximately $99 million. The primary secured liabilities at that time were:

(a) 2011 Notes in the principal amount of $71,381,900, plus accrued and unpaid interest. The 2011 Notes have an annual interest rate of 10% and matured on June 15, 2014; and

(b) 2013 Notes in the principal amount of $12,340,998, plus accrued and unpaid interest. The 2013 Notes have an annual interest rate of 10% and matured on June 15, 2014; and

Goldfarb Affidavit at para. 52; Application Record, Tab 4.

16. Cline is the issuer of the Secured Notes. Cline's obligations in respect of the Secured Notes are guaranteed by New Elk and North Central. As security for the payment of the Secured Notes, Cline, New Elk and North Central granted security interests in favour of the Trustee over substantially all of their real and personal property.

Goldfarb Affidavit at para. 9; Application Record, Tab 4.

17. Pursuant to the Intercreditor Agreement, the 2011 Notes and the 2013 Notes have a first-ranking security interest in substantially all of the assets, property and undertakings of the Applicants and rank *pari passu* as between each other.

Goldfarb Affidavit at para. 81; Application Record, Tab 4.

18. Cline and New Elk are defendants in an uncertified class action lawsuit alleging that they violated the WARN Act by failing to provide personnel who provided services to New Elk with at least sixty days' advance written notice of the suspension of full-scale production at the New Elk Mine. The Applicants dispute the allegation that there was a violation of the WARN Act.

Goldfarb Affidavit at para. 56; Application Record, Tab 4.

19. Presently, the Applicants are aware of approximately $3.5 million in other unsecured claims, including accounts payable relating to ordinary course trade payables.

Goldfarb Affidavit at para. 55; Application Record, Tab 4.

20. Notwithstanding the Applicants' efforts to manage their business challenges (as described in the Goldfarb Affidavit), adverse industry conditions and the suspension of full-scale mining activities at the New Elk Mine have made it impossible for the Cline Group to meet its financial commitments as they become due.

Goldfarb Affidavit at paras. 7-8, 85-89, 101 and 114-115; Application Record, Tab 4.

21. Due to the absence of other available sources of funding, the Applicants have needed to continue borrowing additional funds pursuant to issuances of Secured Notes to meet their day-to-day obligations.

Goldfarb Affidavit at para. 47(j), 92 and 94; Application Record, Tab 4.

22. On December 16, 2013, Cline was unable to make semi-annual interest payments in respect of both the 2011 Notes and the 2013 Notes. Upon the instructions of Marret, the Trustee entered into the Forbearance Agreements with the Applicants, pursuant to which the Trustee agreed to forbear from demanding repayment of the Secured Notes until the expiry of the forbearance period, which was ultimately extended to November 28, 2014.

Goldfarb Affidavit at paras. 97-98; Application Record, Tab 4.

23. During the forbearance period, the Applicants engaged Moelis & Company, an independent investment bank, to conduct a comprehensive sale process in an effort to maximize value for the Applicants' stakeholders (the "**Sale Process**"). Unfortunately, no offers or expressions of interest were received in the Sale Process.

Goldfarb Affidavit at paras. 102-112; Application Record, Tab 4.

24. The period of forbearance expired on November 28, 2014 and Marret has confirmed that the Secured Noteholders have given instructions to the Trustee to accelerate the Secured Notes.

Goldfarb Affidavit at paras. 98-99; Application Record, Tab 4.

25. Accordingly, Cline is immediately required to pay $110,173,897 in respect of the Secured Notes. The Cline Group does not have the ability to pay these amounts. Consequently, the Trustee is now in a position to enforce its security over the assets and property of the Applicants.

Goldfarb Affidavit at paras. 8 and 115; Application Record, Tab 4.

26. In light of their financial condition, the Applicants are not able to obtain additional or alternative financing. The Cline Group's sole asset that currently has earnings capability, the New Elk Mine, is largely non-operational and is being maintained under a care and maintenance program. In addition, the aggregate value of the Applicants' assets, property and undertaking (the "**Property**"), taken at fair value, is not sufficient to enable payment of their obligations, due and accruing due. The Applicants are therefore insolvent.

Goldfarb Affidavit at paras. 85, 89-101 and 116; Application Record, Tab 4.

B. STAY OF PROCEEDINGS

27. Without the benefit of CCAA protection, there could be an erosion of the value of the Cline Group. In particular, a debt enforcement against the Applicants could result in the loss of tax attributes and the need to transfer or re-apply for various exploration, mining and environmental permits that are used in the Cline Business. This would impair value that can be preserved in a CCAA restructuring and would lead to a lower recovery for both Secured Noteholders and unsecured creditors of the Applicants, who would receive no recovery in a debt enforcement or bankruptcy scenario.

Goldfarb Affidavit at para. 118; Application Record, Tab 4.

C. PAYMENTS DURING THE CCAA PROCEEDINGS

28. During the course of these CCAA proceedings, and as contemplated in the cash flow forecast attached as Exhibit D to the Goldfarb Affidavit (the "**Cash Flow Forecast**"), the Applicants intend to make payments in the ordinary course in respect of employee compensation, amounts owing to individuals working as independent contractors, and fees and disbursements of any Assistants retained by any of the Applicants in respect of the CCAA or ancillary proceedings, whether such expenses are incurred prior to or after the Initial Order.

Goldfarb Affidavit at paras. 120-121 and 129; Application Record, Tab 4.

29. In addition, the Applicants intend to pay all other reasonable expenses incurred by them to carry on business in the ordinary course after the Initial Order, including all expenses and capital expenditures reasonably necessary for the preservation of the Cline Business or the Property and payment for goods and services supplied or to be supplied to the Cline Group after the Initial Order. The Applicants are also seeking the authority to make any such payments that pertain to the period prior to the Initial Order if, in the opinion of the Applicants and with the consent of the Monitor, the supplier of the applicable good or service or the provider of the applicable license or permit is critical to the Cline Business and the ongoing operations of the Cline Group.

Goldfarb Affidavit at para. 130; Application Record, Tab 4.

D. CHARGES

(1) Proposed Monitor and Administration Charge

30. The Applicants are seeking the appointment of FTI Consulting Canada Inc. ("**FTI**") as the proposed CCAA monitor in these proceedings (the "**Monitor**").

31. The proposed Initial Order provides for a Court-ordered charge (the "**Administration Charge**") over the Property of the Applicants to be granted in favour of the Monitor, its counsel, counsel to the Applicants, the Chief Restructuring Officer of the Applicants (the

"**CRO**") and counsel to Marret in respect of their fees and disbursements incurred at the standard rates and charges. The proposed Administration Charge is in an aggregate amount of $350,000.

Goldfarb Affidavit at para. 132; Application Record, Tab 4.

(2) Directors and Officers and the Directors' Charge

32. The directors and officers of the Applicants have been actively involved in efforts to address the Applicants' current financial circumstances and difficulties, including through the exploration of strategic alternatives, overseeing the Sale Process, communicating with Marret and other stakeholders and participating in the negotiation of the proposed Recapitalization. The directors and officers have been mindful of their duties with respect to the supervision and guidance of the Applicants in advance of these CCAA proceedings.

Goldfarb Affidavit at paras. 134-135; Application Record, Tab 4.

33. Cline maintains an insurance policy with AIG Insurance Company of Canada in respect of the potential liability of directors and officers of the Applicants (the "**D&O Insurance Policy**"). The D&O Insurance Policy insures the directors and officers of the Applicants for certain claims that may arise against them in their capacity as directors and/or officers of the Applicants. The D&O Insurance Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage in respect of the potential director and officer liabilities.

Goldfarb Affidavit at para. 137; Application Record, Tab 4.

34. The directors and officers of the Applicants have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities. In order to continue to carry on business during the CCAA proceedings and in order to conduct the Recapitalization most effectively, the Applicants require the active and committed involvement of the members of their boards of directors and senior officers.

Goldfarb Affidavit at para. 137; Application Record, Tab 4.

35. The proposed Initial Order provides for a Court-ordered charge (the "**Directors' Charge**") in the amount of $500,000 over the Applicants' Property to secure the Applicants' indemnification of their directors and officers in respect of liabilities they may incur during the CCAA proceedings in their capacities as directors and officers. The amount of the Directors' Charge has been calculated based on the estimated exposure of the directors and officers of the Applicants and has been reviewed with the perspective Monitor. The proposed Directors' Charge would apply only to the extent that the directors and officers do not have coverage under the D&O Insurance Policy.

Goldfarb Affidavit at para. 138; Application Record, Tab 4.

E. FINANCIAL RESOURCES DURING CCAA PROCEEDINGS

36. The Applicants are seeking to complete the Recapitalization as quickly as reasonably possible in order to minimize professional costs and to minimize the impact of these CCAA proceedings on the Cline Business. The Applicants anticipate that their existing cash resources (which include the proceeds of a recent litigation settlement) will provide the Cline Group with sufficient liquidity during the CCAA proceedings.

Goldfarb Affidavit at para. 121; Application Record, Tab 4.

F. CHAPTER 15 PROCEEDINGS

37. As discussed in further detail below, the centre of main interests of the Cline Group is located in Ontario, Canada. It is contemplated that these CCAA proceedings will be the primary court-supervised restructuring of the Applicants, and that foreign recognition proceedings will be sought in Colorado pursuant to Chapter 15, Title 11 of the United States Code ("**Chapter 15**").

Goldfarb Affidavit at paras. 142-143; Application Record, Tab 4.

38. The Applicants are seeking authorization in the proposed Initial Order for the Monitor to act as foreign representative of the Applicants in these CCAA proceedings and to seek recognition of these proceedings in the United States pursuant to Chapter 15.

Goldfarb Affidavit at para. 143; Application Record, Tab 4.

G. FURTHER BACKGROUND FACTS

39. The facts relating to the Applicants, the Cline Business and the requested relief are more fully set out in the Goldfarb Affidavit.

PART III - ISSUES AND THE LAW

40. The issues to be considered on this application are whether:

(a) each of the Applicants is a "debtor company" to which the CCAA applies;

(b) the relief sought in the proposed Initial Order is available under the CCAA and consistent with the purpose and policy of the CCAA;

(c) it is appropriate to appoint the Monitor as the foreign representative of the Applicants; and

(d) postponement of Cline's annual shareholders' meeting is appropriate.

A. EACH OF THE APPLICANTS IS A "DEBTOR COMPANY" TO WHICH THE CCAA APPLIES

41. The CCAA applies in respect of a "debtor company" or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies exceeds $5 million.

CCAA, Section 3(1).

42. The term "debtor company" is defined in Section 2 of the CCAA as follows:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.
>
> CCAA, Section 2 ("debtor company").

43. For the reasons described below, each of the Applicants is a "debtor company" within the meaning of this definition.

(1) Each of the Applicants is a "Company"

44. The term "company" is defined in Section 2 of the CCAA as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies [emphasis added].
>
> CCAA, Section 2 ("company")

45. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business" in Canada is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

46. Cline is a "company" within the meaning of the CCAA because it is a corporation incorporated under the laws of British Columbia with gold development assets in Ontario, and which does business from its head office in Toronto, Ontario.

Goldfarb Affidavit at paras. 20, 24, 33-35, 44, 46-47 and 58-60; Application Record, Tab 4.

47. New Elk and North Central are incorporated in the State of Colorado, have assets in Canada, namely bank accounts at the Bank of Montreal in Toronto, Ontario, and are directed from the Cline Group's head office in Toronto, Ontario. Each of New Elk and North Central is a "company" within the meaning of the CCAA because it is an incorporated company having assets in Canada.

Goldfarb Affidavit at paras. 47(p) and 60; Application Record, Tab 4.

(2) The Applicants are Insolvent

48. The insolvency of a debtor company is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), which defines an "insolvent person" as a person (i) who is not bankrupt; (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

(a) is for any reason unable to meet his obligations as they generally become due;

(b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 ("insolvent person").

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (WL) (Ont. Sup. Ct. J. [Commercial List]) at para. 4; leave to appeal to CA refused [2004] OJ No 1903; leave to appeal to SCC refused [2004] SCCA No 336 [*Stelco*]; Book of Authorities, Tab 1.

49. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco, supra at paras. 26 and 28; Book of Authorities, Tab 1.

50. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco, supra at para. 40; Book of Authorities, Tab 1.

51. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

(a) notwithstanding the Applicants' efforts to manage their current business challenges, the suspension of full-scale operations at the Cline Group's only asset with earnings capability has left the Applicants unable to sustain the carrying cost of their secured debt load;

(b) Cline was unable to make semi-annual interest payments in respect of the 2011 Notes and the 2013 Notes when such payments became due on December 16, 2013 and June 15, 2014;

(c) the Secured Notes matured on June 15, 2014 and remain unpaid;

(d) the Forbearance Agreements expired on November 28, 2014 and Marret has advised that the Secured Noteholders have directed the Trustee to accelerate the Secured Notes;

(e) Cline is immediately required to pay $110,173,897, which amount the Applicants are unable to pay;

(f) the Trustee is now in a position to enforce its security over the Property of the Applicants;

(g) given their current financial condition, the Applicants are unable to obtain additional or alternative financing to support their day-to-day operations or to enable the repayment of the Secured Notes;

(h) there is no reasonable expectation that the Applicants, in the near term, will be able to generate sufficient cash flow from operations to support their existing debt obligations; and

(i) the inability to obtain any expressions of interest in the Sale Process demonstrates that the aggregate value of the Applicants' Property, taken at fair value, is not sufficient to enable payment of all of the Applicants' obligations, due and accruing due.

Goldfarb Affidavit at paras. 89-117; Application Record, Tab 4.

(3) The Applicants have claims outstanding in excess of $5 million

52. The Applicants' liabilities far exceed the $5 million threshold amount under the CCAA.

Goldfarb Affidavit at para. 52; Application Record, Tab 4.

53. As a result of the foregoing factors, the CCAA applies to the Applicants as "debtor companies" in accordance with Section 3(1) of the CCAA.

B. THE RELIEF SOUGHT IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(1) The CCAA is Flexible, Remedial Legislation

54. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular, during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

> *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (QL) at paras. 22 and 56-60 (Ont. C.A.) [cited to OJ]; Book of Authorities, Tab 2.
>
> *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 at para. 5 (Ont. Gen. Div.); Book of Authorities, Tab 3.

55. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

> *Re Sulphur Corporation of Canada Ltd.*, 2002 ABQB 682, [2002] A.J. No. 918 (QL) at para. 26 [cited to A.J.]; Book of Authorities, Tab 4.

56. Given the nature and purpose of the CCAA, this Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) Entitlement to Make Pre-Filing Payments

57. To ensure the continued operation of and limit disruption to the Cline Business in order to maximize the value of the Cline Group for the benefit of the Applicants' stakeholders, the Applicants are seeking authorization (but not a requirement) to make certain pre-filing payments, including, *inter alia*: (a) payments to employees in respect of wages,

benefits and related amounts; (b) amounts owing to or in respect of individuals working as independent contractors; (c) the fees and disbursements of any consultants, agents, experts, accountants, counsel or other persons currently retained by the Applicants in respect of the CCAA or ancillary proceedings and related corporate matters; and (d) certain expenses incurred by the Applicants in carrying on the Business in the ordinary course that pertain to the period prior to the date of the Initial Order, if, in the opinion of the Applicants and with the consent of the Monitor, the applicable supplier or service provider is critical to the Cline Business and the ongoing operations of the Cline Group.

Goldfarb Affidavit at paras. 129-130; Application Record, Tab 4.

58. The Court has jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. The Court's jurisdiction is not impaired by Section 11.4 of the CCAA, which codifies the Court's authority to declare a person to be a critical supplier and to grant a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Re Canwest Global Communications Corp. (2009), 59 C.B.R. (5th) 72, [2009] O.J. No. 4286 at paras. 41 and 43 (Ont. Sup. Ct. J. [Commercial List]) [*Canwest Global*]; Book of Authorities, Tab 5.

59. There have been many instances since the 2009 amendments in which courts have authorized applicants to pay certain pre-filing amounts. In granting this authority, the Courts considered a number of factors, including:

(a) whether the goods and services were integral to the business of the applicants;

(b) the applicants' need for the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made without the consent of the Monitor;

(d) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate;

(e) whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

(f) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Re Cinram International Inc., 2012 ONSC 3767, 91 C.B.R. (5th) 46 at paras. 37 and Sch. C. paras. 66-71 (Ont. Sup. Ct. J. [Commercial List]) [*Cinram*]; Book of Authorities, Tab 6.

Re SkyLink Aviation Inc., 2013 ONSC 1500 at para. 26 (Ont. Sup. Ct. J. [Commercial List]) [*SkyLink*]; Book of Authorities, Tab 7.

60. The Applicants view their employees and certain of their independent contractors, certain suppliers of goods and services and certain providers of permits and licenses as critical to the operation of the Cline Business and believe that such persons should be paid in the ordinary course, including in respect of pre-filing amounts, in order to avoid disruption to the Applicants' operations during the CCAA proceedings.

Goldfarb Affidavit at para. 120 and 129; Application Record, Tab 4.

61. In the proposed Initial Order, the Applicants are also seeking authorization (but not the requirement) to pay expenses incurred by them in carrying on the Cline Business in the ordinary course after the date of the Initial Order, including, *inter alia*, all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Cline Business and payment for goods and services supplied or to be supplied to the Cline Group. The Cline Group must make periodic payments in order to keep its mining and exploration licenses in good standing. A failure to make these payments during CCAA proceedings could result in the loss of valuable mining rights.

Goldfarb Affidavit at paras. 120-121 and 129-130; Application Record, Tab 4.

62. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Court to exercise its jurisdiction and grant the Applicants the authority to pay certain pre- and post-filing obligations, subject to the terms and conditions in the proposed Initial Order.

(3) The Charges Are Appropriate

63. The Applicants are seeking approval of certain Court-ordered charges over their assets relating to their administrative costs and the indemnification of their directors and officers. The proposed Initial Order does not purport to give the Charges priority over any validly-perfected security interests listed on Schedule "A" to the proposed Initial Order. The security interests held by the Trustee and Marret are affected by the proposed Charges. The Trustee has been provided with notice of this Application. Marret, in its own capacity and on behalf of the Secured Noteholders, has also been provided with notice of this Application and supports the requested relief.

Goldfarb Affidavit at paras. 123, 140 and 165; Application Record, Tab 4.

(A) Administration Charge

64. In connection with the appointment of the proposed Monitor, the Applicants are seeking the Administration Charge in the amount of $350,000 to secure the professional fees and disbursements incurred at the standard rates and charges of the Monitor, counsel to the Monitor, counsel to the Applicants, the CRO and counsel to Marret. The Administration Charge is to rank in priority to all of the other Charges set out in the proposed Initial Order.

Goldfarb Affidavit at para. 132 and 139-140; Application Record, Tab 4.

65. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

> 11.52(1) *Court may order security or charge to cover certain costs*
> On notice to the secured creditors who are likely to be affected by

> the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) *Priority.* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> CCAA, Section 11.52(1) and (2).

66. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Canwest Global*, *Re Canwest Publishing Inc.*, *Cinram* and *SkyLink*.

> *Canwest Global, supra*; Book of Authorities, Tab 5.
>
> *Re Canwest Publishing Inc.*, 2010 ONSC 222, 64 C.B.R. (5th) 115 (Ont. Sup. Ct. J. [Commercial List]) [*Canwest Publishing*]; Book of Authorities, Tab 8.
>
> *Re Cinram International Inc.*, Initial Order granted June 25, 2012, Toronto CV12-9767-00CL (Ont. Sup. Ct. J. [Commercial List]) [*Cinram Initial Order*]; Book of Authorities, Tab 9.
>
> *SkyLink, supra*; Book of Authorities, Tab 7.

67. In *Canwest Publishing*, the Court noted that Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. The list of factors to consider in approving an administration charge include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

Canwest Publishing, supra, at para. 54; Book of Authorities, Tab 8.

68. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Court to exercise its jurisdiction and grant the Administration Charge in the amount of $350,000, given that:

(a) the proposed restructuring of the Applicants will require the extensive involvement of the professional advisors subject to the Administration Charge;

(b) the professionals that are subject to the Administration Charge have contributed, and continue to contribute, to the recapitalization of the Applicants;

(c) there is no unwarranted duplication of roles so as to minimize the professional fees associated with the Recapitalization;

(d) the secured creditors affected by the charge have been provided with notice of these CCAA proceedings, and the Secured Noteholders (which are secured by security held by the Trustee) and Marret are supportive of the Administration Charge; and

(e) the proposed Monitor is supportive of the Administration Charge.

Goldfarb Affidavit at paras. 133 and 140; Application Record, Tab 4.

(B) Directors' Charge

69. The Applicants are seeking the Directors' Charge in an amount of $500,000 to secure the Applicants' indemnification of their directors and officers in respect of liabilities they may incur after the commencement of the within CCAA proceedings. The Directors' Charge is to be subordinate to the Administration Charge.

Goldfarb Affidavit at paras. 133-141; Application Record, Tab 4.

70. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

> 11.51(1) *Security or charge relating to director's indemnification.* – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) *Priority.* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> 11.51(3) *Restriction – indemnification insurance.* – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault.* – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

CCAA, Section 11.51.

71. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and

no order should be granted if adequate insurance at a reasonable cost could be obtained.

Canwest Global, supra at paras. 46-48; Book of Authorities, Tab 5.

Canwest Publishing, supra at paras. 56-57; Book of Authorities, Tab 8.

Cinram Initial Order, supra at para. 53; Book of Authorities, Tab 9.

SkyLink, supra at para. 27; Book of Authorities, Tab 7.

72. The Applicants submit that the Directors' Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge in the amount of $500,000, given that:

(a) the directors and officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

(b) the Applicants' D&O Insurance Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage in respect of the potential director and officer liabilities;

(c) the Directors' Charge applies only to claims or liabilities for which the directors and officers do not have coverage under the D&O Insurance Policy;

(d) the Directors' Charge would only cover obligations and liabilities that the directors and officers, as applicable, may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;

(e) the Applicants' directors and officers have been actively involved in efforts to address the Applicants' current financial circumstances and difficulties, including through the exploration of alternatives, overseeing the Sale Process, engaging in discussions with Marret on behalf of the Secured Noteholders, negotiating the proposed Recapitalization and the commencement of the within CCAA proceedings;

(f) the Applicants require the continued active and committed involvement of the members of their boards of directors and officers;

(g) the amount of the Directors' Charge has been calculated based on the estimated maximum exposure of the directors and officers of the Applicants and has been reviewed with the proposed Monitor;

(h) the secured creditors affected by the charge have been provided with notice of these CCAA proceedings, and the Secured Noteholders (which are secured by security held by the Trustee) and Marret are supportive of the Directors' Charge; and

(i) the proposed Monitor is supportive of the Directors' Charge.

Goldfarb Affidavit at paras. 134-138; Application Record, Tab 4.

C. IT IS APPROPRIATE TO APPOINT THE MONITOR AS THE FOREIGN REPRESENTATIVE OF THE APPLICANTS

73. The Applicants, with the assistance of the Monitor as foreign representative, intend to commence Chapter 15 proceedings in the United States Bankruptcy Court for the District of Colorado forthwith should this Court grant the Initial Order. The purpose of the Chapter 15 proceedings would be to give effect to the Recapitalization and the Orders of this Court in the United States, where the New Elk Mine and certain of the Applicants' assets and creditors are located.

Goldfarb Affidavit at paras. 142-143; Application Record, Tab 4.

74. Under Section 56 of the CCAA, the Court has the authority to appoint a foreign representative of the Applicants for the purpose of having these CCAA proceedings recognized in a jurisdiction outside of Canada.

CCAA, Section 56.

75. The Applicants are seeking in the proposed Initial Order authorization for each of the Applicants and the Monitor to apply to any court for the recognition of the Initial Order and authorization for the Monitor to act as a representative in respect of the within CCAA proceedings for the purpose of having these CCAA proceedings recognized in a jurisdiction outside Canada. Under the terms of the proposed Initial Order, the Monitor, as foreign representative of the Applicants, is specifically empowered to apply for recognition of, and to act as the representative of, the within CCAA proceedings in any proceedings pursuant to Chapter 15.

Goldfarb Affidavit at para. 143; Application Record, Tab 4.

76. If FTI is appointed as Monitor of the Applicants in these CCAA proceedings, it will be in a position to, if necessary, act as the foreign representative of the Applicants, file petitions under Chapter 15 seeking recognition of the within CCAA proceedings in the United States and keep this Court informed of developments in such foreign recognition proceedings. Accordingly, the Applicants submit that it is appropriate for this Court to exercise its jurisdiction to appoint the Monitor as foreign representative of the Applicants with respect to these proceedings.

D. THE APPLICANTS' CENTRE OF MAIN INTERESTS IS ONTARIO, CANADA

77. Although the determination of the Applicants' centre of main interests (the "**COMI**") is an issue to be considered by the United States Bankruptcy Court for the District of Colorado, rather than this Court, the Applicants wish to address the COMI for the benefit of this Court as well. The Applicants submit that their COMI is located in Toronto, Ontario, Canada, and that this Court is the appropriate forum in which to hold the primary insolvency proceedings in respect of the Applicants.

78. Cline is the parent company of the Cline Group and is incorporated under the laws of British Columbia. Cline commenced business under the laws of Ontario over a decade ago and its principal office, which serves as the head office and nerve centre of the Cline Group (the "**Toronto Head Office**") is located in Toronto, Ontario.

Goldfarb Affidavit at paras. 44; Application Record, Tab 4.

79. New Elk and North Central are incorporated under the laws of the State of Colorado and have their registered head offices in Colorado. New Elk and North Central are wholly-owned subsidiaries of Cline and are integrated members of the Cline Group. The Applicants submit that the COMI of New Elk and North Central is Ontario, Canada, notwithstanding that both have registered head offices in Colorado.

Goldfarb Affidavit at paras. 45-46; Application Record, Tab 4.

80. In cases under Part IV of the CCAA, courts have, on numerous occasions, found that there was sufficient evidence to rebut the presumption in Section 45(2) of the CCAA and that a debtor company's COMI was in a country other than the country in which the debtor company's registered office was located.

Re Lightsquared LP (2012), 92 C.B.R. (5th) 321, 219 A.C.W.S. (3d) 23 (Ont. Sup. Ct. J. [Commercial List]) [*Lightsquared*]; Book of Authorities, Tab 10.

81. In circumstances where it is necessary to go beyond the Section 45(2) registered office presumption, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's COMI. The factors are:

(a) the location is readily ascertainable by creditors;

(b) the location is one in which the debtor's principal assets or operations are found; and

(c) the location is where the management of the debtor takes place.

Lightsquared, supra at para. 25; Book of Authorities, Tab 10.

82. The Court may need to give greater or less weight to a given factor depending on the circumstances of the particular case. In all cases, however, the review is designed to ensure that the location of the proceeding corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to the commencement of the proceedings.

Lightsquared, supra at para. 26; Book of Authorities, Tab 10.

83. The COMI of the Applicants is Ontario, Canada as evidenced by the following:

(a) the corporate head office and the nerve centre of the Cline Group is located in Toronto, Ontario;

(b) Cline, the parent of the Cline Group and the principal borrower/obligor under the Secured Notes, is a Canadian entity;

(c) New Elk and North Central rely nearly exclusively on Cline, their Canadian parent, to finance their operations and are liable as guarantors for Cline's obligations in respect of the Secured Notes;

(d) until June 2013, the shares of Cline were publicly-listed on the Toronto Stock Exchange, and the most recent annual general meeting of Cline was held in Toronto, Ontario;

(e) corporate-level decision making for the Cline Group, including decisions with respect to New Elk, North Central and the New Elk Mine, are undertaken by the executive management of Cline;

(f) the majority of the executive management of the Cline Group, including the management of New Elk and North Central, is shared;

(g) Cline's acting Chief Executive Officer, Matthew Goldfarb, serves on the board of directors of each of the three Applicants, and the Chief Financial Officer of Cline, Paul Haber, also serves on the board of directors of North Central;

(h) the Cline Group's major contracts, including those of New Elk and North Central, are approved at the corporate level by the executive management of Cline;

(i) a substantial portion of the administrative functions in respect of the Cline Group, including information technology, general accounting, financial reporting, budgeting, and human recourse functions related to the Applicants, are carried out at the Toronto Head Office;

(j) the Secured Notes are the principal source of financing for the Cline Group – representing in excess of 95% of the Cline Group's aggregate liabilities – and all of the Secured Notes are held by beneficial owners whose investments are managed by Marret, which is based in Toronto, Ontario;

(k) approximately 97% of the Secured Notes are beneficially held by Secured Noteholders that are domiciled in Canada;

(l) the Trustee of the Secured Notes, Computershare Trust Company of Canada, is located in Toronto, Ontario;

(m) the 2011 Indenture and the 2013 Indenture are both governed by the laws of the Province of Ontario;

(n) New Elk is treated as a branch of Cline (and not as a separate taxable corporation) for U.S. federal income tax purposes;

(o) Cline operates a centralized cash management system from the Toronto Head Office, pursuant to which Cline, as parent company, approves the expenditures of

all members of the Cline Group, advances funds for all such expenditures, controls and monitors the consolidated cash balance of the Cline Group and provides reporting on the Cline Group's cash balances to the board of directors of Cline;

(p) New Elk and North Central have Canadian bank accounts with the Bank of Montreal located in Toronto, Ontario;

(q) Cline prepares consolidated financial statements that incorporate the financial results and position of the entire Cline Group, including New Elk and North Central; and

(r) the consolidated financial statements are specified in the 2011 Indenture and the 2013 Indenture as the relevant financial information for determining Cline's compliance with certain financial covenants relating to the Secured Notes.

Goldfarb Affidavit at para. 47; Application Record, Tab 4.

84. Accordingly, the Applicants submit that their COMI is located in Ontario, Canada.

E. POSTPONEMENT OF ANNUAL SHAREHOLDERS' MEETING

85. Section 182(1) of the *Business Corporations Act* (British Columbia) (the "**BCA**") provides that "a company must hold an annual general meeting...at least once in each calendar year and not more than 15 months after the annual reference date for the preceding calendar year." "Annual reference date" is defined in Section 1(1) of the BCA as, *inter alia*, the date in the annual reference period on which the company holds its annual general meeting.

Business Corporations Act, SBC 2002, c. C-57, Sections 1(1) and 182(1).

86. The previous annual general meeting of Cline was held on August 15, 2013. Cline was therefore statutorily required to hold an annual general meeting by November 15, 2014.

Goldfarb Affidavit at para. 144; Application Record, Tab 4.

87. Courts considering CCAA applications have commonly exercised their jurisdiction to grant relief to insolvent companies from the corporate requirement of calling annual meetings of shareholders. Such relief has been granted in situations where the holding of the meeting would not have provided any material benefit to shareholders given their lack of economic interest resulting from the insolvency of the debtor company or where the Court found that it would be preferable for the applicant to continue focussing its efforts and resources on its restructuring rather than on the holding of an annual meeting.

Canwest Global, supra at paras. 53-54; Book of Authorities, Tab 5.

SkyLink, supra at para. 29; Book of Authorities, Tab 7.

88. In this case, it would serve no purpose for Cline to call and hold its annual meeting of shareholders given that the shareholders of Cline no longer have an economic interest in Cline as a result of its insolvency. Preparing for and holding an annual shareholders meeting would result in unnecessary costs and divert the attention of senior management away from the implementation of the proposed Recapitalization.

Goldfarb Affidavit at para. 144; Application Record, Tab 4.

89. Accordingly, the Applicants submit that it is appropriate for the Court to exercise its jurisdiction to relieve Cline from any obligation to call and hold an annual meeting of its shareholders until after the termination of these CCAA proceedings or further Order of the Court.

Goldfarb Affidavit at para. 144; Application Record, Tab 4.

PART IV - RELIEF REQUESTED

90. The Applicants are in an unsustainable financial position. The Cline Group has a number of valuable interests in mineral properties but currently lacks the financial capacity to develop and operate them as a result of a protracted downturn in the market for its commodities, a lack of new liquidity, and the inability to operate profitably under current market conditions. The depressed global market for metallurgical coal and the consequent suspension of full-scale coal mining activities at the New Elk Mine has led to the inability of Cline to generate the revenue needed to satisfy the obligations in respect of the Secured Notes as those obligations become due.

91. In order to avoid an involuntary debt enforcement scenario and the accompanying loss of value, the Cline Group has negotiated the Recapitalization and achieved the support of Marret, on behalf of the Secured Noteholders, who are the only parties with a remaining economic interest in the Applicants. The Recapitalization is in the best interests of other stakeholders of the Applicants, including the Applicants' unsecured creditors, who would otherwise receive no recovery. The Recapitalization will result in the Cline Group having an improved capital structure, following which it will be in a significantly better position to withstand the prolonged weakness in the global price of metallurgical coal.

92. The Applicants submit that they meet all of the qualifications required to obtain the requested relief under the CCAA.

93. For the reasons set out above, the Applicants request that this Court grant the proposed form of Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 2, 2014

Robert J. Chadwick

Logan Willis

Bradley Wiffen

SCHEDULE A - LIST OF AUTHORITIES

1. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336.

2. *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (Ont. C.A.)

3. *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div.)

4. *Re Sulphur Corporation of Canada Ltd.*, 2002 ABQB 682, [2002] A.J. No. 918

5. *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72, [2009] O.J. No. 4286 (Ont. Sup. Ct. J. [Commercial List])

6. *Re Cinram International Inc.*, 2012 ONSC 3767, 91 C.B.R. (5th) 46 (Ont. Sup. Ct. J. [Commercial List])

7. *Re SkyLink Aviation Inc.,* 2013 ONSC 1500 (Ont. Sup. Ct. J. [Commercial List])

8. *Re Canwest Publishing Inc.*, 2010 ONSC 222, 64 C.B.R. (5th) 115 (Ont. Sup. Ct. J. [Commercial List])

9. *Re Cinram International Inc.*, Initial Order granted June 25, 2012, Toronto CV12-9767-00CL (Ont. Sup. Ct. J. [Commercial List])

10. *Re Lightsquared LP* (2012), 92 C.B.R. (5th) 321, 219 A.C.W.S. (3d) 23 (Ont. Sup. Ct. J. [Commercial List])

SCHEDULE B – STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT
RSC 1985, c C-36, as amended

s. 2 ("company")

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies.

s. 2 ("debtor company")

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent.

s. 3(1)

Application - This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

s. 11

General power of court – Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances

s. 11.51(1)

Security or charge relating to director's indemnification – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all of part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

s. 11.51(2)

Priority – The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

s. 11.51(3)

Restriction – indemnification insurance – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

s. 11.51(4)

Negligence, misconduct or fault – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

s. 11.52(1)

Court may order security or charge to cover certain costs – On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate – in respect of the fees and expenses of

a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

b) any financial, legal or other experts engaged by the company for the purpose of proceeding under this Act; and

c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

s. 11.52(2)

Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

s. 56

Authorization to act as representative of proceeding under this Act - The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

BANKRUPTCY AND INSOLVENCY ACT
RSC 1985, c B-3, as amended

s. 2 ("insolvent person")

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

a) who is for any reason unable to meet his obligations as they generally become due,

b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due

BUSINESS CORPORATIONS ACT (BRITISH COLUMBIA)
SBC 2002, c. C-57, as amended

s. 1(1) ("annual reference date")

"annual reference date" means, for an annual reference period applicable to a company,

a) the date in that annual reference period on which the company holds its annual general meeting, or

...

s. 182(1)

Annual General Meetings - Subject to subsections (2) to (5), a company must hold an annual general meeting,

a) for the first time, not more than 18 months after the date on which it was recognized, and

b) after its first annual reference date, at least once in each calendar year and not more than 15 months after the annual reference date for the preceding calendar year.

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

Court File No: _____

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM
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