Court File No. CV14-10781-00CL

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
(Plan Sanction Motion returnable January 27, 2015)

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PART I - INTRODUCTION

1. Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "**Applicants**") seek an Order (the "**Sanction Order**"), among other things:

    (a) sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "**Plan**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"); and

    (b) extending the Stay Period, as defined in the Initial Order of this Court granted December 3, 2014 (the "**Initial Order**"), to and including April 1, 2015.[1]

2. The Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges. If implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise and result in an improved

[1] Any capitalized terms used but not defined herein shall have the meaning given to them in the Affidavit of Matthew Goldfarb sworn January 21, 2015 (the "**Goldfarb Affidavit**"), the Second Report of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor dated January 14, 2015 (the "**Monitor's Second Report**") and the Plan, as applicable. All dollar amounts expressed herein, unless otherwise noted, are in Canadian currency.

capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal. The Applicants and their boards of directors believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

3. The Recapitalization and the approval of the Plan by this Court are supported by the Monitor and by Marret, on behalf of the Secured Noteholders.

4. The Plan also has strong support from creditors of the Applicants, as evidenced by the voting results at the Meetings. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

PART II - THE FACTS

A. BACKGROUND TO THE CCAA PROCEEDINGS

5. The Applicants, along with Raton Basin Analytical LLC ("**Raton Basin**" and, together with the Applicants, the "**Cline Group**"), are in the business of locating, exploring and developing mineral resource properties, with a particular focus on metallurgical coal and gold (the "**Cline Business**").

> Goldfarb Affidavit at para. 10; Motion Record of the Applicants ("**Motion Record**"), Tab 2.

6. As described in greater detail in the affidavit of Matthew Goldfarb sworn December 2, 2014 (the "**Initial Affidavit**"), the Cline Group has experienced financial challenges that have necessitated a recapitalization of the Applicants under the CCAA. On December 3, 2014, the Applicants sought protection from their creditors under the CCAA and obtained the Initial Order. On the same date, this Court also granted the Claims Procedure Order and the Meetings Order. The Stay Period (as defined in the Initial Order) was extended to March 1, 2015 by an Order of this Court granted December 22, 2014.

> Initial Affidavit at para. 7; Motion Record, Tab 2, Exhibit C.
>
> Goldfarb Affidavit at paras. 12, 13 and 15; Motion Record, Tab 2.

7. On December 3, 2014, the Monitor, as foreign representative of the Applicants, commenced ancillary proceedings (the "**Chapter 15 Proceedings**") in the United States by filing petitions under Chapter 15, Title 11 of the United States Bankruptcy Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Colorado (the "**U.S. Court**"). By the petitions, the Monitor sought an order (the "**Recognition Order**") recognizing the CCAA Proceedings as "foreign main proceedings" within the meaning of the Bankruptcy Code and giving full force and effect in the United States to the Initial Order, the Claims Procedure Order and the Meetings Order. No objections to the Recognition Order were received by the U.S. Court prior to the deadline for such objections on January 9, 2015. The U.S. Court entered the Recognition Order on January 14, 2015.

Goldfarb Affidavit at para. 16; Motion Record, Tab 2.

B. <u>CLAIMS PROCEDURE</u>

8. On December 3, 2014, this Court granted the Claims Procedure Order approving the Claims Procedure to ascertain all of the claims against the Applicants and their present and former directors and officers. The Applicants, with the assistance of the Monitor, carried out the Claims Procedure in accordance with the terms of the Claims Procedure Order and have diligently pursued all steps and requirements in connection with the Claims Procedure.

Goldfarb Affidavit at paras. 13 and 19; Motion Record, Tab 2.

9. As detailed in the Monitor's Second Report, the Claims Procedure resulted in Claims being filed against the Applicants as follows:

   (a) $92.674 million of claims in respect of the Secured Noteholders Allowed Secured Claim;

   (b) $21.02 million in Affected Unsecured Claims, consisting of the Secured Noteholders Allowed Unsecured Claim of $17.5 million and other unsecured claims of $3.702 million; and

(c) $4.203 million in WARN Act Claims.

Goldfarb Affidavit at para. 20; Motion Record, Tab 2.

Monitor's Second Report at para. 38.

10. The treatment of a portion of the Secured Noteholders Allowed Claim as unsecured is supported by the results of the Sale Process, which indicate that there is no realistic prospect of the Cline Group achieving a sale of the Cline Business at the present time at values that would enable the payment in full of the Secured Noteholders Allowed Claim. The Monitor has also stated in the Monitor's Second Report that the obligations owed by the Applicants in respect of the Secured Notes appear to exceed the realizable value of the Cline Group at the present time.

Goldfarb Affidavit at para. 22; Motion Record, Tab 2.

Monitor's Second Report at para. 89.

11. There were no Director/Officer Claims filed against the Directors and Officers as part of the Claims Procedure.

Monitor's Second Report at para. 41.

12. The Claims Procedure resulted in five Disputed Claims in respect of Affected Unsecured Claims, which remain unresolved.

Goldfarb Affidavit at para. 21; Motion Record, Tab 2.

C. THE RECAPITALIZATION AND THE PLAN

(1) Overview of the Recapitalization

13. The Applicants have experienced financial difficulties as a result of the curtailment of full scale mining activities at the New Elk Mine and the prolonged downturn in the metallurgical coal market. In an effort to identify a sale or merger transaction as a means to generate sufficient proceeds to satisfy their obligations and to maximize value for their

stakeholders, the Applicants undertook a comprehensive review of their alternatives, including the Sale Process carried out in the summer of 2014.

Goldfarb Affidavit at paras. 49 and 50; Motion Record, Tab 2.

14. The Applicants actively engaged in discussions with Marret and its advisors regarding a restructuring or recapitalization of the Applicants. These discussions ultimately resulted in the proposed Recapitalization, which is to be implemented pursuant to the Plan. As evidenced by the voting results at the Meetings, the Recapitalization and the Plan have strong support from the Applicants' Affected Creditors.

Goldfarb Affidavit at paras. 47 and 51; Motion Record, Tab 2.

15. The Applicants' boards of directors believe that the Recapitalization is in the best interests of the Applicants and their stakeholders and that the Plan offers a greater benefit to the Applicants' stakeholders than any other restructuring, sale or debt enforcement alternatives available to the Applicants in the circumstances. If implemented, the Recapitalization would:

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

(b) reduce the Applicants' secured indebtedness by in excess of $55 million;

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

(d) resolve the WARN Act Class Action, which represents a contingent unsecured liability in excess of $4 million;

(e) preserve certain tax attributes within the restructured companies;

(f) keep the Applicants' mining rights and permits in good standing, avoiding the need to transfer, re-negotiate or re-apply for such rights and permits;

(g) provide a limited recovery for unsecured creditors that they could not expect to receive under any other bankruptcy or debt enforcement scenario; and

(h) result in an improved capital structure to enable the Cline Group to better withstand prolonged weakness in the price of metallurgical coal.

Goldfarb Affidavit at para. 24; Motion Record, Tab 2.

(2) Amendments to the Plan

16. On January 13, 2005, counsel to the WARN Act Plaintiffs in the class action proceedings (the "**Class Action Counsel**") submitted a class Proof of Claim on behalf of 307 WARN Act Plaintiffs in the aggregate amount of US$3.7 million. Class Action Counsel also indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Applicants' Plan of Compromise and Arrangement dated December 3, 2014 the ("**Original Plan**") without an enhancement of the recovery for the WARN Act Plaintiffs. In an effort to determine whether it would be possible to resolve the WARN Act Claims as part of the Recapitalization, counsel to the Applicants engaged with Class Action Counsel with respect to a possible resolution of the WARN Act Claims.

Goldfarb Affidavit at para. 26; Motion Record, Tab 2.

17. These discussions, with input from Marret and the Monitor, have ultimately led to the development of a proposed resolution (the "**WARN Act Resolution**") of the WARN Act Claims as part of the Plan. Pursuant to the Plan, the WARN Act Claims will be fully and forever compromised, released and discharged in respect of the Applicants in exchange for (a) a $90,000 cash payment to be made on the Plan Implementation Date (the "**WARN Act Cash Payment**"); and (b) an unsecured, non-interest-bearing entitlement to receive $120,000 in cash on the date that is eight years from the Plan Implementation Date (the "**WARN Act Plan Entitlement**"). These payments are to be made directly to Class Action Counsel. Certain reasonable fees, costs and expenses arising from the WARN Act Class Action case will be funded out of these payments in amounts to be determined by agreement of Class Action Counsel and the representative plaintiffs in the WARN Act Class Action. Class Action Counsel will then be responsible for distributing all remaining amounts directly to the WARN Act Plaintiffs.

Goldfarb Affidavit at para. 27; Motion Record, Tab 2.

18. This resolution provides for an enhanced recovery for the WARN Act Plaintiffs Class of $210,000 (with $90,000 paid on the Plan Implementation Date), as opposed to the recovery offered in the Original Plan of $100,000 payable in eight years from the Plan Implementation Date. On January 20, 2015, the Applicants reached agreement with Class Action Counsel on the terms of the WARN Act Resolution and the amendments needed to address that resolution in the Plan. Consequently, the Original Plan was amended to reflect the terms of the WARN Act Resolution.

Goldfarb Affidavit at para. 28; Motion Record, Tab 2.

19. The Applicants served the amended Plan on the service list on January 20, 2015 and notice of the amended Plan was provided by email to all Affected Creditors that had submitted Proofs of Claim, Notices of Dispute or voting proxies.

Goldfarb Affidavit at para. 30; Motion Record, Tab 2.

20. The Applicants believe that the WARN Act Resolution is in the best interests of the Cline Group, as it resolves longstanding litigation in respect of the Applicants, avoids potential delay in the completion of the Recapitalization and ensures that the restructured Cline Group will have no ongoing liability with respect to the WARN Act Class Action. Additionally, the WARN Act Resolution provides an improved recovery for the WARN Act Plaintiffs and does not impact the value of consideration to be received by Affected Unsecured Creditors under the Plan.

Goldfarb Affidavit at para. 31; Motion Record, Tab 2.

21. All of the amendments to the Original Plan were supported by the Monitor and Marret (on behalf of the Secured Noteholders) and are in compliance with the Plan amendment provisions set forth in the Original Plan and the Meetings Order.

Goldfarb Affidavit at para. 32; Motion Record, Tab 2.

(3) Summary of the Plan

(i) Purpose and Effect of the Plan

22. In developing the Plan, the Applicants sought to maximize value for their stakeholders and to achieve a fair and reasonable balance among their Affected Creditors. The principal terms of the Plan, as amended, are summarized as follows:

(a) the Plan is filed on a consolidated basis in respect of the Applicants;

(b) the Plan provides for three separate classes of creditors, namely the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

(c) the Plan apportions the aggregate Secured Noteholders' claim between the Secured Noteholders Allowed Secured Claim, which is $92,673,897 for purposes of the Plan, and the Secured Noteholders Allowed Unsecured Claim, which is $17,500,000 for purpose of the Plan and which represents the Secured Noteholders' unsecured deficiency claim;

(d) the Secured Noteholders Allowed Secured Claim will be compromised, released and discharged in exchange for new Cline common shares representing 100% of the equity in Cline, and new indebtedness in favour of the Secured Noteholders evidenced by a credit agreement with a term of seven years in the principal amount of $55 million, bearing interest at 0.01% per annum plus an additional variable interest payable only once the Applicants have achieved certain operating revenue targets;

(e) the claims of Affected Unsecured Creditors, which exclude the WARN Act Plaintiffs but include the Secured Noteholders Allowed Unsecured Claim, will be compromised, released and discharged in exchange for each such Affected Unsecured Creditor's *pro rata* share of an unsecured, subordinated, non-interest bearing entitlement to receive $225,000 from Cline on the date that is eight years from the date the Plan is implemented (the "**Unsecured Plan Entitlement**");

(f) notwithstanding the Secured Noteholders Allowed Unsecured Claim, the Secured Noteholders will waive their entitlement to the proceeds of the Unsecured Plan Entitlement, and all such proceeds will be available for distribution to the other Affected Unsecured Creditors with valid claims who are entitled to the Unsecured Plan Entitlement, allocated on a *pro rata* basis;

(g) all Affected Unsecured Creditors with valid claims of up to $10,000 will, instead of receiving their *pro rata* share of the Unsecured Plan Entitlement, be paid in cash for the full value of their claim, provided that this cash payment will not apply to any Secured Noteholder with respect to its Secured Noteholders Allowed Unsecured Claim;

(h) all WARN Act Claims will be compromised, released and discharged in exchange for the payment on the Plan Implementation Date of the WARN Act Cash Payment in the amount of $90,000, and an unsecured, subordinated, non-interest bearing entitlement to receive $120,000 on the date that is eight years from the Plan Implementation Date, provided that, in each case, certain reasonable fees, costs and expenses arising from the WARN Act Class Action case will be funded from such consideration and the remaining amounts will be distributed by Class Action Counsel directly to the WARN Act Plaintiffs;

(i) certain claims against the Applicants, including Employee Priority Claims, Government Priority Claims, claims covered by insurance, certain prior-ranking secured claims of equipment providers and the secured claim of Bank of Montreal in respect of corporate credit card payables, will remain unaffected by the Plan;

(j) existing equity interests in Cline will be cancelled for no consideration; and

(k) the shares of New Elk and North Central will not be affected by the Recapitalization and will remain owned by Cline and New Elk, respectively.

Goldfarb Affidavit at para. 34; Motion Record, Tab 2.

23. The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

Plan, Section 2.2.

24. Unaffected Creditors will not be affected by or receive distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are satisfied in full on the Plan Implementation Date in accordance with the express terms of the Plan).

Plan, Sections 2.3 and 3.5.

25. Equity Claimants will not receive any consideration or distributions under the Plan.

Plan, Section 3.4(4).

26. Any Affected Creditor with a Disputed Distribution Claim will not be entitled to receive any distribution under the Plan with respect to such Disputed Distribution Claim unless and until such Claim becomes an Allowed Affected Claim. As discussed above, as at the date of the Meetings, there were five Disputed Claims. Disputed Claims will be resolved in the manner set out in the Claims Procedure Order and the Plan.

Plan, Section 3.6.

Goldfarb Affidavit at para. 21; Motion Record, Tab 2.

(ii) Releases

27. The Plan provides for the release of certain parties (the "**Released Parties**"), including (i) the Applicants, the Directors and Officers and employees and contractors of the Applicants and (ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in subparagraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Director/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matters (collectively, the "**Released Claims**").

Plan, Section 7.1.

Goldfarb Affidavit at paras. 39; Motion Record, Tab 2.

28. The Plan does not release: (i) the right to enforce the Applicants' obligations under the Plan; (ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or (iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA. The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

Plan, Section 7.1.

Goldfarb Affidavit at para. 40; Motion Record, Tab 2.

(iii) Amendment to the Cline Articles

29. The Plan provides that, on the Plan Implementation Date, the Articles of Cline shall be altered to, among other things, consolidate the issued and outstanding Cline Common Shares and to effect the cancellation of any fractional Cline Common Shares.

Plan, Section 5.3.

D. MEETINGS OF CREDITORS

30. The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

Goldfarb Affidavit at paras. 45; Motion Record, Tab 2.

31. The Monitor has complied with the notice and other requirements set forth in the Meeting Order.

Goldfarb Affidavit at para. 46; Motion Record, Tab 2.

32. The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed by the required majorities in each of the three classes of creditors. Specifically, the Affected Creditors approved the Plan by the following majorities:

(a) Secured Noteholders Class: 100% in number and 100% in value (consisting of 16 Secured Noteholders).

(b) Affected Unsecured Creditors Class: 100% in number and 100% in value (consisting of 16 Secured Noteholders, 62 Convenience Creditors and 4 other Affected Unsecured Creditors).

(c) WARN Act Plaintiffs Class: 100% in number and 100% in value (consisting of the two representative plaintiffs in the WARN Act Class Action).

Goldfarb Affidavit at para. 47; Motion Record, Tab 2.

Monitor's Third Report at para. 47.

33. None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of Disputed Claims in the voting results.

Goldfarb Affidavit at para. 48; Motion Record, Tab 2.

E. FURTHER BACKGROUND FACTS

34. Facts relating to the Plan, the results of the Claims Procedure and the Meetings and the requested relief are more fully set out in the Goldfarb Affidavit, the Initial Affidavit and the Monitor's Second Report.

PART III - ISSUES AND THE LAW

35. The issues to be considered on this motion are whether:

(a) the requirements for Plan approval have been met;

(b) the releases are appropriate in the circumstances;

(c) the Court has the authority to order that the Articles be amended in accordance with the Plan; and

(d) an extension of the Stay Period is appropriate.

A. THE REQUIREMENTS FOR PLAN APPROVAL HAVE BEEN MET

36. Pursuant to section 6(1) of the CCAA, the Court has the discretion to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the company and its creditors.

CCAA, section 6(1).

37. The general requirements for court approval of a CCAA plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

Re SkyLink Aviation Inc., 2013 ONSC 2519 at para. 26; Book of Authorities of the Applicants (**"Book of Authorities"**), Tab 1.

(1) There has been Strict Compliance with Statutory Requirements

38. The first and second requirements of the test for the sanction of a plan of compromise or arrangement under the CCAA relate to compliance with the procedural requirements of the CCAA and court orders granted during the CCAA proceedings. With respect to the first part of the test, factors that may be considered by the courts include whether:

(a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA;

(b) the applicant has total claims against it in excess of $5 million;

(c) the notice calling the creditors' meeting was sent in accordance with the order of the court;

(d) the creditors were properly classified;

(e) the meeting of creditors was properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority.

Re Canadian Airlines Corp., 2000 ABQB 442 [*Canadian Airlines*] at para. 62; Book of Authorities, Tab 2.

39. The Applicants have complied with the procedural requirements of the CCAA, the Initial Order, the Claims Procedure Order, the Meetings Order and all other Orders granted by the Court during the CCAA Proceedings. In particular:

(a) upon granting of the Initial Order, this Court found that the CCAA applies to the Applicants as "debtor companies" in accordance with the CCAA and that the Applicants' liabilities far exceed the $5 million threshold amount under the CCAA;

(b) prescribed notices to creditors and other interested persons as required under the Initial Order, the Claims Procedure Order and the Meetings Order were delivered within the timeframes and as required by such Orders;

(c) the classification of the Applicants' Affected Creditors into three Voting Classes – namely the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class – was approved by this Court pursuant to the Meetings Order. This classification was not opposed at the hearing to approve the Meetings or at the subsequent comeback hearing on December 22, 2014;

(d) the Original Plan was amended in accordance with its terms to reflect the terms of the WARN Act Resolution and interested parties were notified in advance of the Meetings of the amendment of the Original Plan;

(e) each of the Meetings was properly constituted and the voting was properly carried out in accordance with the Meetings Order; and

(f) the Plan was approved by 100% in number and 100% in value of persons voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

Re Cline Mining Corporation, 2014 ONSC 6998 at paras. 34 and 35; Book of Authorities, Tab 3.

Meetings Order at para. 19.

Goldfarb Affidavit at para. 54; Motion Record, Tab 2.

40. Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning Crown claims, employee claims and pension claims.

CCAA, sections 6(3), 6(5) and 6(6).

41. In accordance with the provisions of the CCAA, the Plan treats Government Priority Claims and Employee Priority Claims as Unaffected Claims. Such claims, if any, will not be compromised under the Plan and will be paid as required by the CCAA. Accordingly, the requirements in sections 6(3) and 6(5) of the CCAA are satisfied. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply.

Goldfarb Affidavit at para. 37; Motion Record, Tab 2.

42. In accordance with section 6(8) of the CCAA, the Plan provides that Equity Claimants will not receive any consideration or distributions under the Plan in respect of their Equity Claims.

CCAA, section 6(8).

Plan, section 3.4(4).

43. Accordingly, it is submitted that the statutory requirements for the sanction of the Plan under section 6 of the CCAA have been satisfied.

(2) Nothing has been Done or Purported to be Done that is Not Authorized by the CCAA

44. With respect to the second part of the test for sanction of a plan of compromise or arrangement under the CCAA, courts ought to rely on the reports of the Monitor and on other parties in assessing whether anything has been done or purported to have been done that is not authorized by the CCAA.

> *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 [*Canwest Global*] at para. 17; Book of Authorities, Tab 4.

45. Throughout the course of the CCAA Proceedings, the Applicants have acted in good faith and with due diligence and have complied with the requirements of the CCAA and the Orders of this Court. The Monitor's reports to the Court have not identified any conduct or action by the Applicants that is not authorized by the CCAA and have stated that the Applicants have acted in good faith and with due diligence. The Applicants are not aware of any basis for asserting that the Applicants have proceeded in a manner that is not authorized by the CCAA.

> Goldfarb Affidavit at para. 54; Motion Record, Tab 2.
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> Monitor's First Report at para. 39.
>
> Monitor's Second Report at para. 87.

46. Accordingly, it is submitted that the second part of the plan sanction test has been met.

(3) The Plan is Fair and Reasonable

47. When considering whether a plan is fair and reasonable, the Court does not require perfection. Rather the Court will measure the fairness and reasonableness of a plan against the available commercial alternatives, weigh the equities and balance the relative degrees of prejudice that would flow from granting or refusing the relief being sought under the CCAA:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.
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> *Olympia & York Developments Ltd. v Royal Trust Co.*, 17 C.B.R. (3d) 1 [*Olympia & York*] at para. 29 (Ont. Ct. Jus. (Gen Div)) (1993); Book of Authorities, Tab 5.
>
> *Canadian Airlines*, *supra* at paras. 3 and 179; Book of Authorities, Tab 2.
>
> *Canwest Global*, *supra* at para. 19; Book of Authorities, Tab 4.

48. In assessing the fairness and reasonableness of a plan of compromise or arrangement, the Court's discretion ought to be guided by the objectives of the CCAA – namely "to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators." Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable to liquidation.

> *Northland Properties Ltd. v Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195 at para. 27 (BC CA) (1989); Book of Authorities, Tab 6.
>
> *Canadian Airlines*, *supra* at para. 95; Book of Authorities, Tab 2.

49. Factors considered by the courts in considering whether a plan is fair and reasonable in the circumstances of a particular case have included:

(a) classification of creditors and creditor approval;

(b) what creditors would receive on liquidation or bankruptcy compared to the plan;

(c) alternatives to the plan and bankruptcy;

(d) oppression;

(e) unfairness to shareholders; and

(f) the public interest.

Canwest Global, supra at para. 21; Book of Authorities, Tab 4.

50. A plan need not necessarily provide equal treatment to all parties in order to be equitable. In fact, equal treatment may at times be contrary to equitable treatment. Courts have approved plans of arrangement with differing treatment among creditors where the differences have been disclosed and there is a sufficient rational explanation for such differences.

Canadian Airlines, *supra* at para. 179; Book of Authorities, Tab 2.

Re Sino-Forest Corporation, 2012 ONSC 7050 at para. 66; Book of Authorities, Tab 7.

51. An important measure of whether a plan is fair and reasonable is the level of approval by creditors. Creditor support for a plan creates an inference that the plan is a fair and reasonable and economically feasible.

Canadian Airlines, *supra* at para 97; Book of Authorities, Tab 2.

52. Secured creditors are entitled to vote on a plan in respect of their deficiency claims in the context of CCAA proceedings.

Re SkyLink Aviation Inc., Meetings Order granted March 8, 2013 at para. 22 (Ont. Sup. Ct. [Commercial List]); Book of Authorities, Tab 8.

Re PSINet Ltd., 33 C.B.R. (4th) 284 at para. 4 (Ont Sup Ct J [Commercial List]) (2002); Book of Authorities, Tab 9.

53. It is submitted that the Plan is fair and reasonable in the circumstances given:

(a) the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;

(b) the classification of the Applicants' creditors into three Voting Classes – the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class – is rationally justifiable and was approved by this

Court pursuant to the Meetings Order and the classification was not opposed at the hearing to approve the Meetings Order or thereafter at the comeback hearing;[2]

(c) the results of the Sale Process indicate that: (i) the Secured Noteholders would suffer a significant shortfall in the amounts owed to them if they were to enforce their security; (ii) there would be no residual value for the Cline Group's unsecured creditors or the WARN Act Plaintiffs if the Cline Group's secured creditors were to enforce their security; and (iii) the existing equity interests in Cline have no remaining economic value;

(d) the Recapitalization preserves certain tax attributes and mining rights and permits, which will result in Secured Noteholders receiving a higher recovery than they would in a debt enforcement scenario or a sale of the Applicants' property, which could result in the loss of those valuable assets;

(e) the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs, who would otherwise receive no recovery in a debt enforcement scenario or a sale of the Applicants' property;

(f) all of the Affected Creditors that voted on the Plan at the Meetings voted for its approval;

(g) the Plan is economically feasible;

(h) the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

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[2] The Applicants' submissions on the fairness and reasonableness of the classification of creditors were set forth comprehensively in the Applicants' factum dated December 2, 2014 in support of the motion for the Meetings Order and the Claims Procedure Order. In brief, holders of the 2011 Notes and 2013 Notes have a commonality of interest in the Secured Noteholders Class; Affected Unsecured Creditors, including the Secured Noteholders with respect to their Secured Noteholders Allowed Unsecured Claim, have a commonality of interest in the Affected Unsecured Creditors Class because they have no security enforcement remedy in respect of their Affected Unsecured Claims and would remain unpaid in the event of a security enforcement situation; and the WARN Act Plaintiffs are properly classified in a separate WARN Act Plaintiffs Class due to the unique nature and status of their contingent and unproven class action claims.

(i) Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

(j) the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA;

(k) the cancellation of Equity Interests in Cline under the Plan is a function of the insolvency of the Applicants, and not of oppressive conduct;

(l) the releases provided under the Plan are appropriate in the circumstances, as further discussed below;

(m) the Plan serves the public interest and the broader purpose of the CCAA by allowing the Applicants to avoid bankruptcy or liquidation;

(n) completion of the Recapitalization on an expeditious basis will preserve the Applicants' declining cash resources and enable them to better withstand current weakness in global commodity markets; and

(o) the Plan is supported by the Applicants, Marret (on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favour of the Plan at the Meetings.

Initial Affidavit at paras. 112, 113, 127 and 128; Motion Record, Tab 2, Exhibit C.

Goldfarb Affidavit at paras. 34, 44, 47 and 55; Motion Record, Tab 2.

Monitor's Second Report at paras. 91 and 95.

Plan, sections 3.4(4) and 3.5.

54. The Monitor's Second Report recommended the approval of the Original Plan. The Monitor provided the following reasons for supporting the Original Plan in the Monitor's Second Report:

(a) it appears that the Plan is the best viable, going-concern alternative available to the Applicants and will provide a recovery to the largest number of the Applicants' stakeholders;

(b) the Monitor is satisfied that the Applicants and their boards of directors have determined that the Plan represents the best opportunity to provide a stronger foundation for the Cline Group to remain a going concern; and

(c) the Monitor believes that the Plan is fair and reasonable.

Given that the Plan enhances the recoveries offered to the WARN Act Plaintiffs in the Original Plan and does not adversely affect Affected Unsecured Creditors, the Monitor continues to support the Plan, as amended.

Monitor's Second Report at paras. 87-95.

B. THE RELEASES ARE APPROPRIATE IN THE CIRCUMSTANCES

55. The CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring. Third-party releases have become a common feature in Canadian restructurings and Courts have on at least a dozen occasions approved plans containing third-party releases.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., 2008 ONCA 587 [*ATB Financial*] at paras. 43 and 74-75; Book of Authorities, Tab 10.

Canwest Global, supra; Book of Authorities, Tab 4.

Re Angiotech Pharmaceuticals Inc., 2011 BCSC 450; Book of Authorities, Tab 11.

SkyLink, supra; Book of Authorities, Tab 8.

Re Sino-Forest Corporation, 2012 ONSC 7050; Book of Authorities, Tab 7.

56. The Court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third-party releases are appropriate. CCAA courts have approved third party releases in the context of plans of arrangement where the releases are rationally related to a resolution of the debtors' claims, benefit creditors

generally and are not overly broad. Factors considered by courts in determining whether to approve third party releases include:

(a) whether the parties to be released are necessary and essential to the restructuring of the debtor;

(b) whether the claims to be released are rationally related to the purpose of the plan and necessary for it;

(c) whether the plan would fail without the releases;

(d) whether the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan;

(e) whether the plan would benefit not only the debtor companies but creditors generally;

(f) whether the creditors voting on the plan had knowledge of the nature and effect of the releases;

(g) whether the releases are fair and reasonable and not overly broad;

(h) whether the releases are opposed by any party to the proceedings; and

(i) whether the Monitor considers the releases to be fair and reasonable.

ATB Financial, supra at para. 71; Book of Authorities, Tab 10.

Canwest Global, supra at para. 30; Book of Authorities, Tab 4.

57. The releases provided in the Plan were negotiated as part of the overall framework of compromises in the Plan, and these releases facilitate the successful completion of the Plan and the Recapitalization. The third party releases provided under the Plan protect the Released Parties from potential claims relating to the Applicants based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants

are being discharged in the Plan. The releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

Plan, sections 2.1 and 7.1.

Goldfarb Affidavit at para. 44; Motion Record, Tab 2.

58. The releases provided for in the Plan were contained in the Original Plan filed with the Court on December 3, 2014 and attached to the Meetings Order. The Information Statement, which summarized and described the terms of the releases, was posted on the Monitor's website and sent to all Known Creditors, including Marret (on behalf of the Secured Noteholders), the Class Action Counsel (on behalf of the WARN Act Plaintiffs) and any Creditor who made a request for a copy of such Information Package. Notice of the CCAA Proceedings and the Chapter 15 Proceedings was provided to all known creditors of the Applicants and to Class Action Counsel and potential individual WARN Act Plaintiffs (to the extent the names and addresses of such WARN Act Plaintiffs were known). This notification process ensured that the Applicants' Creditors had notice of the nature and effect of the releases. The Applicants are not aware of any objections to the releases provided for in the Plan.

Goldfarb Affidavit at para. 43; Motion Record, Tab 2.

59. The releases of the released Directors/Officers contained in the Plan are appropriate in the circumstances given:

(a) the released Directors and Officers consist of parties who, in the absence of the Plan releases, could have Claims for indemnification or contribution against the Applicants;

(b) the release of Director/Officer Claims against the released Directors and Officers is integral to the Plan and avoids contingent claims for indemnification or contribution by the Directors and Officers against the Applicants;

(c) the releases were negotiated as part of the overall framework of compromises in the Plan;

(d) the released Directors and Officers include members of the boards of directors and senior management of the Applicants who have been involved in the Applicants' efforts to address their financial challenges, before and during the CCAA Proceedings, including the extensive exploration of recapitalization alternatives and the development and negotiation of the Recapitalization, the WARN Act Resolution and the Plan;

(e) no Director/Officer Claims were asserted in the Claims Procedure; and

(f) the releases provided to the released Directors and Officers are sufficiently broad to accomplish their purpose of facilitating the implementation of the Plan without being overly broad. In particular, the Directors and Officers are expressly not released from any Director/Officer Claims that are not permitted to be released under section 5.1(2) of the CCAA.

Plan, section 7.1.

Goldfarb Affidavit at paras. 41; Motion Record, Tab 2.

60. The releases provided for in the Plan are integral to the framework of compromises in the Plan. In the absence of the releases, the Applicants would not have been able to achieve the broad support that now exists in favour of the Plan. The Applicants are not aware of any objections to the releases provided for in the Plan. The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein. Accordingly, it is submitted that it is appropriate for the Court to grant the releases as part of its approval of the Plan.

Goldfarb Affidavit at para. 44; Motion Record, Tab 2.

C. AMENDMENTS TO THE ARTICLES

61. The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares

Plan, section 5.3.

62. Section 6 (2) of the CCAA states:

> If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.
>
> CCAA, Section 6(2).

63. The amendments to the Articles are necessary in order to effect the provisions of the Plan and the requested amendments may lawfully be made under sections 54(1), 54(4) and 257(2)(b) of the *Business Corporations Act*, S.B.C. 2002, c. 57. Accordingly, it is submitted that it is appropriate for the Court to grant the amendments as part of its approval of the Plan.

D. EXTENSION OF STAY PERIOD

64. The Applicants are requesting an extension of the Stay Period until April 1, 2015.

65. Section 11.02(2) of the CCAA states:

> A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (b) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> CCAA, Section 11.02(2).

66. In order to make an order pursuant to Section 11.02(2), the Court must be satisfied that: (i) circumstances exist that make the order appropriate; and (ii) the applicant has acted, and is acting, in good faith and with due diligence.

CCAA, Section 11.02(3).

67. The Applicants submit that an Order extending the Stay Period to and including April 1, 2015 is appropriate in the circumstance because:

(a) the Company has made substantial progress towards the completion of its Recapitalization;

(b) the Applicants require the ongoing benefit of the stay of proceedings in order to complete the remaining matters in these CCAA Proceedings, including, if this Court approves the Plan, the implementation of the Plan and the completion of the Recapitalization;

(c) subject to Court approval, the Company intends to implement the Plan as expeditiously as possible;

(d) while the Monitor, as foreign representative of the Applicants, intends to seek the recognition of the Sanction Order forthwith if the Sanction Order is granted by this Court, there is some uncertainty as to the timing of a hearing at which the U.S. Court would consider the recognition of the Sanction Order, which in turn could affect the timing of the implementation of the Plan;

(e) the Applicants believe that it is prudent to request an extension of the Stay Period at this time to provide for additional time to implement the Plan in the event that such additional time becomes necessary;

(f) an extension of the Stay Period at this juncture avoids the time and expense that would need to be incurred if the Applicants were required to return to Court to seek an extension of the Stay Period at a later time;

(g) the Applicants' cash flow forecast projects that the Applicants will have access to all necessary financing during the extended Stay Period;

(h) creditors will not suffer any material prejudice if the Stay Period is extended;

(i) the Applicants have acted, and continue to act, in good faith and with due diligence towards the completion of the Recapitalization; and

(j) the Monitor and Marret, on behalf of the Secured Noteholders, supports the requested stay extension.

Goldfarb Affidavit at paras. 57-59; Motion Record, Tab 2.

PART IV - RELIEF REQUESTED

68. The Applicants submit that the Plan achieves the best available outcome for the Applicants and their stakeholders, and provides a superior economic result to that which could be realized through other sale, restructuring or debt enforcement alternatives. In particular, the Plan provides value to unsecured stakeholders that they would not otherwise receive in any other scenario. The Recapitalization and the Plan will result in an improved capital structure that will enable the Cline Group to better withstand the current downturn in the metallurgical coal market and to maximize the value of the Applicants for their stakeholders.

69. The Plan is fair and reasonable, and the Applicants have complied with all statutory requirements under the CCAA and the terms of the Orders granted in these CCAA Proceedings.

70. The Plan was approved at the Meetings by the unanimous support of all Affected Creditors that voted at the Meetings. The Monitor also recommends approval of the Plan.

71. An Order extending the Stay Period on the terms requested is appropriate in the circumstances while the Applicants proceed with the implementation of the Plan and the completion of the Recapitalization.

72. For the reasons set out above, the Applicants request that this Court approve the Plan and grant the requested relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 23, 2015

per: Robert J. Chadwick.

Robert J. Chadwick

Logan Willis

Bradley Wiffen

SCHEDULE A - LIST OF AUTHORITIES

1. *Re SkyLink Aviation Inc.*, 2013 ONSC 2519

2. *Re Canadian Airlines Corp.*, 2000 ABQB 442

3. *Re Cline Mining Corporation*, 2014 ONSC 6998

4. *Re Canwest Global Communications Corp.,* 2010 ONSC 4209

5. *Olympia & York Developments Ltd. v Royal Trust Co.*, 17 C.B.R. (3d) 1 (Ont Ct Jus (Gen Div)) (1993)

6. *Northland Properties Ltd. v Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195 (BC CA) (1989)

7. *Re Sino-Forest Corporation*, 2012 ONSC 7050

8. *Re SkyLink Aviation Inc.*, Meetings Order granted March 8, 2013 (Ont. Sup. Ct. [Commercial List])

9. *Re PSINet Ltd.*, 33 C.B.R. (4th) 284 (Ont Sup Ct J [Commercial List]) (2002)

10. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

11. *Re Angiotech Pharmaceuticals Inc.*, 2011 BCSC 450

SCHEDULE B – STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c. C-36, as amended

s. 6(1)

If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

s. 6(2)

If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

s. 6(3)

Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it

provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

s. 6(5)

The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

s. 6(6)

If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

s. 6(8)

No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

s. 11.02(2)

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

s. 11.02(3)

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

BUSINESS CORPORATIONS ACT
S.B.C. 2002, c. 57, as amended

s. 54(1)

Subject to this Part, a company may

(a) create one or more classes of shares,

(b) create one or more series of shares,

(c) increase, reduce or eliminate the maximum number of shares that the company is authorized to issue out of any class or series of shares,

(d) establish a maximum number of shares that the company is authorized to issue out of any class or series of shares for which no maximum is established,

(e) subdivide all or any of its unissued, or fully paid issued, shares with par value into shares of smaller par value,

(f) subdivide all or any of its unissued, or fully paid issued, shares without par value,

(g) consolidate all or any of its unissued, or fully paid issued, shares with par value into shares of larger par value,

(h) consolidate all or any of its unissued, or fully paid issued, shares without par value,

(i) if the company is authorized to issue shares of a class of shares with par value,

(i) subject to section 74, decrease the par value of those shares, or

(ii) increase the par value of those shares if none of the shares of that class of shares are allotted or issued,

(j) eliminate any class or series of shares if none of the shares of that class or series of shares are allotted or issued,

(k) change all or any of its unissued, or fully paid issued, shares with par value into shares without par value,

(l) change all or any of its unissued shares without par value into shares with par value,

(m) alter the identifying name of any of its shares, or

(n) otherwise alter its authorized share structure or shares when required or permitted to do so by this Act.

s. 54(4)

A company may, in conjunction with the subdivision or consolidation of shares referred to in this section, convert fractional shares within the class or series of shares being subdivided or consolidated into whole shares in accordance with section 83.

s. 257(2)(b)

A company must not alter its notice of articles unless:

subject to subsection (3) of this section, the company has been authorized to make the alteration by a court order or, if the alteration is not authorized by a court order,

(i) by the type of resolution specified by this Act,

(ii) if this Act does not specify the type of resolution, by the type of resolution specified by the articles, or

(iii) if neither this Act nor the articles specify the type of resolution, by a special resolution.

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

Court File No.: CV14-10781-00CL

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
(Plan Sanction Motion returnable January 27, 2015)

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