

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

B E T W E E N:

**BRIO FINANCE HOLDINGS B.V.**

Applicant

- and -

**CARPATHIAN GOLD INC.**

Respondent

**APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND  
INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED**

**FACTUM OF THE APPLICANT  
(Application Returnable April 22, 2016)**

April 21, 2016

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**PART I - OVERVIEW**

- 1 Carpathian Gold Inc. ("**CPN**"), a public company headquartered in Toronto, together with its subsidiaries, is an exploration and development mining company.
- 2 CPN's primary business interests are (i) the Riacho dos Machados gold exploration, development and production project located in Brazil and undertaken by Mineração Riacho dos Machados Ltda. (the "**RDM Mine**"), and (ii) the Rovina Valley gold and copper exploration project located in Romania (the "**Romanian Project**"). The Romanian Project is not the subject of this Application.
- 3 Mineração Riacho dos Machados Ltda. ("**MRDM**") is an indirect subsidiary of CPN.
- 4 MRDM is indebted to the Applicant pursuant to a Project Facility (as defined below) and certain gold purchase agreements (together with the Project Facility, the "**Facilities**"). MRDM's indebtedness under the Project Facility currently exceeds US\$273 million.

These obligations are currently due and payable as a result of various events of default under the Facilities.

- 5 CPN has guaranteed the obligations of MRDM and granted security over, among other things, intercompany debts owing to CPN and the shares and membership interest in two of its subsidiaries, Ore-Leave Capital (Brazil) Limited (“**OLC**”) and OLV Coöperatie U.A. (“**OLV**”), which indirectly own MRDM (collectively, the “**Limited Receivership Assets**”). The security over the Limited Receivership Assets has now become enforceable as a result of the various events of default under the Facilities.
- 6 It is clear from all available information that the Limited Receivership Assets does not have a value that approaches the current outstanding secured debt under the Facilities.
- 7 This proceeding is being commenced to, among other things, allow Brio Finance Holdings B.V. (“**Brio**” or the “**Applicant**”) to acquire, through a credit-bid transaction, the Limited Receivership Assets. The credit-bid transaction is an integral part of an overall restructuring of CPN involving the following steps:
  - (a) Acquisition by Brio of the Facilities from Macquarie Bank Limited (“**MBL**”), CPN's former lender, which was completed on March 31, 2016;
  - (b) Acquisition by Brio of the Limited Receivership Assets through the credit-bid transaction; and
  - (c) An equity investment of US\$1 million in CPN (the “**Equity Investment**”).
- 8 CPN consents to the appointment of the proposed receiver over the Limited Receivership Assets for the above purpose.
- 9 The proposed receivership would not involve the balance of CPN's assets or operations, and in particular would not involve the Romanian Project or CPN's subsidiaries with direct or interest interests in the Romanian Subsidiaries (as defined herein).
- 10 The appointment of the proposed receiver is just and convenient in the circumstances.

## **PART II - THE FACTS**

11 CPN's primary assets consist of the equity interests in its subsidiaries and intercompany receivables.<sup>1</sup>

### *The Romanian Subsidiaries*

12 Through a series of direct and indirect subsidiaries (the "**Romanian Subsidiaries**"), CPN is the ultimate parent of the Romanian operating entity, SC SAMAX Romania SRL ("**SAMAX Romania**").<sup>2</sup>

13 SAMAX Romania operates the Romanian Project.<sup>3</sup>

14 The Facilities are not secured on the shares of the Romanian Subsidiaries or the Romanian Project. The Romanian Subsidiaries and the Romanian Project are not the subject of this Application.<sup>4</sup>

### *The RDM Subsidiaries*

15 CPN owns 100% of (i) the issued and outstanding shares of OLC Brazil, and (ii) 99.9998% of the issued and outstanding membership interests in OLV. OLC Brazil owns the remaining 0.0002% of the issued and outstanding membership interests in OLV.<sup>5</sup>

16 OLV owns 100% of the issued and outstanding interests in OLC Holdings B.V. ("**OLC Holdings**"). Together, OLV and OLC Holdings own 100% of the issued and outstanding quotas of MRDM, which owns and operates the RDM Mine.<sup>6</sup> The RDM Mine is an open pit gold mine, located approximately 145 kilometers from the city of Montes Claros in south-eastern Brazil operated by MRDM. MRDM currently employs approximately 579 people on a full time basis at the RDM Mine

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<sup>1</sup> Affidavit of Joseph M. Longpre, sworn April 21, 2016 (the "Longpre Affidavit") at para. 30.

<sup>2</sup> Longpre Affidavit at para. 31.

<sup>3</sup> Longpre Affidavit at para. 32.

<sup>4</sup> Longpre Affidavit at para. 33.

<sup>5</sup> Longpre Affidavit at para. 34.

<sup>6</sup> Longpre Affidavit at para. 35.

17 Collectively, OLC Brazil, OLV, OLC Holdings and MRDM are referred to herein as the “RDM Subsidiaries”.<sup>7</sup>

18 The shares of OLC Brazil and OLV are the subject of this Application.

### Financial Position of CPN

19 CPN has been experiencing significant financial difficulties for some time.<sup>8</sup>

20 CPN, on a consolidated basis for the reporting period ending September 30, 2015, incurred a net loss of approximately \$56 million, and as at September 30, 2015 reported an accumulated deficit of approximately \$219 million. CPN’s cash reserves are also depleted: as of September 30, 2015, CPN held, on a consolidated basis, unrestricted cash and cash equivalents of only approximately \$726,000.<sup>9</sup>

21 The obligations under the Facilities of not less than \$273 million are currently due and payable as a result of existing defaults. It is clear that the aggregate of CPN’s property, at a fair valuation, is not sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of its obligations under the Facilities.<sup>10</sup>

22 CPN’s current financial difficulties are largely attributable to the debts incurred under the Facilities. Excluding the Facilities, CPN’s liabilities on a non-consolidated basis are less than \$100,000, plus certain limited contingent unsecured claims relating to isolated allegations of wrongful dismissal.<sup>11</sup>

23 Searches performed of Ontario’s Personal Property Security Registry current to April 5, 2016 show that Brio is the only secured party with a registration against CPN.<sup>12</sup>

### The Project Facility

24 On January 11, 2013, MRDM, as borrower, CPN and each of the other RDM Subsidiaries, as guarantors, and MBL entered into, among other things, a \$90 million

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<sup>7</sup> Longpre Affidavit at para. 36.

<sup>8</sup> Longpre Affidavit at para. 25.

<sup>9</sup> Longpre Affidavit at para. 26.

<sup>10</sup> Longpre Affidavit at para. 27.

<sup>11</sup> Longpre Affidavit at para. 43.

non-revolving credit facility (the “**Project Facility**”) pursuant to a project facility agreement (as subsequently amended and supplemented from time to time, the “**Project Facility Agreement**”).<sup>13</sup>

- 25 The purpose of the Project Facility was to enable MRDM to finance costs of the construction, development and operation of the RDM Mine.<sup>14</sup>
- 26 The obligations, liabilities and indebtedness of MRDM with respect to the Project Facility are guaranteed by CPN and each of the RDM Subsidiaries.<sup>15</sup>
- 27 CPN and the RDM Subsidiaries defaulted on certain covenants and obligations under the Project Facility Agreement starting in October 2013.<sup>16</sup>
- 28 In order to assist and permit CPN and the RDM Subsidiaries an opportunity to identify a going concern solution to the financial difficulties facing the RDM Mine and ultimately, conduct a sales process, CPN, the RDM Subsidiaries and MBL entered into a number of forbearance arrangements and ultimately expanded what was originally intended to be a \$90 million facility to over \$270 million.<sup>17</sup>

### Defaults

- 29 The defaults under the Facilities are detailed in fifty-three amending and forbearance agreements entered into between MBL, CPN, and the RDM subsidiaries. The outstanding defaults (the “**Existing Defaults**”) include:
- (a) Failures to maintain required balances in the Proceeds Account and Operating Account (each as defined in the Project Facility Agreement), as required under Section 12.04 of the Project Facility Agreement;
  - (b) Failures to maintain required ratios under Section 10.04 of the Project Facility Agreement;

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<sup>12</sup> Longpre Affidavit at para. 53.

<sup>13</sup> Longpre Affidavit at para. 47.

<sup>14</sup> Longpre Affidavit at para. 48.

<sup>15</sup> Longpre Affidavit at para. 50.

<sup>16</sup> Longpre Affidavit at para. 54.

<sup>17</sup> Longpre Affidavit at para. 55 and 57.

- (c) Failures to deliver an updated Life of Mine Plan in breach of Section 10.01(7)(b) of the Project Facility Agreement;
- (d) Payment defaults on March 31, 2014, June 30, 2014, December 31, 2014, March 31, 2015 and June 30, 2015; and
- (e) Failures to maintain a TSX listing for CPN's common shares in breach of Section 13.01(29) of the Project Facility Agreement.<sup>18</sup>

30 As a result of the Existing Defaults, the obligations under the Facilities are now due and payable and a notice of intention to enforce security under Section 244 of the BIA has been issued by Brio and the applicable notice period has been waived by CPN.

#### Sales Process

31 Efforts to canvass the market for financing and sale opportunities commenced in August 2012. A sales process was undertaken in two phases until October 2015, during which time not less than 50 potentially interested parties were engaged regarding a potential transaction. No viable transaction acceptable to the Agent and the Lender was identified.<sup>19</sup>

#### Restructuring Transaction

32 Discussions between MBL, Brio Gold Inc. (the parent of Brio) and CPN regarding an acquisition of the Facilities (the "**Loan Acquisition Transaction**") as a first step toward the acquisition of the RDM Mine began in October 2015.<sup>20</sup>

33 In connection with those discussions, a Restructuring Agreement was entered into between CPN, MBL, Brio Gold Inc. and the RDM Subsidiaries. Under the Restructuring Agreement, CPN and the RDM Subsidiaries would (among other things) consent to the acquisition by Brio Gold Inc. of the Facilities and the security granted thereunder and CPN, MBL, Brio Gold Inc. and the RDM Subsidiaries agreed to work cooperatively and

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<sup>18</sup> Longpre Affidavit at para. 54.

<sup>19</sup> Longpre Affidavit at para. 57.

<sup>20</sup> Longpre Affidavit at para. 61.

in good faith to complete the acquisition of the Limited Receivership Assets and the Equity Investment.<sup>21</sup>

34 The Loan Acquisition Transaction was completed on March 31, 2016 and the acquisition of the Limited Receivership Assets, as contemplated by the Restructuring Agreement (as amended) can now move forward.<sup>22</sup>

35 The acquisition of the shares and memberships of OLV and OLC Brazil and the Carpathian Intercompany Debt is the final step in the series of transactions for the acquisition by Brio of MRDM that began in November 2015.<sup>23</sup>

36 Through the acquisition of the shares and memberships of OLV and OLC Brazil, Brio would acquire a 100% indirect interest in MRDM and the RDM Mine (the "**RDM Acquisition**").<sup>24</sup>

37 The RDM Acquisition has been publicly disclosed through a number of press releases of CPN, beginning in November of 2015, and then again in February 2016 and March 2016.<sup>25</sup>

38 The transaction allows Brio to acquire an asset that is strategically beneficial to Brio and, at the same time, allows CPN to move forward and focus on the Romanian Project with an injection of \$1 million of liquidity through an equity subscription by Brio.<sup>26</sup>

### The Proposed Receiver

39 Brio seeks to appoint FTI Consulting Canada Inc. ("**FTI**") as receiver over the Limited Receivership Assets.

40 FTI is a well-respected firm and is familiar with the operational and financial circumstances of CPN and MRDM, and the transactions contemplated by the proposed receivership.<sup>27</sup>

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<sup>21</sup> Longpre Affidavit at paras. 62 – 64.

<sup>22</sup> Longpre Affidavit at para. 67.

<sup>23</sup> Longpre Affidavit at para. 68.

<sup>24</sup> Longpre Affidavit at para. 69.

<sup>25</sup> Longpre Affidavit at para. 71.

<sup>26</sup> Longpre Affidavit at para. 72.

<sup>27</sup> Longpre Affidavit at para. 92.



- 41 FTI has had prior involvement with CPN<sup>28</sup>:
- (a) In January 2013, FTI was retained by CPN to provide certain financial advisory and consulting services, including the services of Mr. Andrew Bantock, a Senior Managing Director of FTI's Australian affiliate, to serve as Chief Restructuring Officer (the "**Financial Advisory and CRO Engagement**"). Mr. Bantock resigned the position of Chief Restructuring Officer by mutual agreement on December 8, 2015.
  - (b) In October 2013, FTI was retained by MBL to provide analytical support and strategic assistance to MBL regarding CPN's financial and operating projections for the RDM Mine (the "**Macquarie Engagement**"). Only a small amount of work was performed by FTI under the Macquarie Engagement, consisting of a review of (i) actual against forecasted cash flow, and (ii) supporting documentation for a sample of payments. The last time billed under the Macquarie Engagement was charged on October 31, 2013.
  - (c) In March 2014 FTI was retained by Bennett Jones LLP, in its capacity as legal counsel to CPN, to investigate and report on activities relating to the solicitation, approval and implementation of a sample of contracts and potential irregularities related thereto (the "**BJ Engagement**"). The BJ Engagement was completed in June 2014.
- 42 All of FTI's engagements for CPN are complete. The fee arrangements of each of the FTI engagements was based on hourly rates and none of the engagements had any element of success fee or contingent compensation.<sup>29</sup>
- 43 On March 31 2016, FTI's Brazilian affiliate was engaged by MRDM to provide the services of Mr. Luis Moreno as restructuring advisor.<sup>30</sup>
- 44 In Brio's view, the prior engagements of FTI and its foreign affiliates described above should not impact FTI's ability to properly discharge its role as Receiver in this matter. The prior engagements have assisted in providing FTI with valuable information about CPN and MRDM and the proposed transaction. Further, Brio is unaware of any aspects

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<sup>28</sup> Longpre Affidavit at paras. 83-89.

<sup>29</sup> Longpre Affidavit at para. 90.

<sup>30</sup> Longpre Affidavit at para. 91.

of the prior engagements of FTI and its foreign affiliates that would provide any basis to conclude that FTI is not able to independently assess the terms of the RDM Acquisition. Aside from Brio's agreements with respect to FTI's fees on the Receivership mandate, as described below, Brio has no other agreements or arrangements with FTI in connection with CPN or the RDM Subsidiaries.<sup>31</sup>

### **PART III - ISSUES TO BE DETERMINED**

45 This Application raises the following issues for determination:

- (a) whether the appointment of a receiver over the Limited Receivership Assets is appropriate;
- (b) whether the restrictions in Section 13.3 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") apply to FTI and, if so, if permission of the court should be granted to permit FTI to act as Receiver in this case, as is contemplated by Section 13.3;
- (c) whether the Applicant's request not to require approval of the Receiver's and its counsel's fees is appropriate; and
- (d) whether the Applicants' request for certain relief in respect of the Romanian Subsidiaries is appropriate.

### **PART IV - THE LAW**

#### *Appointment of a Receiver Pursuant to the BIA*

46 Section 243 of the BIA provides for the appointment of a receiver when it is "just and convenient" to do so:

(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just and convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or

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<sup>31</sup> Longpre Affidavit at para. 92.

bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless:

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

47 It is clear in the circumstances that Brio is a secured creditor entitled to make an application under Section 243 of the BIA.

48 The powers that Brio requests this Court provide to the Receiver are within the scope of those listed in Section 243 of the BIA and are consistent with the limited purpose of this matter.

49 Brio has sent the notices required under section 244 of the BIA and CPN has consented to an earlier enforcement under subsection 244(2) of the BIA for the purposes of completing the transactions contemplated herein.

50 CPN is an "insolvent person" under the BIA. Its 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 of CPN's obligations due and accruing when the obligations under the Facilities are considered.

51 The only remaining question is whether the appointment of a receiver is just and/or convenient in the circumstances.

52 This court has found in circumstances where the debtor cannot carry on business as usual and does not have funding to continue operations and there is a real risk of value

dissipation, the appointment of a receiver for the purposes of carrying out an expedited sale is both just and convenient.<sup>32</sup>

53 This court has also found in circumstances where the record revealed a professional and prolonged effort to elicit interest in the assets from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior secured indebtedness, the appointment of a receiver to undertake an expedited credit bid transaction was both just and convenient.<sup>33</sup>

54 In the current case CPN cannot carry on business with the burden of the liability under the Facilities outstanding and will not have funding to continue operating if it must satisfy the operating costs of the RDM Mine, which have been funded by significant advances under the Project Facility for the past several years. Further, if Brio is not able to take over the RDM Mine in the very near future, there is a significant risk that funding will not be available to the RDM Mine and value dissipation will occur.

55 No legitimate rights of any party are prejudiced by the appointment of a receiver in this case. The only party with any economic interest in the Limited Receivership Assets is Brio, as secured creditor under the Facilities.

56 CPN has consented to the appointment of the receiver for the purposes of carrying out the proposed sale transaction.

57 It is expected that this receivership will be for a very short term in order to facilitate the expedited RDM Acquisition.

58 The Applicant would not be in a position to move forward with the RDM Acquisition outside of a court-ordered receivership, and the Equity Investment would not be made.

### Section 13.3 of the BIA

59 Section 13.3 of the BIA states, in part, that:

Except with the permission of the court and on such conditions as the court may impose, no trustee shall act as trustee in relation to the estate of a debtor where the trustee:

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<sup>32</sup> *Tool-Plas Systems Inc. (Re)* [2008] O.J. No. 4217 (Ont. S.C.J.) at para. 3, Book of Authorities of the Applicant, Tab 9.

<sup>33</sup> *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.* (2013), 17 C.B.R. (6<sup>th</sup>) 169 (Ont. S.C.J.) at paras. 11 and 12, Book of Authorities of the Applicant, Tab 8.

(a) is, or at any time during the two preceding years was,

(i) a director or officer of the debtor;

(ii) an employer or employee of the debtor or of a director or officer of the debtor;

(iii) related to the debtor or to any director or officer of the debtor; or

(iv) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the debtor.

60 While FTI and its international affiliates have been engaged in certain roles in relation to CPN and its subsidiaries over the past several years as noted above, it is submitted that no such roles would prevent FTI, under Section 13.3 of the BIA, from acting as Receiver in this case, to the extent that Section 13.3 is applicable in a receivership context.

61 The only restrictions in Section 13.3 that could potentially be applicable in the current case are those restrictions that relate to accountants of the debtor and officers of the debtor as a result of the Financial Advisory and CRO Engagement.

62 A review of the engagements shows that FTI did not act as an accountant in this engagement. The term “accountant” must be given its usual, normal and generally accepted meaning<sup>34</sup> and simply providing financial advisory services does not, on its own lead to the conclusion that one was an accountant of CPN.

63 While Mr. Bantock was to serve as Chief Restructuring Officer of CPN as part of the Financial Advisory and CRO Engagement, Mr. Bantock was not an officer of CPN in the ordinary sense as defined under the *Canada Business Corporations Act* (the “CBCA”). The CBCA defines an officer as:

An individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation or any other individual who performs functions for a corporation similar to those normally performed by any individual occupying any of those offices.

It is submitted that a Chief Restructuring Officer is not a properly appointed officer of CPN, with all of the obligations and duties associated with such a role. The role of a Chief Restructuring Officer is analogous to that of an external advisor. Mr. Bantock was

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<sup>34</sup> *Hover (Re)* (2000), 21 C.B.R. (4<sup>th</sup>) 263 (Alta Q.B.) at para. 26, Book of Authorities of the Applicant, Tab 3.

not an authorized signing officer of CPN and was never listed as an officer of CPN in any public filings of CPN.<sup>35</sup> Therefore, the restrictions in Section 13.3 of the BIA that relate to officers of the debtor are not applicable in this case.

64 Even if the restrictions in Section 13.3 of the BIA were engaged in the current circumstances, the purpose of section 13.3 is to prevent a conflict of interest, by protecting the debtor from a trustee who may have information that could be used to the prejudice of the debtor and to insure that the trustee who may have a close relationship with the debtor does not work to the prejudice of the creditors.<sup>36</sup>

65 There is no evidence that the trustee has or will act in a way that would prejudice CPN or the creditors in this case. CPN and the primary secured creditor support the appointment of FTI as receiver. In the current circumstances, the appointment of FTI, given its experience with CPN, is the most logical approach as this is the best way to ensure that existing knowledge at FTI is utilized in a manner that can provide the most comprehensive information to the Court in the most efficient manner possible.

66 This Court in recent CCAA proceedings, including *Nelson Education Ltd.(Re)*, has also commented on the appropriateness of a proposed Court Officer's prior involvement with the Debtor. The Applicant and proposed Receiver are cognizant of the Court's concerns and believe that FTI's indirect prior involvement will in no way adversely affect its ability to satisfy its role as Court Officer should the appointment be granted.

#### Receiver's and Its Counsel's Fees

67 The proposed form of Receivership Order provides that the proposed receiver and its legal counsel shall not be required to pass their accounts unless requested to do so by the Applicant, the Court or any other interested party.

68 This type of order has been granted in a number of past cases by this Court in both receivership and *Companies' Creditors Arrangement Act* contexts.<sup>37</sup>

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<sup>35</sup> Longpre Affidavit at para. 87.

<sup>36</sup> *Hover (Re)* (2000), 21 C.B.R. (4<sup>th</sup>) 263 (Alta Q.B.) at para. 26, Book of Authorities of the Applicant, Tab 3.

<sup>37</sup> See, for example, *In the Matter of Data & Audio-Visual Enterprises Holdings Inc. et al.*, Court File No. CV-13-10274-00CL, Initial Order dated September 30, 2013 at para. 31, Book of Authorities of the Applicant, Tab 4; *International Forest Products Corporation and St. Marys Paper Corp.*, Court File No. CV-11-9367-00CL, Receivership Order dated December 29, 2011 at para. 18, Book of Authorities of the Applicant, Tab 5.

- 69 The Applicant submits that the proposed order is appropriate in the current circumstances where:
- (a) The accounts of the proposed receiver and its legal counsel are to be paid by Brio Gold Inc. and will not impact the value of the remaining assets of CPN in which other stakeholders of CPN may have an interest;
  - (b) Any interested party can request that the Receiver and its legal counsel pass their accounts if any concerns about those accounts arise; and
  - (c) The Receiver's mandate in this case will be very short and very limited and, as such, the time and cost associated with passing accounts would not be insignificant relative to the overall cost of this mandate.

*Applicant's request for certain relief in respect of the Romanian Subsidiaries*

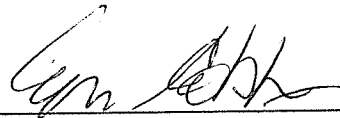
- 70 The Applicant requests an order that:
- (a) no person shall, solely as a result of the granting of this Order, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by CPN or any of CPN's subsidiaries without written consent of the Receiver or leave of this Court.
- 71 This order is intended to assist CPN, and in particular the Romanian Subsidiaries, in ensuring that no technical defaults arise under arrangements to which CPN or the Romanian Subsidiaries are parties as a result of these proceedings. This intention is consistent with the overall goal of this limited receivership, which is to leave CPN, the Romanian Subsidiaries and the Romanian Project unaffected.
- 72 The language sought in the proposed order is consistent with language found in the Model Initial Order adopted by the Commercial List in matters under the *Companies' Creditors Arrangement Act*. The protections of such orders are regularly extended to not

just the debtor company itself but also its subsidiaries.<sup>38</sup> Such orders can be made where it is just and convenient to do so.<sup>39</sup>

73 If such orders may be made under the *Companies' Creditors Arrangement Act* in circumstances where it is just and convenient to do so, it is submitted that the same principles should apply when considering whether such orders may be granted in a proceeding under the *Bankruptcy and Insolvency Act*. As explained by this Court in *Essar Steel Algoma Inc. (Re)*, "the harmonization of insolvency law common to both the BIA and the CCAA is desirable to the extent possible."<sup>40</sup> It is submitted that there is no reason why a just and convenient outcome that preserves stability of the operations of a corporate group during a restructuring of certain members of that group under the CCAA should not also be available to that same corporate group in a circumstance where their proceeding is taking place under the BIA.

74 A significant goal of this proceeding is to place CPN and its Romanian Subsidiaries in a position to move forward with the Romanian Project. The proposed order seeks to support that goal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of April, 2016.



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Lawyers for the Applicant

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<sup>38</sup> *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) at paras. 27-30, Book of Authorities of the Applicant, Tab 1, *Jaguar Mining Inc. (Re)* (2013), 12 C.B.R. (6th) 290 at paras. 27 and 37, Book of Authorities of the Applicant, Tab 6.

<sup>39</sup> *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at para. 21, Book of Authorities of the Applicant, Tab 7.

<sup>40</sup> *Essar Steel Algoma Inc. (Re)* (2016) 33 C.B.R. (6th) 313 (Ont. S.C.J.) at para. 30, Book of Authorities of the Applicant, Tab 2.



**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Tool-Plas Systems Inc. (Re)* [2008] O.J. No. 4217 (Ont. S.C.J.).
2. *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.* (2013), 17 C.B.R. (6th) 169 (Ont. S.C.J.).
3. *In the Matter of Data & Audio-Visual Enterprises Holdings Inc. et al.*, Court File No. CV-13-10274-00CL, Initial Order dated September 30, 2013.
4. *International Forest Products Corporation and St. Marys Paper Corp.*, Court File No. CV-11-9367-00CL, Receivership Order dated December 29, 2011.
5. *Hover (Re)* (2000), 21 C.B.R. (4th) 263 (Alta Q.B.).
6. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.).
7. *Jaguar Mining Inc. (Re)* (2013), 12 C.B.R. (6th) 290.
8. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.).
9. *Essar Steel Algoma Inc. (Re)* (2016) 33 C.B.R. (6th) 313 (Ont. S.C.J.).

**SCHEDULE “B”  
LEGISLATION**

***Bankruptcy and Insolvency Act***, R.S.C. 1985, C. B-3, as amended

13.3 (1) Except with the permission of the court and on such conditions as the court may impose, no trustee shall act as trustee in relation to the estate of a debtor

- (a) where the trustee is, or at any time during the two preceding years was,
  - (i) a director or officer of the debtor,
  - (ii) an employer or employee of the debtor or of a director or officer of the debtor,
  - (iii) related to the debtor or to any director or officer of the debtor, or
  - (iv) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the debtor; or
- (b) where the trustee is
  - (i) the trustee under a trust indenture issued by the debtor or any person related to the debtor, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Québec that is granted by the debtor or any person related to the debtor, or
  - (ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just and convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or sued in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless:

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

**Canada Business Corporations Act**, RSC 1985, c C-44

2(1) In this Act,

“**officer**” means an individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices; (*dirigeant*)

**BRIO FINANCE HOLDINGS B.V.**  
Applicant

and **CARPATHIAN GOLD INC.**  
Respondent

Court File No: CV-16-11359-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT  
(Application Returnable  
April 22, 2016)**

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