

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

BETWEEN:

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 RECEIVER
(Re Approval and Vesting Order and Discharge Order)
(Returnable April 29, 2016)**

Dated: April 26, 2016

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PART I - INTRODUCTION

1. This motion is brought by FTI Consulting Canada Inc. (“**FTI**”) in its capacity as Court-appointed receiver (the “**Receiver**”) of certain assets, property and undertaking of Carpathian Gold Inc. (the “**Debtor**”) for:

(a) an order (the “**Approval and Vesting Order**”):

(i) Approving the Share and Asset Purchase Agreement made and entered into as of April 22, 2016 (the “**Sale Agreement**”) between the Receiver and Brio Finance Holdings B.V. (the “**Purchaser**”) for the sale of the Limited Receivership Assets (as defined below) and the transactions contemplated thereby (the “**Brio Transaction**”);

(ii) Vesting all right, title and interest of the Debtor in and to the Limited Receivership Assets in the Purchaser free and clear of any Encumbrances (as defined in the Approval and Vesting Order); and

(b) An order (the “**Discharge Order**”):

(i) Approving the first report of the Receiver dated April 22, 2016 and the activities described therein; and

(ii) discharging the Receiver and terminating this receivership (the “**Receivership**”), each effective upon the filing with the Court by the Receiver of a certificate confirming completion of the Receiver’s remaining obligations (the “**Discharge Certificate**”).

2. Prior to the commencement of this limited receivership the Debtor, with the assistance of experienced financial advisors unrelated to the Receiver, conducted a thorough, fair and efficacious sale process (the “**Sale Process**”) in an effort to find a purchaser for all or part of its assets. This process did not directly result in a sale transaction. However, the Brio Transaction was ultimately developed as a result of the Sale Process.

3. The Receivership was commenced with the consent of the Debtor and is limited to the appointment of the Receiver over the Limited Receivership Assets. The Debtor continues to operate in respect of the rest of its assets, which are unaffected by the Receivership, as are the Debtor’s employees and creditors, other than the Purchaser.

4. The Brio Transaction is a credit bid by the Purchaser, who is the only registered secured creditor of the Debtor and is owed approximately \$273 million¹ under the Project Facility and the Facility Guarantee, as hereinafter defined. The Brio Transaction:

¹ All references to money contained herein are in U.S. dollars unless otherwise stated.

- (a) was arrived at after a robust and fair sale process failed to result in a viable sale;
- (b) is for a purchase price that far exceeds the value of the Limited Receivership Assets;
- (c) is supported by the Debtor and the Receiver;
- (d) has ancillary benefits to the Debtor and its stakeholders as a result of a \$1 million Equity Investment to be made by the Purchaser following the completion of the Brio Transaction; and
- (e) represents the best possible transaction in the circumstances for the benefit of all parties.

5. Once the Brio Transaction, if approved, has closed and the Receiver completes any necessary remaining administrative duties, the Receivership will be completed and ought to be terminated.

PART II - FACTS

6. The facts with respect to this motion are more fully set out in the affidavit of Joseph M. Longpre sworn April 21, 2016² (the "**Longpre Affidavit**") in support of the Limited Receivership Order dated April 22, 2016³ (the "**Limited Receivership Order**"), the affidavit of Jim Meloche, sworn April 22, 2016,⁴ in support of the orders sought herein (the "**Meloche Affidavit**") and the first Report of the Receiver dated April 22, 2016⁵ ("**First Report**"). Capitalized terms that are not defined herein have the meaning set out in the First Report.

² Motion Record of the Receiver dated April 22, 2016 (the "**Motion Record**"), Tab 6: Longpre Affidavit.

³ Motion Record, Tab 2: First Report of the Receiver dated April 22, 2016, Appendix "A": Limited Receivership Order dated April 22, 2016.

⁴ Motion Record, Tab 3: Meloche Affidavit.

⁵ First Report.

A. Background

7. The Debtor's principal business is the exploration and development of mines.⁶ At the time of the commencement of the Receivership the Debtor was primarily involved in two mining projects:

- (a) the Riacho dos Machados gold exploration, development and production project located in Brazil and undertaken by Mineração Riacho dos Machados Ltda. ("**MRDM**"), an indirect subsidiary of the Debtor (the "**RDM Mine**"); and
- (b) the Rovina Valley gold and copper exploration project located in Romania (the "**Romanian Project**").⁷

8. The Romanian Project is not subject to the Limited Receivership Order or involved in this Receivership in any way.⁸

9. On April 22, 2016, FTI was appointed as Receiver of the the following assets of the Debtor:

- (a) all shares of Ore-Leave Capital (Brazil) Limited ("**OLC Brazil**");
- (b) the membership in OLV Coöperatie U.A. ("**OLV**") including all of the Debtor's right, title and interest in and to such membership as well as all rights of the Debtor in connection with such membership including, without limitation, the Debtor's entitlement to any account held by, and rights to receive payment from, OLV under OLV's articles of association; and

⁶ Longpre Affidavit, *supra*. at para 7.

⁷ *Ibid.* at para 8.

⁸ *Ibid.* at para 33.

- (c) All indebtedness owing by any of OLC Brazil, OLV, OLC Holdings B.V., or MRDM (together, the “**Brazilian Subsidiaries**”), to the Debtor (the “**Carpathian Intercompany Debt**”).⁹

(collectively, the “**Limited Receivership Assets**”)

10. The Receivership was commenced after the Debtor conducted a thorough sale process that failed to result in a sale transaction. The sole purpose of the Receivership is to complete the Brio Transaction which is one part of an overall restructuring arrangement with respect to the Debtor involving the following component parts:

- (a) The acquisition by the Purchaser of MBL’s position under the Project Facility;
- (b) The acquisition by the Purchaser of the Limited Receivership Assets pursuant to the Sale Agreement in exchange, *inter alia*, for the release of the Facility Guarantee; and
- (c) A \$1 million subscription by the Purchaser, for common shares of the Debtor (the “**Equity Investment**”).¹⁰

B. The Sale Process

11. Prior to the appointment of the Receiver, the Debtor, with the assistance of experienced financial advisors, ran a Sales Process commencing in August 2012 through to August 2015. The Sales Process was run with the assistance of Origin Merchant Partners (“**Origin**”), Paradigm Capital Inc. (“**Paradigm**”) and PCF Capital Group (“**PCF**”). Neither FTI Consulting Canada Inc. nor its affiliates were involved in conducting the pre Receivership sales process.

⁹ Limited Receivership Order, *supra.* at para 2.

¹⁰ Longpre Affidavit, *supra.* at paras 62, 64; First Report, *supra.* at para 16.

12. The worldwide Sale Process was executed in two phases over a three year period in an effort to broadly solicit potential strategic transactions to maximize value for the benefit of the Debtor's stakeholders.¹¹

Phase 1

13. Over a 3-4 month period beginning September 2013, a total of 53 potential purchasers (the “**Phase 1 Prospects**”) were contacted, provided with a teaser and invited to execute a confidentiality agreement to gain access to a data room.¹² Of the Phase 1 Prospects contacted:

- (a) 43 were strategic purchasers and 10 were financial purchasers;
- (b) 28 executed confidentiality agreements;
- (c) Seven (7) attended site visits; and
- (d) Ten (10) submitted non-binding confidential expressions of interest.¹³

14. All Phase 1 Prospects ultimately declined to pursue a transaction and Phase 1 was suspended indefinitely on or about December 2013 for reasons detailed in the Meloche Affidavit.¹⁴

Phase 2:

15. On November 28, 2014 the Debtor re-engaged with Origin and engaged PCF to commence the second phase (“**Phase 2**”) of the Sale Process to sell the Debtor or any or all of its assets.¹⁵ During Phase 2, Origin and PCF prepared:

- (a) A sale process acknowledgment letter which they provided to all parties contacted with respect to the Sale Process;

¹¹ Meloche Affidavit, *supra.* at para 8-10.

¹² *Ibid.* at para 13.

¹³ *Ibid.* at para 13.

- (b) a confidential information memorandum summarizing key aspects of the RDM Project; and,
- (c) A virtual data room containing material information in relation to, among other things, the Debtor, MRDM and the RDM Project.¹⁶

16. Over a 3 month period Origin contacted 51 parties (the “**Phase 2 Prospects**”) of which 42 were potential strategic purchasers and 9 were potential financial purchasers.¹⁷ Of the Phase 2 Prospects:

- (a) 44 declined interest prior to any preliminary due diligence;
- (b) Seven (7) new parties signed a confidentiality agreement and conducted due diligence in the Virtual Data Room;
- (c) Three (3) attended site visits;
- (d) Five (5) submitted proposals, including one Potential Purchaser that was working with Brio Gold Inc. (“**BGI**”), an affiliate of the Purchaser. Each of the proposals contemplated a purchase price less than the amount then owed to MBL;¹⁸ and
- (e) One (1) provided a term sheet to the Debtor and to Macquarie Bank Limited (“**MBL**”), the senior secured creditor of the Debtor at that time, in respect of a potential restructuring;¹⁹

17. Ultimately, none of the Phase 2 Prospects’ proposals progressed to closing.

¹⁴ *Ibid.* at para 14.

¹⁵ *Ibid.* at para 15.

¹⁶ *Ibid.* at para 16-17.

¹⁷ *Ibid.* at para 20.

¹⁸ *Ibid.* at para 23.

¹⁹ *Ibid.* at paras 20-21.

C. Debt Structure and Financial Difficulties

18. At the time of the Sale Process MRDM was indebted to MBL pursuant to certain financial asset agreements providing a credit facility for the development of the RDM Mine (the “**Project Facility**”).²⁰ MRDM and the Debtor had also entered into certain gold purchase agreements with MBL²¹ (together with the Project Facility, the “**Facilities**”). As of March 31, 2016, the total secured indebtedness under the Facilities was not less than \$273 million (the “**Indebtedness**”).²²

19. The obligations of MRDM under the Facilities are guaranteed by the Debtor (the “**Facility Guarantee**”)²³ who has granted a security interest in certain of its assets in respect of the Facility Guarantee²⁴ (the “**Security**” and, together with Facilities and the Facility Guarantee, the “**Assigned Assets**”).

20. The Debtor has been experiencing financial as well as liquidity difficulties. As at September 30, 2015 the Debtor reported:

- (a) a net loss in the preceding quarter of approximately \$56 million;
- (b) an accumulated deficit of approximately \$219 million; and
- (c) only approximately \$726,000 of unrestricted cash and cash equivalents.²⁵

21. MRDM was (and is) in default of its obligations under the Facilities and unable to repay the amounts due and owing.²⁶

22. Counsel to the Receiver, Stikeman Elliott LLP (the “**Receiver’s Counsel**”), has conducted a review of the security on the Limited Receivership Assets held by the Purchaser securing amounts owing by the Debtor as guarantor under the Facilities

²⁰ Longpre Affidavit *supra*. at para 47.

²¹ *Ibid.* at para 44.

²² *Ibid.* at paras 10, 27.

²³ *Ibid.* at paras 50.

²⁴ *Ibid.* at para 51.

²⁵ *Ibid.* at para 26.

and delivered an opinion on the security. In addition, to facilitate and support the opinion provided by the Receiver's Counsel, Barbadian counsel, Clarke Gittens Farmer ("**Barbadian Counsel**") and Dutch counsel, Heussen B.V. ("**Dutch Counsel**"), conducted similar reviews relevant to their jurisdictions and delivered opinions addressed to the Receiver (the opinions of Receiver's Counsel, Barbadian Counsel and Dutch Counsel collectively being the "**Security Opinions**").²⁷

23. Subject to the customary assumptions and qualifications contained in the Security Opinions, the applicable Security Opinions provide that:

- (a) The personal property security granted in favour of the Purchaser is valid and, with respect to the General Security Agreement entered into between the Debtor and MBL (as assigned to the Purchaser) (the "**GSA**"), the GSA is enforceable and creates valid security interests in the personal property of the Debtor secured thereby under the laws of the Province of Ontario, including the Carpathian Intercompany Debt and the Dutch Pledged Membership;
- (b) The personal property security granted in favour of the Purchaser is valid, and with respect to the Barbados Security Document, such Barbados Security Document is enforceable and creates, under the laws of Barbados, a valid security interest in the personal property of the Debtor secured thereby under the laws of Barbados, including the Barbados Pledged Securities;
- (c) The security interest of the Purchaser in the Barbados Pledged Securities has been perfected by control pursuant to the laws of the Province of Ontario.²⁸

²⁶ *Ibid.* at para 11.

²⁷ First Report, *supra.* at para 11-12.

²⁸ *Ibid.* at para 13

24. In summary, the Security Opinions conclude that, subject to statutory and possessory liens, security interests perfected by possession or control, purchase money security interests and claims that have priority by operation of law, the Purchaser has a first ranking security interest in the Limited Receivership Assets.

D. Debt and Security Assignment and Restructuring Arrangement

25. During Phase 2, discussions in respect of a potential restructuring transaction involving BGI were initiated.²⁹

26. On November 20, 2015, MBL and BGI entered into an option agreement (the "**Option Agreement**") pursuant to which BGI was granted, among other things, the option to purchase all of MBL's rights and interest in the Assigned Assets.³⁰

27. That same day, BGI, MBL, the Debtor and the Brazilian Subsidiaries entered into a Restructuring Agreement which contemplated the assignment of the Assigned Assets from MBL to the Purchaser, ultimately by way of an Assignment Agreement dated February 17, 2016 (the "**Assignment Agreement**").³¹

28. The Restructuring Agreement also contemplated a credit bid transaction whereby the Purchaser would credit bid its debt position, and release the Facility Guarantee and all other obligations of the Debtor to the Purchaser under the agreements pertaining to the Facilities and the Security, in exchange for ownership of the Limited Receivership Assets. The credit bid portion of the transaction was and is to be implemented pursuant to the Sale Agreement.

29. Finally, the Restructuring Agreement contemplates a subscription agreement by which BGI (or the Purchaser) is to provide a cash injection of \$1 million into the Debtor in exchange for common shares in the capital of the Debtor (the "**Equity**

²⁹ Meloche Affidavit, *supra*. at para 22, 27.

³⁰ Longpre Affidavit, *supra*. at para 62.

³¹ *Ibid.* at para 62, 64-65.

Subscription”). The Equity Subscription is to be completed immediately following the closing of the Brio Transaction.

30. The transaction contemplated by the Assignment Agreement was completed on March 31, 2016, with consideration of approximately \$41.9 million.³²

E. Receivership and Share and Asset Purchase Agreement

31. Pursuant to the Sale Agreement, the Purchaser will purchase all of the Limited Receivership Assets for aggregate consideration of a cash purchase price of \$1 and a full and final release by the Purchaser of the Facility Guarantee and all other obligations of the Debtor to the Purchaser under the agreements pertaining to the Facilities and the Security.³³

32. The Purchaser requires the Brio Transaction to be implemented pursuant to an approval and vesting order, substantially in the form attached to the Sale Agreement.³⁴ Accordingly, on April 22, 2016, the Purchaser sought and was granted the Limited Receivership Order appointing FTI as Receiver over the Limited Receivership Assets.

33. The Debtor consented to the Limited Receivership Order, and has agreed to support the consummation of the Brio Transaction.

34. The Receiver anticipates that, if the Approval and Vesting Order is granted, all conditions of closing for the Brio Transaction will be satisfied or waived and the Brio Transaction will close immediately.

³² *Ibid.* at para 65, First Report at para 30.

³³ First Report, Appendix “B”: Share and Asset Purchase Agreement, Articles 2.1, 2.2 [SAPA].

³⁴ Longpre Affidavit, *supra.* at para 75; SAPA, Article 4.3(a) and Schedule “A”.

PART III - ISSUES

35. The issues on this motion are as follows:
- (a) Should this Court approve the Brio Transaction and vest the Limited Receivership Assets in the Purchaser?
 - (b) Should the First Report and the activities described therein be approved?
and
 - (c) Should this Court grant the Receiver its discharge upon the filing of the Discharge Certificate?

PART IV - LAW AND ARGUMENT

36. The Receiver submits that:
- (a) The Brio Transaction should be approved by this Court because (i) the Brio Transaction satisfies the *Soundair* Principles (as defined below); and (ii) there is no realistic prospect that the respective positions of stakeholders or the treatment that they will receive would be improved if a new or extended sales process was undertaken in the Receivership;
 - (b) The First Report and the activities described therein should be approved;
and
 - (c) The Discharge Order should be granted.

A. The Brio Transaction Should be Approved

(i) *The Brio Transaction Satisfies the Soundair Principles*

37. The principles set out in *Royal Bank v. Soundair Corp.*³⁵ (the “*Soundair Principles*”) for the Court to consider on a motion for the approval of a sale of assets in a receivership are well established:

- a. Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- b. The interests of all parties;
- c. The efficacy and integrity of the process by which offers have been obtained; and
- d. Whether there has been unfairness in the working out of the process.³⁶

38. Absent a violation of the *Soundair Principles*, the Court should place particular weight on the Court-appointed officer’s recommendation with respect to a proposed transaction.³⁷

39. The Brio Transaction satisfies the *Soundair Principles* for approval of disposition of assets in a receivership for, *inter alia*, the following reasons:

- (a) **The Sale Process leading to the Brio Transaction was reasonable in the circumstances:**
 - (i) The Sale Process was carried out by Origin, Paradigm and PCF, who are each experienced financial advisors, unrelated to FTI, the Debtor, MBL or the Purchaser;³⁸

³⁵ Book of Authorities of the Receiver [BOA], Tab 1: *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 16 [*Soundair*].

³⁶ *Ibid.* at para. 16.

³⁷ BOA, Tab 2: *Re Eddie Bauer of Canada Inc.*, [2009] O.J. No. 3784 at para 22 (S.C.J. [Commercial List]).

³⁸ Meloche Affidavit at para 5-7, 9, 10.

- (ii) The Sale Process was carried out in a manner typical of, and consistent with, such marketing processes that have been approved by the courts in many receivership and other court-supervised proceedings, and the timelines provided for in the Sale Process were reasonable in the circumstances;³⁹
 - (iii) The Sale Process and the opportunity to acquire the Limited Receivership Assets was widely known.⁴⁰ The Brio Transaction has been publically disclosed through a number of press releases of the Debtor, beginning in November of 2015 and then again in February 2016 and March 2016;⁴¹
 - (iv) The Sale Process allowed interested parties adequate opportunity to conduct due diligence and submit proposals for the acquisition of the Limited Receivership Assets.⁴² In total 67 potential purchasers, both strategic and financial, were contacted during the Sale Process and given the opportunity to access a confidential information memorandum and data room provided they signed a confidentiality agreement;⁴³ and
 - (v) The Sale Process was conducted in a fair and transparent and reasonable manner by Origin, Paradigm and PCF. ⁴⁴
- (b) **The Brio Transaction is in the best interest of all parties:**
- (i) The Purchaser holds valid and enforceable security on the Limited Receivership Assets ranking in priority to all other known creditors. The Indebtedness is approximately \$273 million

³⁹ First Report at para 33(a).

⁴⁰ *Ibid.* at para 33(b).

⁴¹ Longpre Affidavit, *supra.* at para 71.

⁴² First Report, *supra.* at para 33(c).

⁴³ *Ibid.* at para 29; Meloche Affidavit *supra.* at para 20.

and, in the Receiver's view, the sale process has clearly demonstrated that there is no prospect of any transaction that could repay the Indebtedness in full. Accordingly, the Purchaser is the only stakeholder with any economic interest in the Limited Receivership Assets;⁴⁵

- (ii) The Brio Transaction releases the Debtor from its guarantees of approximately \$273 million of debt, and will allow the Debtor to continue to operate as a going concern in respect of its other projects. The Debtor will also benefit from the \$1 million Equity Subscription contemplated by the Restructuring Agreement;⁴⁶
- (iii) No creditors or employees of the Debtor are adversely affected by the Brio Transaction.⁴⁷

(c) **The Brio Transaction was entered into after an efficacious and fair Sale Process:**

- (i) The Sale Process was global in scope, took place over multiple years and failed to result in any viable transaction;⁴⁸
- (ii) The maximum amount offered under any expression of interest during the Sale Process was significantly less than the Indebtedness;⁴⁹
- (iii) After the extensive marketing efforts of the Sale Process, MBL, a commercial lender, determined that, in its reasonable business judgment, the sale of the Indebtedness in the approximate

⁴⁴ First Report, *supra.* at para 33(d).

⁴⁵ *Ibid.* at para 34.

⁴⁶ *Ibid.* at para 35, 43.

⁴⁷ Longpre Affidavit, *supra.* at para 44.

⁴⁸ First Report, *supra.* at para 29, Meloche Affidavit, *supra.* at paras 8-22.

⁴⁹ Meloche Affidavit, *supra.* at para 23.

amount of \$273 million for the price of approximately \$41.9 million represented the highest and/or best offer received for the assets subject to its security,⁵⁰ and

(iv) Since November 2015, when the Restructuring Agreement was executed, there has been no material improvement in the business or market conditions that would suggest a different result could be achieved if the Sale Process was reopened at this time.⁵¹

(d) **The Receiver has not identified any unfairness in the working out of the process.**⁵²

40. The Receiver has concluded that the Brio Transaction is the highest and best transaction in respect of the Limited Receivership Assets resulting from the Sale Process and the consideration appears to be fair and reasonable in the circumstances.⁵³

41. The stakeholders of the Debtor other than the Purchaser are unaffected by the Brio Transaction and will benefit from the Equity Subscription.

(ii) *Sales Process satisfies the appropriate considerations*

42. In *Nelson Education Limited (Re)*,⁵⁴ in the context of a liquidating *Companies Creditors' Arrangement Act* proceeding, Justice Newbould held that the *Soundair Principles*, which apply to the approval of a sale transaction resulting from a post-filing sales process, also apply to the approval of a sale transaction resulting from a pre-filing sales process.⁵⁵

43. The decision in *Nelson* is consistent with the reasoning in *Tool-Plas Systems Inc. (Re)* ("*Tool-Plas*") where Justice Morawetz held that, when considering whether to

⁵⁰ First Report, *supra*. at para 29-30.

⁵¹ *Ibid.* at paras 33, 40.

⁵² *Ibid.* at para 37.

⁵³ *Ibid.* at para 42.

⁵⁴ BOA, Tab 3: *Nelson Education Limited (Re)*, 2015 ONSC 5557 [*Nelson*]

⁵⁵ *Nelson, supra.* at paras. 32, 37; *Soundair, supra* at para. 16.

approve a transaction without an extended sale process carried out within the receivership, the Court:

should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the ... transaction would realistically be any different if an extended sales process were followed.⁵⁶

44. The Receiver relies on its submissions in paragraph 39 above and submits that each of the factors set out in *Soundair* and *Tool-Plas* is satisfied.

45. For the forgoing reasons, the Receiver submits that this Court should approve the Sale Agreement and authorize the Receiver to complete the Brio Transaction contemplated therein.

B. The First Report and Activities Described Therein Should be Approved

46. The decision of Justice Morawetz in *Re Target Canada Co.* identified that the doctrinal and jurisdictional bases for the approval of Court Officer's reports (and the activities described therein) derive from the doctrine of *res judicata*.⁵⁷

47. An important factor in the approval of a Court Officer's report is the evidentiary record before the Court (i.e., whether the Court is asked to "squarely" decide the issue in respect of which approval is sought). With respect to the approval of a sales transaction in particular, Justice Morawetz provides the following guidance (citations omitted):

...[I]f the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the Monitor in its report. The approval issue is put squarely before the court and the court must, among other

⁵⁶ BOA, Tab 4: *Tool-Plas Systems Inc. (Re)*, 2008 CanLII 54791 at para 15.

⁵⁷ BOA, Tab 5: *Re Target Canada Co.*, 2015 ONSC 7574 at paras 13-14.

things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that *res judicata* and related doctrines apply to approval of a Monitor's report in these circumstances.⁵⁸

48. The issues canvassed by the Receiver's First Report with respect to the Approval and Vesting Order and Distribution Order are "squarely" before the Court on the present motion, are supported by substantial affidavit evidence and commentary from the Receiver, address essential issues in respect of which findings of fact must be made to determine whether to grant the relief sought herein, and will result in a decision that will substantively affect the rights of stakeholders of the Debtor. In the present circumstances, and provided that the Court otherwise grants the Approval and Vesting Order and Discharge Order, approval of the Receiver's First Report and its activities described therein is appropriate relief.⁵⁹

49. For the foregoing reasons, the Receiver's First Report and the activities described therein ought to be approved.

C. The Discharge Order should be granted

50. If this Court grants the Approval and Vesting Order, then, once the Brio Transaction has closed and the Receiver has completed any necessary remaining administrative procedures, the Receiver will have completed its statutory duties, those duties set out in the Limited Receivership Order and the steps necessary to complete the Receivership and satisfy its purpose. Once these matters have been completed the Receiver will file the Discharge Certificate with the Court, certifying same.⁶⁰

⁵⁸ *Ibid.* at paras 18-19

⁵⁹ First Report, *supra*.

⁶⁰ *Ibid.* at para 45.

51. The expeditious completion of the Receivership will avoid the costs of additional Court appearances and reduce any potential confusion in the market with respect to the status of the Debtor and its ongoing operations.

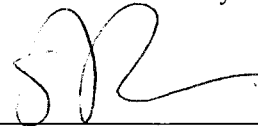
52. The fees and expenses of the Receiver, including the fees and expenses of the Receiver's Counsel, have been or will be paid by BGI pursuant to a fee indemnity letter dated March 22, 2016.⁶¹ Unless a request is made by the Court, BGI or any other interested party, it is not necessary to appear before this Court for approval of these fees.

53. Accordingly, the Receiver submits, with the support of the Purchaser and the Debtor, that it is appropriate that this Court grant the Discharge Order, terminating the Receivership and discharging the Receiver, each effective on filing of the Discharge Certificate.⁶²

PART V - ORDER REQUESTED

54. For all of the foregoing reasons, the Receiver submits that it is appropriate for this Court to grant the orders sought substantially in the forms at Tabs 4-5 of the Receiver's Motion Record. The form of Orders being sought do not materially deviate from the Model Orders of this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2016.



Stikeman Elliott LLP

Lawyers for the Receiver

⁶¹ *Ibid.* at para 49.

⁶² *Ibid.* at paras 46-47.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)
2. *Re Eddie Bauer of Canada Inc.*, [2009] O.J. No. 3784 (S.C.J. [Commercial List]).
3. *Nelson Education Limited (Re)*, 2015 ONSC 5557
4. *Tool-Plas Systems Inc. (Re)*, 2008 CanLII 54791
5. *Target Canada Co. (Re)*, 2015 ONSC 7574

SCHEDULE "B"
RELEVANT STATUTES

BRIO FINANCE HOLDINGS B.V.

and

CARPATHIAN GOLD INC.

Applicant

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE RECEIVER
(RETURNABLE APRIL 29, 2016)**

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