

**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 OR  
ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP  
(BARBADOS) LIMITED, BANRO CONGO (BARBADOS)  
LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA  
(BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED  
AND KAMITUGA (BARBADOS) LIMITED**

(the "Applicants")

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**FACTUM OF THE APPLICANTS  
(Approval of SISP, Stay Extension and CCAA Charges Priority)**

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January 16, 2018

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**PART I - OVERVIEW**

1. This factum is filed in support of the Applicants' comeback motion returnable January 18, 2018 at which time the Applicants are seeking, among other things, approval of a sale and investment solicitation process ("**SISP**"), an extension of the stay of proceedings (the "**Stay of Proceedings**") as defined in the Order of this Court granted on December 22, 2017 (the "**Initial Order**")<sup>1</sup> up to and including March 30, 2018 (the "**Stay Extension**") and enhanced priority for the Charges so that they rank in priority to all other Encumbrances (the "**Enhanced Priority**").

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<sup>1</sup> Defined terms not otherwise define herein shall have the meaning ascribed to those terms in the Initial Order, the affidavits of Rory James Taylor, sworn on December 21, 2017 and January 8, 2018 (the "**First Taylor Affidavit**" and "**Second Taylor Affidavit**" respectively), and the affidavit of Geoffrey Farr, sworn on December 22, 2017 (the "**Farr Affidavit**").

2. Banro is a Canadian public corporation and, through the Banro Group, is involved in the exploration, development and mining of gold in the DRC.<sup>2</sup> Through certain of the Non-Applicant Subsidiaries, the Banro Group owns two operating gold mines in the DRC known as the Twangiza gold mine and the Namoya gold mine, as well as certain exploration and exploitation rights in the DRC.<sup>3</sup>

3. The Initial Order, among other things:

- (a) granted the Stay of Proceedings in favour of the Applicants and the Non-Applicant Subsidiaries until and including January 19, 2018;
- (b) authorized Banro to borrow the maximum sum of US\$20 million pursuant to the DIP Term Sheet and established the DIP Lender's Charge as security for the Applicants' obligations thereunder;
- (c) authorized the Applicants to take all steps and actions contemplated by, and to comply with their obligations under the Support Agreement;
- (d) appointed FTI Consulting Canada Inc. as Monitor; and
- (e) established the Directors' Charge and the Administration Charge.

4. Both the DIP Term Sheet and the Support Agreement require the Applicants to return to Court by no later than January 19, 2018 to seek the Enhanced Priority as well as approval of the SISP, the form of which is attached to the Support Agreement.<sup>4</sup>

5. The SISP was designed to solicit proposals for sale or investment as an alternative to the Recapitalization described in the Support Agreement. Should the SISP not result in a

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<sup>2</sup> First Taylor Affidavit, at para 4.

<sup>3</sup> First Taylor Affidavit, at para 6.

<sup>4</sup> Second Taylor Affidavit, at para 11, and at Exhibit "D".

Successful Bid, the Banro Group has agreed, under the Support Agreement, to proceed to implement the Recapitalization.<sup>5</sup>

6. The Stay Extension is requested in order provide the Applicants with time to implement the SISP and move forward with the Recapitalization.

7. Pursuant to the Initial Order, any interested party who wished to vary the Initial Order had until seven (7) days prior to the originally scheduled Comeback Date of January 19, 2018 to bring a motion to do so. No such motions have been brought. Further, the Applicants have received no notice of any objections to the relief sought by the Applicants as outlined herein.

## **PART II - FACTS**

### **BACKGROUND AND GRANTING OF INITIAL ORDER**

8. The relevant facts are set out in the First Taylor Affidavit, the Second Taylor Affidavit, the Farr Affidavit, the report to Court of FTI in its capacity as proposed monitor dated December 21, 2017 (the “**Pre-filing Report**”) and the report to Court of the Monitor dated January 15, 2018 (the “**First Report**”).

### **OVERVIEW OF THE APPLICANTS’ ACTIVITIES SINCE THE GRANTING OF THE INITIAL ORDER**

9. With the assistance of the Monitor, the Applicants have, among other things, (i) engaged with various stakeholder groups and/or their advisors in regards to these proceedings; and (ii) commenced preparations for the implementation of the SISP, in the event that it is approved by the Court.<sup>6</sup>

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<sup>5</sup> First Taylor Affidavit, at para 102.

<sup>6</sup> Second Taylor Affidavit, at para 5.

10. The Applicants' stakeholders have been notified of the CCAA proceedings by the Monitor, as required by the CCAA.<sup>7</sup>

11. The Banro Group has continued to operate its business, subject to the provisions of the Initial Order. In this respect, the Applicants have worked with Monitor to prepare an updated cash flow (the January 11 Forecast, as defined in the First Report) to, among other things, account for the resupply of the Namoya Mine and restart of mining operations which are now possible because of the re-opening of the supply road to the mine in late December 2017.<sup>8</sup>

### **DIP FINANCING**

12. A summary of significant terms of the DIP Term Sheet was provided in the Applicants' factum dated December 22, 2017 (the "**Initial Factum**") filed in support of the Initial Order at paragraphs 50 through 52 thereof and will not be repeated herein.

13. Pursuant to the DIP Term Sheet, the DIP Lender's advance of funds is conditional upon among other things, by no later than January 19, 2018: (i) the Enhanced Priority being granted by the Court; (ii) the SISP being approved by the Court and (iii) Baiyin obtaining certain regulatory approvals from the government of the People's Republic of China.<sup>9</sup>

14. Baiyin has informed the Monitor that it expects to receive regulatory approval before January 19, 2018.<sup>10</sup> An update will be provided to the Court at the hearing of the motion.

15. The DIP Term Sheet also provided that prior to January 19, 2018, the Applicants and the DIP Lenders would agree on the identity of the Borrower or Borrowers thereunder and amend the DIP Term Sheet accordingly. The parties have now agreed that Banro and BGB will be co-

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<sup>7</sup> First Report, at para 17.

<sup>8</sup> First Report, at paras 23-24.

<sup>9</sup> First Taylor Affidavit, at para 15.

<sup>10</sup> First Report, at para 25.

borrowers under the DIP Term Sheet and are in the process of amending the DIP Term Sheet accordingly.

**SISP<sup>11</sup>**

16. The contemplated SISP is a two-phase process. First, bidders will be invited to submit non-binding letters of intent. The letters of intent will be reviewed by Banro, in consultation with the Monitor and the DIP Lender, to determine whether any of the letters of intent are capable of forming a Qualified Alternative Transaction Bid.<sup>12</sup>

17. In order to constitute a Qualified Alternative Transaction Bid, a bid must, among other things, provide for consideration in a minimum amount, being the Qualified Consideration.<sup>13</sup>

18. The Monitor is in the process of preparing an estimate of the amount of the Qualified Consideration, which will be made available to potential bidders.

19. Second, for bidders whose letters of intent are determined to be capable of forming a Qualified Alternative Transaction Bid, bidders will be invited to submit final binding bids for consideration by Banro, the Monitor, and, subject to certain conditions, the DIP Lender. These final bids will then be evaluated by Banro in consultation with the Monitor, and, subject to certain conditions, the DIP Lender, to determine the Successful Bid, if any.<sup>14</sup>

20. Key terms of the SISP include:

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<sup>11</sup> Capitalized terms used in this section but not defined shall have the meanings given to them in the SISP.

<sup>12</sup> First Report, at para 43 (c) and (d).

<sup>13</sup> Qualified Consideration is defined in the SISP as “(i) cash consideration sufficient to indefeasibly repay all DIP Obligations; plus (ii) cash consideration sufficient to indefeasibly pay all Priority Claims; plus (iii) cash consideration sufficient to indefeasibly repay not less than 75% of the aggregate principal amount outstanding under the Affected Parity Lien Debt; plus (iv) cash consideration sufficient to indefeasibly repay all amounts due under the Stream Agreements or treatment of the Stream Agreements on the same terms as the Recapitalization.” See also the First Report at para 35.

<sup>14</sup> First Report, at para 43 (e) and (f).

- (a) **Bidders:** A list of potential interested parties (“**Potential Bidders**”), including strategic purchasers and financial investors is being created with input from the Applicants, the Monitor, the Monitor’s global network, and the Special Committee of Banro’s Board of Directors (the “**Potential Bidder List**”).<sup>15</sup>
- (b) **Teaser:** a “teaser” document (the “**Teaser Letter**”) is being prepared to introduce Potential Bidders to the opportunity to participate in the SISP and an overview of the SISP Procedures.<sup>16</sup>
- (c) **Due Diligence Access:** (i) a template non-disclosure agreement (the “**NDA**”) has been drafted in form and substance satisfactory to Banro and the Monitor<sup>17</sup>; and (ii) an acknowledgement of the SISP Procedures is being prepared (the “**SISP Acknowledgement**”).
- (d) **Diligence Materials:** (i) a confidential virtual data room (the “**Data Room**”) is being populated for Potential Bidders to access due diligence materials once each of the Potential Bidders executes an NDA; and (ii) a confidential information memorandum (the “**CIM**” and together with the Data Room, the “**Diligence Materials**”) is being prepared to provide information to each of the Potential Bidders who signs a Confidentiality Agreement.<sup>18</sup>
- (e) **Letters of Intent:** under the proposed SISP, with the assistance of the Monitor, Banro will solicit non-binding letters of intent (the “**Non-Binding LOIs**”) by March 2, 2018, after which Banro (in consultation with the Monitor and subject to certain

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<sup>15</sup> First Report, at para 20(a).

<sup>16</sup> First Report, at para 20(c).

<sup>17</sup> First Report, at para 20(b).

<sup>18</sup> First Report, at paras 20(d)-(e).



conditions, the DIP Lender) will determine if any Non-Binding LOIs received are capable of becoming a Qualified Alternative Transaction Bid.<sup>19</sup>

- (f) **Bid Deadline:** If it is determined that no proposals received could form the basis of a Qualified Alternative Transaction Bid, then the SISP will be immediately terminated and Banro will proceed to take steps to complete the Recapitalization. If it is determined that one or more proposals received could form the basis of a Qualified Alternative Transaction Bid, then the SISP will proceed to the second phase whereby bidders will complete any further due diligence and be entitled to submit final binding bids by no later than 12:00 pm (Eastern Time) on April 9, 2018 (the “**Bid Deadline**”).<sup>20</sup>
- (g) **Qualified Bids:** if one or more Qualified Alternative Transaction Bids are received by the Bid Deadline, Banro (in consultation with the Monitor and, subject to certain conditions, the DIP Lender) shall determine whether to accept a Qualified Alternative Transaction Bid or to proceed with the Recapitalization.<sup>21</sup>
- (h) **Successful Bid(s):** Banro, in consultation with the Monitor and the Conforming DIP Lender, reserves the right to identify the highest or otherwise most favourable Qualified Alternative Transaction Bid(s) or take one or more of the steps outlined in the SISP.<sup>22</sup>
- (i) **Court Approval:** On or before April 27, 2018, Banro shall apply to the Court (the “**Sale Approval Motion**”) for an order approving a Successful Bid and

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<sup>19</sup> First Report, at para 43(c).

<sup>20</sup> First Report, at para 43(e).

<sup>21</sup> First Report, at para 43(f).

<sup>22</sup> First Report, at para 43(f).

authorizing Banro (and/or any applicable member of the Banro Group) to enter into a Definitive Agreement with the Successful Bidder.<sup>23</sup>

21. The following chart summarizes the relevant milestones for the proposed SISP:

March 2, 2018	Deadline for Non-Binding LOIs
April 9, 2018	Deadline for binding Alternative Transaction Bids (if necessary)
April 27, 2018	Court approval of Alternative Transaction Bid (if applicable)
April 30, 2018	Outside Date

### PART III - ISSUES

22. The key issues on this Motion are as follows:

- (a) Is the approval of the SISP appropriate, fair and reasonable as contemplated by the objectives in the CCAA?
- (b) Should the Charges be granted Enhanced Priority? and
- (c) Should the Stay Extension be granted?

### PART IV - LAW

#### APPROVAL OF THE SISP

23. In *Re Brainhunter*, Morawetz J. (as he then was) held that when determining whether to approve a sale process, the Court should consider the factors set out in *Re Nortel Networks Corp.*<sup>24</sup> being:

- (a) is a sale transaction warranted at this time?

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<sup>23</sup> First Report, at para 43(g).

<sup>24</sup> *Re Brainhunter Inc.*, 2009 CarswellOnt 8207, at para 13, Book of Authorities of the Applicants, Tab 1 [*Re Brainhunter*]; citing *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467, at para 49, Book of Authorities of the Applicants, Tab 2 [*Re Nortel Networks Corp.*].

- (b) will the sale benefit the whole “economic community”?
- (c) do any of the debtors’ creditors have a bona fide reason to object to a sale of the business?
- (d) is there a better viable alternative?<sup>25</sup>

24. In light of the *Re Nortel Networks Corp* criteria, the proposed SISP should be approved by this Court for the following reasons:

- (a) The proposed SISP is warranted at this time as it will provide a means for testing the market, gauging interest in the Applicants and their assets and determining the best offer for the purchase of, or investment in, the Applicants’ business, if any materialize. The Applicants, in consultation with the Monitor, have determined that it is in the best interests of the Applicants’ stakeholders to pursue the SISP. This Court will retain its jurisdiction to approve any proposed sale to any successful bidder under section 36 of the CCAA, and to hear submissions from interested stakeholders again at that time;
- (b) The SISP provides an opportunity to market a sale of or investment in the Banro Group as a going-concern for the benefit of the entire “economic community” including creditors and employees. If the SISP culminates in a Successful Bid, then substantial value will be generated for distribution among the Applicants’ stakeholders;
- (c) The Monitor supports the SISP and will play an active role in its implementation.<sup>26</sup> The SISP has been designed to be a fair, transparent process run by the Applicants in consultation with the Monitor, and supported by the

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<sup>25</sup> *Re Nortel Networks Corp.*, at para 49; *Re Brainhunter*, at para 13.

<sup>26</sup> First Report, at para 49.

parties with the major economic interest in the Applicants' assets. The Applicants are not aware of any creditor objections to the SISP. Stakeholders will have a further ability to make submissions regarding the effects of a proposed transaction if the Applicants bring a sale approval motion before this Court.

- (d) Approval of the SISP is a condition precedent for the advance of funds under the DIP Term Sheet.
- (e) If no Qualified Alternative Transaction Bid is received, or if it is determined that there will not be a Successful Bid under the SISP, then the Applicants will proceed to implement the Recapitalization. In this way, the Applicants are pursuing a dual-track restructuring, with the objective of maximizing value for their stakeholders.

25. The Monitor, Baiyin and Gramercy support the SISP.<sup>27</sup> For the reasons set out above, the Applicants submit that this Court should approve the SISP.

#### **PRIORITY OF CCAA CHARGES**

26. The Initial Order provides for three Charges (as defined in the Initial Order) over the Applicants' property. The three Charges and their order of priority are:

- (a) Administration Charge (to the maximum amount of \$1,500,000);
- (b) DIP Lender's Charge; and
- (c) Directors' Charge (to the maximum amount of USD\$3,200,000).

27. The legal principles supporting the granting of the Charges is set out in detail in the Initial Factum at paragraphs 58, 59, 75 and 84 and are not repeated herein.

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<sup>27</sup> First Report, at para 49.

28. Pursuant to paragraph 43 of the Initial Order, the Applicants and the beneficiaries of the Charges were granted leave to make a further application to the Court should they deem it necessary or advisable to have the Charges rank ahead of Encumbrances held by parties that did not receive notice of the Applicants' CCAA Application:

each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for Encumbrances the holders of which did not receive notice of the application for this order. The Applicants and the beneficiaries of the Charges are hereby granted leave to bring a motion at the Comeback Date (as defined below) to have the Charges rank ahead of all such Encumbrances, on notice to the holders thereof [emphasis added].

29. In order for the Court to grant a priming interim financing charge, directors' charge, or administration charge, a debtor is required to give notice to the secured creditors likely to be affected.<sup>28</sup>

30. Searches of the Ontario Personal Property Registry current to December 18, 2017 showed only registrations against Banro by each of the Collateral Agents, one of which was an assignment from Equity Financial Trust Company as the Assigning Collateral Agent, and no registrations against any of the Barbados Entities. Company Searches conducted at the Corporate Affairs and Intellectual Property Office in the Barbados current to December 4, 2017 against the Barbados Entities showed only registrations against the Barbados Entities by each of the Collateral Agents, one of which was an assignment from Equity Financial Trust Company, as the Assigning Collateral Agent. These parties were all served with the Applicants' motion on January 8, 2018 and no opposition has been received.

31. Reflecting the commercial realities of insolvency proceedings, the Court frequently grants priming interim financing charges to secure the obligations of a debtor pursuant to interim

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<sup>28</sup> See sections 11.2, 11.51, and 11.52 of the CCAA.

financing.<sup>29</sup> As is common, in this case, the DIP Lender requires that the DIP Lender's Charge be granted priority over all other security interests, charges and liens other than the Permitted Priority Liens.<sup>30</sup>

32. Further, the beneficiaries of the Directors' Charge and the Administration Charge require enhanced priority so that they are properly protected from liabilities they could incur as a result of their continued participation in the Applicants' proceedings.<sup>31</sup>

33. Considering the above, the Applicants submit that it is appropriate in the circumstances for the Court to grant the Enhanced Priority for the Charges as requested in the Stay Extension & CCAA Charges Priority Order. The Applicants submit:

- (a) Subject to the fulfillment of the other conditions under the DIP Term Sheet, Enhanced Priority will allow the Applicants to access the funds contemplated by the DIP Financing;
- (b) The DIP Financing is essential for the Applicants to continue operations through the proposed extension of the Stay of Proceedings, and to implement the SISP, if approved;
- (c) The continued participation of the beneficiaries of the Directors' Charge is important for the success of the Applicants' restructuring;
- (d) The beneficiaries of the Administration Charge are providing essential services to the Applicants, for the benefit of all stakeholders;

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<sup>29</sup> *Re Timminco Ltd.*, 2012 ONSC 506 at paras 66 and 68; Book of Authorities, Tab 3; *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145 at paras 17, 18 and 24; Book of Authorities, Tab 4.

<sup>30</sup> Second Taylor Affidavit, at para 11.

<sup>31</sup> First Taylor Affidavit, at paras 117 and 119; Second Taylor Affidavit, at para 12.

- (e) Without the Enhanced Priority, the beneficiaries of the Directors' Charge and Administration Charge may not be sufficiently protected from liabilities they could incur by participating in these proceedings;
- (f) The Initial Order contemplated that the Applicant could seek enhanced priority for the Charges, on a further motion on notice to the holders of Encumbrances who did not receive notice of the Applicants' initial application; and
- (g) As described above, such holders of Encumbrances have been given notice of the Applicants' present motion to enhance the priority of the Charges.

34. Considering the above, the Applicants submit that it is appropriate at this time, on notice to the holders of the Encumbrances, to grant the Charges Enhanced Priority over the existing Encumbrances.

#### **EXTENSION OF THE STAY OF PROCEEDINGS**

35. The Applicants seek this Court's approval of an extension of the Stay of Proceedings up to and including March 30, 2018, to allow the Applicants to pursue the SISP, or, if no proposals are deemed satisfactory pursuant to the terms of the SISP, to proceed with the implementation of the Recapitalization.

36. Under section 11.02 of the CCAA, the Court may extend a stay of proceedings if the Court is satisfied of the following:

- (a) The Applicants satisfy the Court that circumstances exist that make the order appropriate; and

(b) The Applicants also satisfy the Court that they have acted, and are acting, in good faith and with due diligence.<sup>32</sup>

37. The proposed extension of the Stay of Proceedings will provide the Applicants and the Monitor with the opportunity to move forward with the SISP and, subject to the determination that there has been a successful bid, bring a transaction contemplated by the SISP to Court for approval.

38. The Applicants have acted and continue to act in good faith and with due diligence in developing the SISP.<sup>33</sup>

39. Subject to the Applicants' receipt of an advance of funds on January 19, 2018 in accordance with the DIP Term Sheet, it is forecast that the Applicants will have sufficient liquidity to fund their operations up to and including March 30, 2018.<sup>34</sup> No stakeholders will suffer any material prejudice if the Stay Extension is granted.<sup>35</sup>

40. Therefore, the Applicants submit that the requested Stay Extension be granted.

#### **PART V - RELIEF SOUGHT**

41. The Applicants request that this Court grant the Orders set out in their Notice of Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of January, 2018.**

  
Cassels Brock & Blackwell LLP  
Lawyers for the Applicants

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<sup>32</sup> CCAA, at section 11.02(3).

<sup>33</sup> First Report, at para 67.

<sup>34</sup> First Report, at para 65.

<sup>35</sup> First Report, at para 66.



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

1. *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]).
2. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]).
3. *Re Timminco Ltd.*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]).
4. *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145 (Ont. S.C.J.).

**SCHEDULE "B"**  
**RELEVANT STATUTES**

**Companies' Creditors Arrangement Act, RSC 1985, c C-36**

**Stays, etc. — initial application**

**11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(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.

**Burden of proof on application**

**(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.

**Interim financing**

**11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

**Priority — secured creditors**

**(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**Priority — other orders**

**(3)** The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

## **Factors to be considered**

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
  - (b) how the company's business and financial affairs are to be managed during the proceedings;
  - (c) whether the company's management has the confidence of its major creditors;
  - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
  - (e) the nature and value of the company's property;
  - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
  - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

## **Security or charge relating to director's indemnification**

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

## **Priority**

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

## **Restriction — indemnification insurance**

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

## **Negligence, misconduct or fault**

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

## **Court may order security or charge to cover certain costs**

**11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

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

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

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

## **Priority**

**(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**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 OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANTS  
(Approval of SISF, Stay Extension and CCAA Charges Priority)**

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