

**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")

---

**FACTUM OF THE APPLICANTS  
(CCA Initial Application)**

---

December 22, 2017

**CASSELS BROCK & BLACKWELL LLP**

2100 Scotia Plaza  
40 King Street West  
Toronto, ON M5H 3C2

Ryan C. Jacobs LSUC# 59510J  
Tel: 416.860.6465  
Fax: 416.640.3189  
rjacobs@casselsbrock.com

Jane O. Dietrich LSUC# 49302U  
Tel: 416.860.5223  
Fax: 416.640.3144  
jdietrich@casselsbrock.com

Joseph J. Bellissimo LSUC# 46555R  
Tel: 416.860.6572  
Fax: 416.642.7150  
jbellissimo@casselsbrock.com

Ben Goodis LSUC# 70303H  
Tel: 416.869.5312  
Fax: 416.640.3199  
bgoodis@casselsbrock.com

*Lawyers for the Applicants*

# INDEX

	<u>Page</u>
<b>PART I - OVERVIEW .....</b>	<b>1</b>
<b>PART II - FACTS .....</b>	<b>5</b>
<b>PART III - ISSUES .....</b>	<b>11</b>
<b>PART IV - LAW.....</b>	<b>12</b>
<b>I.    JURISDICTION.....</b>	<b>12</b>
<b>A.  The Applicants are each a “company” as defined in the CCAA .....</b>	<b>12</b>
<b>B.  The Applicants are each a “debtor company” as defined in the CCAA.....</b>	<b>13</b>
<b>C.  Claims Total More than \$5 Million.....</b>	<b>13</b>
<b>II.   A STAY OF PROCEEDINGS IS APPROPRIATE .....</b>	<b>14</b>
<b>III.  APPOINTMENT OF MONITOR.....</b>	<b>15</b>
<b>IV.   APPROVAL OF DIP FINANCING &amp; THE DIP LENDERS’ CHARGE .....</b>	<b>16</b>
<b>A.  DIP Financing .....</b>	<b>16</b>
<b>B.  DIP Lenders’ Charge .....</b>	<b>17</b>
<b>V.    SUPPORT AGREEMENT .....</b>	<b>19</b>
<b>VI.   DIRECTORS’ CHARGE.....</b>	<b>21</b>
<b>VII.  ADMINISTRATION CHARGE.....</b>	<b>23</b>
<b>PART V - RELIEF SOUGHT .....</b>	<b>24</b>
<b>SCHEDULE "A" LIST OF AUTHORITIES .....</b>	<b>A-1</b>
<b>SCHEDULE "B" RELEVANT STATUTES.....</b>	<b>B-1</b>

**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**")

---

**FACTUM OF THE APPLICANTS  
(CCAA Initial Application)**

---

**PART I - OVERVIEW**

1. This is an application by Banro Corporation ("**Banro**"), Banro Group (Barbados) Limited ("**BGB**"), Banro Congo (Barbados) Limited, Namoya (Barbados) Limited, Lugushwa (Barbados) Limited, Twangiza (Barbados) Limited, and Kamituga (Barbados) Limited (collectively, the "**Barbados Entities**" and together with Banro, the "**Applicants**") pursuant to the *Companies' Creditors Arrangement Act*<sup>1</sup> (the "**CCAA**") for an Initial Order including provisions:

- (a) declaring that the CCAA applies to the Applicants;
- (b) granting a stay of proceedings in favour of the Applicants and certain of their direct and indirect subsidiaries<sup>2</sup> (the "**Non-Applicant Subsidiaries**", collectively

---

<sup>1</sup> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ["**CCAA**"].

<sup>2</sup> The Non-Applicant Subsidiaries are: (i) Banro Congo Mining S.A., (ii) Namoya Mining S.A., (iii) Lugushwa Mining S.A., (iv) Twangiza Mining S.A., and (v) Kamituga Mining S.A.

with the Applicants, the “**Banro Group**”<sup>3</sup>) and their respective directors and officers;

- (c) appointing FTI Consulting Canada Inc. (“**FTI**”) to act as the monitor (the “**Monitor**”);
- (d) authorizing the Applicants to borrow and/or guarantee the maximum sum of \$20 million pursuant to an interim financing term sheet (the “**DIP Term Sheet**”) as interim financing (the “**DIP Financing**”) from Gramercy Funds Management LLC as agent for and on behalf of certain funds and accounts for which it acts as investment manager or advisor (“**Gramercy**”) and Baiyin International Investment Ltd. and affiliates thereof within the direct or indirect control of Baiyin Nonferrous Group Company Limited (“**Baiyin**”, and together with Gramercy, the “**DIP Lender**”) and granting the DIP Lenders’ Charge (as defined below) as security for the Applicants’ obligations thereunder;
- (e) authorizing the Applicants to take all steps and actions contemplated by and comply with their obligations under a Support Agreement among the Applicants, Gramercy, Baiyin, and others (the “**Support Agreement**”);
- (f) establishing the Directors’ Charge (as defined below); and
- (g) establishing the Administration Charge (as defined below).

2. Banro is a Canadian public corporation and, through the Banro Group, is involved in the exploration, development and mining of gold in the Democratic Republic of the Congo (the “**DRC**”).<sup>4</sup> The Banro Group owns two operating gold mines in the DRC known as the Twangiza

---

<sup>3</sup> A copy of the Organizational Chart for the Banro Group is found at Exhibit “B” of the Affidavit of Rory James Taylor, sworn December 21, 2017 and found at Tab 2 to the Applicants’ Application Record (the “**Taylor Affidavit**”).

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

gold mine and the Namoya gold mine, as well as certain exploration and exploitation mining rights in the DRC.<sup>5</sup>

3. The Banro Group collectively has 1450 employees, of which 89 are employees of Banro. Of the Banro employees, 80 of them work primarily in the DRC.<sup>6</sup> The Banro Group's operations are primarily conducted by certain of its Non-Applicant Subsidiaries in the DRC.<sup>7</sup>

4. The Applicants do not have the liquidity to meet their obligations as they become due. In particular, the Applicants failed to make a quarterly interest payment in the amount of approximately \$4.94 million on the 10.00% secured notes due March 1, 2021 in the amount of \$197.5 million (the "**2017 Notes**") that was due on December 1, 2017. If the failure to make such interest payment is not cured within the 30 day grace period, an event of default will have occurred under the 2017 Notes.<sup>8</sup>

5. In order to conserve liquidity, the Applicants and certain of the Non-Applicant Subsidiaries entered into agreements with affiliates of Baiyin and Gramercy to defer their repayment obligations under certain gold streaming agreements and gold forward sale agreements. The extension of these deferrals past December 31, 2017 is conditional upon, among other things, the commencement of these CCAA proceedings. However, even with these conservatory measures, the Applicants are in immediate need of additional liquidity to continue operations and fund the operations of the Non-Applicant Subsidiaries.<sup>9</sup>

---

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

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

<sup>7</sup> Taylor Affidavit, at para 6.

<sup>8</sup> Taylor Affidavit, at para 13.

<sup>9</sup> Taylor Affidavit, at para 14.

6. Members of the Banro Group (including the Applicants) have also entered into the Support Agreement with other Gramercy and Baiyin related parties. However, it is conditional upon the receipt of regulatory approvals in favour of Baiyin (or its related parties).<sup>10</sup>

7. To provide for additional liquidity to satisfy ongoing operational requirements of the Banro Group, the Applicants have negotiated the DIP Financing, which is subject to a number of conditions including the Court's approval and regulatory approvals in favour of Baiyin.<sup>11</sup> Although approval of the DIP Financing is being sought at this time, based on the Applicants' cash flow forecast, no funds are to be advanced until following the comeback hearing, at which time the Applicants intend to seek enhanced priority for the DIP Financing, approval of a sale and investment solicitation process ("**SISP**"), and expect Baiyin to have received regulatory approvals as required.

8. Following extensive discussions with the Applicants' primary stakeholders, the Special Committee of Banro's board of directors (the "**Special Committee**") has determined that restructuring the financial obligations of the Applicants under the protection of the CCAA with the DIP Financing and in accordance with the Support Agreement is in the best interests of the Banro Group's stakeholders.<sup>12</sup>

9. 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 approval of a SISP. Further, the Support Agreement provides that unless a Successful Bid (as defined in the SISP) is identified in accordance with the SISP, the Banro Group will take steps to implement a recapitalization transaction (the "**Recapitalization**").<sup>13</sup> Approval of the Recapitalization is not being sought at this time, but it is described in the Taylor Affidavit and the Recapitalization term sheet is attached to

---

<sup>10</sup> Affidavit of Geoffrey Farr, sworn December 22, 2017 (the "**Farr Affidavit**"), at para 5.

<sup>11</sup> Taylor Affidavit, at para 15.

<sup>12</sup> Farr Affidavit, at para 3.

<sup>13</sup> Taylor Affidavit, at para 17.

the Support Agreement, found appended to the affidavit of Geoffrey Farr, sworn December 22, 2017 (the “**Farr Affidavit**”).

## **PART II - FACTS**

10. The relevant facts in this proceeding are set out in detail in the affidavit of Rory James Taylor, sworn December 21, 2017 (the “**Taylor Affidavit**”), and the Farr Affidavit. Mr. Taylor is the Chief Financial Officer of Banro, and Mr. Farr is the Vice President, General Counsel, and Corporate Secretary of Banro.<sup>14</sup> Capitalized terms used in this Factum that are not otherwise defined have the same meanings as in the Taylor Affidavit.

### **Corporate Overview**

#### **The Banro Group**

11. Banro is a *Canada Business Corporations Act* (“**CBCA**”)<sup>15</sup> company with its head office in Toronto, Ontario.

12. Banro’s common shares are listed on the Toronto Stock Exchange and on the New York Stock Exchange.<sup>16</sup> Its two largest shareholders are Baiyin and Gramercy, who each own approximately 30 per cent of the common shares of Banro. Baiyin and Gramercy, or parties related to them, also control significant amounts of the Banro Group’s debt.<sup>17</sup>

13. BGB is a wholly-owned subsidiary of Banro, incorporated in Barbados. BGB holds equity in each of the other Barbados Entities.<sup>18</sup>

14. The Barbados Entities share a common registered address in St. Michael, Barbados.<sup>19</sup>

---

<sup>14</sup> Taylor Affidavit, at para 1; Farr Affidavit, at para 1..

<sup>15</sup> *Canada Business Corporations Act*, RSC 1985, c C-44; Taylor Affidavit, at para 19.

<sup>16</sup> Taylor Affidavit, at para 8. On November 21, 2017, the Ontario Securities Commission issued a “cease trade order” (the “**CTO**”) which prohibits trading in Banro’s securities in Canada. Banro’s shares continue to trade on the NYSE American.

<sup>17</sup> Taylor Affidavit, at para 8.

<sup>18</sup> Taylor Affidavit, at para 25.

15. Each of the Barbados Entities have assets in Canada, consisting of bank accounts at the Toronto-Dominion Bank, which were recently opened and contain nominal amounts. As well, each of the Barbados Entities holds shares in other Banro Group entities. All of these share certificates are located in Toronto, being held by TSX Trust Company.<sup>20</sup>

16. The Barbados Entities' only material assets are the shares in certain other Banro Group entities and certain intercompany receivables. None of the Barbados Entities have any employees.<sup>21</sup>

17. The Non-Applicant Subsidiaries include a group of operating companies incorporated in the DRC, through which the exploration, development and production of gold in the DRC is carried on.<sup>22</sup>

#### **Debts and Obligations of the Banro Group**

18. The Applicants and certain Non-Applicant Subsidiaries are either direct obligors and/or guarantors in relation to certain debt instruments and agreements, including the 2017 Notes and certain gold forward sale and streaming agreements. The following table provides an overview of the primary debt obligations of the Banro Group.<sup>23</sup>

---

<sup>19</sup> Taylor Affidavit, at para 25.

<sup>20</sup> Taylor Affidavit, at para 25.

<sup>21</sup> Taylor Affidavit, at para 28.

<sup>22</sup> The two most significant of the Non-Applicant Subsidiaries are: (a) Twangiza Mining S.A.– the operating company which owns and operates the Twangiza gold mine; and (b) Namoya Mining S.A.– the operating company which owns and operates the Namoya gold mine.

<sup>23</sup> This table is reproduced from the Taylor Affidavit. Capitalized terms used in the table but not defined shall have the meanings given to them in the Taylor Affidavit.



No.	Debt	Creditor <sup>24</sup>	Amounts	Parity or Priority Lien Debt Pursuant to Collateral Trust Agreement	Debtor	Guarantor(s)
1	2017 Notes	Trustees on behalf of the Noteholders <sup>25</sup>	\$197.5MM Principal amount outstanding	Parity	BGB	All Companies other than BGB & Non-Applicant Subsidiaries
2	BCDC Loan and Line of Credit	Banque Commercial du Congo	\$11.9MM Principal and interest outstanding	-	Namoya Mining S.A.	Banro
3	Doré Loan Agreement	Baiyin-related party	\$10MM Principal amount outstanding	Parity	Twangiza Mining S.A.	-
4	Twangiza Streaming Agreement	Baiyin-related party	\$58MM Estimated secured amount	A portion of which is Parity; a portion of which is Priority	Twangiza Mining S.A.	Certain Companies & Non-Applicant Subsidiaries
5	Twangiza Forward I Agreement	Gramercy related-party	\$6.6MM Outstanding amount relating to prepayment	Priority	Twangiza Mining S.A.	Certain Companies & Non-Applicant Subsidiaries
6	Twangiza Forward II Agreement	Baiyin-related party	\$6.2MM Outstanding amount relating to prepayment	-	Twangiza Mining S.A.	Banro <sup>26</sup>
7	Namoya Streaming Agreement	Gramercy related-party	\$42.4MM Estimated secured amount	A portion of which is Parity; a portion of which is Priority	Namoya Mining S.A.	Banro & Certain Non-Applicant Subsidiaries
8	Namoya Forward I Agreement	Baiyin-related party holds 50% Gramercy related-party holds 50%	\$44MM Outstanding amount relating to prepayment	Priority	Namoya Mining S.A.	Certain Companies & Non-Applicant Subsidiaries
9	Namoya Forward II Agreement	Baiyin-related party holds 55.8% Gramercy related-party holds 44.2%	\$20.6MM Outstanding amount relating to prepayment	Parity	Namoya Mining S.A.	Certain Companies & Non-Applicant Subsidiaries
10	Namoya Rawbank Line of Credit	Rawbank S.A.	\$4.3MM Principal and interest outstanding	-	Namoya Mining S.A.	Banro
11	Twangiza Rawbank Line of Credit	Rawbank S.A.	\$3.6MM Principal and interest outstanding	-	Twangiza Mining S.A.	Banro
12	Equipment Finance Facility 1	Tractafic Equipment International	\$2.9MM Outstanding debt	-	Twangiza Mining S.A.	Banro
13	Equipment Finance Facility 2	Tractafic Equipment International	\$4.1MM Outstanding debt	-	Namoya Mining S.A.	Banro

<sup>24</sup> Not taking into account the 2017 Notes, approximately \$117.5 million was advanced and/or remains outstanding to the Banro Group by Baiyin-related parties and \$80 million by Gramercy-related parties.

<sup>25</sup> With respect to the 2017 Notes, Baiyin-related parties hold approximately \$56.5 million and Gramercy related parties hold approximately \$82.8 million.

<sup>26</sup> This debt is currently unsecured but is guaranteed by Banro under section 5.14 of the Twangiza Forward II Agreement. Within six months of use of the Prepayment Amount to pay down or purchase Equipment, security is to be granted over that equipment in favour of Baiyin.

19. The Applicants' obligations under certain of these debt instruments and agreements are subject to a Collateral Trust Agreement dated April 19, 2017, which provides for the designation of certain debts as Priority Lien Debt or Parity Lien Debt.<sup>27</sup>

20. In addition to the foregoing, Banro has certain unsecured debts and obligations as set out in the Taylor Affidavit.<sup>28</sup>

### **Financial Difficulties**

21. The DRC's very unstable operating environment continues to pose additional challenges, as volatility in commodity prices, together with continued political instability, have impacted the country's growth and resulted in a significant depreciation of the DRC's unit of currency, the Congolese Franc, against the US Dollar.<sup>29</sup>

22. This instability has had a direct effect on the Banro Group's operations. In particular, as a result of certain security issues in the region of the Namoya gold mine, mining operations have been limited for a significant portion of 2017.

### **Need for CCAA Protection**

23. The Banro Group has taken a number of steps in order to preserve its value and financial condition.<sup>30</sup>

24. However, as a result of the continuing liquidity challenges and discussions with stakeholders, following a recommendation by the Special Committee, the Applicants' boards of directors determined that a CCAA proceeding is required in order to protect the Applicants'

---

<sup>27</sup> Taylor Affidavit, at paras 52-54.

<sup>28</sup> Taylor Affidavit, at paras 66-68.

<sup>29</sup> Taylor Affidavit, at para 71.

<sup>30</sup> Taylor Affidavit, at para 76.

going concern value and to give them time to resolve their liquidity and operational issues with the support of their key stakeholders.<sup>31</sup>

25. Following extensive negotiations, the Applicants, Baiyin, Gramercy and related parties have entered into the Support Agreement. Under the Support Agreement, the Banro Group agrees to seek approval of and comply with the SISP, and if no Successful Bid (as defined in the SISP) is identified as a result of the SISP, to proceed to complete the Recapitalization.<sup>32</sup>

26. Based on the Cash Flow Statement and the underlying assumptions including continued deferral under the forward and streaming agreements, additional financing of approximately \$14.5 million is required to maintain operations until April 1, 2018.<sup>33</sup>

27. The Applicants have entered into the DIP Term Sheet with the DIP Lender, which includes the following material commercial terms<sup>34</sup>:

- (a) Maximum amount: USD\$20 million.<sup>35</sup>
- (b) Conditions Precedent: Conditions Precedent for the advance of funds include Baiyin's receipt of governmental approvals to act as DIP lender, the issuance of the Initial Order by December 22, 2017, the Applicants' entering into the Support Agreement, the Court's granting of the Interim Financing Priority Order and the SISP Approval Order on or before January 19, 2018, and no Liens ranking in priority to the DIP Lenders' Charge other than the Permitted Priority Liens.<sup>36</sup>

---

<sup>31</sup> Farr Affidavit, at para 3.

<sup>32</sup> Farr Affidavit, at para 5; Taylor Affidavit, at para 102.

<sup>33</sup> Taylor Affidavit, at para 78.

<sup>34</sup> The DIP Term Sheet is described in greater detail beginning at para 94 of the Taylor Affidavit, and can be found in full at Tab 2-N to the Applicants' Application Record. Capitalized terms used in this section but not otherwise defined shall have the meanings assigned to them in the DIP Term Sheet.

<sup>35</sup> Taylor Affidavit, at para 94.

<sup>36</sup> Taylor Affidavit, at para 94.

- (c) Repayment: upon the earliest occurrence of an Event of Default, the completion of the Recapitalization or any Successful Bid, conversion of the CCAA proceeding to a proceeding under the *Bankruptcy and Insolvency Act*<sup>37</sup>, a sale of all or substantially all of the Collateral, or April 30, 2018.<sup>38</sup>
  
- (d) Interest Rate: 12% per annum, with default interest of + 2% per annum.<sup>39</sup>
  
- (e) DIP Milestones:
  - (i) Obtaining the Interim Financing Priority Order and the SISP Order, no later than January 19, 2018;
  - (ii) Obtaining a Court Order approving a meeting for a vote on the Recapitalization Plan on or before February 2, 2018;
  - (iii) Delivering meeting materials in respect of the Recapitalization Plan on or before February 5, 2018;
  - (iv) Provided that no LOI submitted in accordance with the SISP could form the basis of a Qualified Alternative Transaction Bid pursuant to and in accordance with the SISP, hold a meeting for a vote on the Recapitalization Plan on or before March 9, 2018;
  - (v) Provided that no LOI submitted in accordance with the SISP could form the basis of a Qualified Alternative Transaction Bid pursuant to and in accordance with the SISP, obtain a Court Order approving the Recapitalization Plan on or before March 16, 2018;
  - (vi) If an LOI is submitted in accordance with the SISP that could form the basis of a Qualified Alternative Transaction Bid and such a bid is submitted on or prior to April 9, 2018,
    - a) the Borrower shall select the Successful Bid on or before April 16, 2018;
    - b) a Court Order approving the Successful Bid shall have been entered on or before April 27, 2018; and
    - c) the Successful Bid shall have been implemented on or before April 30, 2018; and
  - (vii) If an LOI is submitted in accordance with the SISP that could form the basis of a Qualified Alternative Transaction Bid but no such bid is submitted on or prior to April 9, 2018,

---

<sup>37</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [“**BIA**”].

<sup>38</sup> Taylor Affidavit, at para 94.

<sup>39</sup> Taylor Affidavit, at para 94.

- a) the Borrower shall hold the Meeting on or before April 20, 2018;
- b) the Plan Approval Order shall have been entered on or before April 27, 2018; and
- c) the Recapitalization Plan shall have been implemented on or before April 30, 2018.<sup>40</sup>

28. Based on the Cash Flow Statement and the underlying assumptions, if the DIP Financing is not implemented, the Applicants will not have sufficient liquidity to fund operations past January 29, 2018.<sup>41</sup>

### **PART III - ISSUES**

31. The key issues on this Application are as follows:

- (a) Should the Applicants be granted protection under the CCAA?
- (b) Should the stay of proceedings be extended to the Non-Applicant Subsidiaries and their directors and officers?
- (c) Should the Monitor be appointed as requested?
- (d) Should the DIP Financing be approved and the DIP Lenders' Charge be granted?
- (e) Should the Applicants be authorized to take all actions contemplated by, and comply with their obligations under, the Support Agreement?
- (f) Should the Directors' Charge be approved? and
- (g) Should the Administration Charge be approved?

---

<sup>40</sup> Taylor Affidavit, at para 94.

<sup>41</sup> Taylor Affidavit, at para 79.

## PART IV - LAW

### I. JURISDICTION

32. The CCAA applies to a “debtor company” with total claims against it or its affiliated debtor companies of more than \$5,000,000.<sup>42</sup>

#### A. The Applicants are each a “company” as defined in the CCAA

33. The CCAA defines “company” as follows:

“company” means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.<sup>43</sup>

34. Banro is incorporated pursuant to the CBCA and, therefore, is a “company” as defined in the CCAA.<sup>44</sup> Banro’s registered head office is in Toronto, Ontario.<sup>45</sup>

35. The Barbados Entities are each incorporated pursuant to the laws of Barbados but have assets in Canada, consisting of recently opened bank accounts at the Toronto-Dominion Bank in Toronto each holding nominal amounts.<sup>46</sup> All of these share certificates are located in Toronto, being held by TSX Trust Company.<sup>47</sup>

36. The existence of a bank account in Canada with nominal funds has been held to be sufficient to qualify a company to be a “company” under the CCAA.<sup>48</sup>

---

<sup>42</sup> CCAA, at s 3(1).

<sup>43</sup> CCAA, at s 2(1).

<sup>44</sup> Taylor Affidavit, at para 19.

<sup>45</sup> Taylor Affidavit, at para 19.

<sup>46</sup> Taylor Affidavit, at para 25.

<sup>47</sup> Taylor Affidavit, at para 25.

<sup>48</sup> *Re Canwest Global Communications Corp.*, [2009] OJ No 4286 (QL) (ON SC), at para 30, Book of Authorities of the Applicants [“BOA”] Tab A [“*Canwest Global 6184*”]; *Re Cinram International Inc.*, 2012 ONSC 3767, at Schedule C, para 47, BOA Tab B; *Re Global Light Telecommunications Inc.*, 2004 BCSC 745 at paras 16-18, BOA Tab C.

**B. The Applicants are each a “debtor company” as defined in the CCAA**

37. A “debtor company” is “any company that is bankrupt or insolvent.”<sup>49</sup>

38. The term “insolvent” is not expressly defined in the CCAA. However, the courts have held that, for purposes of the CCAA, a debtor is “insolvent” if it meets the definition of an “insolvent person” in section 2 of the BIA<sup>50</sup> or if it is “reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”<sup>51</sup>

39. The Applicants have insufficient funds to pay their debts and are unable to meet their obligations as they generally become due and owing in the ordinary course of business. Notably, the Applicants are unable to pay the approximately \$4.94 million interest payment pursuant to the 2017 Notes that was due and payable on December 1, 2017.<sup>52</sup> The Applicants do not expect to be able to make such interest payment prior to the end of the 30-day grace period provided for under the 2017 Notes. As a result, the Applicants are insolvent.<sup>53</sup>

**C. Claims Total More than \$5 Million**

40. The liabilities of the Applicants exceed \$5 million because, among other things, each of the Applicants are liable under the 2017 Notes in the principal amount of \$197.5 million as issuer or guarantor.<sup>54</sup>

41. The Applicants have complied with the other statutory requirements for making this application.<sup>55</sup>

---

<sup>49</sup> CCAA, at s 2(1).

<sup>50</sup> BIA at s 2.

<sup>51</sup> *Re Stelco Inc*, 2004 CarswellOnt 1211 (SCJ), leave to appeal refused in 2004 CarswellOnt 2936 (ONCA), leave to appeal refused in 2005 CarswellOnt 5200 (SCC) at para 26, BOA Tab D [***Re Stelco***]; followed in *Re Canwest Global 6184*, at para 25.

<sup>52</sup> Taylor Affidavit, at para 13.

<sup>53</sup> Taylor Affidavit, at para 13.

<sup>54</sup> Taylor Affidavit, at para 39.

## II. A STAY OF PROCEEDINGS IS APPROPRIATE

42. The proposed Initial Order requested by the Applicants seeks a stay of proceedings in this case for an initial period to January 19, 2018. Given their current financial situation, a stay of proceedings at this time is in the best interests of the Banro Group and its stakeholders and is both appropriate and necessary.

43. The Applicants respectfully request that the stay of proceedings be extended to the Non-Applicant Subsidiaries. In *Re Tamerlane Ventures Inc. and Pine Point Holding Corp.*,<sup>56</sup> Justice Newbould considered whether the stay of proceedings could be extended to non-applicant third parties. In that case, Justice Newbould explained,

Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc.* (2010), 2010 ONSC 222 (CanLII), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.)*, 2012 ONSC 3767 (CanLII), *Sino-Forest Corporation (Re.)*, 2012 ONSC 2063 (CanLII) and *Skylink Aviation Inc. (Re.)*, 2013 ONSC 1500 (CanLII). I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.<sup>57</sup>

44. Similarly, in *Re Jaguar Mining Inc.*,<sup>58</sup> Regional Senior Justice Morawetz stated,

The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.<sup>59</sup>

---

<sup>55</sup> Pursuant to section 9(1) of the CCAA, this Honourable Court has jurisdiction to hear this Application because Banro's head office is located in Toronto, Ontario and the Barbados Entities have assets in Toronto, Ontario. The Applicants' application materials also include the information and documents required by section 10(2) of the CCAA.

<sup>56</sup> *Re Tamerlane Ventures Inc. and Pine Point Holding Corp.*, 2013 ONSC 5461, BOA Tab E [*Re Tamerlane*].

<sup>57</sup> *Re Tamerlane*, at para 21.

<sup>58</sup> *Re Jaguar Mining Inc.*, Court File No. CV-13-10383-00CL, Endorsement of RSJ Morawetz dated January 16, 2014, BOA Tab F [*Jaguar Mining*].

<sup>59</sup> *Jaguar Mining*, at paras 39-40.



45. The Non-Applicant Subsidiaries are integral members of the Banro Group, and include the direct owners and operators of the Banro Group's two producing gold mines in the DRC.<sup>60</sup> The Non-Applicant Subsidiaries have also guaranteed the obligations under the 2017 Notes.<sup>61</sup> If creditors were able to enforce these guarantees or other claims against the Non-Applicant Subsidiaries, it would materially affect the ability of the Non-Applicant Subsidiaries to continue their essential mining operations and therefore materially impact the ability of the Applicants (and the Banro Group generally) to restructure their affairs.

46. Therefore, the Applicants submit that extending the stay of proceedings to the Non-Applicant Subsidiaries is important to the restructuring process and is just and reasonable.

### **III. APPOINTMENT OF MONITOR**

47. Pursuant to section 11.7 of the CCAA, the Court is required to appoint a person to monitor the business and financial affairs of a debtor company at the same time that an initial CCAA order is made.<sup>62</sup>

48. FTI, is a trustee within the meaning of subsection 2(1) of the BIA and is not disqualified under any of the restrictions pursuant to section 11.7(2) of the CCAA. FTI was retained as an advisor to the Special Committee in September 2017, and has assisted the Applicants with their preparations for the present CCAA application.<sup>63</sup>

49. In light of its familiarity with the Applicants' business and financial arrangements, the Applicants respectfully request that FTI be appointed Monitor. FTI has consented to be appointed as Monitor, subject to Court approval.<sup>64</sup>

---

<sup>60</sup> Taylor Affidavit, at paras 29-30.

<sup>61</sup> Taylor Affidavit, at para 39.

<sup>62</sup> CCAA, at s 11.7.

<sup>63</sup> Taylor Affidavit, at paras 85-86.

<sup>64</sup> Taylor Affidavit, at para 88. See also the consent of FTI attached as Exhibit "M" to the Taylor Affidavit, found at Tab 2-M of the Applicants' Application Record.

#### IV. APPROVAL OF DIP FINANCING & THE DIP LENDERS' CHARGE

##### A. DIP Financing

50. The Applicants are seeking approval of the DIP Financing from the DIP Lender in the principal amount of USD\$20 million. The Applicants consulted with the proposed Monitor on the DIP Financing and believe that the DIP Financing will meet the Applicants' immediate and short-term liquidity needs to allow them to restructure under the protection of the CCAA.

51. Banro or another of the Applicants is contemplated to be the borrower pursuant to the DIP Financing, with the other Applicants and the Non-Applicant Subsidiaries acting as guarantors. The DIP Lender is comprised of the Applicants' two primary stakeholders, Baiyin and Gramercy, who each hold a substantial part of the Applicants' equity and debt obligations. The DIP Financing has been negotiated with these parties on the understanding that it would be secured by a priming DIP Lenders' Charge, ranking ahead of all other secured creditors of the Applicants other than Permitted Priority Liens, as defined in the DIP Term Sheet.

52. The DIP Financing is conditional upon, among other things, Baiyin receiving certain regulatory approvals from authorities in the People's Republic of China, the Interim Financing Priority Order and the SISP Approval Order. Therefore, there will be no advance of funds until after the Comeback Date.

53. Upon commencement of a CCAA proceeding, interim financing provides "some assurance of stability to the marketplace, including the customers of the applicant and its suppliers and dealers."<sup>65</sup> Interim financing is "a benefit to all stakeholders, as it allows the debtor to protect going-concern value while [it] attempts to devise a plan acceptable to creditors."<sup>66</sup>

---

<sup>65</sup> *Re Mobilicity Group*, 2013 ONSC 6167, at para 31, BOA Tab G.

<sup>66</sup> *Canwest Global 6184*, at para 31.

54. The DIP Financing will ensure that the Applicants have sufficient funding to continue operations throughout the CCAA proceedings and to pay for the costs of the restructuring process.<sup>67</sup>

55. The Applicants and the Monitor sought proposals for interim financing from other parties and have determined that no viable alternative interim financing is available.<sup>68</sup> The DIP Financing from Baiyin and Gramercy also reduces the possibility for litigation with a third party over a priming interim financing facility.<sup>69</sup>

### **B. DIP Lenders' Charge**

56. The DIP Financing sought is contemplated to be secured by the DIP Lenders' Charge, which would attach to all of the Applicants' property and rank in priority to all secured and unsecured creditors of the Applicants and subject only to the Permitted Priority Liens.

57. The granting of the priming DIP Lenders' Charge is an integral part of the negotiated consideration for the DIP Financing, and is a condition precedent to the DIP Financing and receiving the advances of funds contemplated therein.<sup>70</sup>

58. Sub-section 11.2(4) of the CCAA sets out factors to be considered by the court in determining whether to grant a priority interim financing charge.<sup>71</sup>

59. These factors are not exhaustive and in *Canwest Global Communications Corp., Re*, (“**Canwest**”) Justice Pepall stressed the importance of meeting the following three criteria:

- (a) whether notice has been given to secured creditors likely to be affected by the security of the charge;

---

<sup>67</sup> Taylor Affidavit, at paras 89 and 95.

<sup>68</sup> Taylor Affidavit, at para 94.

<sup>69</sup> Taylor Affidavit, at para 91.

<sup>70</sup> Taylor Affidavit, at para 98.

<sup>71</sup> CCAA at s 11.2(4).

- (b) whether the amount to be granted under the interim financing is appropriate and required having regard to the debtor's cash-flow statement; and
- (c) whether the interim charge secures an obligation that existed before the Order was made (which it should not).<sup>72</sup>

60. In this case, the Applicants submit that the proposed DIP Lenders' Charge satisfies the relevant criteria and should be granted.

61. Based on the Cash Flow Statement, prepared with the assistance of FTI, the funds are needed to ensure that the Applicants can continue in the normal course during the CCAA proceeding.<sup>73</sup> The funds provided will be used to (i) fund the Applicants' immediate funding requirements, including working capital and other corporate purposes; and (ii) pay professionals' fees and the fees of the DIP Lender, all in accordance with the DIP budget (the "**DIP Budget**") as agreed to by the Applicants and the DIP Lender.<sup>74</sup>

62. The Applicants' business and affairs will be managed by the Applicants' Management with additional oversight and consultation provided by the Monitor. The Management has the support of the Applicants' major stakeholders, who have agreed to provide the DIP Financing.

63. The proposed DIP Lenders' Charge will initially only rank in priority to holders of Encumbrances who received notice of the Applicants' application for the Initial Order.<sup>75</sup> The DIP Term Sheet requires that, by no later than January 19, 2018, the Applicants will obtain an order extending the priority of the DIP Lenders' Charge ahead of all Encumbrances other than the Permitted Priority Liens, on notice to the holders thereof.<sup>76</sup>

---

<sup>72</sup> *Canwest Global 6184*, at paras 32-34.

<sup>73</sup> Taylor Affidavit, at paras 78-79.

<sup>74</sup> Taylor Affidavit, at para 94.

<sup>75</sup> Taylor Affidavit, at para 97.

<sup>76</sup> Taylor Affidavit, at para 97.

64. The proposed DIP Lenders' Charge does not secure any obligation that existed prior to the granting of the charge.<sup>77</sup> The proposed Monitor will also file a report recommending the Court approve the DIP Financing and related charge and outlining its reasons for such recommendation.

65. Accordingly, this Court has jurisdiction and it is appropriate to grant the DIP Lenders' Charge with the priority requested.

## V. SUPPORT AGREEMENT

66. The Applicants seek the authorization of this Court to take all actions contemplated by, and comply with their obligations under, the Support Agreement.

67. Under the Support Agreement, the Applicants agree to seek approval of and comply with the SISP and, if no Successful Bid is identified as a result of the SISP, to proceed to complete the Recapitalization (the "**Recapitalization**"). As well, Baiyin, Gramercy and parties related thereto agree to support the SISP and if no Qualified Alternative Transaction Bid is identified as a result of the SISP, to support the Recapitalization.<sup>78</sup> The obligations under the Support Agreement are conditional upon Baiyin receiving regulatory approvals prior to January 19, 2018.

68. The Recapitalization provides that the Applicants would take steps to present a plan of compromise or arrangement (the "**Plan**") to their creditors.<sup>79</sup>

69. The Plan would provide for, among other things:

- (a) an exchange of certain Parity Lien Debt obligations, including the obligations under the 2017 Notes, for equity in Banro;

---

<sup>77</sup> Taylor Affidavit, at para 96.

<sup>78</sup> Taylor Affidavit, at para 102.

<sup>79</sup> The Plan is described in greater detail beginning at para 109 of the Taylor Affidavit. The Recapitalization is found in the Restructuring Term Sheet attached to the Support Agreement, which is found at Exhibit "A" to the Farr Affidavit, at Tab 3-A of the Applicants' Application Record. Capitalized terms used in this section but not otherwise defined shall have the meanings assigned to them in the Restructuring Term Sheet.

- (b) consensual amendment of Priority Lien Debt and other obligations held by Baiyin and Gramercy (or related parties), including temporary deferrals of certain obligations owing thereunder and, in exchange for these consensual amendments, Baiyin and Gramercy (and related parties) would also receive certain warrants of Banro;
- (c) treating certain strategic debt at the DRC level as unaffected;
- (d) compromising certain unsecured claims against Banro in exchange for nominal consideration; and
- (e) extinguishing all existing equity and equity related interests and claims against Banro.<sup>80</sup>

70. Further, it is intended that, for voting purposes, the plan would provide for a (i) secured creditor class, which would include all holders of Parity Lien Obligations that are being exchanged for common shares, and a (ii) unsecured creditor class, which would include all affected unsecured creditors of Banro whose claims would be extinguished in exchange for a payment of a nominal amount. This unsecured creditor class would include the holders of deficiency claims with respect to the Parity Lien Debt equal to 25% of the obligations under the affected Parity Lien Debt.<sup>81</sup>

71. In past CCAA proceedings, this Honourable Court has granted initial orders authorizing CCAA applicants to comply with the terms of restructuring support agreements with their

---

<sup>80</sup> Taylor Affidavit, at para 109.

<sup>81</sup> Taylor Affidavit, at para 110.

stakeholders.<sup>82</sup> No approval for the contemplated SISP or Recapitalization is being sought at this time.

72. In this case, the Applicants submit that by performing their obligations under the Support Agreement, the Applicants' will be enabled to resolve their liquidity issues and achieve a successful comprehensive restructuring of their financial affairs with the support of their key stakeholders.

## VI. DIRECTORS' CHARGE

73. The proposed Initial Order contemplates the indemnification of the Applicants' directors and officers, the creation of a charge (the "**Directors' Charge**") in relation thereto, and a related stay of proceedings in respect of claims against the Banro Group's directors and officers. The statutory authority is found in sections 11.03 and 11.51 of the CCAA.<sup>83</sup>

74. The Applicants request the approval of the Directors' Charge in the maximum amount of USD\$3.2 million. The Directors' Charge is proposed to rank after the Administration Charge and the DIP Lenders' Charge. Similar to the DIP Lenders' Charge, at this time, the Directors' Charge is not to have priority over holders of Encumbrances (as defined in the Initial Order) who have not received notice of the application for the Initial Order.<sup>84</sup> It is expected that the Applicants will bring a motion at the Comeback Date to have the Directors' Charge rank ahead of all Encumbrances, on notice to the holders thereof.<sup>85</sup>

75. In *Jaguar Mining*, Regional Senior Justice Morawetz set out the following factors to be considered with respect to the approval of a directors' charge:

---

<sup>82</sup> See, for example, *In the Matter of a Plan of Compromise or Arrangement of Great Western Minerals Group, Ltd.*, Initial Order of the Honourable Madam Justice Conway dated April 30, 2015, Court File No. CV-15-10953-00CL, BOA Tab H, at para 14; See also, *In the Matter of a Plan of Compromise or Arrangement of Jaguar Mining Inc.*, Initial Order of the Honourable Regional Senior Justice Morawetz (as he then was) dated December 23, 2013, Court File No. CV-13-10383-00CL, BOA Tab I, at para 13.

<sup>83</sup> CCAA, at ss 11.03(1) and 11.51.

<sup>84</sup> Taylor Affidavit, at para 115.

<sup>85</sup> Taylor Affidavit, at para 115.

- (a) whether notice has been given to the secured creditors likely to be affected by the charge;
- (b) whether the amount is appropriate;
- (c) whether the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
- (d) that the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.<sup>86</sup>

76. The independent directors of the Applicants have each advised that without the protection of the Directors' Charge they will resign. The Applicants submit that it is important to have the Directors' Charge to keep their directors and officers in place during the restructuring and to protect them against liabilities that they could incur throughout.<sup>87</sup> The Directors' Charge is supported by the Applicants' major creditors.

77. The Applicants have worked with the Monitor and the other professionals to estimate the proposed quantum of the Directors' Charge.<sup>88</sup>

78. In this case the Applicants' current directors' and officers' insurance coverage (the "**D&O Insurance**") may not be sufficient in size or types of coverage to adequately protect the directors from the types of personal liability that they may be exposed to. Further, due to the exclusions in the D&O Insurance, there is a degree of uncertainty as to the coverage provided for.<sup>89</sup>

---

<sup>86</sup> *Jaguar Mining*, at para 45.

<sup>87</sup> Taylor Affidavit, at para 117.

<sup>88</sup> Taylor Affidavit, at paras 116.

<sup>89</sup> Taylor Affidavit, at para 114.



79. In accordance with the provisions of the CCAA and the Initial Order, the Directors' Charge will only apply if the D&O Insurance is insufficient or inapplicable.

80. The Applicants respectfully submit that the Directors' Charge is reasonable in the circumstances. Accordingly, the Applicants request that this Court exercise its discretion to approve the Directors' Charge proposed in the Initial Order.

## **VII. ADMINISTRATION CHARGE**

81. The Applicants are requesting that its counsel, the Monitor and counsel to the Monitor be protected by an Administration Charge on all of the property of the Applicants up to a maximum amount of \$1.5 million (the "**Administration Charge**").

82. The Administration Charge is proposed to rank ahead of the other Court-ordered charges. As with the DIP Lenders' Charge and the Directors' Charge, the Administration Charge will, for the present time, only rank in priority to holders of Encumbrances who received notice of the Applicants' application for the Initial Order and the court-ordered Charges sought therein. It is expected that the Applicants will bring a motion at the Comeback Date to have the Administration Charge rank ahead of all Encumbrances, on notice to the holders thereof.

83. Section 11.52 of the CCAA expressly provides that the Court has jurisdiction to grant a charge for the fees and expenses of financial, legal and other advisors or experts.<sup>90</sup>

84. The case law has developed a non-exhaustive list of factors to be considered in approving an administration charge, including: (a) the size and complexity of the business being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to

---

<sup>90</sup> CCAA, at s 11.52.

be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.<sup>91</sup>

85. The Applicants submit that the quantum of the proposed Administration Charge is in line with the nature and size of the Applicants' business and the involvement required by professional advisors.

**PART V - RELIEF SOUGHT**

97. The Applicants request that this Court grant relief by making an order substantially in the form of the Initial Order included in the Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of December, 2017.**

*Cassels Brock & Blackwell LLP*

---

Cassels Brock & Blackwell LLP

Lawyers for the Applicants

---

<sup>91</sup> *Canwest Global 6184*, at para 52; *Re Canwest Publishing Inc.*, 2010 ONSC 222, at para 54, as found in the Commercial List Authorities Book; *Jaguar Mining*, at paras 42-44.

**TAB A**

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

1. *Re Canwest Global Communications Corp.*, [2009] OJ No 4286 (Ont. SCJ [Comm List]).
2. *Re Cinram International Inc.*, 2012 ONSC 3767 (Ont. SCJ [Comm List]).
3. *Re Global Light Telecommunications Inc.*, 2004 BCSC 745.
4. *Re Stelco Inc.*, 2004 CarswellOnt 1211 (Ont SCJ [Comm List]), leave to appeal refused in 2004 CarswellOnt 2936 (ONCA), leave to appeal refused in 2004 CarswellOnt 5200 (SCC).
5. *Re Tamerlane Ventures Inc. and Pine Point Holding Corp.*, 2013 ONSC 5461 (Ont. SCJ [Comm List]).
6. *Re Jaguar Mining Inc.*, Endorsement of Justice Morawetz dated January 16, 2014, in Court File No. CV-13-10383-00CL (Ont. SCJ [Comm List]).
7. *Re Mobilicity Group*, 2013 ONSC 6167 (Ont. SCJ [Comm List]).
8. *In the Matter of a Plan of Compromise or Arrangement of Great Western Minerals Group, Ltd.*, Initial Order of Justice Conway dated April 30, 2015, Court File No. CV-15-10953-00CL (Ont. SCJ [Comm List]).
9. *In the Matter of a Plan of Compromise or Arrangement of Jaguar Mining Inc.*, Initial Order of Justice Morawetz dated December 23, 2013, in Court File No. CV-13-10383-00CL (Ont. SCJ [Comm List]).
10. *Re Canwest Publishing Inc.*, 2010 ONSC 222 (Ont SCJ [Comm List]).

**TAB B**

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

**Bankruptcy and Insolvency Act, RSC 1985, c B-3**

**Definitions**

**2. (1)** In this Act,

"insolvent person".

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

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

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

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

"trustee"

"trustee" or "licensed trustee" means a person who is licensed or appointed under this Act;

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

**Definitions**

**2. (1)** In this Act,

"company"

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

"debtor company"

"debtor company" means any company that

(a) is bankrupt or insolvent,

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

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

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

“director”

“director” means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called;

**Application**

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

**Resignation or removal of directors**

**5.1 (4)** Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

**Jurisdiction of court to receive applications**

**9. (1)** Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

**Documents that must accompany initial application**

**10. (2)** An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

**General power of court**

**11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions

set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

### **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.

### **Stays — directors**

**11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

### **Exception**

**(2)** Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

### **Persons deemed to be directors**

**(3)** If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.



## **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.

### **Critical supplier**

**11.4 (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 a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

### **Obligation to supply**

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

### **Security or charge in favour of critical supplier**

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

### **Priority**

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

### **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.

### **Court to appoint monitor**

**11.7 (1)** When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

### **Restrictions on who may be monitor**

**(2)** Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

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

Court File No.

**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  
(CCA Initial Application)**

**Cassels Brock & Blackwell LLP**

2100 Scotia Plaza  
40 King Street West  
Toronto, ON M5H 3C2

Ryan C. Jacobs LSUC# 59510J

Tel: 416.860.6465

Fax: 416.640.3189

[rjacobs@casselsbrock.com](mailto:rjacobs@casselsbrock.com)

Jane O. Dietrich LSUC# 49302U

Tel: 416.860.5223

Fax: 416.640.3144

[jdietrich@casselsbrock.com](mailto:jdietrich@casselsbrock.com)

Joseph J. Bellissimo LSUC# 46555R

Tel: 416.860.6572

Fax: 416.642.7150

[jbellissimo@casselsbrock.com](mailto:jbellissimo@casselsbrock.com)

Ben Goodis LSUC # 70303H

Tel: 416.869.5312

Fax: 416.640.3199

[bgoodis@casselsbrock.com](mailto:bgoodis@casselsbrock.com)

*Lawyers for the Applicants*