

**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
HARTE GOLD CORP.**

(Applicant)

**FACTUM OF THE APPLICANT
(Re: Approval and Reverse Vesting Order)
(Returnable: January 28, 2022)**

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PART I - OVERVIEW

1. Harte Gold Corp. ("**Harte Gold**" or the "**Company**") is a gold mining company which has a single operational mine located in Northern Ontario. On December 6, 2021, Harte Gold commenced these proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") following a strategic review process (the "**Pre-Filing Strategic Process**") to address the Company's financial liquidity issues and to fund accelerated life-of-mine capital, including the potential restructuring of its long-term debt. The Pre-Filing Strategic Process was overseen by a Strategic Committee formed of certain members of Harte Gold's board of directors and with the assistance of FTI Consulting Canada Inc. ("**FTI**"). On December 7, 2021, this Court granted an initial order (the "**Initial Order**") in respect of Harte Gold and appointed FTI as the monitor in the CCAA Proceedings (the "**Monitor**").

2. Immediately prior to commencing these CCAA Proceedings, after having conducted the Pre-Filing Strategic Process over a period of approximately six (6) months, Harte Gold entered into a Subscription Agreement (the "**Subscription Agreement**" or the "**Stalking Horse Bid**") with 1000025833 Ontario Inc. ("**833 Ontario**"), its first ranking secured creditor, pursuant to which 833 Ontario agreed to act as a "stalking horse bidder" in the context of a sale and investment solicitation process (the "**SISP**") to be undertaken by Harte Gold, with the assistance of the Monitor, within the CCAA Proceedings. 833 Ontario also provided a DIP facility in order to permit Harte Gold to continue operating in the ordinary course during the CCAA Proceedings and complete the SISP. Following a competing bid being made by ANR Investments 2 B.V. ("**ANR 2**", and together with certain of its affiliates, the "**Appian Parties**"), an affiliate of Harte Gold's second ranking secured creditor, the Subscription Agreement was subsequently amended and restated

(the “**Amended and Restated Subscription Agreement**”) to materially improve the consideration previously offered by 833 Ontario as part of the Subscription Agreement.

3. On December 20, 2021, this Court granted an amended and restated initial order (the “**ARIO**”) and a SISP Approval Order (the “**SISP Order**”) which (a) authorized the Company to use the Amended and Restated Subscription Agreement as the stalking horse bid; and (b) approved procedures for conducting the SISP (the “**SISP Procedures**”). Following the issuance of the SISP Order, Harte Gold and the Monitor solicited any further interest from parties in submitting a higher and better offer for Harte Gold’s assets and business. Though a new “Qualified Bid” was submitted by ANR 2 under the SISP, 833 Ontario and the Appian Parties, with the consent of the Monitor, continued direct discussions between themselves, which led to 833 Ontario submitting a revised bid matching the consideration provided under ANR 2’s bid pursuant to a Second Amended and Restated Subscription Agreement (as defined below). The Company and the Monitor were informed by the Appian Parties that they supported the revised bid by 833 Ontario. After carefully considering the available options, Harte Gold, in consultation with, and based on the recommendation of, the Monitor and Harte Gold’s counsel, determined that it was in Harte Gold’s and its stakeholders’ best interest to cancel the Auction and declare the Second Amended and Restated Subscription Agreement the “Successful Bid” under the SISP.

4. The transactions contemplated by the Second Amended and Restated Subscription Agreement (the “**833 Transactions**” or the “**Sale Transaction**”) have been structured as a “reverse vesting” transaction which provides, among other things, the following: (a) 833 Ontario will subscribe for 100 common shares in the share capital of Harte Gold and all of its other existing shares will be cancelled so as to allow 833 Ontario to become the sole shareholder of Harte Gold; (b) all Excluded Contracts, Excluded Assets and Excluded Liabilities (as such terms are defined in the Second Amended and Restated Subscription Agreement) will be transferred and “vested out” to corporations formed by Harte Gold (the “**ResidualCos**”).

5. As part of the 833 Transactions, 833 Ontario will provide the following consideration to Harte Gold: (a) cash consideration equal to: (i) all claims ranking in priority to, or *pari passu* with, the amounts owing to the lenders under the BNPP Credit Agreement, (ii) all properly perfected and secured amounts and obligations owing by Harte Gold under the Appian Facility Agreement (the “**Appian Indebtedness**”), and (iii) the amounts necessary to fund the completion of the CCAA Proceedings and the bankruptcy of the ResidualCos upon completion of the 833 Transactions; (b) a credit bid of the amounts outstanding and owing to 833 Ontario under (i) the BNPP Credit

Agreement and (ii) the DIP Financing Agreement; and (c) the retention of most of Harte Gold's other liabilities and obligations, including pursuant to its various royalty and offtake agreements.

6. The Second Amended and Restated Subscription Agreement and the 833 Transactions represent the best outcome in the circumstances following the conduct of the Pre-Filing Strategic Process and SISF which broadly canvassed the market for Harte Gold's business and assets. The Sale Transaction will permit Harte Gold's business to emerge from creditor protection and continue its operations as a going concern for the benefit of its employees, suppliers and other stakeholders. Further, the Sale Transaction represents a very positive outcome for the Company's creditors with almost all of Harte Gold's liabilities either being assumed or paid in full. The only creditors that will not be assumed or paid in full are a very small number of creditors with claims in respect of Excluded Contracts or Excluded Liabilities.

7. This factum is filed in support of Harte Gold's motion for:

- (a) an order (the "**Approval and Reverse Vesting Order**") to facilitate the completion of the 833 Transactions, which, among other things:
 - (i) approves the 833 Transactions contemplated by the Second Amended and Restated Subscription Agreement entered into on January 19, 2022 between 833 Ontario, as investor, 833 Ontario's sole shareholder, Silver Lake Resources Limited ("**Silver Lake**"), as guarantor, and Harte Gold, as issuer (the "**Second Amended and Restated Subscription Agreement**"), and authorizes and directs Harte Gold to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the 833 Transactions;
 - (ii) grants a release in favour of Harte Gold's directors, officers and advisors, the Monitor and its advisors and 833 Ontario and its directors, officers and advisors; and
 - (iii) extends the Stay Period until March 29, 2022; and
- (b) an order (the "**Monitor's Expanded Powers Order**") enhancing the Monitor's powers in respect of the ResidualCos. (as defined below).

PART II - THE FACTS

8. The facts with respect to this motion are more fully set out in the affidavit of Frazer Bouchier sworn January 24, 2022 (the “**Sale Approval Affidavit**”), the affidavit of Frazer Bouchier sworn December 14, 2021 (the “**Comeback Affidavit**”), and the affidavit of Frazer Bouchier sworn December 6, 2021 (the “**Initial Application Affidavit**”). Capitalized terms used within this Factum but not otherwise defined have the meanings ascribed to them in the Sale Approval Affidavit.

A. Background

(i) The Business and Operations

9. Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario), which has its head office in Toronto, Ontario. Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter.

Initial Application Affidavit at paras. 8 - 9, Motion Record of the Applicant, Tab 2(A).

10. Harte Gold’s operates a gold mine (the “**Sugar Zone Mining Operation**”) located in northern Ontario, within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River (the “**Sugar Zone Property**”), which Sugar Zone Mining Operation produces gold bullion.

Initial Application Affidavit at para. 16, Motion Record of the Applicant, Tab 2(A).

11. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies.

Initial Application Affidavit at para. 34, Motion Record of the Applicant, Tab 2(A)

(ii) Capital Structure

12. Harte Gold’s primary secured creditors are 833 Ontario, as assignee of BNPP, and AHG Jersey Limited (“**AHG**”).

Initial Application Affidavit at paras. 47 - 67, Motion Record of the Applicant, Tab 2(A).

13. 833 Ontario, a wholly-owned subsidiary of Silver Lake, is the Company’s first ranking secured creditor following the assignment by BNPP of its rights and obligations under the BNPP Credit Agreement in respect of the BNPP Debt Facilities. As of commencement of the CCAA

Proceedings, the BNPP Debt Facilities were fully drawn and an aggregate principal amount of US\$63,000,000 is owed under the BNPP Credit Agreement.

Initial Application Affidavit at paras. 54 - 56, Motion Record of the Applicant, Tab 2(A).

14. AHG, one of the Appian Parties, is the Company's second ranking secured creditor in respect of the Appian Facility. As of commencement of the CCAA Proceedings, the Appian Facility was fully drawn and an aggregate principal amount of US\$28, was owed in respect of the Appian Facility.

Initial Application Affidavit at paras. 62 – 63, 67, Motion Record of the Applicant, Tab 2(A)

15. Though BNPP has assigned the BNPP Debt Facilities to 833 Ontario, it remains a first-ranking secured creditor of Harte Gold in respect of certain commodity hedging arrangements. The Company is also party to three (3) offtake agreements with certain Appian Parties and OMF Fund II SO Ltd., and three (3) net smelter royalties with certain Appian Parties and certain individuals and trusts.

Initial Application Affidavit at paras. 20-23, 30, Motion Record of the Applicant, Tab 2(A).

B. The Pre-Filing Strategic Process

16. In response to the various operational and financial challenges described in the Initial Application Affidavit, Harte Gold undertook various efforts in an attempt to improve its liquidity situation. Harte Gold also commenced a strategic review of its alternatives with the advice and guidance of legal and financial advisors.

Initial Application Affidavit at paras. 84 - 90, Motion Record of the Applicant, Tab 2(A).

17. On June 8, 2021, Harte Gold's board of directors established a strategic committee (the "**Strategic Committee**") to oversee, evaluate and review possible transactions and to bring forward its recommendations to Harte Gold's board of directors. In late June 2021, Harte Gold also engaged FTI to commence a formal sale and investment solicitation process and in this context, on July 19, 2021, Harte Gold's board of directors established a special committee composed of independent directors, to assist management in navigating the Pre-Filing Strategic Process.

Sale Approval Affidavit at paras. 23 - 24, Motion Record of the Applicant, Tab 2.

18. As part of the Pre-Filing Strategic Process:

- (a) Harte Gold and FTI assembled a list of approximately two hundred and forty-one (241) potential buyers and investors;
- (b) Harte Gold and FTI prepared and sent a “teaser” to all of the above potential buyers and investors on or about July 6, 2021 and thereafter to an additional five (5) interested parties that subsequently contacted Harte Gold or FTI about the opportunity;
- (c) all potential buyers and investors were advised that a deadline of August 13, 2021 was set as the date for the submission of non-binding expressions of interest (the “**NBIO Bid Deadline**”);
- (d) in total, thirty-one (31) interested parties executed confidentiality agreements, or had already executed confidentiality agreements earlier in the Pre-Filing Strategic Review Process, and twenty-eight (28) of these interested parties accessed a virtual data room set up by FTI in order to perform their due diligence;
- (e) four (4) non-binding expressions of interest were received by the NBIO Bid Deadline; and
- (f) a deadline of September 23, 2021 was set for the submission of binding offers (the “**Binding Offer Deadline**”).

19. Despite the extensive solicitation efforts, no binding bid was ultimately submitted by the Binding Offer Deadline of September 23, 2021. However, discussions continued with a number of parties regarding a potential transaction.

Sale Approval Affidavit at para. 25, Motion Record of the Applicant, Tab 2.

20. On November 19, 2021, Cue Minerals PTY Limited (“**Cue Minerals**”), a wholly-owned subsidiary of Silver Lake, advised Harte Gold and FTI that it had acquired the BNPP Debt Facilities for the benefit of 833 Ontario. Silver Lake subsequently advised Harte Gold and FTI of its interest to acquire Harte Gold’s business and operations by way of a credit-bid of its affiliates’ loan and to provide Harte Gold with interim financing in connection with any proceedings under the CCAA.

Sale Approval Affidavit at para. 28, Motion Record of the Applicant, Tab 2.

21. On November 22, 2021, after the issuance of a press release by Harte Gold announcing the above assignment, Harte Gold also received an offer from the Appian Parties to acquire its business and operations, as well as an offer to provide it with interim financing. Following the initial assignment, Cue Minerals assigned the BNPP Debt Facilities to 833 Ontario.

Sale Approval Affidavit at para. 30, Motion Record of the Applicant, Tab 2.

22. Harte Gold and FTI subsequently informed both Cure Minerals and the Appian Parties (and their respective advisors) that: (a) given the circumstances, it would be appropriate to undertake a further sale and investment solicitation process (i.e. the SISP) under the supervision of this Court with the benefit of a “stalking horse bid”; (b) interim financing would be required to fund, *inter alia*, continued operations, the SISP and the CCAA Proceedings; and (c) given Harte Gold’s liquidity issues, time was of the essence for completing any transaction.

Sale Approval Affidavit at para. 31, Motion Record of the Applicant, Tab 2.

23. Subsequently, Harte Gold, with assistance of its financial and legal advisors, engaged in parallel negotiations with 833 Ontario (as assignee of the BNPP Debt Facilities from Cue Minerals) and Appian on both a proposed stalking horse bid and DIP facility. On December 5, 2021, after careful consideration of the proposals submitted by each of 833 Ontario and the Appian Parties, Harte Gold's board of directors, in exercising its business judgment and in consultation with FTI, ultimately decided to approve the execution of the Initial Subscription Agreement with 833 Ontario.

Sale Approval Affidavit at paras. 32 - 33, Motion Record of the Applicant, Tab 2.

24. After the commencement of the CCAA Proceedings, the Appian Parties advised Harte Gold and the Monitor that it would be opposing the approval of the Initial Subscription Agreement as the stalking horse bid and would seek approval of their own bid as the stalking horse bid in a revised SISP. Accordingly, the Appian Parties submitted a revised form of stalking horse bid to Harte Gold and the Monitor.

Sale Approval Affidavit at paras. 34 - 36, Motion Record of the Applicant, Tab 2.

25. In response, 833 Ontario submitted to Harte Gold and the Monitor the Amended and Restated Subscription Agreement which provided:

- (a) a significant increase in the Subscription Price payable by 833 Ontario, in consideration for the Subscribed Shares as a result of 833 Ontario committing to retain certain additional contracts upon closing, such as Harte Gold’s offtake and royalty agreements, including those entered into with the Appian Parties; and

- (b) a mechanism whereby, if declared the “Successful Bidder” in accordance with the SISP Procedures, Silver Lake would issue to the Monitor, in advance of the Closing, in escrow, a number of shares in the share capital of Silver Lake (the “**Silver Lake Shares**”), equal to the value of all properly perfected and secured obligations owing under the Appian Facility Agreement to permit such amount to be paid in full in cash on the Closing Date.

Sale Approval Affidavit at para. 37, Motion Record of the Applicant, Tab 2.

26. On December 20, 2021, this Court granted the SISP Order which approved, *nunc pro tunc*, Harte Gold’s execution of the Amended and Restated Subscription Agreement as well as the conduct by Harte Gold (with the assistance of the Monitor) of the SISP in accordance with the SISP Procedures.

Sale Approval Affidavit at para. 38 - 40, Motion Record of the Applicant, Tab 2

C. The SISP

27. The SISP and SISP Procedures approved by the Court contemplated the following milestones:

DATE	MILESTONE
By no later than 1 day following the issuance by the Court of the SISP Order	Distribution by the Monitor of the Solicitation Notice and the Required Acknowledgment to the Known Potential Bidders
January 14, 2022 at 5:00 p.m. (prevailing Eastern Time)	The deadline for the receipt by the Monitor of Bids and Deposits
By no later than January 20, 2022	Date of the Auction (if any)
Subject to the availability of the Court, no later than seven (7) calendar days following either the conclusion of the Auction or the date on which a determination is made by Harte Gold, with the consent of the Monitor, not to proceed with an Auction in accordance with paragraph Error! Reference source not found. of the SISP Procedures	Hearing of the Approval Motion

28. In accordance with the SISP Procedures:

- (a) the Monitor provided the Solicitation Notice to forty-six (46) Known Potential Bidders (other than 833 Ontario and the Appian Parties). In addition, the Solicitation Notice was provided to two (2) additional parties that were not Known Potential Bidders who contacted the Monitor regarding the SISP (together with the Known Potential Bidders, the “**Potential Interested Parties**”);
- (b) the SISP Order and the SISP Procedures were posted on the Monitor’s website on December 20, 2021; and
- (c) Harte Gold issued the SISP Press Release on December 20, 2021

Sale Approval Affidavit at para. 42, Motion Record of the Applicant, Tab 2.

29. At the Bid Deadline, the only party to submit a “Qualified Bid” was ANR2, one of the Appian Parties. The circumstances related to the submission of the bid are described in the Sale Approval Affidavit.

Sale Approval Affidavit at para.44, Motion Record of the Applicant, Tab 2.

30. Following the submission of the bids, as described in further detail in the Sale Approval Affidavit, 833 Ontario and the Appian Parties advised Harte Gold and the Monitor that 833 Ontario/Silver Lake and the Appian Parties had been in discussions with a view to settling matter relating to the Appian NSRs between them prior to the Bid Deadline, an agreement in principle had been achieved prior to the Bid Deadline but not executed a final binding agreement, the Appian Parties submitted the bid pending finalization of a binding agreement with 833 Ontario and it was the preference of the Appian Parties that Harte Gold finalize an agreement with 833 Ontario/Silver Lake instead of pursuing their own bid.

Sale Approval Affidavit at para. 53, Motion Record of the Applicant, Tab 2.

31. Accordingly, both 833 Ontario/Silver Lake and the Appian Parties requested that the Auction be postponed to January 20, 2022 and that Harte Gold and Monitor allow 833 Ontario/Silver Lake and the Appian Parties to continue their discussions regarding a settlement of matters relating to the Appian NSRs. Both parties indicated they would not participate in any Auction unless such discussions were permitted. Ultimately, after careful consideration, Harte Gold and the Monitor determined that it was reasonable and appropriate to grant such requests.

Accordingly, the Auction was postponed until January 20, 2022, as permitted under the terms of the SISP Procedures.

Sale Approval Affidavit at para. 54, Motion Record of the Applicant, Tab 2.

32. After numerous discussions between the parties, 833 Ontario/Silver Lake and the Appian Parties informed Harte Gold and the Monitor that: (a) they had executed a conditional settlement agreement (which included, among other things, the condition that 833 Ontario be declared the Successful Bidder), and (b) as part of such settlement agreement, the Appian Parties would support 833 Ontario's bid. As such, 833 Ontario/Silver Lake and the Appian Parties advised the Monitor that they would not participate in an Auction. However, Harte Gold and the Monitor advised both 833 Ontario/Silver Lake and the Appian Parties that the bid under First Amended and Restated Subscription Agreement could not be the "Successful Bid", since the ANR 2 bid was superior.

Sale Approval Affidavit at paras. 57 - 58, Motion Record of the Applicant, Tab 2.

33. Following discussions between 833 Ontario/Silver Lake, the Appian Parties, the Monitor and Harte Gold, and letters delivered from 833 Ontario/Silver Lake and the Appian Parties indicating they would not participate in an Auction, 833 Ontario submitted to Harte Gold and the Monitor, the Second Amended and Restated Subscription Agreement substantially matching the consideration offered under the Appian Subscription Agreement submitted by ANR 2.

Sale Approval Affidavit at paras. 60 - 61, Motion Record of the Applicant, Tab 2.

34. The Second Amended and Restated Subscription Agreement provided the following improved terms in comparison to the First Amended and Restated Subscription Agreement:

- (a) the designation of the lease between Harte Gold, as tenant, and CT Tower Investment Inc., as landlord, in respect of the property located at 161 Bay Street, Suite 2400, Toronto, Ontario, as a "Retained Contract" and assuming or retaining Harte Gold's liabilities thereunder;
- (b) the amendment of the definition of "Assumed Liabilities" to: (i) specify that the \$10 million Cure Cost and Pre-Filing Trade Amount Cap (previously set out in the First Amended and Restated Subscription Agreement) will not apply to "Post-Filing Trade Amounts" (as defined in the Second Amended and Restated Subscription Agreement), which shall be specifically assumed as part of the 833 Transactions; and (ii) provide that any amounts or obligations owing by Harte Gold to any of the

Appian Parties (including under royalty agreements entered into with the Appian Parties) are subject to the settlement agreement between 833 Ontario, Silver Lake and the Appian Parties; and

- (c) the undertaking to pay an additional cash deposit in an amount of US\$1,693,658.72, equivalent to approximately 5% of the Appian Indebtedness to be funded from the proceeds resulting from the sale of the Share Deposit.

Sale Approval Affidavit at para. 62, Motion Record of the Applicant, Tab 2.

35. Following careful consideration of the available options, Harte Gold, in consultation with the Monitor and Harte Gold's counsel, determined that it was in Harte Gold's and its stakeholders' best interest to cancel the Auction and declare the Second Amended and Restated Subscription as the "Successful Bid" under the SISP. The various factors taken into account by Harte Gold in making this determination are set out in the Sale Approval Affidavit.

Sale Approval Affidavit at paras. 64 - 65, Motion Record of the Applicant, Tab 2.

D. The Second Amended and Restated Subscription Agreement

36. The Second Amended and Restated Subscription Agreement represents the highest and best offer in respect of the Harte Gold's business and the culmination of an extensive solicitation process conducted over seven (7) months. The key terms of the Second Amended and Restated Subscription are set on Schedule "A" of this factum.

Sale Approval Affidavit at paras. 67 - 68, Motion Record of the Applicant, Tab 2.

37. The Second Amended and Restated Subscription Agreement contemplates a reverse vesting structure whereby:

- (a) 833 Ontario will subscribe for and purchase new shares of Harte Gold who will, in turn, cancel and terminate all of its existing shares, so that 833 Ontario may become the sole shareholder of Harte Gold; and
- (b) all excluded contracts, excluded assets and excluded liabilities will be transferred and "vested out" to corporations to be incorporated by Harte Gold (the "**ResidualCos**") in advance of Closing, so as to allow 833 Ontario to indirectly acquire Harte Gold's business and assets on a "free and clear" basis.

Sale Approval Affidavit at para. 69, Motion Record of the Applicant, Tab 2.

PART III - ISSUES

38. The issues before this Court, as addressed below, are whether the Court should:
- (a) Approve the Second Amended and Restated Subscription Agreement and 833 Transactions and grant the Approval and Reverse Vesting Order;
 - (b) Grant the requested release in favour of Harte Gold's directors, officers and advisors, the Monitor and its advisors and 833 Ontario and its directors, officers and advisors;
 - (c) Extend the Stay Period; and
 - (d) Expand the Monitor's powers with respect to the ResidualCos.

PART IV - THE LAW

A. The Second Amended and Restated Subscription Agreement and 833 Transactions Should be Approved

(i) The Second Amended and Restated Subscription Agreement and 833 Transactions Should be Approved

39. Section 36 of the CCAA sets out the applicable legal test for obtaining court approval of a sale outside the ordinary course of business during a CCAA proceeding. This legal test is also applicable in the context of a reverse vesting transaction. In particular, section 36(3) outlines certain factors that the Court may consider when deciding whether to approve a sale:

Factors to be considered

36 (3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

CCAA, s. 36(3).

Quest University Canada (Re), 2020 BCSC 1883 [“**Quest University**”] ([Canlii](#)).

40. The factors enumerated in section 36(3) are not intended to be exhaustive, nor are they intended to be a checklist that must be followed in every CCAA sale transaction.

Target Canada Co. (Re), 2015 ONSC 1487 at para 16 [“**Target**”] ([Canlii](#)).

41. Courts have noted that the section 36(3) criteria largely corresponds with the principles articulated in *Soundair* for the approval of the sale of assets in an insolvency scenario, those being:

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

Target, supra ([Canlii](#)) at paras 14-17.

Royal Bank v Soundair Corp, 1991 CanLII 2727 (ONCA) [“**Soundair**”] ([Canlii](#)).

42. CCAA courts have previously noted in the context of approving a sale transaction that the informed business judgement of a debtor and the opinion of the monitor are entitled to deference.

Target, supra ([Canlii](#)) at para 18.

AbitibiBowater, Inc (Re), 2010 QCCS 1742 at paras 70-72 ([Canlii](#)).

43. For the reasons that follow, the Company submits that the Sale Transaction with 833 Ontario satisfies the statutory criteria for approval of a sale and completion of the Sale Transaction is consistent with the remedial purpose of the CCAA:

- (a) **The solicitation process was reasonable:** The Sale Transaction was the culmination of approximately seven (7) months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the Pre-Filing Strategic Process and the SISF, the latter of which was approved by the Court pursuant to the SISF Order.

As described above, as part of the Pre-Filing Strategic Process, Harte Gold and FTI broadly canvassed the market by contacting two-hundred and forty-one (241) parties regarding their potential interest in acquiring Harte Gold's business and assets. This allowed Harte Gold to receive initial bids from 833 Ontario and ANR 2 and subsequently additional bids as part of the SISP. The competitive tension in this process resulted in material improvements on two occasions, including in the final bid submitted by 833 Ontario (i.e. the Second Amended and Restated Subscription Agreement).

- (b) **The Monitor approved the solicitation process:** FTI was actively involved and consulted in both the Pre-Filing Strategic Process and the SISP and, as confirmed by the Monitor's Second Report, the Monitor is supportive of the Court approving the Second Amended and Restated Subscription Agreement and the 833 Transactions contemplated therein.
- (c) **Stakeholders were consulted during the sale process:** Harte Gold consulted with its primary secured creditors, being BNPP, 833 Ontario and the Appian Parties, throughout the Pre-Filing Strategic Process and the SISP (where appropriate), and these secured creditors were given the opportunity to submit bids in respect of Harte Gold's business and assets, which 833 Ontario and ANR 2 did.
- (d) **The Subscription Price payable is fair and reasonable:** The Subscription Price payable pursuant to the 833 Transactions is fair and reasonable as confirmed by the results of the Pre-Filing Strategic Process and the SISP. Furthermore, the consideration is expected to result in either assumption or payment in full of most of Harte Gold's liabilities.
- (e) **The Sale Transaction benefits the whole economic community:** Following completion of the 833 Transactions, Harte Gold will continue its operations as going concern, resulting in: (i) all except four (4) of Harte Gold's employees preserving their employment; and (ii) substantially all of providers of goods and services to Harte Gold having the opportunity to maintain their business relationship with the Company. Additionally, all trade claims and "Cure Costs" in relation to Retained Contracts will assumed or paid in full (subject to the cap set forth in the Second Amended and Restated Subscription Agreement) and Harte Gold will also retain its existing offtake and royalty agreements. In summary, in this case, not only will secured creditors be paid in full, but it is expected that the significant majority of

unsecured creditors will also be unaffected by the Sale Transaction. The result is a very positive outcome for the majority of the Company's stakeholders.

Sale Approval Affidavit at paras. 68 – 69, 75, Motion Record of the Applicant, Tab 2.

Second Report of the Monitor dated January 24, 2022 (the "**Second Report**") at paras. 68 – 91.

44. Additionally, though the Auction was cancelled, modification of the SISP was explicitly contemplated by the SISP Order and the SISP Procedures which permitted Harte Gold and the Monitor to make "real time" decisions regarding the conduct of the SISP and the Auction. Paragraph 5 of the SISP Order "authorized and directed to take such steps as they consider necessary or desirable in carrying out each of their obligations [under the SISP]" and paragraphs 24(k) and 33 of the SISP Procedures provided as follows:

(k) Harte Gold reserves its rights to modify the conduct of the Auction at any time, acting reasonably, in consultation with the Monitor, in any manner that would best promote the goals of the Auction process, including to select the Successful Bid and/or Back-up Bid prior to the completion of the Auction.

[...]

33. There will be no amendments to this SISP without the consent of the Monitor and Harte Gold and, if such modification or amendment materially deviates from the key dates contemplated in Section 2 hereof, with the written consent of the Stalking Horse Bidder, or with the approval of the CCAA Court.

SISP Order and SISP Procedures, Motion Record of the Applicant, Tab 2(C).

45. CCAA courts have confirmed that the business judgment rule and deference applies to the conduct of a sale process leading to a sale transaction, as courts should not interfere with the validly exercised discretion of a debtor company and the monitor in the carrying out of a court-approved sale process, particularly in circumstances where the exercise discretion has been authorized by court order, as is the case here.

Essar Steel Algoma Inc., Re, 2016 ONSC 3205 at paras. 29-30 ([Canlii](#)).

46. The decision to cancel the Auction and declare the Second Amended and Restated Subscription Agreement the "Successful Bid" as described in the Sale Approval Affidavit recognized the particular circumstances at hand, in particular: (i) ANR 2, who had submitted the "Qualified Bid" that would serve as the "Opening Bid" in the Auction, preferred that the Company finalize an agreement with 833 Ontario; and (ii) 833 Ontario/Silver Lake advised the Company and

the Monitor that it would not submit an “Overbid” to the Appian Subscription Agreement if the Auction were to proceed. The decision was made by the Company (a) in accordance with the SISP; (b) in good faith and in a manner consistent with the Company’s business judgment; and (c) only following careful consideration of the available options with a view to maximizing value and certainty for Harte Gold and its stakeholders.

Sale Approval Affidavit at paras. 64 - 65 , Motion Record of the Applicant, Tab 2.

(ii) The Court has jurisdiction to grant the Approval and Reverse Vesting Order

47. The Court has jurisdiction under sections 11 and 36 of the CCAA to approve a reverse vesting transaction in appropriate circumstances. Though reverse vesting transactions are a recent development under the CCAA, courts across the country, including in Ontario, have considered their authority to approve them on a number of occasions and in each instance have determined the scope of authority provided under the CCAA is sufficient to approve reverse vesting transactions.

48. The first reverse vesting sale transaction was approved by this Court in *Plasco Energy*. The transaction permitted a purchaser to acquire the shares of a corporate entity which owned certain intellectual property and tax losses while vesting out certain excluded liabilities which were assumed by a newly formed entity. Justice Wilton-Siegal found “the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise.”

Plasco Energy (Re), (July 17, 2015), CV-15-10869-00C [“*Plasco Energy*”] ([Monitor's Website](#)).

49. More recently, reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada as well. In *Nemaska*, Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor, including related to the court’s jurisdiction to approve such a transaction. Leave to appeal the decision was refused by the Quebec Court of Appeal and the Supreme Court of Canada. The Quebec Court of Appeal noted that the CCAA judge found that “the terms ‘sell or otherwise dispose of assets outside the ordinary course of business’ under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs [reverse vesting orders] on a case by case basis, in accordance with the wide discretionary powers

afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*.”

Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218 [“**Nemaska**”] at paras. 52 and 71 ([Canlii](#)), leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCA 1488 at para. 19 [“**Nemaska QCCA**”] ([Canlii](#)); leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc*, 2021 CarswellQue 4589.

50. Similarly, in *Quest University*, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court’s authority to grant a reverse vesting order under the CCAA. Following the review of the caselaw, Justice Fitzpatrick found that the CCAA provided sufficient authority to grant the reverse vesting order which was consistent “with the remedial purposes of the CCAA” and consistent with the Supreme Court of Canada’s ruling on a CCAA court’s jurisdiction in *Callidus*. The issue in each case is not whether the court has sufficient jurisdiction but whether the relief is “appropriate” in the circumstances and that stakeholders are treated as fairly and reasonably as the circumstances permit. The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not “meritorious” and also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The British Columbia Court of Appeal also stated that the reverse vesting order granted in the case “reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings”.

Quest University, *supra* at paras. 153 – 161 ([Canlii](#)), leave to appeal BCCA refused, *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364 at para. 29 and 32 ([Canlii](#)).

Callidus Capital Corp. v. Canada, 2018 SCC 47 ([Canlii](#)).

51. In addition to the above contested cases, Canadian courts, on several other occasions, have granted unopposed reverse vesting orders pursuant to sections 11 and 36 of the CCAA in order to facilitate a transaction in respect of the debtor company for the benefit of its creditors and other stakeholders. These cases include *JMB Crushing Systems Inc.*, *Bellatrix Exploration Ltd.*, *Wayland Group Corp.*, *Comark Holdings Inc.*, *Beleave Inc.*, *Stornoway Diamond Inc.*, *Dominion Diamond Mines ULC*, *Junction Craft Brewing Inc.*, *Vert Infrastructure Ltd.*, *Cirque du Soleil Canada Inc.*, and *Green Relief Inc.* among others.

JMB Crushing Systems Inc. (Re), Amended Reverse Vesting Order granted March 31, 2021, Court File No. 2001-05482 (ABQB) ([Monitor’s Website](#)).

Bellatrix Exploration Ltd. (Re), Approval and Vesting Order granted June 22, 2021, Court File No. 1901-13767 (ABQB) ([Monitor’s Website](#)).

Wayland Group Corp. (Re), Approval and Vesting Order granted April 21, 2020,

Court File No: CV-19-00632079-00CL (ONSC) ([Monitor's Website](#)).

Comark Holdings Inc. (Re), Approval and Vesting Order and CCAA Termination Order granted July 13, 2020, Court File No. CV-20-00642013-00CL (ONSC) ([Monitor's Website](#)).

Beleave Inc. (Re), Approval and Vesting Order granted September 18, 2020, Court File No. CV-20-00642097-00CL (ONSC) ([Monitor's Website](#)).

Stornoway Diamond Inc. (Re), Approval and Vesting Order granted October 7, 2019, Court File No. 500-11-05704-191 (QCSC) ([Monitor's Website](#)).

Dominion Diamond Mines ULC (Re), Transaction Approval and Reverse Vesting Order granted November 16, 2021 (ABQB) ([Monitor's Website](#)).

Vert Infrastructure Ltd. (Re), Approval and Vesting Order and Endorsement of Justice Conway dated June 8, 2021 (ONSC) ([Monitor's Website](#)).

Cirque du Soleil Canada Inc. (Re), Approval and Vesting Order granted October 26, 2020 (QCSC) ([Monitor's Website](#)).

Green Relief Inc. (Re), Approval and Vesting Order granted November 9, 2020 (ONSC), Court File No. CV-20-00639217-00CL ([Monitor's Website](#)).

52. Most recently, on December 17, 2021, this Court granted an approval and reverse vesting order, similar to the one sought by Harte Gold, in the proposal proceedings commenced by Junction Craft Brewing Inc. pursuant to the section analogous to Section 36 under the *Bankruptcy and Insolvency Act* (i.e. Section 65.13).

Junction Craft Brewing Inc. (Re), Approval and Vesting Order granted December 17, 2021, Court File No.: 21-2774500 ([Proposal Trustee's Website](#)).

53. The Company is unaware of any instance where a CCAA court has denied a reverse vesting order on the basis that the CCAA did not provide sufficient authority to grant such an order.

54. As reverse vesting orders have become used more frequently to complete transactions, the issue is not whether the Court has the jurisdiction to grant such orders, but rather whether such an order is “appropriate” in the circumstances, as stated by Justice Fitzpatrick in *Quest University*. Justice Fitzpatrick noted that in many of the previous cases in which a reverse vesting order was granted, some of the purchased assets included certain assets or licenses that were either difficult to transfer to the purchaser and/or more valuable if maintained within the existing corporate entity:

Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable "assets" that could be not transferred.

Quest University, supra, at para. 160.

FIGR Brands, Inc. (Re), Endorsement of Justice McEwen dated June 10, 2021 (ONSC) ([Monitor's Website](#)).

Beleave Inc. (Re), Endorsement of Justice Conway dated September 18, 2020 (ONSC) ([Monitor's Website](#)).

55. In this case, the Second Amended and Restated Subscription Agreement is structured as a reverse vesting transaction to maintain twelve (12) material permits and licenses that are required for Harte Gold's mining operations, twenty-four (24) active work permits and licenses that allow Harte Gold to perform exploration work on various parts of the Sugar Zone property, and other forest resource licenses and fire Permits (collectively, the “**Permits and Licenses**”), and also maintain the Retained Contracts for the benefit of Harte Gold. A traditional asset sale transaction structure would require having to seek the consent to assignment from contract counterparties and a transfer of such Permits and Licenses resulting in delay and additional costs in completing the transaction to the detriment of Harte Gold's stakeholders. Additionally, amendments to various mineral claim registrations would have created additional costs associated with the Sale Transaction.

Sale Approval Affidavit at paras. 72 - 73, Motion Record of the Applicant, Tab 2.
Second Report at paras. 92 – 96.

56. The reverse vesting aspect of the transaction will not prejudice or impair any rights of Harte Gold's creditors as compared to an asset sale transaction, and certain elements of the Sale Transaction were structure to preserve rights that creditors may have in an asset sale transaction. For example, no assignment of contracts is contemplated as part of the 833 Transactions, however, the Second Amended and Restated Subscription Agreement provides for the payment of all “Cure Costs” in a manner substantially similar to that contemplated by section 11.3(4) of the

CCAA (subject to the cap set forth in the Second Amended and Restated Subscription Agreement). Accordingly, the Company submits that approving the Sale Transaction as a reverse vesting transaction is appropriate in the circumstances and consistent with the underlying objectives of the CCAA.

Sale Approval Affidavit at para. 74, Motion Record of the Applicant, Tab 2.

Second Report at paras. 97 – 98.

B. The Release in the Approval and Reverse Vesting Order Should be Granted

(i) This Court has the Jurisdiction to Approve the Release Outside of a CCAA Plan of Compromise or Arrangement

57. Harte Gold seeks a release (the “**Release**”) for (a) the present and former directors, officers, employees, legal counsel and advisors of Harte Gold and the ResidualCos; (b) the Monitor and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors; and (c) the Investor, its directors, officers, employees, legal counsel and advisors (collectively, the “**Released Parties**”). The Release covers any and all present and future claims against the Released Parties based upon any fact, matter of occurrence in respect of the 833 Transactions or Harte Gold, its assets, business or affairs or administration of Harte Gold, except any claim for fraud or willful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

58. Releases for directors, the Monitor and other advisors to debtor companies are a common feature of CCAA plans. The absence of a CCAA plan, however, does not deprive the court of the jurisdiction to approve releases for these parties. Section 5.1(1) of the CCAA, for example, which deals with releases relating to directors, is drafted permissively. It does not limit the jurisdiction of the Court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

CCAA, s. 5.1(1).

Green Relief Inc. (Re), 2020 ONSC 6837 [“**Green Relief**”] at paras. 23 and 25 ([CanLII](#)).

59. CCAA courts have, on multiple occasions, approved releases in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of, among other parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

Green Relief Inc. (Re), 2020 ONSC 6837 at para. 76 ([CanLII](#)).

Arrangement relatif à Nemaska Lithium inc., 2020 QCCS 3218 at para. 106 ([CanLII](#)).

Nelson Education Limited (Re), 2015 ONSC 5557 at para. 49 ([CanLII](#)).

Green Growth Brands Inc. et al. (Re), Order Terminating CCAA Proceedings at para. 12 granted May 19 2021, Court File No. CV-20-00641220-00CL (ONSC) ([Monitor's Website](#)).

Green Relief Inc. (Re), Approval and Vesting Order at para. 24 granted November 9 2020, Court File No. CV-20-00639217-00CL (ONSC) ([Monitor's Website](#)).

Comark Holdings Inc. et al. (Re), Approval and Vesting and CCAA Termination Order at paras. 18 to 19 granted July 13 2020, Court File No. CV-20-00642013-00CL (ONSC) ([Monitor's Website](#)).

TGF Acquisition Parent Ltd. (Re), Wind-Down Order at paras. 7 and 17 granted June 22, 2021, Court File No. CV-21-00657098-00CL (ONSC), ([Monitor's Website](#)).

Golf Town Canada Holdings Inc. (Re), CCAA Termination Order at para. 14 granted March 29, 2018, Court File No. CV-16-11527-00CL (ONSC) ([Monitor's Website](#)).

60. In *Green Relief*, Justice Koehen, as part of an approval and vesting order in respect of a reverse vesting transaction, granted a release in favour of (a) the current directors, officers, employees, independent contractors that provided legal or financial services to the debtor, legal counsel, and advisors of the debtor; and (b) the monitor and its legal counsel. Justice Koehnen, citing Morawetz C.J.'s decision in *Lydian*, evaluated the requested release with reference to the following non-exhaustive factors:

- (a) Whether the claims to be released are rationally connected to the purpose of the plan;
- (b) Whether the plan can succeed without the releases;
- (c) Whether the parties being released contributed to the plan;
- (d) Whether the releases benefit the debtors as well as the creditors generally;
- (e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
- (f) Whether the releases are fair, reasonable and not overly-broad.

Green Relief, supra, at paras. 27 and 50 to 56 ([CanLII](#)).

Lydian International Limited (Re), 2020 ONSC 4006 [*Lydian*] at para. 54 ([CanLII](#)).

61. Justice Koehnen noted that, as in most discretionary exercises, it is not necessary for each of the above factors to apply in order for a release to be granted.

Green Relief, *supra*, at para. 28 ([CanLII](#)).

62. The Release sought by Harte Gold are consistent with those that have previously been approved by this Court and, as will be described below, are aligned with the factors set out in *Green Relief*.

(ii) The Release Should be Granted in the Circumstances

63. The Release is reasonable and appropriate in the circumstances and should be granted for the following reasons:

- (a) **Whether the claims to be released are rationally connected to the purpose of the restructuring:** The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the Directors' Charge (as those terms are defined in the Initial Order). The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.
- (b) **Whether the releasees contributed to the restructuring:** The Released Parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental to the conduct of the Pre-Filing Strategic Process, the SISF and the continued operations of Harte Gold during the CCAA Proceedings. With a proposed sale that, if approved by this Court and completed, will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA Proceedings have had a successful outcome for the benefit of Harte Gold's stakeholders. The Released Parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of the Release.
- (c) **Whether the Release is fair, reasonable and not overly broad:** The Release is fair and reasonable. The Company, for example, is unaware of any outstanding director claims or liabilities against the directors and officers of the Company. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to the Company or 833 Ontario as it relates to its conduct with

respect to the Company or these CCAA Proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow in circumstances as the Release carve out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced to allow Harte Gold and the Released Parties to move forward with the Sale Transaction and work to conclude these CCAA Proceedings.

- (d) **Whether the restructuring could succeed without the Release:** The Release is being sought, with the support of 833 Ontario, Silver Lake and the Appian Parties, the most significant stakeholders in these CCAA Proceedings, as it will bring certainty and finality for the Released Parties. Additionally, Harte Gold and 833 Ontario both believe that the Release is also an essential component to the 833 Transactions.
- (e) **Whether the Release benefit Harte Gold as well as the creditors generally:** The Release benefit Harte Gold's creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the Company, thus minimizing further claims against Harte Gold.
- (f) **Creditors knowledge of the nature and effect of the Release:** All creditors on the Service List were served with materials relating to this motion. The Company also took additional efforts to serve all parties with excluded claims under the Sale Transaction. Additionally, the form of the Release was included in the form approval and reverse vesting order that was included in the original Application Record in these CCAA Proceedings, which provided stakeholders with ample notice and time to raise concerns with the Company or the Monitor. To date, no creditor has objected to the Release. A specific claims process for claims against the Released Parties in these circumstances would only result in additional costs and delay without any corresponding benefit.

Sale Approval Affidavit at paras. 77 - 81, Motion Record of the Applicant, Tab 2..

Proposed Approval and Reverse Vesting Order at para. 21, Motion Record of the Applicant, Tab 3.

C. The Stay Extension Should be Granted

64. The current stay period expires on January 31, 2022. Pursuant to s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

CCAA, s. 11.02(2) and (3).

65. Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the 833 Transactions, while at the same time preserving the *status quo* and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

66. No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. The Company is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, the Company is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

Sale Approval Affidavit at paras. 82 - 85, Motion Record of the Applicant, Tab 2.

Second Report at paras. 105 – 108.

D. The Monitor's Powers Should be Expanded

67. The CCAA provides the Court with broad discretion to in respect of the Monitor's functions in a particular CCAA proceeding. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, section 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances. There are numerous examples of CCAA courts granting expanded powers to the Monitor where such relief is warranted in the circumstances.

CCAA, s. 11, s. 23(1)(k).

See for example, *Ernst & Young Inc. v. Essar Global Fund Ltd et. al.*, 2017 ONSC 1366 at para. 34 ([Canlii](#)) affirmed on appeal 2017 ONCA 1014 ([Canlii](#)); and *Wayland Group Corp. (Re)*, Wind-Down and Liquidation Order granted April 17, 2020, Court File No: CV-19-00632079-00CL (ONSC) ([Monitor's Website](#)); *Nortel Networks Corporation (Re)*, Order granted August 14, 2009, Court File No.: 09-CL-7950 ([Monitor's Website](#)); and *Nortel Networks Corporation (Re)*, Order (Monitor's Expansion of Power Order #2) granted October 3, 2012, Court File No.: 09-CL-7950 ([Monitor's Website](#)); *Green Relief Inc. (Re)*, Approval and Vesting Order granted November 9, 2020 (ONSC), Court File No. CV-20-00639217-00CL ([Monitor's Website](#)).

68. The Monitor's Expanded Powers Order provides the Monitor with certain powers, effective upon the issuance of the Approval and Reverse Vesting Order, to administer the affairs of the ResidualCos, which is necessary to complete the 833 Transactions, along with the powers necessary to wind down these CCAA Proceedings and bankrupt the ResidualCos following closing of the 833 Transactions. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the 833 Transactions and the wind-down of the CCAA Proceedings; on the contrary, the granting of such powers will significantly benefit stakeholders given the positive effects of the Sale Transaction described above.

Sale Approval Affidavit at paras. 86 - 89, Motion Record of the Applicant, Tab 2.

Second Report at paras. 101 – 104.

PART V - ORDER SOUGHT

69. In light of the foregoing, the Company respectfully submits that the Court grant the Approval and Reverse Vesting Order and the Monitor's Expanded Powers Order in the forms attached to the Company's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2022.



Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
SUMMARY OF SECOND AMENDED AND RESTATED SUBSCRIPTION AGREEMENT

Key Terms	Second Amended and Restated Subscription Agreement
Investor	833 Ontario
Guarantor	Silver Lake
Purchased Assets	The Subscribed Shares, which represent all of the equity interests in Harte Gold
Purchase Price	<p>Purchase price equal to the following:</p> <p>(a) <u>Cash Consideration</u>: A cash payment in an amount required to pay:</p> <ul style="list-style-type: none"> (i) all claims ranking in priority to, or <i>pari passu</i> with, the amounts owing to the lenders under the BNPP Credit Agreement (including, for greater certainty, all professional fees, costs and expenses secured by the Administration Charge, but excluding the amounts owing under the DIP Term Sheet), plus (ii) the value of all properly perfected and secured amounts and obligations owing by the Company to AHG under the Appian Facility Agreement as of the Closing Date (the "Appian Indebtedness"), plus (iii) the amounts necessary to fund the completion of the CCAA Proceedings and the bankruptcy of ResidualCo. 1 and ResidualCo. 2 upon completion of the Transactions; <p>(b) <u>Credit Bid Consideration</u>: An amount equivalent to all amounts and obligations owing by the Company to the Investor under: (i) the BNPP Credit Agreement (and any other ancillary agreement or document thereto), including the principal amount of indebtedness outstanding thereunder and interest accrued thereon as of the Closing Date, plus any other fees owing by the Borrower under the BNPP Credit Agreement or any other ancillary agreement or document thereto, and (ii) the DIP Term Sheet including the principal amount of indebtedness outstanding thereunder and interest accrued thereon as of the Closing Date, plus any other fees owing by the Borrower under the DIP Term Sheet, which the Investor shall cause the release thereof in favour of the Company at Closing;</p> <p>(c) <u>Assumed Liabilities</u>: An amount equivalent to the Assumed Liabilities which the Investor shall cause the Company to retain, on the Closing Date. Assumed Liabilities means (a) Liabilities specifically and expressly designated by the Investor as assumed Liabilities in Schedule "H" (b) Liabilities which relate to the Business under any Retained Contracts, Permits and Licenses or Permitted Encumbrances (in each case, to the extent forming part of the</p>

Key Terms	Second Amended and Restated Subscription Agreement
	<p>Retained Assets) arising out of events or circumstances that occur after the Closing; (c) Cure Costs in relation to Retained Contracts and Pre-Filing Trade Amounts, up to a maximum aggregate amount of \$10,000,000 for such Cure Costs and such Pre-Filing Trade Amounts (the “Cure Costs and Pre-Filing Trade Amount Cap”); (d) the Excluded Liability Promissory Note and (e) all Post-Filing Trade Amounts. For greater certainty, : (a) the royalties payable by the Company under the Retained Contracts shall be subject to the Cure Costs and Pre-Filing Trade Amount Cap, provided that the royalties payable under the Appian Royalty Agreements and any other amounts payable to the Appian Parties shall be excluded from the calculation of the Cure Costs and Pre-Filing Trade Amount Cap; and (b) neither the Post-Filing Trade Amounts or any other amounts or obligations owing by the Company to any of the Appian Parties (including under the Appian Royalty Agreements) shall be subject to the Cure Costs and Pre-Filing Trade Amount Cap.</p>
Deposit	<p><u>Cash Deposit</u>: \$100,000 payable within 2 days of the granting of the SISP Order and an amount of US\$1,693,658.72, which represents approximately five percent (5%) of the Appian Indebtedness, to be funded from the first available Share Proceeds.</p> <p><u>Share Deposit</u>: A number of Silver Lake Shares to be issued in the name of Harte Gold in a number equal to the amount of the Appian Indebtedness, divided by the VWAP of the Silver Lake Shares for the five (5) trading days prior to the Determination Date, payable no later than 5 days after the First Amended and Restated Subscription Agreement is determined or deemed to be the “Successful Bid” in accordance with the SISP Procedures.</p>
Transaction Structure	Reverse vesting structure
Employees	All employees except four (4) will be retained
Regulatory Approvals	No competition act approval required
Target Closing Date	February 18, 2022
Outside Date	March 31, 2022
Key Conditions to closing	<p>Key conditions include:</p> <p>The Court granting the Approval and Reverse Vesting Order</p>
Other	Upon Closing, the Silver Lake Parties shall provide and deliver a full and final release to the Company’s D&Os and other representatives, as well as

Key Terms	Second Amended and Restated Subscription Agreement
	to the Monitor and its legal counsel.

**SCHEDULE “B”
LIST OF AUTHORITIES**

Cases

1. *Quest University Canada (Re)*, 2020 BCSC 1883 ([Canlii](#))
2. *Target Canada Co. (Re)*, 2015 ONSC 1487 ([Canlii](#))
3. *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ONCA) ([Canlii](#))
4. *AbitibiBowater, Inc (Re)*, 2010 QCCS 1742 ([Canlii](#))
5. *Essar Steel Algoma Inc., Re*, 2016 ONSC 3205 ([Canlii](#))
6. *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCS ([Canlii](#))
7. *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCA 1488 ([Canlii](#))
8. *Arrangement relatif à Nemaska Lithium Inc*, 2021 CarswellQue 4589
9. *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364 ([Canlii](#))
10. *Callidus Capital Corp. v. Canada*, 2018 SCC 47 ([Canlii](#))
11. *Green Relief Inc. (Re)*, 2020 ONSC 6837 ([Canlii](#))
12. *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 ([Canlii](#))
13. *Nelson Education Limited (Re)*, 2015 ONSC 5557 ([Canlii](#))
14. *Lydian International Limited (Re)*, 2020 ONSC 4006 ([CanLII](#))
15. *Ernst & Young Inc. v. Essar Global Fund Ltd et. al.*, 2017 ONSC 1366 ([Canlii](#))
16. *Ernst & Young Inc. v. Essar Global Fund Ltd et. al.*, 2017 ONCA 1014 ([Canlii](#))

**SCHEDULE “C”
RELEVANT STATUTES**

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(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.

[...]

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. — other than initial application

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

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

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

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

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.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[...]

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[...]

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

[...]

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

- (a) a director or officer of the insolvent person;
- (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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

Court File No.: CV-21-00673304-00CL

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD
CORP.**

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE JANUARY 28, 2021)**

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