

**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: Comeback Hearing)  
(Returnable: December 16, 2021)**

December 15, 2021

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**PART I - OVERVIEW**

1. Over the course of the past few years and, most recently, over the past several months, Harte Gold Corp. ("**Harte Gold**" or the "**Company**") has attempted to restructure and refinance its debt obligations to address its liquidity challenges. In May 2021, Harte Gold commenced a strategic review process to explore, review and evaluate a broad range of strategic alternatives focused on ensuring its financial liquidity and to fund accelerated life-of-mine capital, including the potential restructuring of its long-term debt. As part of these initiatives, Harte Gold established a Strategic Committee and, subsequently, a Special Committee (formed of independent directors) to support management in evaluating all strategic alternatives, and in navigating through the strategic review process. Harte Gold also initiated a sale and investment solicitation process as part of which Harte Gold solicited offers from potentially interested parties (the "**Pre-Filing Strategic Process**") with the assistance of FTI Consulting Canada Inc. ("**FTI**").

2. On December 6, 2021, after having conducted the Pre-Filing Strategic Process over a period of approximately six (6) months, and after having engaged with certain interested parties and evaluating the various alternatives available with the assistance of financial and legal advisors, Harte Gold entered into the following agreements with 1000025833 Ontario Inc. ("**833 Ontario**"), a first ranking secured creditor:

- (a) a Subscription Agreement (the "**Subscription Agreement**") whereby 833 Ontario, in its capacity as investor (in such capacity, the "**Stalking Horse Bidder**") offered to acquire all or substantially all of Harte Gold's business, as a going concern, through a share acquisition structure (the "**Stalking Horse Transaction**"), with the understanding that such offer would be used, subject to approval by the Court, as a "stalking horse bid" (the "**Stalking Horse Bid**") 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 (as defined below).

- (b) a DIP Facility Loan Agreement (the “**DIP Financing Agreement**”) whereby 833 Ontario, in its capacity as lender (in such capacity, the “**DIP Lender**”), agreed to provide Harte Gold, subject to the prior approval by the Court, with a \$10.8 million debtor-in-possession financing facility (the “**DIP Loan**”) to finance Harte Gold’s costs and expenses during these CCAA Proceedings, including in relation to the conduct of the SISP.

3. On December 7, 2021, Harte Gold sought and obtained creditor protection and certain other ancillary relief pursuant to an order granted by this Court (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**” and such proceedings, the “**CCAA Proceedings**”). Pursuant to the Initial Order, the Court, *inter alia*, ordered or approved, as applicable:

- (a) a stay of all proceedings and remedies against or in respect of Harte Gold, its property (the “**Property**”), business, and its director and officers (the “**Stay**”), for an initial period of ten (10) days (the “**Stay Period**”);
- (b) the appointment of FTI as the monitor of Harte Gold in the CCAA Proceedings (in such capacity, the “**Monitor**”);
- (c) the execution by Harte Gold of the DIP Financing Agreement, and the authority by Harte Gold to borrow under the DIP Financing Agreement an initial amount of \$400,000 during the initial 10-day Stay Period (the “**Initial Advance**”), to be secured by a priority charge over the Property in favour of the DIP Lender (the “**DIP Lender’s Charge**”);
- (d) an “**Administration Charge**” against the Property in an initial amount of \$500,000, as security for the payment of the professional fees and disbursements incurred and to be incurred by the Monitor, counsel to the Proposed Monitor, counsel to Harte Gold and counsel to Harte Gold’s directors and officers, in connection with the CCAA Proceedings; and
- (e) a “**Directors Charge**” against the Property in a maximum amount of \$2,400,000 in favour of the directors and officers of Harte Gold, as security for Harte Gold’s

obligation to indemnify such directors and officers for obligations and liabilities they may incur in such capacities after the commencement of the within proceedings, including with respect to employee vacation pay which may have accrued prior to the commencement of these proceedings but which may become due and payable after the commencement of these proceedings, except to the extent that such obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

4. Harte Gold now seeks the issuance of:
  - (a) an amended and restated initial order (the “**ARIO**”), substantially in the form of the draft order attached to the Motion Record at Tab 3; and
  - (b) a sale and investment solicitation process order (the “**SISP Order**”), substantially in the form of the draft order attached to the Motion Record at Tab 6.
  
2. This Factum is filed by Harte Gold in support of such relief.

## **PART II - THE FACTS**

5. The facts with respect to this motion are more fully set out in the Affidavits of Frazer Bourchier sworn December 6, 2021 (the “**Initial Application Affidavit**”) and on December 14, 2021 (the “**Comeback Affidavit**”, together with the December 6, 2021 Bourchier Affidavit, the “**Bourchier Affidavits**”), and were also summarized as part of Harte Gold’s factum previously filed in support of the Initial Order. Capitalized terms used within this Factum but not otherwise defined have the meanings ascribed to them in the Bourchier Affidavits.

## **PART III - ISSUES**

6. The issues before this Court, as addressed below, are whether the Court should:
  - (a) grant the ARIO in order to, *inter alia*: (i) extend the Stay Period until January 31, 2022; (ii) increase the amounts which may be borrowed by Harte Gold under the DIP Financing Agreement, which will be secured by the DIP Charge; and (iii) increase the quantum of the Administration Charge.
  - (b) grant the SISP Order in order to, *inter alia*: (i) approve Harte Gold’s execution of the Amended and Restated Subscription Agreement with 833 Ontario filed as Exhibit

“C” to the Comeback Affidavit; (ii) authorize Harte Gold to use the Amended and Restated Subscription Agreement as the “Amended and Restated Stalking Horse Bid”; and (iii) approve the conduct of the SISP by Harte Gold, with the assistance of the Monitor, in accordance with the procedures appended thereto (the “**SISP Procedures**”).

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

##### **A. The ARIO Should be Granted**

###### **(i) The Stay Period Should be Extended**

7. The current Stay Period expires on December 16, 2021. 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.<sup>1</sup>

8. Harte Gold is now seeking to extend the Stay Period to and including January 31, 2022 to allow it to seek to complete the proposed SISP. During the proposed extension of the Stay Period, Harte Gold will advance the SISP in accordance with the SISP Procedures and work towards achieving a value maximizing transaction for the benefit of its stakeholders.

9. As described in the Bouchier Affidavits, the SISP Procedures provide that the bid deadline will be set to January 14, 2022, with the auction, if any, to be held on January 20, 2022.

10. No creditor is expected to suffer any material prejudice as a result of the extension of the Stay Period. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course in accordance with the proposed ARIO and the CCAA. As detailed in the Harte Gold’s Cash Flow Statement, Harte Gold is expected to have sufficient liquidity (given the DIP Loan) to continue its operations during the contemplated extension of the Stay Period.

###### **(ii) The DIP Financing Agreement and the DIP Lenders’ Charge**

11. On December 7, 2021, this Court approved, as part of the Initial Order, the DIP Financing Agreement entered into with 833 Ontario, and granted a DIP Lender’s Charge against the Property of Harte Gold to secure Harte Gold’s obligations to 833 Ontario under the DIP Financing

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<sup>1</sup> CCAA, s. 11.02(2) and (3).

Agreement, which such DIP Lender's Charge ranking in priority to all parties having received notice of Harte Gold's Initial Application. However, this Court only authorized Harte Gold to borrow under the DIP Financing Agreement an amount of up to \$400,000 for the initial 10-day Stay Period.

12. Harte now seeks the Court's authorization to increase the amounts which it may borrow under the DIP Financing Agreement to an aggregate amount of \$10.8 million, so as to provide with the necessary interim financing during the pendency of these CCAA Proceedings, within which it intends to conduct the SISP in order to maximize value for its creditors and other stakeholders, and facilitate the continuation of its business and operations as a going concern. The Cash Flow Statement prepared by Harte Gold demonstrates Harte Gold's needs such interim financing.

13. 833 Ontario, as DIP Lender, has confirmed its commitment to advance the full amount of the DIP Loan under the DIP Financing Agreement (i.e. \$10.8 million), subject to this Court's approval thereof and subject to being granted a DIP Lender's Charge to secure such obligations which ranks in priority to all other Encumbrances, except only for the Administration Charge. As will appear from an affidavit of service which will be filed in advance of the Comeback Hearing, all creditors who are likely to be affected by the proposed DIP Lender's Charge will have been served with a copy of Harte Gold's Motion Record.

14. Harte Gold respectfully submits that the relief sought above is justified in the circumstances, and meets all of the criteria set out in section 11.2 (4) of the CCAA which are: (a) the period during which Harte Gold is expected to be subject to the CCAA Proceedings; (b) how Harte Gold's business and financial affairs are to be managed during the CCAA Proceedings; (c) whether Harte Gold's management has the confidence of its major creditors; (d) whether the DIP Loan will enhance the prospects of a viable restructuring of Harte Gold's business and operations; (e) the nature and value of Harte Gold's Property; (f) whether any creditor will be materially prejudiced as a result of the proposed DIP Lender's Charge; and (g) whether the Monitor supports the approval of the DIP Financing Agreement and the granting of the DIP Lender's Charge.

15. The Monitor has advised Harte Gold that it is supportive of the above. Furthermore, Harte Gold has been advised by Appian that it does not oppose to the approval of the DIP Financing Agreement, nor the DIP Charge.

**(iii) The Administration Charge**

16. On December 7, 2021, this Court approved, as part of the Initial Order, an Administration Charge in an *initial* amount of \$500,000 to secure the fees and expenses of the Monitor and its

counsel, Harte Gold's counsel as well as of Harte Gold's directors and officers' counsel, for the initial ten (10)-day Stay Period.

17. Harte Gold now seeks an increase to such Administration Charge to an *aggregate* amount of \$1,500,000. This increase in the Administration Charge is based upon additional fees that the foregoing professionals expect to incur during the pendency of these CCAA Proceedings. The Applicant worked in consultation with the Monitor to determine the appropriate quantum of the Administration Charge, which was based upon various professionals' previous history and experience with restructurings of similar scope and complexity.

18. Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge. In *Canwest Publishing Inc.*,<sup>2</sup> in addition to the considerations enumerated in section 11.52, Justice Pepall considered the following factors:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charges;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to 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.

19. In the case at hand, the following factors support the granting of the Administration Charge as requested:

- (a) the operations of Harte Gold are significant and complex;
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings and the SISF;
- (c) each of the proposed beneficiaries will play a critical role in these CCAA Proceedings;
- (d) there is no unwarranted duplication of roles;

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<sup>2</sup> *Canwest Publishing Inc.*, 2010 ONSC 222, at para. 54 ([CanLII](#)) [*Canwest*]

- (e) it is unlikely that the above-noted advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements; and
- (f) the Monitor and the DIP Lender support the Administration Charge and its proposed quantum.

20. In light of the foregoing, Harte Gold respectfully submits that it is appropriate to grant the Administration Charge as requested.

## **B. The SISP Order Should be Granted**

### **(i) The Terms of the Initial Stalking Horse Bid**

21. As appears from a copy of the Subscription Agreement filed as Exhibit “W” to the Initial Application Affidavit (the “**Initial Stalking Horse Bid**”), the Initial Stalking Horse Bid entered into between Harte Gold and 833 Ontario essentially provided for acquisition by 833 Ontario of all or substantially all of Harte Gold’s business and operations, as a going concern, by way of a reverse vesting structure whereby 833 Ontario would seek to become the sole shareholder of Harte Gold and to transfer to ResidualCo. 1 and ResidualCo. 2 the Excluded Assets, the Excluded Contracts and the Excluded Liabilities (as such terms are defined in the Initial Stalking Horse Bid). The key terms of such Initial Stalking Horse Bid are highlighted in the summary table attached hereto as **Schedule “A”**.

### **(ii) The Events Leading to the Execution of the Initial Stalking Horse Bid**

22. As further described in the Bouchier Affidavits, the execution of the Initial Stalking Horse Bid with 833 Ontario was the culmination of Harte Gold’s continued efforts over the course of the past approximately six (6) months, to secure the highest or otherwise best offer possible for its business and/or assets.

23. As highlighted in the Bouchier Affidavits, two hundred and forty-one (241) parties (including Appian) were solicited during Pre-Filing Solicitation Process, four (4) of such parties submitting a non-binding bid by the NBIO Bid Deadline of August 13, 2021, and none of them subsequently



submitted to Harte Gold any binding offers. Thereafter, Harte Gold and FTI engaged in discussions with interested parties with the objective of securing a binding bid.

24. On November 19, 2021, Harte Gold was advised by Silver Lake that its wholly owned subsidiary, Cue Minerals, had acquired BNPP's rights and obligations under the BNPP Credit Agreement (and related Credit Documents) as they relates to the BNPP Debt Facilities, and that it intended to submit an offer to acquire the entirety of Harte Gold's business and operations, including by way of credit-bidding its first ranking secured debt under the BNPP Credit Agreement (and related Credit Documents). Cue Minerals Subsequently transferred its rights and obligations under the BNPP Assignment Agreement to 833 Ontario.

25. On November 22, 2021, after the issuance of a press release by Harte Gold announcing the assignment of BNPP's rights and obligations under the BNPP Credit Agreement (and related Credit Documents) in respect of the BNPP Debt Facilities to Cue Minerals, Harte Gold received a first offer from the Appian Parties to acquire its business and operations, as well as an offer to provide it with interim financing.

26. This was the first written offer submitted to Harte Gold and FTI by Appian, despite the fact that since the commencement of the Pre-Filing Strategic Process in May 2021, the Appian Parties were continuously kept informed of all solicitation efforts undertaken by Harte Gold, with the assistance of FTI, and were also given the opportunity during such period to submit such an offer. In fact:

- (a) The scope and timeline of the Pre-Filing Strategic Process were discussed at length during various meetings of Harte Gold's board of directors, at which the Appian Parties' three board nominees were present and, during such meetings, presentations were made and the possibility for the Appian Parties to submit a bid in the Pre-Filing Strategic Process was discussed;
- (b) In early July 2021, the Appian Parties received a copy of the "teaser" that was sent to all Prospective Bidders and interested parties, which formally advised the Appian Parties of the opportunity to acquire and/or invest in Harte Gold. The same "teaser" was sent to all prospective bidders;
- (c) In July and August 2021, FTI reached out to representatives of the Appian Parties on numerous occasions in order to, *inter alia*, ensure that they understood the Pre-Filing Strategic Process, assess their interest in a potential transaction, answer any

questions they may have had concerning the Pre-Filing Strategic Process and to confirm their right to submit a bid in the context of the Pre-Filing Strategic Process; and

- (d) The Appian Parties never confirmed whether or not they would submit a bid in the context of the Pre-Filing Strategic Process, which resulted in the establishment of the Special Committee and, thereafter, the resignation of the Appian nominees on such Board of Directors.

27. Despite the foregoing, Harte Gold and FTI engaged with both 833 Ontario and Appian with respect to their interest in a transaction, and both 833 Ontario and Appian were given the opportunity to formalize their respective proposals and submit to Harte Gold a written offer for DIP financing and for a stalking horse bid. Both parties were clearly advised that given Harte Gold's liquidity challenges, time was of the essence.

28. As both 833 Ontario and Appian expressed a desire to become the stalking horse bidder and DIP lender in these CCAA Proceedings, Harte Gold, with assistance of its financial and legal advisors, engaged in parallel negotiations with 833 Ontario and Appian on both a proposed stalking horse bid and DIP facility in order to secure the best offers possible.

29. On December 3, 2021, after two (2) weeks of negotiations, Harte Gold requested that 833 Ontario and Appian provide their best and final offer with respect to each of their stalking horse bid and DIP financing proposal, by no later than **December 4, 2021 at 5:00 p.m. Eastern Time**, so as to allow Harte Gold to properly assess such proposals and determine the best path going forward. Both 833 Ontario and Appian were also advised that Harte Gold would be commencing its CCAA Proceedings and appearing before this court for the issuance of an initial CCAA order on December 7, 2021.

30. In the morning of December 4, 2021, 833 Ontario communicated with Harte Gold in order to advise it that it was prepared to improve its previous proposals with respect to: (i) its DIP financing (the terms of which were summarized in the Initial Application Affidavit) and (ii) its stalking horse bid, to now include a payment in full of all of Harte Gold's obligations under the Appian Facility Agreement, by way of the Share Consideration, as well as an assumption and payment in full of all Cure Costs relating to the Retained Contracts, and all pre-filing Trade Amounts owing by Harte Gold, up to a maximum amount of \$7.5 million (which Harte Gold believes should cover all or substantially all of the Cure Costs and pre-filing Trade Amounts owing). No break fee would be required, nor any expense reimbursement, other than what is already contemplated in the BNPP

Credit Agreement. Such revised DIP proposal and stalking horse bid proposal were sent to Harte Gold by 833 Ontario before noon on December 4, 2021.

31. That same day (i.e. on December 4, 2021 also), at 6:00 p.m., Appian sent to Harte Gold what it then considered to be its best and final offer on its proposed DIP financing and on its stalking horse bid. With respect to Appian's DIP proposal, Appian offered to advance to Harte Gold less than 50% of what 833 Ontario was willing to offer, on terms and conditions less favorable to Harte Gold, as appears from confidential Exhibit AA filed, under seal, in support of the Initial Application Affidavit.

32. With respect to Appian's proposed stalking horse bid, while Appian proposed to pay in cash the amounts owing under the BNPP Credit Agreement, and "assume" and "maintain" on Harte Gold's books and records its second lien debt under the Appian Facility Agreement, Appian did not expressly provide for the payment of pre-filing Trade Amounts, other than Cure Costs associated with contracts to be retained as part of its proposed transaction. A copy of Appian's initial stalking horse bid proposal (the "**Initial Appian Proposal**") together with a summary table comparing the stalking horse bid proposal submitted by 833 Ontario and the Initial Appian Proposal were attached as Exhibits "A" and "B" respectively to the Comeback Affidavit.

33. After due consideration of both 833 Ontario's and Appian's then respective best and final proposals submitted on December 4, 2021, Harte Gold and its board of directors, in exercising their business judgment, determined that it would be appropriate to move forward with: (a) 833 Ontario's DIP financing proposal and (b) 833 Ontario's stalking horse bid proposal. In deciding to execute the DIP Financing Agreement and the Initial Stalking Horse Bid proposed by 833 Ontario, Harte Gold and its board of directors considered, among other things the following :

- (a) the terms of 833 Ontario's DIP financing proposal, as mentioned, were clearly better than those proposed by Appian; and
- (b) the terms of 833 Ontario's Initial Stalking Horse Bid, were considered to be competitive in comparison with Appian's December 4, 2021 stalking horse bid proposal, especially since such proposal by Appian did not specify whether or not Appian would be offering any consideration for pre-filing Trade Amounts, or which of Harte Gold's contracts Appian was prepared to assume and exclude.

34. In addition, Harte Gold also considered the following:

- (a) First, at this early stage, Harte Gold only seeks to put the wheels in motion in order to commence a SISP and maintain a competitive environment so as to secure the highest or otherwise best offer in the circumstances for its business and assets for the benefit of its creditors and other stakeholders. Neither 833 Ontario or Appian will be declared the “Successful Bidder” until the SISP is conducted in accordance with the SISP Procedures;
- (b) Second, even if 833 Ontario is chosen at this stage to be the stalking horse bidder, Appian will not in any way be prejudiced or restricted from participating in the SISP or submitting any bid in the context therein, or from being declared the “Successful Bidder” if its bid ultimately constitutes the highest or otherwise best offer in the SISP; and
- (c) Third, if 833 Ontario is not declared the “Successful Bidder”, the fact is that its Stalking Horse Bid does not require the payment of any break fee nor any expense reimbursement above what 833 Ontario is already entitled to under the BNPP Credit Agreement such that neither Harte Gold or its creditors will suffer any prejudice resulting from the foregoing.

35. As such, the Initial Stalking Horse Bid entered into between Harte Gold and 833 Ontario was simply intended to set the minimum acceptable bid to be submitted as part of the SISP. The Court’s approval of Harte Gold’s execution of the Initial Stalking Horse Bid entered into with 833 Ontario would not have caused any prejudice to Appian, nor restricted its right to participate in the SISP nor submit an offer in the context thereof. Furthermore, the approval of Harte Gold’s execution of the Initial Stalking Horse Bid proposed by 833 Ontario would also not have cause any prejudice to Harte Gold or its creditors since the Initial Stalking Horse Bid proposed by 833 Ontario did not require the payment of any “break fee” or any expense reimbursement over and above what 833 Ontario was already entitled to under the BNPP Credit Agreement.

**(iii) The Revised Appian Proposals**

36. On December 9, 2021 and December 11, 2021, respectively, after 833 Ontario’s Initial Stalking Horse Bid was made public and after the Initial Order was granted, Appian submitted two (2) revised stalking horse bid proposals (the “**Revised Appian Proposals**”), as further discussed in the Comeback Affidavit.

37. While the Revised Appian Proposals provide for an increased purchase price, Harte Gold believes that it is important to consider the facts of this case when considering the Revised Appian Proposals:

- (a) since the commencement of the Pre-Filing Strategic Process some six (6) months ago, Appian has been solicited by both Harte Gold and FTI on numerous occasions however, until late November 2021, no offer from Appian was submitted;
- (b) instead, Harte Gold understands that Appian held discussions directly with BNPP without the presence of Harte Gold or of FTI, with a view to secure BNPP's support in connection with a potential offer to be made to Harte Gold; However, since no such support was secured, no such offer was submitted;
- (c) it was only on November 22, 2021, after a press release announcing the assignment of BNPP's rights and obligations under the BNPP Credit Agreement to Cue Minerals (now 833 Ontario) was issued that Appian's first made an offer to Harte Gold to acquire its business and operations;
- (d) following the submission of this first offer by Appian, Harte Gold engaged in discussions with, *inter alia*, Appian in order to secure the highest or otherwise best offer in the circumstances for its stakeholders, to be used as a stalking horse bid in the context of a SISP;
- (e) as part of those discussions, Appian was clearly advised that time was of the essence, given Harte Gold's limited liquidities;
- (f) after approximately two (2) weeks of discussions and negotiations, Appian was further advised that Harte Gold required that Appian's best and final offer be received by no later than December 4, 2021 at 5:00 p.m. Eastern Time;
- (g) despite the foregoing, Appian only submitted its stalking horse bid offer on December 4, 2021 at 6:00 p.m., with no indication as to its intention relating to the assumption or payment of the pre-filing Trade Amounts, no indication as to the contracts it proposed to retain and no indication of the liabilities it proposed to assume and exclude from its proposed transaction; and
- (h) now that the Initial Order has been granted and the Stalking Horse Bid proposed by 833 Ontario has been made public, Appian has come forward with the Revised

Appian Proposals submitted, respectively, on December 9, 2021 and December 11, 2021 (in part to clarify certain elements of the December 9, 2021 proposal) and seeks the issuance by this Court to declare it as the stalking horse bidder in the SISP.

38. As appears from the above, Appian has had the opportunity for the past six (6) months to submit an offer to Harte Gold, but ultimately decided to wait before doing so. Whatever its reasons were, and even if the Revised Appian Proposals provide for an increased purchase price, it is respectfully submitted that this Court should be cautious in considering such revised proposals.

39. First, it is apparent from the Revised Appian Proposals that Appian wishes to impose upon Harte Gold and the Monitor the fact that if it is chosen to be the stalking horse bidder, then the SISP Procedures will need to provide that any "Superior Offer" will require a payment **in cash** of all of Harte Gold's obligations under the Appian Facility Agreement, the Appian Financing Agreement, the Appian offtake agreements and the Appian royalty agreements, as appears from the suggested definition of "Superior Offer" below:

***"Superior Offer"** means a credible, reasonably certain and financially viable offer made by a Qualified Bidder that (i) provides for consideration in excess of the aggregate of the "Subscription Price" as defined in and contemplated by the Stalking Horse Transaction plus the Initial Overbid Amount, including cash consideration sufficient to pay, in full and in cash, the Cash Consideration (as defined in the Stalking Horse Bid) and all Appian Existing Agreement Obligations (as defined in the Stalking Horse Bid), and (ii) Harte Gold and the Monitor, each with the assistance of their legal advisors, consider to be better than the Stalking Horse Transaction. Solely with respect to the definition of **"Superior Offer"**, the Stalking Horse Transaction is valued at CAD\$[●]*

40. Harte Gold views this suggested definition of "Superior Offer" in the SISP Procedures as being problematic in the context of a SISP, namely given the following:

- (a) no suggested value has been assessed or provided with respect to Harte Gold's obligations under the offtake agreements and royalty agreements entered into with Appian such that:
  - (i) prospective bidders will be unable to adequately determine what may constitute a "Superior Offer";
  - (ii) the value assigned to Harte Gold's obligations under the Appian offtake and royalty agreements by each prospective bidder may vary significantly,

depending on the assumptions made by each prospective bidder, including their assumptions with respect to the price of gold in the future;

- (iii) Appian will ultimately have the discretion to determine whether or not a bid constitutes a “Superior Offer” pursuant to the SISP Procedures;
- (b) the Revised Appian Proposals and the SISP procedures proposed by Appian require that prospective bidders pay, *in cash*, all of Harte Gold’s obligations under the existing Appian agreements (which include the Appian Facility Agreement, the Appian Financing Agreement, the Appian offtake agreements and the Appian royalty agreements), even though the Revised Appian Proposals only provide for an “assumption” and “maintenance” of Harte Gold’s obligations under such agreements, as opposed to a full credit-bid of such obligations.

41. Harte Gold believes that the imposition of the above on any prospective bidder will have a chilling effect on them, thereby reducing the chances of any prospective bidder coming forward during the SISP. At this stage of the CCAA Proceedings, Harte Gold’s intentions are to attract as many prospective bidders as possible (rather than pushing them away) so as to maintain a competitive environment for bidders in order to ultimately secure the highest or otherwise best offer in the circumstances for the benefit of its creditors and other stakeholders.

42. Also, as appears from the SISP Procedures proposed by Appian, it seems that Appian requires prospective bidders to pay a deposit equivalent to 5% of their cash consideration, while refusing itself to pay such amount, by only offering to pay a deposit equivalent to what Appian considers to be 2.5% of its cash consideration offered in the Revised Appian Proposals.

**(iv) 833 Ontario’s Amended and Restated Stalking Horse Bid**

43. On December 14, 2021, in accordance with section 9.9 of the Initial Stalking Horse Bid, 833 Ontario submitted to Harte Gold and FTI an amended version of its stalking horse bid proposal (the “**Amended and Restated Stalking Horse Bid**”) which provided, in addition to the other terms and conditions set out in 833 Ontario’s Initial Stalking Horse Bid, the following:

- (a) a mechanism whereby if declared the “Successful Bidder” in the SISP, Silver Lake will issue to the Monitor, in escrow, *in advance of the Closing*, the Silver Lake Shares, in a number equal to the value of all property perfected and secured amounts and obligations owing by the Company’s to AGH under the Appian Facility Agreement as of the Closing Date). This will to allow the Monitor to sell and

monetize the Silver Lake Shares, and pay, **in cash**, the amounts owing to Appian under the Appian Facility Agreement upon Closing of the transaction. Any shortfall resulting from a reduction in value of the Silver Lake Shares between the date of their issuance and the date on which they are ultimately sold by the Monitor will still be guaranteed by 833 Ontario and Silver Lake; and

- (b) the assumption of all of Harte Gold's obligations under its various offtake agreements and royalty agreements, including those entered into with Appian.

44. A copy of the Amended and Restated Stalking Horse Bid proposed by 833 Ontario was attached as Exhibit "C" to the Comeback Affidavit.

45. While Harte Gold's board of directors considered the execution of 833 Ontario's initial Stalking Horse Bid dated December 6, 2021 (Exhibit "W" to the December 6, 2021 Bouchier Affidavit) to be appropriate in the circumstances at that time, it now recognizes that:

- (a) the Amended and Restated Stalking Horse Bid proposed by 833 Ontario responds to certain concerns which Appian may have had with respect to the payment of Harte Gold's obligations to Appian under the Appian Facility Agreement in Silver Lake Shares (which will no longer be the case); and
- (b) the Amended and Restated Stalking Horse Bid proposed by 833 Ontario provides for a significant increase in its subscription price, as a result of 833 Ontario committing to "assume" and "retain" certain additional contracts upon, such as Harte Gold's offtake and royalty agreements.

46. Furthermore, contrary to the Revised Appian Proposals, the Amended and Restated Stalking Horse Bid proposed by 833 Ontario does not require, as part of the SISP Procedures, for bids to provide for a payment in cash of all of Harte Gold's obligations under the various existing agreements with Appian, including the Appian offtake and royalty agreements, in order to be considered as a "Superior Bid".

47. For the reasons further discussed below, Harte Gold, after having consulted with the Monitor, believes and respectfully submit that this Court should approve its execution of the Amended and Restated Stalking Horse Bid proposed by 833 Ontario, as well as the use of same as the stalking horse bid in the SISP.



**(v) Factors for Approving Stalking Horse Bids and Related SISP**

48. The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a sale process in relation to a CCAA debtor's business and assets, prior to or in the absence of a plan of compromise or arrangement.<sup>3</sup>

49. Over the past few years, approvals of stalking horse agreements and related SISPs have become a common feature in CCAA proceedings as they facilitate sales by establishing a baseline price and deal structure for parties (other than the stalking horse bidder) potentially interested in acquiring the business and/or assets of the debtor company, in order to generate superior bids to the stalking horse bid, thereby maximizing value for the benefit of stakeholders while enhancing the fairness of the sale process. As such, the use of stalking horse bids, including stalking horse credit bids, has been recognized by Canadian courts as a reasonable and useful element of a solicitation processes and therefore has been approved in a number of CCAA proceedings.<sup>4</sup>

50. In *Nortel*, this Court approved a stalking horse sale and solicitation process similar to the one at hand - *which also contemplated the holding of an auction*. In doing so, the Court set out four (4) factors which the court should consider in the exercise of its general statutory discretion to determine whether or not to approve and ratify, as applicable, stalking horse agreement and related SISP:<sup>5</sup>

- (a) Is a sale warranted at this time?
- (b) Will the sale be of benefit to the whole "economic community"?
- (c) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?
- (d) Is there a better viable alternative?

51. The Court in *Nortel* also indicated in that case that the proposed process would see the debtors returning to court for approval "*of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in Soundair*".<sup>6</sup> The *Nortel* decision predates the 2009 CCAA amendments which introduced section

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<sup>3</sup> *McEwan Enterprises Inc.*, 2021 ONSC 6878 at paras. 42-44 ([CanLII](#)).

<sup>4</sup> *Nortel Networks Corp, Re* (2009), 55 C.B.R. (5th) 229 at para. 56 ([CanLII](#)) [**Nortel**]; *Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), at para 13 ([CanLII](#)) [**Brainhunter**]; *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20 ([CanLII](#)) [**Danier**]; *CCM Master Qualified Fund Ltd v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para. 7 ([CanLII](#)); *Aralez Pharmaceuticals Inc.*, (October 20, 2018) Toronto, CV-18-603054-00CL at para. 6, Order Re Bidding Procedures Approval ([Monitor's Website](#)).

<sup>5</sup> *Nortel*, at para. 49. See also *Danier*, at para. 23; *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 at paras. 37-38 ([CanLII](#)) [**Mustang**]; *Brainhunter* at para. 13.

<sup>6</sup> *Nortel*, at para. 53.

36 of the CCAA, which expressly permits the sale of all or substantially all of the debtor's assets in the context of CCAA proceedings. Section 36 of the CCAA also sets out certain factors to be considered for the approval of such sale; this provision does not, however, directly assess the factors a court should consider when deciding to approve a sale process aimed at soliciting bids for a debtors' assets.

52. In the matter of *Brainhunter*, in a decision rendered *after* the 2009 CCAA amendments, the court considered the applicability of the newly introduced section 36 of the CCAA on a motion for approval of a sale process that included a stalking horse agreement by a proposed purchased acknowledged to be "*an insider and related party*". In approving the execution of the stalking horse agreement and the sale process at issue, the court commented on the relationship between the criteria set in *Nortel* and section 36 of the CCAA as follows:

*"Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while section 36 of the CCAA is engaged when determining whether to approval a sale. Counsel also submitted that s. 26 should also be considered indirectly when applying the Nortel Criteria.*

*I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process."*<sup>7</sup>

53. In 2011, this Court, in the matter of *Clothing for Modern Times Ltd. (Re)*, confirmed that the criteria set out in *Nortel* were held to represent "*the factors a court should consider when reviewing a proposed sale process under the CCAA in the absence of a plan.*"<sup>8</sup>

54. In 2015, this Court, presided by his Honour, granted an order in the matter of *Crate Marines Sales Limited* approving the execution of a stalking horse agreement, as well as a related sale and investment solicitation process which provided for the holding of an auction, should one or more superior bid be submitted in the context of such process. In doing, his Honour relied upon the principles set out above, including those in the matter of *Brainhunter*, and stated the following:<sup>9</sup>

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<sup>7</sup> *Brainhunter*, at paras. 16-17.

<sup>8</sup> *Clothing for Modern Times Ltd. (Re)*, 2011 ONSC 7522 at para. 19 ([CanLII](#))

<sup>9</sup> *Crate Marine Sales Ltd., Re*, 2015 ONSC 1062, at paras. 13 ([CanLII](#))

*13. A stalking horse offer combined with a court-approved bidding procedure is commonly used in insolvency situations to facilitate the sale of businesses and assets.*

55. The distinction between the approval of a sales process and the approval of an actual sale was also confirmed in *Danier*.<sup>10</sup> In that case, which concerned the approval of a sales process in proposal proceedings commenced pursuant to the BIA, the Court applied the criteria set out in *Nortel* confirming that section 65.13 of the BIA (which is the equivalent of section 36 of the CCAA) “*is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding to approve the sale process itself.*”

56. Accordingly, the distinction between the approval of the execution of the Amended and Restated Stalking Horse Bid and SISP and the approval of a transaction in respect of Harte Gold's assets upon completion of the SISP is important to the present case.

57. As previously mentioned, approval of the Amended and Restated Stalking Horse Bid proposed by 833 Ontario is only being sought at this stage of these CCAA Proceedings for the purpose of establishing a baseline transaction for the SISP. The Amended and Restated Stalking Horse Bid may, or may not, ultimately be the final or best bid at the end of the SISP. If the Stalking Horse Bid is ultimately selected as the “*Successful Bid*” after having conducted the SISP, then Harte Gold will return before this Court to seek its approval of the transaction contemplated in the Subscription Agreement. It is at that point that this Court will be called upon to fully consider the criteria set out in section 36 of the CCAA.

**(vi) Harte Gold's Execution of the Amended and Restated Stalking Horse Bid and the SISP Should be Approved**

58. Taking into consideration the clear benefits of using a stalking horse bid in the context of a SISP, especially a stalking horse bid like one proposed by 833 Ontario which does not require the payment of any “*break fee*” or any expense reimbursement over and above what is payable under the BNPP Credit Agreement, Harte Gold and its board of directors, using their business judgment, determined, after carrying out the Pre-Filing Strategic Process and subsequently engaging in negotiations with 833 Ontario and Appian over multiple weeks, that it was appropriate in the circumstances to execute the Initial Stalking Horse Bid with 833 Ontario.

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<sup>10</sup> *Danier*, at para. 22; See also *Mustang* at paras. 36-38.

59. With the revised terms set out in the Amended and Restated Stalking Horse Bid proposed by 833 Ontario, Harte Gold and its board of directors continue to believe that it is appropriate in the circumstances to move forward with 833 Ontario as its stalking horse.

60. Harte Gold respectfully submits that based the criteria set out in *Nortel* and reaffirmed in *Brainhunter*, it is appropriate for this Court to approve at this stage of the CCAA Proceedings the execution by Harte Gold of the Amended and Restated Stalking Horse Bid proposed by 833 Ontario as well as the SISP:

- (a) **A sale transaction is warranted at this time:** Harte Gold is insolvent and unable to continue with its operations. A sale will maximize value and allow Harte Gold to continue as a going concern for the benefit of its stakeholders, including its employees, supplier and the local economy in northern Ontario generally.
- (b) **The sale will benefit the whole economic community:** The Amended and Restated Stalking Horse Bid proposed by 833 Ontario sets a floor for other sale transactions and may contribute to a higher valuation of Harte Gold's business, increasing the potential consideration to be received. The SISP Procedures are designed and intended to solicit the highest and best bid for Harte Gold's business, for the benefit of Harte Gold's stakeholders.
- (c) **Creditor consultation:** Harte Gold's secured creditors, including the Appian Parties, have been consulted and were given the opportunity to submit a bid throughout the Pre-Filing Strategic Process.
- (d) **There is no better viable alternative:** The Amended and Restated Stalking Horse Bid and the SISP Procedures follow significant discussions and negotiations with respect to potential alternatives. As at December 4, 2021, the DIP proposal and stalking horse bid proposal submitted by 833 Ontario appeared to be both better than those submitted by Appian. Now that Appian and 833 Ontario have both submitted revised stalking horse bid proposals, Harte Gold and its board of directors remain of the view that the Amended and Restated Stalking Horse Bid proposed by 833 Ontario is superior to the Revised Appian Proposal. While Harte Gold recognizes Appian's continued interest in acquiring the business and operations of Harte Gold, Appian will have the opportunity to submit an offer in the context of the SISP, and the approval of the Amended and Restated Stalking Horse Bid proposed by 833 Ontario does not in any way prejudice Appian or restrict its ability to submit a

superior proposal to the Stalking Horse Bid. While there may ultimately be a better alternative upon completion of the SISP, the approval of Harte Gold’s execution of the Amended and Restated Stalking Horse Bid offered by 833 Ontario and the conduct of the SISP in accordance with the SISP Procedures is reasonable in the circumstances, and constitutes an appropriate path going forward

- (e) **The Monitor’s involvement:** The Monitor was involved in the negotiations that led to the execution of the Initial Stalking Horse Bid, to the preparation of the related SISP Procedures and the subsequent discussions regarding the Amended and Restated Stalking Horse Bid. The Monitor supports approval of the Amended and Restated Stalking Horse Bid and SISP Procedures, and will continue to be involved on a go-forward basis.
  
- (f) **The consideration received is fair and reasonable:** The Amended and Restated Stalking Horse Bid and the related SISP Procedures establishes a floor price determined following the conduct of the Pre-Filing Strategic Process and subsequent negotiations, and a process to solicit better offers. The result of the SISP Procedures is a continuation of Harte Gold’s business on a going concern basis, and the maximization of value, for the benefit of Harte Gold’s stakeholders.

61. Considering the clear interest in Harte Gold’s business and assets, Harte Gold seeks, in addition to the approval of its execution of the Amended and Restated Stalking Horse Bid, the approval as well of the SISP and related SISP Procedures, which have been approved by 833 Ontario and by the Monitor, and which will govern the solicitation of higher or otherwise better offers for Harte Gold’s business and assets in these CCAA Proceedings. The SISP and related SISP Procedures contemplate the completion of 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,	Hearing of the Approval Motion

DATE	MILESTONE
with the consent of the Monitor, not to proceed with an Auction in accordance with the SISP Procedures	

62. Given the clear interest from at least two (2) parties, being 833 Ontario and Appian, Harte Gold submits that it is wholly appropriate in the circumstances to maintain a competitive environment between interested parties to ensure that all potentially interested parties are given the opportunity to submit their best possible bid and, in turn, ensure the maximization of value for its business and its assets, for the benefit of Harte Gold's stakeholders. Harte Gold believes and submit that the potential benefit of pursuing the above process clearly outweighs the costs relating to same, especially seeing the interest from 833 Ontario and Appian.

63. The SISP and related SISP Procedures set forth the terms and procedures for a fair and efficient solicitation process, and take under consideration the fact that a Pre-Filing Strategic Process has already been conducted during the approximate six (6)-months period preceding these CCAA Proceedings.

64. Harte Gold believes the timeline in the SISP Procedures is reasonable in the circumstances and will yield the maximum value for Harte Gold's business. By maintaining a competitive environment for interested parties to bid, Harte Gold's stakeholders can be assured that appropriate measures have and will be taken to maximize value for Harte Gold's business.

**(vii) This Court Should Be Cautious in Second-Guessing the Business Judgment of Harte Gold's Board of Directors**

65. In initially deciding to move forward with 833 Ontario's Stalking Horse Bid proposal, Harte Gold's directors and officers reviewed the stalking horse bid proposals submitted to them by both 833 Ontario and Appian on December 4, 2021, exercised their business judgment, and, ultimately, acted in accordance with their fiduciary duties.

66. It is well recognized that courts must give due consideration to the "*business judgment rule*" and give weight to the recommendations of the Monitor.<sup>11</sup> In fact, Courts across Canada have recognized on multiple occasions that they should be reluctant to second-guess the application of

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<sup>11</sup> 9286594 *Canada Inc. v Advance Engineering Products Ltd.*, 2015 SKQB 196 at para. 35 ([CanLII](#)); *Bloom Lake* at para. 28, citing *AbitibiBowater Inc. (Re)*, 2009 QCCS 6460 [*AbitibiBowater*] at para. 59 ([CanLII](#)). Although the court in *AbitibiBowater* did not specifically reference the business judgment rule by name, the Court did observe, at para. 59: "*Absent some compelling, exceptional factor to the contrary, the Court should accept an applicant's proposed sales process where it was recommended by the Monitor and supported by the stakeholders*".

business expertise to the considerations that are involved in corporate decision making.<sup>12</sup>

67. For example, in the matter of *Stelco (Re)*, the Ontario Court of Appeal confirmed this principle, stating that “*the court is not entitled to usurp the role of the directors and management in conducting what are in substance Harte Gold’s restructuring efforts*”.<sup>13</sup>

68. In the matter of *AbitibiBowater*, Justice Gascon, as he then was, reiterated the importance of not second guessing the commercial and business judgment of the board of directors of a debtor company in the context of a sale transaction:<sup>14</sup>

*[70] That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.*

*[71] A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should.*

*[72] In prior decisions rendered in similar context, courts in this province have emphasized that they should intervene only where there is clear evidence that the Monitor failed to act properly. A subsequent, albeit higher, bid is not necessarily a valid enough reason to set aside a sale process short of any evidence of unfairness.*

69. In this case, the Initial Stalking Horse Bid proposed by 833 Ontario and executed by Harte Gold on December 6, 2021, provided much needed certainty and allowed Harte Gold to send a reassuring message to the market that it would continue its business and operations as a going concern upon emergence from these CCAA Proceedings. The caselaw is clear that the question to be asked is not whether the stalking horse bid and SISP put forward by Harte Gold was perfect, but rather whether it was reasonable in the circumstances,<sup>15</sup> which Harte Gold submits it was.

70. Now that 833 Ontario has submitted its Amended and Restated Stalking Horse Bid, Harte Gold and its board of directors continue to believe, using their business judgment, that moving forward with 833 Ontario as its Stalking Horse Bidder remains appropriate in the circumstances, particularly given the additional consideration offered by 833 Ontario as part of its Amended and Restated Stalking Horse Bid.

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<sup>12</sup> *Nortel, Re*, at paras. 51(b) and 54; *Brainhunter, Re*, at para. 20; *Peoples Department Stores Inc. (Trustee of) v. Wise*, at para. 67 2004 SCC 68 ([CanLII](#)); *Stelco Inc., Re*, at para. 44 2005 CanLII 8671 ([CanLII](#)) [[Stelco](#)]

<sup>13</sup> *Stelco Inc. (Re)*, 2005 CanLII 40140 (ONCA) at para. 26 ([CanLII](#)); *Stelco*, at para. 44.

<sup>14</sup> *AbitibiBowater inc. (Arrangement relatif à)*, at paras. 70-72 2010 QCCS 1742 ([CanLII](#)). While this decision was rendered in the context of a sale approval hearing (as opposed to a SISP hearing), Harte Gold respectfully submits that the same principles should apply here, especially considering the efforts undertaken by Harte Gold and FTI to secure a binding offer over the course of the Pre-Filing Strategic Process which commenced in May 2021

<sup>15</sup> *Sanjel Corporation (Re)* 2016 ABQB 257 at para. 80 ([CanLII](#)); *Bloom Lake, g.p.l. (Re)*, 2015 QCCS 1920 at para. 36 ([CanLII](#)) [[Bloom Lake](#)].

71. Once more, it is worthwhile reiterating the fact that this Court's approval of Harte Gold's execution of the Amended and Restated Stalking Horse Bid offered by 833 Ontario will not, in any way whatsoever, prejudice Appian or restrict its right to participate in the SISP and submit an offer in the context thereof. Also, the approval of Harte Gold's execution of the Amended and Restated Stalking Horse Bid proposed by 833 Ontario will not cause any prejudice to Harte Gold or its creditors since 833 Ontario has not required the payment of any "break fee" or any expense reimbursement over and above what it is already entitled to under the BNPP Credit Agreement, should its Amended and Restated Stalking Horse Bid not be declared the "Successful Bid" in the SISP.

**PART V - ORDER SOUGHT**

72. In light of the foregoing, the Applicant respectfully submits that the Court should approve and grant the ARIO and SISP Order attached at Tab 3 and 6 of the Motion Record, respectively.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15 day of December, 2021.

A handwritten signature in black ink, appearing to read "L. Ni", is positioned above a horizontal line.

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**Stikeman Elliott LLP**  
Lawyers for the Applicant



**SCHEDULE “A”  
KEY TERMS OF SILVER LAKE INITIAL STALKING BID**

Key Terms	Silver Lake Stalking Horse Bid
Investor	833 Ontario
Guarantor	Silver Lake
Purchased Assets	The Subscribed Shares, which will represent all of the equity interests in Harte Gold
Purchase Price	<p>Purchase price equal to:</p> <p>(a) <u>Cash Consideration</u>: Equal to all claims ranking in priority or <i>pari passu</i> to claims under the BNPP Credit Agreement (excluding the amounts owing under the DIP Term Sheet), plus amounts necessary to fund the completion of the CCAA Proceedings, and implementation of the transaction, including the bankruptcies of the ResidualCos upon completion of the transactions contemplated in the Stalking Horse Bid;</p> <p>(b) <u>Credit Bid Consideration</u>: All claims under the under the DIP Term Sheet and the BNPP Credit Agreement;</p> <p>(c) <u>Share Consideration</u>: Fully paid ordinary shares of Silver Lake (the “<b>Silver Lake Shares</b>”) to be issued in the name of AHG (Jersey) Limited in a number equal to the value of Harte Gold’s secured obligations towards AHG (Jersey) Limited under the Appian Facility Agreement as of the Closing Date divided by the VWAP of the Silver Lake Shares for the 5 trading days prior to the Closing, with a guarantee by 833 Ontario to cover and pay, in cash, any shortfall resulting from the sale by Appian of the Silver Lake Shares within 90 days following the closing of the transaction contemplated in the Subscription Agreement;</p> <p>(d) <u>Assumed Liabilities</u>: The royalty pursuant to the Impact Benefit Agreement entered into on April 18, 2018 between Harte Gold Pic Mobert First Nation (the “Impact Benefit Agreement”) (ii) all Liabilities in respect of Employees, except for Terminated Employees, (iii) Liabilities which relate to the Business under any Retained Contracts, Permits and Licenses or Permitted Encumbrances after Closing (iv) Cure Costs in relation to Retained Contracts and Trade Amounts, up to an aggregate of \$7,500,000 for such Cure Costs and such Trade Amounts; and</p> <p>(e) <u>Excluded Liabilities</u>: Includes: (i) all liabilities relating to the Retained Contracts prior to the commencement of CCAA Proceedings, which are not Cure Costs (ii) all liabilities relating to litigation against Harte Gold prior to Closing; (iii) all liabilities under the Appian Facility Agreement and the Appian Financing Agreement; (iv) all royalty obligations of Harte Gold other than under the Impact Benefit Agreement; (v) all liabilities relating to any financial agreement with Appian Natural Resources Fund LP, Appian Natural Resources Fund II LP and Appian Capital Advisory LLP or any of their affiliates are parties (iv) all Liabilities relating to any change of control provision that may arise in connection with the change of control contemplated by the Transactions</p>

Key Terms	Silver Lake Stalking Horse Bid
Deposit	Amount of deposit: \$100,000
Transaction Structure	Reverse vesting structure
Employees	Investor may designate employees to be terminated no later than the Bid Deadline.
Regulatory Approvals	No competition act approval required
Bidding Procedures	<p>SISP Procedures providing for:</p> <p>(a) Bid Deadline: Jan. 14, 2022;</p> <p>(b) Auction Date: January 20, 2022</p> <p>(c) Approval hearing: 7 days later</p> <p>Current amount of initial and incremental overbid proposed and under consideration by Silver Lake: \$500,000</p> <p>Standstill between potential bidders</p>
Bid Protections	<p><u>Break fee</u>: None</p> <p><u>Expense reimbursement</u>: No incremental costs and expenses payable over and above what is payable under the BNPP Credit Agreement.</p> <p>Reasonable costs and expenses of the Investor and Guarantor (including legal fees) incurred in connection with the negotiation, preparation, execution and delivery of the Stalking Horse Bid and with respect to the implementation of the transactions contemplated thereunder shall be expenses payable under the BNPP Credit Agreement, and in turn under the DIP Term Sheet.</p>
Target Closing Date	February 18, 2022
Outside Date	March 31, 2022
Key Conditions to closing	<p>Key conditions include:</p> <p>(a) Declaration of stalking horse bid as the successful bid in the SISP</p> <p>(b) Court approval of the transaction</p>
Other	Upon Closing, the Silver Lake Parties shall provide and deliver a full and final release to Harte Gold's D&Os and other representatives, as well as to the Monitor and its legal counsel.

**SCHEDULE “B”  
LIST OF AUTHORITIES**

**Cases**

1. *AbitibiBowater Inc. (Re)*, 2009 QCCS 6460 ([CanLII](#))
2. *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742 ([CanLII](#))
3. *Bellatrix Exploration Ltd.*, Re, 2020 ABQB 332, 2020 CarswellAlta 966 ([CanLII](#))
4. *Bloom Lake, g.p.l. (Re)*, 2015 QCCS 1920 ([CanLII](#))
5. *Brainhunter Inc. (Re) (2009)*, 62 C.B.R. (5<sup>th</sup>) 41 (Ont. S.C.J.) ([CanLII](#))
6. *Canwest Publishing Inc.*, 2010 ONSC 222 ([CanLII](#))
7. *CCM Master Qualified Fund Ltd v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750 ([CanLII](#))
8. *Clothing for Modern Times Ltd. (Re)*, 2011 ONSC 7522 ([CanLII](#))
9. *Crate Marine Sales Ltd.*, Re, 2015 ONSC 1062 ([CanLII](#))
10. *Danier Leather Inc.*, Re, 2016 ONSC 1044 ([CanLII](#))
11. *D&H Farms Ltd. v. Farm Credit Canada*, 2002 SKCA 88 ([CanLII](#))
12. *Essar Steel Algoma Inc.*, Re, 2017 ONSC 1401 ([CanLII](#))
13. *Grant Forest Products Inc.*, Re, 2010 ONSC 1846 ([CanLII](#))
14. *In the matter of Aralez Pharmaceuticals Inc.*, (October 20, 2018) Toronto, CV-18-603054-00CL, Order Re Bidding Procedures Approval ([Monitor's Website](#))
15. *Les Boutiques San Francisco Incorporées*, Re, 2004 CanLII 480 (QCCS) ([CanLII](#))
16. *McEwan Enterprises Inc.*, 2021 ONSC 6878 ([CanLII](#))
17. *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 ([CanLII](#))
18. *Nortel Networks Corp. Re (2009)*, 55 C.B.R. (5<sup>th</sup>) 229 ([CanLII](#))
19. *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 ([CanLII](#));
20. *Rail Power Technologies Corp.*, Re, 2009 QCCS 2885 ([CanLII](#))
21. *Royal Bank of Canada v. Soundair Corporation*, [1991] OJ No 1137 (ONCA) ([CanLII](#))
22. *Sanjel Corporation (Re)* 2016 ABQB 257 ([CanLII](#))
23. *Stelco Inc.*, Re 2005 CanLII 8671 ([CanLII](#))

24. *Stelco Inc. (Re)*, 2005 CanLII 10641 (ONCA) ([CanLII](#))

25. 9286594 *Canada Inc. v Advance Engineering Products Ltd.*, 2015 SKQB 196 ([CanLII](#))

**SCHEDULE “C”  
RELEVANT STATUTES**

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

**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.

**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**

**11.03 (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.

[...]

## **Meaning of *regulatory body***

**11.1 (1)** In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

## **Regulatory bodies — order under section 11.02**

**(2)** Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

## **Exception**

**(3)** On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

**(a)** a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

**(b)** it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

## **Declaration — enforcement of a payment**

**(4)** If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

## **Interim financing**

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

**Priority — secured creditors**

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

**Priority — other orders**

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

**Factors to be considered**

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

[...]

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

**11.51 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of 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.

### **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.

[...]

**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

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(RETURNABLE DECEMBER 16, 2021)**

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