

**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 WITH RESPECT TO  
EXPRESS GOLD REFINING LTD.**

**AMENDED NOTICE OF MOTION**  
(returnable ~~on a date to be determined~~ December 4, 2023)

Deloitte Restructuring Inc. (“**Deloitte**”), in its capacity as the court-appointed monitor (the “**Monitor**”) of Express Gold Refining Ltd. (“**EGR**”), will make a motion to the Honourable Justice Cavanaugh of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) on ~~a date to be determined by the Court~~ December 4, 2023, at 10:00 a.m. or as soon after that time as the motion can be heard.

**PROPOSED METHOD OF HEARING:** The motion is to be heard

- In writing under subrule 37.12.1 (1) because it is (*insert one of* on consent, unopposed *or* made without notice);
- In writing as an opposed motion under subrule 37.12.1 (4);
- In person;
- By telephone conference;
- By video conference.

at the following location 330 University Ave, Toronto, Ontario, ~~via Zoom (the details of which will be provided by the Court at a later date).~~

**THE MOTION IS FOR:**

1. An order, substantially in the form attached as **Appendix “A”** to the Sixteenth Report of the Monitor dated September 22, 2023 (the “**Sixteenth Report**”), for the following relief (the “**Mediation Order**”):

- (a) appointing a mediator as an officer of the Court to act as a neutral third party to assist in the mandatory mediation of certain tax disputes and litigation between EGR and the Canada Revenue Agency (“**CRA**”);
- (b) approving the Confidentiality Protocol (as defined in the Mediation Order) attached as **Schedule “A”** to the Mediation Order;
- (c) approving an increase to the Administration Charge, as defined in the Initial Order of this Court dated October 15, 2020 (the “**Initial Order**”), from \$300,000 to \$500,000; and
- (d) such further and other relief as counsel may advise and this Honourable Court may deem just.

2. Capitalized terms not otherwise defined herein shall have the meaning ascribed to such term in the Sixteenth Report.

**THE GROUNDS FOR THIS MOTION ARE:**

3. EGR is in the business of, among other things, gold refining, trading of gold bullion (and other precious metals) and precious metals forward contracts.

4. Over the past decade, CRA has conducted three full-scale audits of EGR relating to,

among other things, the manner in which EGR charges GST/HST to its customers and recovers such GST/HST as Input Tax Credits from CRA.

5. On July 29, 2020, following its most recent audit, CRA issued Notices of Reassessment related to EGR's June 1, 2016 to October 31, 2018 reporting periods, imposing tax, penalties and interest in excess of \$189.5 million (the "**2020 Reassessments**"). CRA further advised EGR that it intended to take enforcement actions notwithstanding EGR's contestation.

6. Upon receiving Notice of CRA's intention to enforce, on October 15, 2020, EGR sought and obtained creditor protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**"), and Deloitte was appointed as Monitor in the proceedings (the "**CCAA Proceedings**"). EGR's filing was intended to create breathing room while EGR pursued its appeal from the 2020 Reassessments at the Tax Court of Canada ("**Tax Court**") bearing Court File No. 2020-1214(GST)G (the "**Tax Litigation**").

7. Over the past three years, the Tax Litigation has proceeded in a protracted manner and at an enormous cost to EGR, with EGR's professional fees in connection with the Tax Litigation and these CCAA Proceedings approaching \$11 million to date. EGR and CRA recently completed discoveries, following which they were required to meet to discuss whether a settlement conference would be beneficial, or whether hearing dates should be set for trial.

8. On March 31, 2023, CRA and EGR jointly wrote to the Tax Court requesting that a settlement conference be scheduled for July 20, 2023, noting that "*the parties believe that a settlement conference would be beneficial*" (the "**Joint Settlement Conference Request**").

9. On May 29, 2023, the Tax Court rejected the Joint Settlement Conference Request.

10. The parties have requested trial dates for May or June of 2024; however, the Tax Court has not yet confirmed any dates. Moreover, there is a sizable discrepancy between each party's proposed length of trial. In particular, EGR's Tax Counsel has advised the Monitor that EGR intends to call approximately 11 witnesses during its proposed four-week trial, while CRA intends to call 60 witnesses and seeks up to 65 days of hearing with a 90-day break between the conclusion of hearing evidence and closing arguments.

11. Given the stakes, appeals from any judgment are also a virtual certainty. The Tax Litigation thus has the potential to continue into 2026 and beyond.

12. The Monitor is of the view that in light of: (i) the projected range of costs of trial and the indeterminate time frames currently experienced in the proceeding before the Tax Court; (ii) the parties' Joint Settlement Conference Request, which was unfortunately rejected by the Tax Court; and (iii) in recognition that conducting litigation without the parameters that one would expect to adhere to in a matter on the Commercial List, that it is imperative that the parties move forward at this time with alternative dispute resolution.

13. The objective of the proposed mediation (the "**Mediation Process**") is to facilitate a global resolution of the Tax Litigation and all related current and potential tax disputes between EGR and CRA; or, should a global resolution not be achieved, a narrowing of the issues for trial.

14. The proposed participants in the Mediation Process are EGR and CRA, together with their respective counsel and advisors. The Monitor would attend the mediation and be available to assist as the parties and the mediator may consider beneficial.

15. The Mediation Process would be privileged, confidential and non-binding so as to encourage a candid and fulsome negotiation of all elements of the Tax Litigation. Any settlement

reached within the Mediation Process would become a binding agreement, subject to Court approval where it affects the interests of EGR.

16. The Monitor has consulted with each of EGR and CRA/DOJ regarding the proposed Mediation Process and form of Mediation Order. EGR is prepared and willing to participate in the Mediation Process, and is supportive of the proposed form of Mediation Order. The CRA opposes the relief sought on this motion and will not voluntarily participate in the Mediation Process.

17. The prospect of meaningful negotiation and settlement of the Tax Litigation (or, alternatively, narrowing of issues) in the context of the Mediation Process, is consistent with the statutory and remedial objectives of the CCAA, a framework intended to facilitate compromises and arrangements between companies and stakeholders. Procedures similar to the proposed Mediation Process have been approved in various other CCAA proceedings.

18. The increase of the Administration Charge from \$300,000 to \$500,000 is required in order to adequately secure the fees and disbursements to be incurred by the Mediator. The proposed increase is reasonable and appropriate in the circumstances.

19. The Monitor relies upon:

- (a) The provisions of the CCAA, including section 11, and the inherent and equitable jurisdiction of this Honourable Court;
- (b) Rules 1.04, 1.05, 1.08, 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;
- (c) Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and

- (d) Such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

20. The Sixteenth Report; and

21. Such further and other evidence as counsel may advise and this Honourable Court may permit.

~~September 22,~~[November 15,](#) 2023

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as at September 25, 2023

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PROCEEDING COMMENCED AT TORONTO

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