

**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 EXPRESS GOLD REFINING LTD.**

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TO : THE SERVICE LIST

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PART I - OVERVIEW

1. The mandatory mediation order requested by the monitor (“**Monitor**”) conflicts with the jurisdiction of the Tax Court of Canada (“**TCC**”) and usurps its right to control its own processes.
2. The claim of the Canada Revenue Agency (“**CRA**”) in this proceeding is based on the Goods and Services Tax/Harmonized Sales Tax (“**GST/HST**”) reassessments of Express Gold Refining Ltd. (“**EGR**”) currently on appeal before the TCC, which has exclusive original jurisdiction to determine that appeal.¹
3. EGR and the CRA jointly requested a settlement conference before the TCC, which refused the request. EGR could have sought to have the TCC reconsider its decision but did not do so.
4. Instead, by its motion, the Monitor seeks to have this Court order what the TCC refused to order. While this Court has broad powers under the CCAA² and the ancillary jurisdiction to interpret the provisions of tax statutes for the purpose of deciding issues properly before it, it should decline to grant the Monitor’s motion.

¹ *Tax Court of Canada Act*, RSC 1985, c. T-2, as amended [“**Tax Court Act**”], [s. 12](#).

² *Companies’ Creditors Arrangement Act*, RSC c. C-36 [“**CCAA**”], [s. 11](#). *Canada v Canada North Group Inc.*, 2021 SCC 30 at [para 21](#) [“**Canada North**”].

PART II - FACTS

5. By notices of reassessment, the CRA reassessed EGR pursuant to the *Excise Tax Act* (“**ETA**”)³ for approximately \$180 million for GST/HST for the reporting periods from June 1, 2016 to July 31, 2018 (“**Reassessments**”).⁴
6. EGR appealed the Reassessments to the TCC (“**Tax Appeal**”). The Attorney General of Canada (“**AGC**”) on behalf of the Minister of National Revenue contested EGR’s Tax Appeal.⁵
7. The CRA’s claim against EGR in this CCAA proceeding is based entirely on the Reassessments and thus inextricably linked to the outcome of the Tax Appeal.

The Issue in the Tax Appeal

8. The primary issue before the TCC on the Tax Appeal is whether EGR correctly claimed input tax credits for its gold refining business.⁶
9. Under the ETA, persons carrying on business (“**Registrants**”) are required to collect and remit GST/HST on the taxable supplies of goods and services they sell. To carry out their business, Registrants acquire supplies on which they must pay GST. Registrants are entitled to receive a credit for the GST/HST they pay

³ *Excise Tax Act*, [RSC 1985, c. 1 E-15](#), as amended [“**ETA**”].

⁴ Affidavit of Sean Evans, affirmed October 27, 2023 at para 2 [“**Evans Affidavit**”], Motion Record of the Attorney General of Canada at Tab 1, page 4 [“**AG’s Motion Record**”].

⁵ Evans Affidavit at paras 2-3, AG’s Motion Record, Tab 1, page 4.

⁶ Evans Affidavit at paras 2-3 and Exhibits “A” and “B”, AG’s Motion Record, Tab 1, pages 4, page 33 at para 52, and page 70 at para 28.

on the supplies they use to produce taxable supplies. These credits are known as “input tax credits” (“**ITCs**”).⁷ Registrants may claim ITCs depending on the extent to which their business makes taxable supplies as opposed to exempt supplies.

10. In the Tax Appeal before the TCC, the CRA contends that EGR was involved in a “carousel scheme” (“**Scheme**”). The purpose of the Scheme was to generate the false impression of entitlement to ITCs by converting pure gold, which is GST/HST exempt or zero-rated, into scrap gold, which is taxable, in circumstances in which EGR knew or ought to have known that GST/HST collectible in respect of those alleged supplies would not be remitted to the Receiver General, but instead would be distributed to various Scheme participants.⁸
11. In the Tax Appeal, the CRA contends that EGR is not entitled to ITCs totalling \$119,903,196.71 in respect of the purported supplies between June 1, 2016 and July 31, 2018 from over 60 Scheme participants. The alleged supplies of scrap gold from the Scheme participants to EGR were artificially created supplies for the sole purpose of participating in the Scheme and not supplies acquired by EGR for consumption, use, or resupply in a *bona fide* business.⁹

⁷ *ETA*, [s.169\(1\)](#).

⁸ Amended Reply, Evans Affidavit, Exhibit “B” at para 22.14, AG’s Motion Record, Tab 1.

⁹ Amended Reply, Evans Affidavit, Exhibit “B”, para 30, AG’s Motion Record, Tab 1.

The Current State of the Tax Appeal

12. The Tax Appeal in the TCC is case managed by a case management judge. Discoveries have been completed and all the undertakings given by the parties have been fulfilled or addressed.¹⁰
13. By a letter dated April 17, 2023, counsel for EGR and the AGC jointly requested that the TCC schedule a settlement conference with respect to the Tax Appeal.¹¹ On May 29, 2023, the TCC advised the parties that their request was denied and asked them to submit a joint application for a hearing of the Tax Appeal.¹²
14. The TCC denied the parties' request for a settlement conference because the parties had not exchanged written settlement offers. EGR has not challenged or raised any concerns with the TCC about its rejection of the parties' request for a settlement conference.¹³
15. In separate letters to the TCC dated June 12, 2023, the AGC and EGR made submissions on the timing and conduct of the Tax Appeal hearing. The parties are available from June 2024 onwards for the hearing and await trial dates from

¹⁰ Evans Affidavit at para 10, AG's Motion Record, Tab 1, pages 6 and 56.

¹¹ Evans Affidavit at para 5 and Exhibit "D", AG's Motion Record, Tab 1, pages 5 and 103-104.

¹² Evans Affidavit at para 5 and Exhibit "E", AG's Motion Record, Tab 1, pages 5 and 107.

¹³ Evans Affidavit at para 5 and Exhibit "E", AG's Motion Record, Tab 1, pages 5 and 107.

the TCC. The AGC estimated that the hearing of the evidence from both parties to the Tax Appeal will not last longer than three months.¹⁴

Other Creditors of EGR

16. EGR's books and records disclose that, as of October 15, 2020, EGR had 108 creditors, excluding the CRA, with aggregate claims of approximately \$39.9 million.
17. In large part, those claims consist of GST/HST charged to EGR but not received by creditors for the periods from August 1, 2018 to October 15, 2020.¹⁵
18. EGR claimed ITCs in respect of GST/HST payable to creditors in the amount of \$37.8 million for that period.¹⁶ The CRA has allowed only \$1.3 million of EGR's claim.¹⁷
19. EGR's standard contract with suppliers stipulates that EGR reserves the right to delay payment of GST/HST, at its discretion, for up to three months to ensure proper compliance with the appropriate tax laws. It states that if the CRA has not determined if the payment of the GST/HST has cleared, EGR may continue

¹⁴ Evans Affidavit at paras 7-9, AG's Motion Record, Tab 1, page 6.

¹⁵ Response to Questions for the Monitor, Q.2, AG's Motion Record, Tab 3, page 155. The Monitor states that \$30.4 million is owed to creditors who the CRA alleges were carousel scheme participants.

¹⁶ Evans Affidavit at para 13, AG's Motion Record, Tab 1, page 7.

¹⁷ The CRA has assessed EGR's returns and denied \$23.6 million of the \$24.9 million claimed as ITCs for the periods of August, September and October 2018. The period of November 1, 2018 to October 15, 2020 has not yet been assessed. EGR claimed ITCs totaling \$12.8 million for that period: Evans Affidavit, para 13, AG's Motion Record, Tab 1, page 7.

to delay payment of the GST/HST until such time as the payment of GST/HST has been cleared or denied or choose to terminate the transaction at the end of the three-month period. It further allows EGR discretion to reverse the transaction if the CRA determines that the GST/HST should not be paid to the customer (due to action or inaction of the customer).¹⁸

PART III - ISSUES

20. The sole issue before this Court is whether it should make an order compelling EGR and the CRA to participate in mandatory mediation of the Tax Appeal before a mediator appointed by this Court.

PART IV - LAW AND SUBMISSIONS

A. THE TCC HAS EXCLUSIVE JURISDICTION TO HEAR AND DETERMINE TAX APPEALS

21. The TCC is a Superior Court of record.¹⁹
22. It has exclusive original jurisdiction to hear and determine tax appeals arising from the *ETA*.²⁰

¹⁸ Evans Affidavit at para 14 and Exhibit “J”, AG’s Motion Record, Tab 1, pages 8 and 126-127.

¹⁹ *Tax Court Act*, [s. 3](#).

²⁰ *Tax Court Act*, [s. 12](#); *ETA*, [s. 302](#).

23. The Supreme Court of Canada (“**SCC**”) has affirmed the need to respect the exclusive jurisdiction of the TCC.²¹ Parliament set up a structure to deal with tax-related appeals that relies on an independent and specialized court. The integrity and efficacy of the system of tax assessments and appeals to the TCC must be preserved.²²
24. The SCC cautioned that judicial review applications should not be used to circumvent the system of tax appeals established by Parliament.²³ Similarly, this motion in a CCAA proceeding should not be used to infringe on the TCC’s jurisdiction and processes.
25. While it is widely recognized that provincial superior courts have broad powers under the CCAA²⁴ and have the ancillary jurisdiction to interpret the provisions of tax statutes when necessary for the purpose of deciding issues properly before

²¹ *Addison & Leyen Ltd v Canada*, 2007 SCC 33 at [para 11](#); *GLP NT Corp v Canada* (2003), 65 OR (3d) 480 (Sup. Ct.) at [para 22](#). The Supreme Court of Canada (“**SCC**”) has granted leave to appeal in two cases involving the exclusive jurisdiction of the Tax Court of Canada (“**TCC**”): (i) *Canada v Dow Chemical Canada ULC*, [2022 FCA 70](#) (leave to appeal granted on February 23, 2023); and (ii) *Canada v Iris Technologies Inc.*, [2022 FCA 101](#) (leave to appeal granted on March 16, 2023) [*“Iris Tech”*]. The SCC heard these two appeals together on November 9, 2023 and reserved judgment. These appeals address the jurisdictional issues between the TCC and the Federal Court of Canada.

²² *Addison & Leyen Ltd v Canada*, *supra* at [para 11](#).

²³ *Addison & Leyen Ltd v Canada*, *supra* at [para 11](#).

²⁴ CCAA, [s. 11](#); *Canada North* at [para 21](#).

them, they should decline to do so if the determination comes in direct conflict with the TCC's jurisdiction.²⁵

26. The determination on the correctness of a tax assessment that is *central* to a superior court proceeding, where the matter is contemporaneously before the TCC, comes in direct conflict with the TCC's jurisdiction and cannot be characterized as ancillary.²⁶

B. A MANDATORY MEDIATION ORDER WOULD CONFLICT WITH THE TCC'S JURISDICTION

27. An order from this Court requiring the parties to engage in mandatory mediation would conflict with the Tax Court's jurisdiction. The mediator's sole task would be to evaluate the merits of the Reassessments for the purpose of resolving the Tax Appeal.
28. The mediator would require an understanding of the factual and legal findings on the issues in the Tax Appeal before the TCC, including legal determinations on the statutory interpretation of the ETA provisions that relate to the calculation of and entitlement to ITCs.²⁷

²⁵ *Canada (Customs and Revenue) v Aboriginal Federated Alliance Inc.*, 2002 ABCA 104 at [paras 18-19](#) [*“Aboriginal Federated Alliance Inc.”*] 783783 *Alberta Ltd. v Canada (Attorney General)*, 2010 ABCA 226 at [paras 26-27](#); *Canada (Attorney General) v Scow*, 2022 BCCA 275 at [paras 89-90](#); *Sorbara v Canada (Attorney General)*, 2009 ONCA 506 at [para 11](#).

²⁶ *Aboriginal Federated Alliance Inc.* at [paras 18-19](#).

²⁷ The appropriate provisions are found at paragraph 29 of the Amended Reply, Evans Affidavit, Exhibit “B” at paras 22.25 to 22.45, AG's Motion Record, Tab 1, page 70-71.

29. The mediator would have to delve into the legal concepts of commercial activity, consideration, exempt supply, taxable supply, zero-rated supply and precious metals, financial instruments, and financial service under the ETA. The mediator would have to understand the parties' positions on whether, among other things, (i) the 60 vendors were legitimate vendors of scrap gold, (ii) EGR's purported transactions were sham transactions or legitimate ones in line with industry standards, (iii) the amounts EGR claimed it paid to Scheme participants were actually remitted to the Receiver General, (iv) EGR conducted a proper risk assessment of its vendors, and (v) EGR knew or ought to have known about the Scheme.²⁸

30. The mediator's tasks will not be ancillary to the Tax Appeal but carried out for the sole purpose of resolving it. While the mediator will not make *a binding determination* on the merits of the Tax Appeal, the mediator's tasks will be the same as that of a TCC judge hearing the matter. Given the overlap between the proposed mediation and the TCC's jurisdiction, this Court should decline to exercise its jurisdiction to grant the order requested by the Monitor.

C. **A MANDATORY MEDIATION ORDER WOULD INFRINGE ON THE TCC'S RIGHT TO CONTROL ITS OWN PROCESS**

31. In the alternative, if the mandatory mediation order does not strictly contravene the TCC's jurisdiction *to hear and determine tax appeals*, it would still usurp the right of the TCC to control its own processes. By the within motion, the Monitor

²⁸ Amended Reply, Evans Affidavit, Exhibit "B" at paras 22.25 to 22.45, AG's Motion Record, Tab 1, pages 59-60.

seeks to make a collateral attack on the TCC's determination not to grant the request of the CRA and EGR for a settlement conference.

32. As a superior court of record vested with plenary powers, the TCC has the right to control and manage its own processes.²⁹
33. The TCC rejected the parties' request to convene a settlement conference because the CRA had not submitted a settlement offer.³⁰
34. Neither the TCC rules nor the practice directive pertaining to settlement conferences require both parties to have submitted settlement offers.³¹ Nonetheless, it was open to the TCC, as part of its ability to control its own process, to reject the parties' request on that basis.
35. As explained by the SCC, considerable deference is owed to procedural rulings made by tribunals with the authority to control their own processes.³² A *fortiori*, as a superior court of record, the TCC should be afforded significant

²⁹ *Tax Court Act*, [s. 3](#); *Lee v Canada (Correctional Service)*, 2017 FCA 228 [*“Lee”*] at [paras 12-13](#). Plenary powers are described as analogous to the inherent powers of provincial superior courts to control their own processes and proceedings: *Lee* at [para 7](#).

³⁰ TCC letter dated May 29, 2023, Evans Affidavit, Exhibit “E”, AG’s Motion Record, Tab 1, page 107.

³¹ Pursuant to [rule 126.2\(1\)](#) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (*“Tax Court Rules”*), the TCC may, at any time, on its own initiative or at the request of a party, direct that a settlement conference be held to consider the possibility of settling any or all of the issues on a tax appeal. The TCC’s Practice Note No. 21, dated November 30, 2018, requires only that a written offer of settlement be made and a written reply be provided: Evans Affidavit, Exhibit “F”, AG’s Motion Record, Tab 1, page 109.

³² *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at [para 231](#).

deference in managing its processes, which includes determining whether to grant a request for a settlement conference.

D. EGR CAN SEEK A RECONSIDERATION OF THE TCC'S DECISION ON THE SETTLEMENT CONFERENCE

36. Ever since the TCC refused the parties' request for a settlement conference on the Tax Appeal, it has been open to EGR to seek to have the TCC reconsider its decision. EGR could have written to the case management judge overseeing the Tax Appeal and made all the submissions the Monitor has made to this Court about the necessity of convening a settlement conference.
37. As noted above, a mediator appointed by this Court would have to come up to speed on all the factual and legal issues in the Tax Appeal before the TCC. As EGR is responsible for the mediator's remuneration, the mediator would prepare for and conduct the mediation at considerable cost to EGR and, by extension, EGR's creditors.
38. By contrast, a settlement conference in the TCC is presided over by a TCC judge,³³ who is well suited to evaluate the merits of the Reassessments and whose evaluation of the positions taken by the parties may have greater weight. The TCC judge would prepare for and conduct the settlement conference at no cost to EGR or the CRA.
39. Tax appeals can only be settled on a principled basis, meaning that the CRA cannot accept an offer of settlement "that cannot be supported by the facts and

³³ *Tax Court Rules*, [r. 126.2\(2\)](#).

the law” pertaining to the case.³⁴ The merits of an assessment are reviewed on a standard of correctness.³⁵ Sawing off the amount at issue between the parties based on commercial considerations is not open to the parties trying to settle a tax appeal.³⁶

E. MANDATORY MEDIATION HAS NEVER BEEN ORDERED WHEN A SINGLE PARALLEL PROCEEDING IN A DIFFERENT COURT IS ONGOING

40. While a CCAA court can order mandatory mediation even in the face of an objecting stakeholder, a CCAA court has never done so where, as in this case, a parallel process is on-going in a different and jurisdictionally specialized court.
41. In *1057863 B.C. Ltd.*, the claim sought to be mediated involved related litigation between the parties in the same court as the CCAA proceeding.³⁷ The superior court overseeing the insolvency proceeding had the jurisdiction and was well-positioned to adjudicate the dispute.
42. The cases of *JTI MacDonald* and *Rothmans, Benson & Hedges, Nortel Networks* and *CannTrust Holdings*³⁸ all involved complex, multi-jurisdictional issues and

³⁴ *CIBC World Markets Inc. v Canada*, 2012 FCA 3 at [paras 20-21](#) [*“CIBC World Markets”*].

³⁵ *Webster v Canada*, 2003 FCA 388 at [para 21](#) [*“Webster”*]; *Iris Tech* at [para 17](#); *ETA*, [s. 301](#) and [302](#).

³⁶ *CIBC World Markets* at [paras 20-25](#). By contrast, in *1057863 B.C. Ltd. (Re)*, [2022 BCSC 759](#) where mandatory mediation was ordered, the claims could be compromised in the mediation based on commercial considerations.

³⁷ In addition, in [1057863 B.C. Ltd. \(Re\)](#), the related compensation claim between the parties was at a much earlier stage than the Tax Appeal is in the present case. Mediation in this case would not streamline the litigation in the Tax Appeal before the TCC; it would duplicate it.

³⁸ *Nortel Networks Corporation (Re)*, 2011 ONSC 4012 at [paras 18-25](#); *CannTrust*

multiple claimants. Mediation was granted to narrow issues, reduce multijurisdictional chaos, and/or ensure equitable treatment of stakeholders. By contrast, the disposition of this CCAA proceeding turns on the result of a tax appeal between two parties that is properly before the TCC.

F. A MANDATORY MEDIATION ORDER IS NOT NECESSARY

EGR's Ability to Fund the Tax Appeal

43. Relying on its professional judgment without any detailed analysis,³⁹ the Monitor argues that mandatory mediation is appropriate because “it is conceivable” that the costs of the CCAA proceeding and the Tax Appeal will wear on EGR’s capacity to continue to fund both on an indefinite basis.⁴⁰
44. Despite bearing almost \$11 million in costs for the CCAA proceeding and the Tax Appeal to date, EGR generated a total of \$3.9 million in after tax profit for 2021 and 2022 even after those costs and has \$2.1 million in the bank.⁴¹ There

Holdings Inc. et al. (Re), 2021 ONSC 4408 at [para 6](#); *JTI-Macdonald Corp (Re)*, 2019 ONSC 2222 at [para 1](#); *Imperial Tobacco, et al, Re*, [2019 ONSC 1684](#) and Endorsement of Justice McEwen, dated March 15, 2019 at [para 5](#).

³⁹ The AGC requested the evidence relied upon for this statement. Response to Questions for the Monitor, Answer to Q.5, AG’s Motion Record, Tab 3, page 156.

⁴⁰ Paragraph 21 of the Monitor’s Sixteenth Report, Monitor’s Motion Record, page 24. Response to Questions for the Monitor, Answer to Q.5, AG’s Motion Record, Tab 3, page 156.

⁴¹ Monitor’s Sixteenth Report at paras 21-22, Monitor’s Motion Record, page 24; Questions for the Monitor Q.3 and 5, Exhibit “C” of the Questions for the Monitor, AG’s Motion Record, Tab 2, pages 130-133 and 141, Response to Questions for the Monitor, Answers to Q.3 and Q.5, AG’s Motion Record, pages 155-156.

is every reason to believe EGR will be able to sustain the costs of the hearing of the Tax Appeal.

EGR's Other Creditors

45. The Monitor suggests that dealing with EGR's other creditors is another reason for the appropriateness of the mandatory mediation order it seeks.
46. Of EGR's aggregate liabilities of \$39.9 million to creditors other than the CRA,⁴² \$30.4 million are claims from suppliers who the CRA allege were Scheme participants.⁴³
47. If EGR is successful in vacating the Reassessments, \$12 million in ITCs claimed by EGR but not yet assessed for the period of November 2018 to October 15, 2020 may become available to EGR to pay a portion of the other creditors' claims.⁴⁴
48. Conversely, if the TCC finds that EGR is not entitled to the ITCs on certain transactions found to be sham transactions, EGR may take the legal position that

⁴² Monitor's Sixteenth Report dated September 22, 2023 at para 20(e), Monitor's Motion Record page 23.

⁴³ Response to Questions for the Monitor, Answer to Q.2, AG's Motion Record, Tab 3, page 155.

⁴⁴ Assuming that the CRA treats the post appeal periods in a manner consistent with the results of the Tax Appeal. Evans Affidavit at para 13, AG's Motion Record, Tab 1, page 7; Response to Questions for the Monitor, Answer to Q2, AG's Motion Record, Tab 3, page 155.

it does not owe GST to the suppliers on those transactions. EGR's standard contract with its suppliers is consistent with this legal consequence.⁴⁵

49. Accordingly, the resolution of the Tax Appeal between EGR and the CRA, no matter which party is successful, will almost certainly reduce the amounts owed by EGR to other creditors.

PART V - ORDER SOUGHT

50. The Attorney General of Canada requests that the Monitor's motion for mandatory mediation Order be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 22, 2023

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⁴⁵ Evans Affidavit at para 14 and Exhibit "J", AG's Motion Record, Tab 1, pages 8 and 126-127.

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PART VI – LIST OF AUTHORITIES**Legislation**

Companies' Creditors Arrangement Act, [RSC c. C-36](#)

Excise Tax Act, [RSC 1985, c. 1 E-15](#)

Tax Court of Canada Act, [RSC 1985, c. T-2](#)

Tax Court of Canada Rules (General Procedure), [SOR/90-688a](#)

Jurisprudence

1057863 B.C. Ltd. (Re), [2022 BCSC 759](#)

783783 Alberta Ltd. v Canada (AG), [2010 ABCA 226](#)

Attorney General of Canada v Iris Technologies Inc., [2022 FCA 101](#)

Addison & Leyen Ltd v Canada, [2007 SCC 33](#)

Canada (Attorney General) v Scow, [2022 BCCA 275](#)

Canada (Customs and Revenue) v Aboriginal Federated Alliance Inc., [2002 ABCA 104](#)

Canada v Canada North Group Inc., [2021 SCC 30](#)

Canada v Dow Chemical Canada ULC, [2022 FCA 70](#)

Canada v Iris Technologies Inc., [2022 FCA 101](#)

CannTrust Holdings Inc. et al. (Re), [2021 ONSC 4408](#)

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Council of Canadians with Disabilities v VIA Rail Canada Inc., [2007 S CC 15](#)

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Imperial Tobacco, et al., [2019 ONSC 1684](#)

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**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
EXPRESS GOLD REFINING LTD.**

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

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