

Court File No.: CV-20-00649558-00CL

**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.**

**TWELFTH REPORT OF THE MONITOR**

**December 12, 2022**

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## INTRODUCTION

1. On October 15, 2020, Express Gold Refining Ltd. (“**EGR**” or the “**Applicant**”) filed for and obtained protection under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”). Pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) granted on October 15, 2020 (the “**Initial Order**”), Deloitte Restructuring Inc. was appointed as the Monitor in these proceedings (in such capacity, the “**Monitor**”). The proceedings commenced by the Applicant under the CCAA are referred to herein as the “**CCAA Proceedings**”. The Initial Order also provided for, among other things, a stay of proceedings with respect to the Applicant until and including October 19, 2020 (the “**Stay Period**”). In his endorsement, Justice Hainey scheduled the comeback hearing (the “**Comeback Hearing**”) for October 19, 2020.
2. At the Comeback Hearing, Justice McEwen amended the Initial Order to, among other things, order that the stay of proceedings shall not apply to the Tax Litigation (as defined herein) and extend the Stay Period until and including October 27, 2020. The Initial Order was amended and restated on October 19, 2020, and again on October 27, 2020 (the “**SARIO**”). The Stay Period in these CCAA Proceedings has been extended numerous times by further Order, most recently up to and including December 16, 2022.
3. The following provides a summary of select orders and endorsements of the Court that are material to the CCAA Proceedings:
  - (a) On May 20, 2021, the Monitor filed a motion (the “**Production Motion**”) for an Order granting the Monitor unfettered access to all documents in EGR’s possession and control that have been provided to EGR or its tax counsel, Baker McKenzie LLP (“**EGR’s Tax Counsel**”), by Canada Revenue Agency (“**CRA**”) in connection with all GST/HST assessments and reassessments that have been issued or will be issued by CRA (the “**Tax Documents**”), including all Tax Documents produced by CRA to EGR or EGR’s Tax Counsel in connection with the appeal commenced by EGR at the Tax Court of Canada (“**Tax Court**”) bearing Court File No. 2020-1214(GST)G (the “**Tax Litigation**”). The Production Motion was heard on June 8, 2021. CRA opposed the Production Motion. The Monitor’s

report to the Court regarding the Production Motion (the “**Fourth Report**”) is attached hereto as **Appendix “A”**.

- (b) On June 9, 2021, the Court issued an endorsement (the “**June 9 Endorsement**”) in respect of the Production Motion. In summary, the June 9 Endorsement provided reasons supporting the Court’s jurisdiction to direct the delivery of the Tax Documents by EGR to the Monitor and further directed an additional hearing, if necessary, to determine any restrictions to be imposed upon certain documents, as identified by CRA. A copy of the June 9 Endorsement is attached hereto as **Appendix “B”**.
- (c) On August 17, 2021, the Court issued a Production and Confidentiality Order, dated June 8, 2021, ordering EGR to produce and make available to the Monitor all Tax Documents (the “**Production Order**”). A copy of the Production Order is attached hereto as **Appendix “C”**.
- (d) On August 16, 2022, the Monitor issued its tenth report (the “**Tenth Report**”), a copy of which is attached hereto as **Appendix “D”**. The purpose of the Tenth Report was to provide the Court with information and updates on the following:
  - (i) the status of the Tax Litigation and the next steps in the CCAA Proceedings; and
  - (ii) the Monitor’s proposed attendance at the examinations for discovery in the Tax Litigation (the “**Examinations**”), which commenced on September 6, 2022, and were completed on October 31, 2022.
- (e) On August 17, 2022, the Court held a case conference (the “**August Case Conference**”) at the request of the Monitor to discuss the Monitor’s attendance at the Examinations. On that same day, Justice McEwen issued an endorsement reserving the scheduling of a motion to address the Monitor’s attendance at the Examinations, to a date to be determined.

4. Copies of all orders and endorsements granted in the CCAA Proceedings are located on the Monitor's website accessible at: <https://www.insolvencies.deloitte.ca/en-ca/pages/ExpressGoldRefiningLtd.aspx> (the "**Monitor's Website**"). The Monitor encourages interested stakeholders to review the Monitor's Website for a complete history of the CCAA Proceedings, including the various orders and endorsements issued.

## **PURPOSE**

5. The purpose of this twelfth report of the Monitor (the "**Twelfth Report**") is to provide the Court with information and updates on the following:
  - (a) the activities of EGR and the Monitor from September 12, 2022, the date of the Eleventh Report of the Monitor (the "**Eleventh Report**"), a copy of which is attached hereto as **Appendix "E"**, filed in connection with the previous motion to extend the Stay Period granted in the CCAA proceedings, to the date of this Twelfth Report;
  - (b) EGR's cash flow results for the 14-week period from August 22, 2022 to November 25, 2022, with a comparison to forecast amounts;
  - (c) EGR's revised cash flow forecast (the "**Revised Cash Flow Forecast**") for the 17-week period from November 28, 2022 to March 24, 2023, and the Monitor's comments thereon;
  - (d) the status of the Tax Litigation;
  - (e) the status of the Examinations, and the Monitor's access to the transcripts generated at the Examinations (the "**Transcripts**"), as described herein; and
  - (f) the Monitor's recommendations.
6. This Twelfth Report should be read in conjunction with the Affidavit of Atef Salama sworn December 6, 2022 in support of the Applicant's motion for the extension of the Stay Period (the "**Salama Affidavit**").

## **TERMS OF REFERENCE AND DISCLAIMER**

7. In preparing this Twelfth Report and making the comments herein, the Monitor has been provided with, and has relied upon the following information (collectively, the “**Information**”): unaudited financial information, books and records and financial information prepared by EGR, and discussions with management of the Applicant (“**Management**”).
8. The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Generally Accepted Assurance Standards (“**Canadian GAAS**”) pursuant to the Chartered Professional Accountants Canada Handbook and, accordingly, the Monitor expresses no opinion or other form of assurance contemplated under Canadian GAAS in respect of the Information.
9. Some of the information referred to in this Twelfth Report consists of forecasts and projections. An examination or review of the financial forecasts and projections, as outlined in the Chartered Professional Accountants Canada Handbook, has not been performed.
10. Future oriented financial information referred to in this Twelfth Report was prepared based on Management’s estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be significant.
11. Unless otherwise stated, all monetary amounts noted herein are expressed in Canadian dollars.

## **ACTIVITIES OF EGR SINCE THE ELEVENTH REPORT**

12. The activities of EGR since the Eleventh Report are set out at paragraphs 24 to 28 of the Salama Affidavit, and such activities of EGR that are related to or arising out of these CCAA Proceedings include:

- (a) complied with the terms of the Second Amended and Restated Monitoring Protocol;
- (b) continued to manage its relationships with customers and suppliers to minimize business disruption;
- (c) continued to provide regular updates and information to the Monitor with respect to the business and the Tax Litigation; and
- (d) continued its efforts to advance the Tax Litigation. A status update of the Tax Litigation is provided in paragraphs 9 to 15 of the Salama Affidavit.

### **ACTIVITIES OF THE MONITOR SINCE THE ELEVENTH REPORT**

13. Since the Eleventh Report, the Monitor has undertaken the following activities:

- (a) monitored EGR's business in accordance with the Second Amended and Restated Monitoring Protocol;
- (b) reviewed EGR's GST/HST filings and communicated with CRA regarding the processing status. In this regard, CRA processed and released net tax refunds for GST/HST filings for the periods from October 16, 2020 to August 31, 2022. The GST/HST filings for the September 2022 and October 2022 periods are currently under review by CRA;
- (c) communicated with EGR's restructuring counsel regarding developments in the CCAA Proceedings and Tax Counsel regarding the status of the Tax Litigation;
- (d) communicated with CRA regarding developments in these CCAA Proceedings;
- (e) communicated with EGR and CRA in relation to the Tax Litigation timeline and the Examinations; and
- (f) assisted EGR in preparing the Revised Cash Flow Forecast and cash flow variance reporting.

## **CASH FLOW FORECAST AND RESULTS RELATIVE TO FORECAST**

14. Summarized in the following table are EGR's actual cash receipts and disbursements for the 14-week period ended November 25, 2022 (the "**Reporting Period**"), as compared to the corresponding weeks in the cash flow forecast included in the Eleventh Report.

<b>Express Gold Refining Ltd.</b>				
<b>Summary of Actual versus Forecast Cash Flows</b>				
<b>For the 14-week period from August 22, 2022 to November 25, 2022</b>				
<b>(\$CAD '000s)</b>				
<b>Unaudited</b>				
	<b>Actual</b>	<b>Forecast</b>	<b>Variance</b>	<b>Note</b>
<b>Receipts</b>				
Collection from Sales and Accounts Receivable	13,184	15,408	(2,224)	<b>A</b>
HST refunds	1,089	1,078	11	<b>B</b>
Interest income	9	2	7	
Other	(88)	-	(88)	<b>C</b>
<b>Total Receipts</b>	<b>14,194</b>	<b>16,488</b>	<b>(2,294)</b>	
<b>Disbursements</b>				
Purchases	(10,633)	(14,791)	4,158	<b>D</b>
Customer accounts and hedging	(1,996)	-	(1,996)	<b>E</b>
Salaries and wages	(233)	(234)	1	
Consulting and professional fees	(40)	(40)	-	
General Administrative Expenses	(63)	(66)	3	
Insurance	(13)	(92)	79	<b>F</b>
Rent	(67)	(50)	(17)	<b>G</b>
Advertising and promotion	(36)	(37)	1	
Vehicle	(7)	(10)	3	
Freight	(26)	(30)	4	
Income Tax	-	(20)	20	<b>H</b>
<b>Total Disbursements</b>	<b>(13,114)</b>	<b>(15,370)</b>	<b>2,256</b>	
Litigation Costs	(412)	(694)	282	<b>I</b>
Restructuring Costs	(267)	(470)	203	<b>J</b>
<b>Total Litigation and Restructuring Costs</b>	<b>(679)</b>	<b>(1,164)</b>	<b>485</b>	
Intercompany loan	-	-	-	
<b>Total Intercompany loan</b>	<b>-</b>	<b>-</b>	<b>-</b>	
<b>Net Cash Flow</b>	<b>401</b>	<b>(46)</b>	<b>447</b>	
<b>Opening Cash</b>	<b>1,391</b>	<b>1,391</b>	<b>-</b>	
<b>Ending Cash</b>	<b>1,792</b>	<b>1,345</b>	<b>447</b>	

15. EGR's actual net cash inflow for the Reporting Period was \$401,000 compared to forecast net cash outflow of \$46,000, resulting in a favourable variance of \$447,000. The following are the reasons for the major variances, identified by the notes in the above table:

- A** An unfavourable variance of \$2.2 million in sales receipts is a permanent difference due to what Management has advised is decreased customer traffic as a result of the decrease in gold price during the first 11 weeks of the Reporting Period;
- B** A favourable variance of \$11,000 in HST refunds is due in part to a permanent difference from i) \$153,000 in higher than expected receipt from the August 2022 net tax refund, and ii) a \$40,000 reversal of a timing difference from the November 2020 GST/HST return, offset by an unfavourable timing difference from the forecast receipt of the September 2022 net tax refund of \$181,000 which has not yet been received.
- C** An unfavourable variance of \$88,000 in other disbursements is a permanent difference due to the exchange rate differences between the average actual foreign exchange rate during the Reporting Period of 1.34 compared to the forecast foreign exchange rate of 1.29 used when converting from Canadian to US dollars.
- D** A favourable variance of \$4.2 million in purchases is a permanent difference due to what Management has advised is decreased customer traffic as a result of the decrease in gold price during the first 11 weeks of the Reporting Period;
- E** An unfavourable variance of \$2.0 million in customer accounts and hedging is primarily due to transfers out totaling i) \$419,000 to EGR's hedging/trading accounts held at Saxo Bank and FXDD and, ii) \$1.6 million related to advances to customers against the customers' gold held at EGR. EGR takes positions in the gold futures markets using the Saxo Bank and FXDD hedging/trading account to hedge against short and long-term fluctuations in the price of gold;
- F** A favourable variance of \$79,000 in insurance is a timing difference that will reverse in the future;
- G** An unfavourable variance of \$17,000 is a timing difference that will reverse in the future;

- H** A favourable variance of \$20,000 in income tax is a timing difference that will reverse in the future;
- I** A favourable variance of \$282,000 in litigation costs is a timing difference that will reverse in the future as a result of a delay in receipt and payment of invoices; and
- J** A favourable variance of \$203,000 in restructuring costs is a timing difference that will reverse in the future as a result of a delay in receipt and payment of invoices.

### **APPLICANT'S REVISED CASH FLOW FORECAST**

16. The Applicant, with the assistance of the Monitor, has prepared the Revised Cash Flow Forecast, which covers the period from November 28, 2022 to March 24, 2023 (the “**Revised Cash Flow Period**”) for the purposes of projecting the cash position of the Applicant’s planned operations and other activities during the Revised Cash Flow Period. A copy of the Revised Cash Flow Forecast is attached hereto as **Appendix “F”**.
17. The Revised Cash Flow Forecast has been prepared by Management, using the probable and hypothetical assumptions set out in the notes to the Revised Cash Flow Forecast (the “**Assumptions**”), and is presented on a weekly basis during the Revised Cash Flow Period.
18. EGR’s opening cash balance on November 28, 2022 was \$1.8 million. The forecast cash flow surplus for the Revised Cash Flow Period before litigation and restructuring costs is estimated to be approximately \$830,000. Litigation and restructuring costs in connection with the Tax Litigation and these CCAA proceedings are estimated to be approximately \$600,000 and \$540,000, respectively, over the Revised Cash Flow Period. As a result, the forecast cash flow deficit for the Revised Cash Flow Period after litigation and restructuring costs is estimated to be \$400,000, resulting in an estimated ending cash balance of \$1.4 million on March 24, 2023.
19. Accordingly, the Applicant is expected to have sufficient liquidity to operate during the proposed Stay Extension Period. However, with all of its costs considered, including all operating costs, litigation costs and restructuring costs, EGR continues to experience an overall deteriorating liquidity position.

20. The Monitor has reviewed the Revised Cash Flow Forecast to the standard required of a Court-appointed monitor by section 23(1)(b) of the CCAA. Section 23(1)(b) requires a monitor to review the debtor's cash flow statement as to its reasonableness and to file a report with the Court on the monitor's findings. The Canadian Association of Insolvency and Restructuring Professionals' Standards of Professional Practice include a standard for monitors fulfilling their statutory responsibilities under the CCAA in respect of a monitor's report on a cash flow statement.
21. In accordance with the standard, the Monitor's review of the Revised Cash Flow Forecast consisted of inquiries, analytical procedures and discussions related to the Information. Since the Assumptions need not be supported, the Monitor's procedures with respect to them were limited to evaluating whether they were consistent with the purpose of the Revised Cash Flow Forecast. The Monitor also reviewed the support provided by Management for the Assumptions and the preparation and presentation of the Revised Cash Flow Forecast.
22. Based on the Monitor's review, nothing has come to its attention that causes it to believe, in all material aspects, that:
  - (a) the Assumptions are not consistent with the purpose of the Revised Cash Flow Forecast;
  - (b) as at the date of this Report, the Assumptions are not suitably supported and consistent with the plans of the Applicant or do not provide a reasonable basis for the Revised Cash Flow Forecast, given the Assumptions; or
  - (c) the Revised Cash Flow Forecast does not reflect the Assumptions.
23. Since the Revised Cash Flow Forecast is based on Assumptions regarding future events, actual results will vary from the information presented even if the Assumptions occur, and the variations could be material. Accordingly, the Monitor expresses no assurance as to whether the Revised Cash Flow Forecast will be achieved. In addition, the Monitor expresses no opinion or other form of assurance with respect to the accuracy of the financial

information presented in the Revised Cash Flow Forecast or relied upon by the Monitor in preparing this Twelfth Report.

24. The Revised Cash Flow Forecast has been prepared solely for the purposes described above, and readers are cautioned that it may not be appropriate for other purposes.

## TAX LITIGATION UPDATE

### *The Examinations*

25. As discussed in the Monitor’s prior reports, CRA’s re-assessments and potential enforcement against EGR was the catalyst for EGR’s filing for creditor protection under the CCAA. The Tax Litigation (which is EGR’s appeal against such re-assessments) is a central component of the CCAA Proceedings.
26. The timetable for the Tax Litigation is set out in an order of the Tax Court dated March 23, 2022 (the “**Timetable Order**”), and is summarized as follows:

<b>Step</b>	<b>Deadline for Completion</b>
Examinations for Discovery	October 31, 2022
Fulfill undertakings	November 30, 2022
Follow-up questions arising from undertakings	December 19, 2022
Responses to follow up questions	January 27, 2023
Status update to court re: readiness for hearing	February 28, 2023

27. On July 25, 2022, the Monitor’s counsel wrote to EGR’s CCAA counsel and CRA’s counsel (the “**DOJ**”) advising of the Monitor’s intention to attend the Examinations “as an observer” (the “**July 25 Letter**”). In the July 25 Letter, the Monitor’s counsel was clear regarding the scope of the Monitor’s attendance stating that “the Monitor does not seek to actively participate in the Examinations by making any statements on the record, posing

any questions to the witnesses or their counsel(s) or otherwise interfering with the parties' processes, including scheduling". A copy of the July 25 Letter is attached hereto as **Appendix "G"**.

28. EGR did not take any issue with the Monitor's attendance at the Examinations.
29. On August 10, 2022, the DOJ delivered a responding letter indicating its opposition to the Monitor's request. A copy of DOJ's letter is attached hereto as **Appendix "H"**.
30. On the same date, August 10, 2022, the DOJ sent a separate letter to the case management judge in the Tax Litigation (the "**Case Management Judge**"), a copy of which is attached hereto as **Appendix "I"**, requesting a case management call on an urgent basis to discuss the Monitor's request.
31. On August 15, 2022, the DOJ sent a second letter to the Case Management Judge, a copy of which is attached hereto as **Appendix "J"**. Soon after, EGR's Tax Counsel advised the Monitor that the Case Management Judge convened a conference call during the afternoon of August 16, 2022. The Monitor was not invited to attend the call and has no direct knowledge of the submissions or representations made during the call regarding the Monitor's request to attend the Examinations.
32. As noted above, on August 17, 2022, counsel for the Monitor, EGR and the DOJ, attended the August Case Conference before this Court regarding the Monitor's attendance at the Examinations. In advance of the August Case Conference, the Monitor prepared and delivered the Tenth Report.
33. As set out in paragraphs 15-21 of the Tenth Report, the alleged basis for CRA's objection to the Monitor's in-person attendance at the Examinations was twofold:
  - (a) CRA believed that the parties to the Tax Litigation have absolute control as to whether and how an adverse party's examination evidence is used and the Monitor's reporting obligations in the CCAA Proceeding could interfere with the parties' control of "information gleaned from observing" the Examinations; and

- (b) CRA believed that the cause of EGR's financial difficulties should by now be known to the Monitor.

34. The Monitor's response to CRA's objections was as follows:

- (a) there is no credible concern regarding control of information because the Monitor's attendance to observe the Examinations would be subject to the strict confidentiality provisions contained in the Production Order (as may be amended or supplemented by this Court); and
- (b) regarding the cause of EGR's financial difficulties, the Monitor was (and is) only aware of the allegations asserted by CRA against EGR. Based on the documentary evidence it has reviewed, the Monitor is unable to understand or consider the validity or invalidity of the allegations. The Examinations provided an important opportunity to supplement the documentary evidence and provide crucial insight into the credibility of the allegations and witnesses, the causes of EGR's insolvency and whether EGR has been acting in good faith and with due diligence prior to and during the CCAA Proceedings. Such information could, as appropriate, facilitate the use of these CCAA Proceedings as a means of resolving the issues between EGR and CRA without the need for (potentially) years of further litigation.

35. The scheduling of a motion to address the Monitor's attendance was reserved and the parties continued their discussions with a view to resolving the issue before the scheduled start of the Examinations on September 6, 2022.

36. On August 19, 2022, the DOJ delivered a further letter to the Tax Court requesting a direction or order to exclude the Monitor from attendance at the Examinations. A copy of the DOJ's letter is attached hereto as **Appendix "K"**.

37. On August 22, 2022, counsel for the Monitor delivered correspondence to the Tax Court outlining its concerns with the CRA's request, in particular the lack of procedural fairness with respect to the rights of the Monitor without (i) any formal motion from the CRA, or

- (ii) giving the Monitor an opportunity to make submissions on the issue. A copy of counsel for the Monitor's letter is attached hereto as Appendix "L".
38. One of the Monitor's primary concerns in relation to the Tax Litigation is that it proceeds on an expedited basis within EGR's financial capabilities and consistent with the objectives of the CCAA. As such, rather than risk any delays to the Timetable, the Monitor did not schedule a motion prior to the start of the Examinations and instead concentrated its efforts on receiving and reviewing the Transcripts in accordance with the Production Order and paragraph 24(e) of the SARIO.
39. By September 6, 2022, the Monitor understood that all parties were in agreement that EGR would provide the Monitor with the Transcripts on a rolling basis. EGR's Tax Counsel advised the Monitor that on September 6, 2022, being the first day of Examination, they raised the issue directly with the DOJ and the DOJ expressly agreed to the Monitor receiving the Transcripts. As such, EGR's Tax Counsel began delivering the Transcripts to the Monitor and its counsel on a rolling basis beginning on September 8, 2022.
40. This practice continued until approximately October 7, 2022, when DOJ forwarded to the Monitor a Directive from the Case Management Judge dated September 8, 2022 (the "**Directive**"), but which had not been delivered to EGR or the CRA until October 6, 2022.
41. The Directive provided that "each party's discovery examination in this matter is to be conducted without the CCAA Monitor and or its counsel present or in any other way observing or listening, particularly given that, unlike typical hearings and trials, discovery examinations including in this Court are not public proceedings". Of note, the Monitor was not provided an opportunity to respond to the Tax Court prior to the issuance of the Directive.
42. In a covering email to EGR's Tax Counsel, the DOJ stated that the Directive "would contradict any written agreement that parties to the CCAA matter may enter into pertaining to the transcripts". A copy of the DOJ's covering email sent October 7, 2022 is attached hereto as Appendix "M" and a copy of the Directive is attached hereto as Appendix "N".

43. The DOJ subsequently inquired with EGR's Tax Counsel as to whether EGR had stopped delivering Transcripts to the Monitor and whether it requested that the Monitor "return" the Transcripts in its possession.
44. In the Monitor's view, the Directive does not prohibit the Monitor from receiving and reviewing the Transcripts as it only contemplates the Monitor "observing or listening" to the live Examinations and not receiving a copy the Transcripts afterwards. Furthermore, EGR's obligation to deliver the Transcripts is expressly set forth in the Production Order and the Monitor is empowered to have access to the Transcripts under paragraph 24(e) of the SARIO.
45. Notwithstanding the foregoing and in order to avoid any delays under the Timetable, the Monitor agreed to a temporary moratorium on the delivery of the Transcripts until the Examinations were completed, while reserving all rights for further Court determination, if required. As a result, EGR's Tax Counsel stopped delivering the Transcripts to the Monitor, with the most recent Transcript in the Monitor's possession being dated October 6, 2022. EGR's Tax Counsel advised the Monitor that the Examinations were completed on October 31, 2022, subject to each party answering their outstanding undertakings, under advisements and refusals.
46. On November 15, 2022, counsel to the Monitor delivered correspondence to the DOJ requesting its position in relation to the delivery of the balance of the Transcripts (for the period of October 7, 2022 to October 31, 2022) (the "**Remaining Transcripts**"). A copy of the November 15, 2022 correspondence is attached hereto as **Appendix "O"**.
47. On November 16, 2022, the DOJ delivered further correspondence to the Monitor indicating that the delivery of the Remaining Transcripts is guided by the Directive and, as a result, a Tax Court issue. This position conflicts with the SARIO and the Production Order. A copy of the DOJ's November 16, 2022 correspondence is attached hereto as **Appendix "P"**.
48. On November 18, 2022, counsel to the Monitor were copied on an email exchange between EGR's Tax Counsel and the DOJ in relation to the delivery of the Remaining Transcripts.

In short, EGR's Tax Counsel communicated to the DOJ that: (i) EGR suspended the delivery of Transcripts to the Monitor effective October 6, 2022, and that the delivery of the Transcripts up to that date were disclosed with the "clear and unequivocal agreement" of the CRA/DOJ, (ii) EGR has not requested the return of the Transcripts delivered to date, and (iii) EGR does not oppose the delivery of the Remaining Transcripts to the Monitor which is consistent with EGR's obligations in the CCAA Proceedings. A copy of the November 18, 2022 correspondence is attached hereto as **Appendix "Q"**.

49. At the time of issuing this Twelfth Report, the Monitor continues to engage in ongoing discussions with the CRA/DOJ and EGR regarding the Monitor's access to the Remaining Transcripts. The Monitor's position remains that it is entitled to all Transcripts pursuant to the Production Order and reserves its right to bring a motion for further relief from this Court should discussions with the CRA/DOJ reach an impasse.

### **THIRD PARTY MAREVA INJUNCTION**

50. On November 28, 2022, the Monitor learned through counsel that EGR had on November 7, 2022 been notified by its banker, the Canadian Imperial Bank of Commerce ("CIBC"), that its accounts containing approximately \$860,000 had been frozen. CIBC had done so as it apparently had received notice of a *Mareva* order dated November 2, 2022, issued by Justice Myers.
51. Upon learning of this development, the Monitor, through counsel, immediately began to investigate the underlying circumstances, including through discussions with EGR's counsel and counsel to the plaintiff who had obtained the *Mareva* order. To date the investigation has revealed the following.
52. On June 14, 2022, Chicago Title Insurance Company ("CTIC") commenced an action bearing court file number CV-22-682646 against a number of parties (the "**Initial Defendants**"), seeking damages of \$2.75 million for, among other things, fraud. The core allegation is that the defendants, or some of them, engaged in a mortgage fraud and subsequently "laundered" the fraudulently obtained proceeds through various transactions and parties.

53. On July 22, 2022, CTIC obtained a *Mareva* order from Justice Koehnen against the Initial Defendants, a copy of which is attached hereto as Appendix “R”. Justice Koehnen’s order was extended by further orders of Justices Vermette (August 2, 2022), Black (August 12, 2022), and Myers (September 7, and October 6, 2022). A copy of Justice Myers’ order dated October 6, 2022 is attached hereto as Appendix “S”.
54. On November 2, 2022, Justice Myers issued a further order that granted CTIC leave to add a number of additional defendants (the “**Additional Defendants**”) to the original claim. EGR was included among the Additional Defendants. A copy of the Amended Statement of Claim is attached hereto as Appendix “T”. It was apparently this order and the Amended Statement of Claim that caused CIBC to freeze the Company’s accounts.
55. Counsel to the Monitor spoke to CTIC’s counsel on December 6, 2022, to obtain further background information. EGR’s counsel, on learning of the freezing of its accounts, discussed the matter with CTIC’s counsel, including the pending CCAA proceeding. CTIC’s counsel was apparently unaware that EGR had been, since 2020, subject to these CCAA Proceedings. None of the various Judges who issued the orders described above was aware of the CCAA proceeding or the pending stay of proceedings. Consequently, CTIC’s counsel directed CIBC to release EGR’s accounts from the freeze and to effectively disregard Justice Myers’ order of November 2, 2022. It appears from discussions with CTIC’s counsel that the principal purpose of adding EGR to CTIC’s action has been to obtain disclosure documents in EGR’s possession that are relevant to the transactions in issue. Counsel to the Monitor has, to date, not been made aware of any facts or circumstances implying that EGR in fact participated in the alleged fraud, as opposed to having been an arm’s length *bona fide* counterparty without any actual knowledge of the alleged scheme.
56. The Monitor is continuing to investigate matters but is currently of the view that the *Mareva* order issued against EGR has no effect in light of the CCAA stay of proceedings. To the extent the issue cannot be resolved between EGR and CTIC, the Monitor intends to seek the Court’s directions once all available information has been considered.

57. Further information regarding the *Mareva* injunction is contained in the Salama Affidavit at paragraphs 16 to 23.

**STAY EXTENSION**

58. The current Stay Period expires on December 16, 2022. EGR is seeking an extension of the Stay Period up to and including March 16, 2023 in order to allow EGR, with the assistance of the Monitor, to:

- (a) preserve the *status quo* and continue to maintain the stability of operations;
- (b) work towards a resolution of the Tax Litigation with CRA; and
- (c) determine next steps in respect of the CCAA Proceedings.

59. As described above, the Revised Cash Flow Statement indicates that EGR will have sufficient liquidity during the Stay Extension Period.

60. In the Monitor's view, EGR has acted and continues to act in good faith and with due diligence in these CCAA Proceedings.

61. The Monitor supports EGR's request for the extension of the Stay Period to March 16, 2023.

All of which is respectfully submitted this 12<sup>th</sup> day of December, 2022.

**Deloitte Restructuring Inc., solely in its  
capacity as Court-appointed Monitor of  
Express Gold Refining Ltd.**



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Phil Reynolds, LIT  
Senior Vice-President



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Warren Leung, LIT  
Senior Vice-President

Appendix “A”  
to the Twelfth Report of the Monitor

**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.**

**FOURTH REPORT OF THE MONITOR**  
**May 19, 2021**

**INTRODUCTION**

1. On October 15, 2020, Express Gold Refining Ltd. (“**EGR**” or the “**Applicant**”) filed for and obtained protection under the *Companies' Creditors Arrangement Act* (the “**CCAA**”). Pursuant to the Order of this Court granted October 15, 2020 (as may be amended, restated or supplemented from time to time, the “**Initial Order**”), Deloitte Restructuring Inc. (“**Deloitte**”) was appointed as the Monitor in these proceedings (in such capacity, the “**Monitor**”). The Initial Order also provided for, among other things, a stay of proceedings with respect to the Applicant until and including October 19, 2020 (the “**Stay Period**”). In his endorsement, Justice Hainey scheduled the comeback hearing (the “**Comeback Hearing**”) for October 19, 2020.
2. On October 18, 2020, Deloitte filed the First Report of the Monitor (the “**First Report**”) which, among other things, described the activities of EGR and the Monitor and the

development of a monitoring protocol, in conjunction with the Applicant, with respect to the business operations of EGR.

3. At the Comeback Hearing on October 19, 2020, Justice McEwen amended the Initial Order (the “**Amended Initial Order**”) to, among other things, extend the Stay Period until and including October 27, 2020.
4. On October 27, 2020, the Amended Initial Order was amended a second time (the “**Second Amended Initial Order**”) to approve the monitoring protocol (the “**Monitoring Protocol**”) agreed to among the Applicant, the Canada Revenue Agency (“**CRA**”) and the Monitor, and to extend the Stay Period until and including December 15, 2020.
5. On December 14, 2020, the Court granted an Order extending the Stay Period until and including March 15, 2021.
6. On March 8, 2021, the Court granted an Order approving the amended protocol (the “**Amended Monitoring Protocol**”) agreed to on March 1, 2021 among the Applicant, CRA and the Monitor, and extending the Stay Period until and including June 11, 2021.

## **PURPOSE**

7. The purpose of this fourth report of the Monitor dated May 19, 2021 (the “**Fourth Report**”) is to provide information to the Court on the relief sought by the Monitor related to access to certain books and records of the Applicant that may be restricted by CRA as it relates to the Tax Litigation (defined below).

## ACCESS TO EGR'S BOOKS AND RECORDS

8. In his affidavit sworn October 14, 2020 (the “**First Salama Affidavit**”), EGR’s Vice-President, Atef Salama, states that the sole reason for EGR’s application for creditor protection under the CCAA is its ongoing tax disputes with CRA, most notably a GST/HST reassessment by CRA resulting in tax liability in excess of \$180 million. At paragraph 4 of the First Salama Affidavit, Mr. Salama goes as far as to state that “... but for the disputes with the [CRA]... [EGR] would be a solvent and successful business with no need for the protections afforded by these proceedings.” A copy of the First Salama Affidavit (without exhibits) is attached hereto as **Appendix “A”**.
9. EGR’s financial statements appear to support Mr. Salama’s assertions. For example, for the year ended May 31, 2020, EGR had earnings before tax of approximately \$8.4 million and, for the year ended May 31, 2019, EGR had earnings before tax of approximately \$3.3 million. EGR appears to be able to service its debt obligations in the ordinary course except for the tax liability related to the GST/HST reassessment.
10. Pursuant to section 23(1)(c) of the CCAA, the Monitor is required to report to this Court regarding “any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company’s business and financial affairs and the cause of its financial difficulties or insolvency...”.
11. The Monitor’s investigation into EGR’s business and financial affairs must include a full investigation into the ongoing tax disputes/assessments/litigation between EGR and CRA (collectively, the “**Tax Litigation**”), as the Tax Litigation is the root cause of EGR’s

insolvency. To date, the Monitor has faced continuing challenges in accessing certain records related to the Tax Litigation, either from EGR or the CRA.

12. Section 24(e) of the Second Amended Initial Order stipulates that the Monitor shall have “...full and complete access to the... books, records, data, including data in electronic form, and other financial documents of the Applicant...”
13. The Monitor further notes that section 24 of the CCAA provides that “for the purposes of monitoring the company’s business and financial affairs, the monitor shall have access to the company’s property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that it is necessary to adequately assess the company’s business and financial affairs.”
14. To date, EGR has granted the Monitor access to its books and records but it has not been at liberty to provide access to documents produced by CRA to its tax counsel, Baker McKenzie LLP (“**EGR’s Tax Counsel**”) in the course of the Tax Litigation which are subject to the implied undertaking rule which binds EGR’s Tax Counsel (collectively, the “**Tax Documents**”).<sup>1</sup> EGR does not oppose the Monitor’s request for unfettered access to *all* of EGR’s books and records, including the Tax Documents. However, the issue, as the Monitor understands it, is that CRA produced the Tax Documents to EGR in the course of the Tax Litigation and therefore the Tax Documents are protected by operation of the implied undertaking rule to which EGR’s Tax Counsel is subject by operation of law.

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<sup>1</sup> The Tax Litigation includes an appeal proceeding that EGR has commenced at the Tax Court of Canada bearing Court File No. 2020-1214(GST\_G).

Access to the Tax Documents will allow the Monitor to understand and independently report to this Court, and to EGR's stakeholders, regarding the Tax Litigation.

#### **THE MONITOR'S EFFORTS TO DATE**

15. On January 25, 2021, the Monitor requested from CRA, via its counsel in the CCAA Proceedings, the Department of Justice (the "**CCAA DOJ**"), information that would allow the Monitor to substantively understand the Tax Litigation and the carousel scheme that is being alleged by CRA, which includes but is not limited to the Tax Documents.
16. The CCAA DOJ responded to the Monitor's request for information on February 11, 2021, advising that CRA is unable to provide this information to the Monitor directly, due to confidentiality restrictions imposed on CRA pursuant to section 241 of the *Income Tax Act* (Canada). However, CRA then stated that if EGR authorizes the Monitor to obtain a copy of the requested documents, then it would be amenable to the Monitor seeking an Order authorising limited disclosure, provided the Order mandates that the contents of the disclosure be confidential and not form a part of the public record or be shared with anyone else.
17. Separately, the Monitor requested copies of the Tax Documents, including a CRA "position paper" and "audit report", from EGR's Tax Counsel, but it told the Monitor that it cannot produce the Tax Documents unless CRA or its counsel in the Tax Litigation, the Department of Justice Canada ("**Tax DOJ**"), agree to waive the implied undertaking rule which binds EGR's Tax Counsel.

18. The Monitor notes that EGR's Tax Counsel has made two written requests, on January 18 and February 1, 2021, to Tax DOJ asking for its consent to EGR's Tax Counsel's disclosure of the Tax Documents to the Monitor. Tax DOJ responded on February 17, 2021, advising that CRA would consent to an Order authorizing EGR to share the position paper and audit report with the Monitor, but only on the basis that the contents of the disclosure would be kept confidential and not form a part of the public record or be shared in any capacity.
19. In short, both CCAA DOJ and Tax DOJ have told the Monitor that they will only agree to disclose the Tax Documents to the Monitor if such disclosure is made under a Court Order preserving confidentiality.
20. In an effort to avoid the time and cost of a court attendance, on March 1, 2021, Monitor's counsel, Dentons Canada LLP ("**Dentons**"), proposed to satisfy CRA's confidentiality concerns by way of executing a written undertaking.
21. On March 22, 2021, following email and telephone correspondence among Dentons, the Monitor and CCAA DOJ, Dentons provided CCAA DOJ with a draft confidentiality undertaking (the "**Draft Undertaking**") setting out terms under which CRA would provide the Monitor with access to confidential documents in the Tax Litigation, including but not limited to the Tax Documents. On April 14, 2021, CCAA DOJ provided the Monitor's counsel with a revised Draft Undertaking, which limited disclosure to CRA's position paper and audit report. In a separate email, CCAA DOJ advised that it was unable to extend the undertaking to all confidential documents in the Tax Litigation, as a waiver of the implied undertaking rule was required in respect of each specific document. Copies of the email correspondence between Dentons and CCAA DOJ regarding the Draft Undertaking

is attached as **Appendix “B”**. Given the volume of documents in the Tax Litigation, this is not a tenable solution.

22. The Monitor has exhausted its efforts to obtain access to information that is critically important to its ability to understand the Tax Litigation and fulfil its obligations under the CCAA and the Orders issued by this Court. The Monitor is therefore seeking an Order of this Court that would facilitate the unfettered access to the books and records of EGR, including all documents in EGR’s possession in connection with the Tax Litigation. It is important to note that the proposed Order would add and contain necessary protections and safeguards to ensure that no confidential information is disclosed to third parties, or used by the Monitor for any purpose other than fulfilling its duties under the Second Amended Initial Order and the CCAA (subject to further Order(s) of the Court).
  
23. To be clear, the Monitor does not seek access to the Tax Documents in order to “insert” itself into the Tax Litigation. The Monitor’s aims are to discharge its duties to this Court and to EGR’s stakeholders, and to advance the CCAA Proceeding. In this regard, the Monitor is hopeful that such disclosure will also allow the Monitor to report to this Court regarding the *bona fides* of EGR’s filing for creditor protection, the state of EGR’s business and financial affairs and the cause of its insolvency, and whether EGR “has acted, and is acting, in good faith and with due diligence”, as required by section 11.02(3) of the CCAA. A fulsome understanding of the Tax Litigation will also enable the Monitor to assess the prospects of the business continuing as a going concern, to assist with possible non-litigation resolutions, potentially aiding in preserving value for all stakeholders and to assist EGR and its stakeholders in facilitating a plan of compromise or arrangement.

24. The Monitor's current efforts to facilitate a compromise or arrangement are being frustrated by its inability to fully access EGR's books and records in connection with the Tax Litigation and better assess the nature of CRA's claims against EGR.
25. The Monitor understands that the Tax Litigation will not be judicially determined in the near-term (*i.e.* 1-2 years) and that the *status quo* is having a material adverse effect on EGR's financial position. For example, the cash flow forecast appended to the Monitor's Third Report shows a net cash outflow of \$1.4 million during the 17-week period – from a cash position of \$5.3 million in February 2021 to a projected cash position of \$3.9 million in June 2021. The forecast decline in cash position is a result of estimated litigation and restructuring costs totaling \$1.5 million during the 17-week period. The Monitor is concerned that a further delay in the CCAA Proceeding, under the *status quo*, may put EGR's chances of successfully restructuring through a plan of compromise or arrangement at risk.

All of which is respectfully submitted this 19<sup>th</sup> day of May, 2021.

**Deloitte Restructuring Inc.,  
Solely in its capacity as Court-appointed Monitor  
of Express Gold Refining Ltd.**

A handwritten signature in cursive script, appearing to read "Phil Reynolds".

Phil Reynolds, LIT  
Senior Vice-President

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.

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

PROCEEDING COMMENCED AT TORONTO

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**FOURTH REPORT OF THE MONITOR**

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Ltd.*

Appendix “B”  
to the Twelfth Report of the Monitor

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

In the Matter of Express Gold Refinancing Ltd.  
Plaintiff(s)

AND

Defendant(s)

Case Management  Yes  No by Judge: McBWAERT

Counsel	Telephone No:	Facsimile No:
<u>(see counsel slip)</u>		

- Order  Direction for Registrar (No formal order need be taken out)  
 Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: \_\_\_\_\_  
 Time Table approved (as follows):

The Monitor seeks documentary disclosure made by the Canada Revenue Agency ("CRA") to the Applicant withi the Applicant's appeal from GST/HST assessments and reassessments to the Tax Court of Canada ("TCC")

The CRA submits that this Court lacks jurisdiction to make such an order. It submits that

9 June 21  
Date

McBWAERT  
Judge's Signature

Additional Pages seven

**Superior Court of Justice  
Commercial List**

**FILE/DIRECTION/ORDER**

**Judges Endorsment Continued**

the motion must be brought before the  
TTC.

For the reasons that follow, I  
disagree.

First, s. 11 of the CCAA provides this  
Court with broad jurisdiction and  
allows it to "make any order that  
it considers appropriate in the circumstances."

This is consistent with the purpose  
of the CCAA: see *Matter of JTI/*  
*Imperial / RBH* 2019 ONSC 2222 paras 15-21.  
The CCAA <sup>im provides</sup> ~~allows~~ this Court, therefore,  
with jurisdiction to deal with  
proceedings other than those that arise  
before the Ontario Superior Court of  
Justice (see above case at para 19).

Second, I believe that CRA's  
submission is misplaced. Both the  
Applicant and CRA are significant  
parties / stakeholder in both actions.

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

In both actions non-privileged relevant documentation has to be produced in fairness to the parties and to allow the Courts to fulfill their truth seeking function.

I see no tension between this Court and the TCC in this regard and respectfully believe there is no prejudice or harm to either proceeding by my accepting jurisdiction to order the production requested by the Monitor in the CCAA matter. Counsel for CRA could not identify any such concerns. Further, ~~both~~<sup>the</sup> implied undertaking sub offer protection in both actions.

I am further of the view that it is reasonable and necessary to order such production so that the CCAA process can be properly

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

carried out. I say this for the following reasons:

- the Applicant consents to the Order sought by the Monitor and submits that the documents sought are critical to its right to defend CRA's accusations;
- the Monitor, at this stage, only seeks the exact same redacted documents that the CRA has already provided to the Applicant;
- the Monitor is prepared to agree to an extensive Production and Confidentiality Order;
- the Monitor requires the documents to fulfill its mandate and this Court cannot manage these CCAA proceedings in a vacuum;
- the Monitor is not a party to the ICC proceedings and may have issues with standing based on the

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

Case law provided by CRA at this meeting,  
• para 24(e) of the Second Amended  
and Restated Initial Order allows for  
the production sought by the Monitor and  
CRA did not oppose that relief.

In addition to the above, the  
cases relied upon by the CRA are  
distinguishable and CRA concedes  
it has no case law directly on  
point that supports its position.

For example, in Silver Wheaton  
Group [2019] TCT No 152 the party  
analogous to the Applicant objected to  
making production for reasons specific  
to that case. In *Tunan v. Doucette*  
[2008] 1 SCR 157 the court dealt  
with the issue of disclosing civil  
transcripts in a criminal proceeding -  
which raises much different  
concerns.

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

For all of the reasons above I am satisfied that I have jurisdiction to order the documents currently sought by the Monitor in the TTC proceeding.

As noted at the hearing, at the request of CRA, I will now convene a hearing (if necessary and I urge the parties to attempt to work out this issue) to determine exactly what documents are to be produced and the form of the order.

I want to deal with this matter quickly.

Counsel are to provide me (in one email after consultation) with mutually agreeable dates for a 90 minute motion in June or July. If problems arise I can

Court File Number: \_\_\_\_\_

**Superior Court of Justice  
Commercial List**

**FILE/DIRECTION/ORDER**

**Judges Endorsment Continued**

be spoken to at a case conference.

*McInt*

Appendix “C”  
to the Twelfth Report of the Monitor

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

THE HONOURABLE )  
JUSTICE MCEWEN )  
TUESDAY, THE 8<sup>TH</sup>  
DAY OF JUNE, 2021

B E T W E E N :

**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.**

**PRODUCTION AND CONFIDENTIALITY ORDER**

**THIS MOTION**, made by Deloitte Restructuring Inc. ("**Deloitte**"), in its capacity as the court-appointed monitor (in such capacity, the "**Monitor**") of Express Gold Refining Ltd. ("**EGR**"), for an order granting the Monitor unfettered access to the books and records of EGR, including all documents in EGR's possession in connection with the Tax Litigation (as defined herein) and GST/HST Reassessments (as defined herein), was heard this day at 330 University Avenue, Toronto, Ontario, via judicial videoconference due to the COVID-19 pandemic.

**ON READING** the Motion Record of the Monitor dated May 19, 2021, including the Fourth Report of the Monitor dated May 19, 2021, and the consent of EGR to the relief sought by the Monitor, and upon the CRA filing materials and making submissions opposing the relief sought by the Monitor on the basis that the Tax Court of Canada was the proper court of jurisdiction to



hear EGR and the Monitor's request for a waiver of the implied undertaking made by EGR in the Tax Litigation and on the basis of s. 295 of the *Excise Tax Act* and on hearing the submissions of counsel for the Monitor and counsel for EGR, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Amanda Campbell sworn June 7, 2021, filed;

### **INTERPRETATION**

1. **THIS COURT ORDERS** that for the purposes of this Order:

- (a) “**CCAA**” means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;
- (b) “**CCAA Proceeding**” means the within proceeding commenced by EGR at the Ontario Superior Court of Justice (Commercial List), at Toronto, bearing Court File No. CV-20-00649558-00CL;
- (c) “**CRA**” means the Canada Revenue Agency, and shall include its legal counsel in connection with the Tax Litigation, being the Department of Justice, Canada;
- (d) “**EGR's Tax Counsel**” means Baker McKenzie LLP;
- (e) “**GST/HST (Re)Assessments**” means all GST/HST assessments and reassessments that have been issued or will be issued by the CRA to EGR that form part of the Tax Litigation, including but not limited to reassessments dated July 22, 2019 and assessments and reassessments dated July 29, 2020;
- (f) “**Monitor's Legal Counsel**” means Dentons Canada LLP;

- (g) “**Subject Document(s)**” means all documents in EGR’s possession and control that have been provided to EGR or EGR’s Tax Counsel by the CRA in connection with the GST/HST (Re)Assessments relating to the Tax Litigation including, but not limited to, documents produced to EGR or EGR’s Tax Counsel by the CRA in the course of the Tax Litigation;
- (h) “**SARIO**” means the Second Amended and Restated Initial Order of Justice McEwen dated October 27, 2020;
- (i) “**Tax Litigation**” means the appeal commenced by EGR at the Tax Court of Canada bearing Court File No. 2020-1214(GST)G;

## **PRODUCTION**

2. **THIS COURT ORDERS** that, notwithstanding any express, deemed or implied undertaking given by EGR or EGR’s Tax Counsel to any person, and notwithstanding the limitations on disclosure of confidential taxpayer/registrant information set out in s. 295 of the *Excise Tax Act*, EGR shall forthwith produce and make available to the Monitor all Subject Documents.

## **CONFIDENTIALITY**

3. **THIS COURT ORDERS** that, in the event any privileged, irrelevant or inadvertently unredacted Subject Document is disclosed to EGR and provided to the Monitor in accordance with this Order, CRA shall immediately bring such inadvertent disclosure to the attention of EGR and the Monitor, and such disclosure and treatment of the Subject Document shall be addressed and governed by written agreement between EGR and CRA, or by further Order of the Court.

4. **THIS COURT ORDERS** that the Monitor shall keep the Subject Documents strictly confidential, shall use the Subject Documents solely for the purposes of the CCAA Proceeding, including for the purposes of discharging its duties as Monitor pursuant to the SARIO and the CCAA, and shall not produce or disclose the Subject Documents to any person (in whole or in part), except to the following firms, entities and individuals:

- (a) any Judge, Master or personnel of the Court as may be necessary for the conduct of the CCAA Proceeding, in which case the Subject Documents shall be marked as “confidential” and filed under seal;
- (b) Monitor’s Legal Counsel; and
- (c) such other persons as EGR, EGR’s Tax Counsel, CRA and the Monitor may agree in writing or as the Court may order.

5. **THIS COURT ORDERS AND DIRECTS** that in the event any Subject Document is disclosed to any person other than in the manner authorized by this Order, the party responsible for such disclosure shall immediately bring all pertinent facts relating to the disclosure to the attention of EGR’s Tax Counsel, CRA and the Monitor’s Legal Counsel and shall make every effort to prevent further disclosure of the Subject Documents.

6. **THIS COURT FURTHER ORDERS** that the termination of the CCAA Proceeding shall not relieve any person to whom the Subject Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of the Subject Documents in accordance with the provisions of this Order.

7. **THIS COURT ORDERS** that upon final termination of the CCAA Proceeding (including appeals, if any), or the earlier discharge of the Monitor in the CCAA Proceeding, all copies of the Subject Documents in the possession of the Monitor and the Monitor's Legal Counsel shall be destroyed within thirty (30) days, unless CRA and EGR's Tax Counsel authorize some other disposition, and confirmation of destruction will be sent in writing to all parties.

8. **THIS COURT ORDERS** that nothing in this Order shall:

- (a) foreclose or limit a party from moving before the Court to vary any term of this Order, provided that such motion is brought on notice to the Monitor, EGR and CRA;
- (b) foreclose or limit the Monitor, EGR or CRA from applying for a further order of confidentiality with respect to documents to be submitted to the Court or produced in connection with the Tax Litigation; or
- (c) constitute a waiver of solicitor-client privilege as between EGR and EGR's Tax Counsel, the Monitor and Monitor's Legal Counsel, and the CRA and the Department of Justice.

9. **THIS COURT ORDERS** that CRA may only waive all or any part of its rights over the Subject Documents under this Order expressly and in writing.

10. **THIS COURT ORDERS** that, if part or all of the Subject Documents subsequently become available in the public domain, such Subject Documents thereafter cease to be governed by this Order. The onus of establishing that particular Subject Documents have become available

in the public domain through no fault or participation of the Monitor or EGR shall rest with the party asserting such.

11. **THIS COURT ORDERS** that the Monitor, EGR and CRA shall have the right to apply to the Court, on notice, for any modification or variation of the restrictions on disclosure imposed by this Order as applied to any specific document.

  
\_\_\_\_\_

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.

8 June 21

Order to go, on an unopposed basis, as per the draft filed and signed.



**ONTARIO**

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

PROCEEDING COMMENCED AT TORONTO

**PRODUCTION AND CONFIDENTIALITY ORDER**

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as court-appointed Monitor of Express Gold Refining  
Ltd.*

Appendix “D”  
to the Twelfth Report of the Monitor

Court File No.: CV-20-00649558-00CL

**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.**

**TENTH REPORT OF THE MONITOR**

**August 16, 2022**

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**Appendices**

- A Appendix “A”: Endorsement of Justice McEwen dated June 9, 2022
- B Appendix “B”: Production and Confidentiality Order of Justice McEwen dated June 8, 2021
- C Appendix “C”: Letter from Monitor’s Counsel to CRA’s Counsel dated July 25, 2022
- D Appendix “D”: Responding Letter from CRA’s Counsel to Monitor’s Counsel dated August 10, 2022
- E Appendix “E”: Letter from CRA Counsel to the Case Management Judge (Tax Court) dated August 10, 2022
- F Appendix “F”: Letter from CRA Counsel to the Case Management Judge (Tax Court) dated August 15, 2022

## INTRODUCTION

1. On October 15, 2020, Express Gold Refining Ltd. (“**EGR**” or the “**Applicant**”) filed for and obtained protection under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”). Pursuant to the Order of this Court granted on October 15, 2020 (as amended, the “**Initial Order**”), Deloitte Restructuring Inc. was appointed as the Monitor in these proceedings (in such capacity, the “**Monitor**”). The proceedings commenced by the Applicant under the CCAA are referred to herein as the “**CCAA Proceedings**”. The Initial Order also provided for, among other things, a stay of proceedings with respect to the Applicant until and including October 19, 2020 (the “**Stay Period**”). In his endorsement, Justice Hainey scheduled the comeback hearing (the “**Comeback Hearing**”) for October 19, 2020.

2. At the Comeback Hearing, Justice McEwen amended the Initial Order to, among other things, order that the stay of proceedings shall not apply to the Tax Litigation (as defined herein) and extend the Stay Period until and including October 27, 2020.

3. On May 20, 2021, the Monitor filed a motion (the “**Production Motion**”) for an Order granting the Monitor unfettered access to the full and complete books and records of EGR and, in particular, all documents in EGR’s possession and control that have been provided to EGR or its tax counsel, Baker McKenzie LLP (“**EGR’s Tax Counsel**”), by CRA in connection with all GST/HST assessments and reassessments that have been issued or will be issued by CRA (the “**Tax Documents**”). The Production Motion was returnable on May 25, 2021 and was adjourned to be heard on June 8, 2021 at 11:00 a.m. CRA opposed the Production Motion.

4. On June 9, 2021, the Court issued an endorsement (the “**June 9 Endorsement**”) in respect of the Production Motion. In summary, the June 9 Endorsement provided reasons supporting the Court’s jurisdiction to direct the delivery of the Tax Documents by EGR to the Monitor (notwithstanding CRA’s objections) and further directed an additional hearing, if necessary, to determine any restrictions to be imposed upon certain documents, as identified by CRA. A copy of the June 9 Endorsement is attached as **Appendix “A”**.

5. On August 17, 2021, the Court issued a Production and Confidentiality Order, dated June 8, 2021, for EGR to produce and make available to the Monitor all Tax Documents (the “**Production Order**”). A copy of the Production Order is attached as **Appendix “B”**.

6. During the CCAA Proceeding, the Stay Period has been extended numerous times by further Order, most recently up to and including September 16, 2022.

7. Copies of all orders and endorsements granted in the CCAA Proceedings are located on the Monitor’s website accessible at: <https://www.insolvencies.deloitte.ca/en-ca/pages/ExpressGoldRefiningLtd.aspx> (the “**Monitor’s Website**”). The Monitor encourages interested stakeholders to review the Monitor’s Website for a complete history of the CCAA Proceedings, including the various Orders and endorsements issued to date.

## **PURPOSE**

8. The purpose of this tenth report of the Monitor (the “**Tenth Report**”) is to provide the Court with information and updates on the following:

- (a) the status of the appeal commenced by EGR at the Tax Court of Canada (“**Tax Court**”) bearing Court File No. 2020-1214(GST)G (“**Tax Litigation**”) and the next steps in the CCAA Proceedings; and
- (b) the Monitor’s proposed attendance at the examinations for discovery in the Tax Litigation (the “**Examinations**”), which are scheduled to begin on September 6, 2022.

## **TAX LITIGATION UPDATE**

### ***The Examinations***

9. CRA’s re-assessments and potential enforcement against EGR were the catalyst for EGR’s filing for creditor protection and the Tax Litigation (which is EGR’s appeal from such re-assessments) is a central component of the CCAA Proceedings and EGR’s efforts to restructure.

10. The next milestone in the Tax Litigation is the Examinations.

11. On March 23, 2022, the Case Management Judge issued an Order containing a timetable for the Tax Litigation (the “**Timetable Order**”), including a deadline of October 31, 2022, for completion of the Examinations.
12. In subsequent correspondence, EGR advised the Monitor that EGR’s representative is to be examined over a multi-week period beginning on September 6, 2022, and CRA’s representative is to be examined in October 2022.
13. On July 25, 2022, the Monitor’s counsel wrote to EGR’s CCAA counsel and CRA’s Counsel advising of the Monitor’s intention to attend the Examinations “as an observer” (the “**July 25 Letter**”). In the July 25 Letter, the Monitor’s counsel was clear regarding scope of the Monitor’s attendance stating that “the Monitor does not seek to actively participate in the Examinations by making any statements on the record, posing any questions to the witnesses or their counsel(s) or otherwise interfering with the parties’ processes, including scheduling”. A copy of the July 25 Letter is attached as **Appendix “C”**.
14. EGR is supportive of the Monitor’s attendance at the Examinations.
15. On August 10, 2022, CRA’s Counsel delivered a responding letter in which it opposed the Monitor’s request (the “**August 10 Letter**”). A copy of the August 10 Letter is attached as **Appendix “D”**. The basis for CRA’s Counsel’s objection appears to be twofold:
  - (a) CRA believes that the parties to the Tax Litigation have absolute control as to whether and how an adverse party’s examination evidence is used and the Monitor’s reporting obligations in the CCAA Proceeding could interfere with the parties’ control of “information gleaned from observing” the Examinations; and
  - (b) CRA believes that the cause of EGR’s financial difficulties should by now be known to the Monitor.
16. Each of these points will be addressed below.
17. On the same date, August 10, 2022, CRA’s Counsel sent a separate letter to the Case Management Judge, a copy of which is attached as **Appendix “E”**, requesting a case management call on an urgent basis to discuss the Monitor’s request. On August 15, 2022, CRA’s Counsel sent

a second letter to the Case Management Judge, a copy of which is attached as **Appendix “F”**. EGR’s Tax Counsel advises the Monitor that the Case Management Judge convened a conference call during the afternoon of August 16, 2022. At the time of issuing this Tenth Report, the Monitor is unaware of the outcome of that conference call.

***The Monitor’s Right to Attend Examination***

18. CRA’s request to exclude the Monitor from the Examinations puts the Monitor in a difficult position, given its duties and obligations under the CCAA, the Initial Order and this Court’s holdings in the June 9 Endorsement.

19. In particular, this Court already addressed the procedural and jurisdictional issues in relation to the Monitor’s participation in the Tax Litigation discovery process in the June 9 Endorsement. This Court was clear that there is no prejudice or harm to either party in either court proceeding if the Monitor is granted access to the discovery process in the Tax Litigation in a monitoring capacity. CRA did not appeal the June 9 Endorsement (and the Production Order) and indeed has abided by its terms.

20. Although the Production Motion centred on documentary discovery, oral discovery is a mere extension of the same discovery process and the same principles apply with respect to the Monitor’s continued involvement. In other words, the Monitor’s right to attend examinations for discovery in relation to documents to which it has access (pursuant to the Production Order) is a logical continuation of the June 9 Endorsement and the Production Order. It would make little sense for the Monitor to have the same access as EGR with respect to documentary discovery but restricted access with respect to oral discovery.

21. With respect to CRA’s two specific objections contained in the August 10 Letter:

- (a) regarding control of information, there is no credible concern in this regard since the Monitor’s attendance to observe the Examinations will be subject to the strict confidentiality provisions contained in the Production Order (as may be amended or supplemented by this Court); and

- (b) regarding the cause of EGR's financial difficulties, the Monitor is only aware of the allegations asserted by CRA against EGR. Based on the documentary evidence it has reviewed, the Monitor is unable to determine the validity of the allegations. The Examinations will supplement the documentary evidence and provide crucial insight into the credibility of the allegations and witnesses, the causes of EGR's insolvency and whether EGR has been acting in good faith and with due diligence prior to and during the CCAA Proceedings.

22. The Monitor seeks to have a "real time" understanding of the Tax Litigation and cannot discharge its duties by repeating or attempting to interpret periodic reports it receives from EGR and/or CRA.

23. Moreover, over the last year, the Monitor has made a substantial effort to facilitate: (i) the potential resolution of the Tax Litigation, and (ii) the restructuring and emergence of EGR from the CCAA Proceedings. The Monitor has frequently corresponded with the CRA and EGR to consider alternate avenues to expedite the Tax Litigation, given there are other creditors and stakeholders who have an interest in seeing a resolution of the Tax Litigation and CCAA Proceedings. The Monitor has also brought motions before this Court to receive Tax Litigation-related documents to better understand the pertinent, substantive issues. The Monitor's attendance at the Examinations will also benefit the parties should they seek to engage in any settlement or alternative dispute resolution discussions.

24. There is no prejudice to the parties if the Monitor attends. The Monitor is cognizant of the of the Timetable Order made by the Case Management Judge and believes that the Monitor's request to attend the Examinations will have no adverse effect on the Timetable Order and fully supports the parties adherence to such Order. As noted, the Monitor will fully abide by the schedule agreed to by the parties and will not pose any questions or make any statements on the record.

25. Although the Examinations will be conducted in person, the Monitor understands there will also be a live video link to the Examinations and therefore the Monitor's attendance will not cause any logistical or crowding concerns in relation to the examination room.

26. Given the nexus between the CCAA Proceedings and the Tax Litigation, the Monitor can only discharge its duties in accordance with the CCAA and the Initial Order if it is able to *independently* monitor and assess the status and progress of the Tax Litigation, and not simply repeat and rely upon the selected reporting of the parties to the Tax Litigation (*i.e.* EGR and CRA).

27. For the foregoing reasons, the Monitor seeks an Order affirming its right to attend the Examinations as an observer.

All of which is respectfully submitted this 16<sup>th</sup> day of August, 2022.

**Deloitte Restructuring Inc., solely in its  
capacity as Court-appointed Monitor of  
Express Gold Refining Ltd.**



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Phil Reynolds, LIT  
Senior Vice-President



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Warren Leung, LIT  
Senior Vice-President

**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.**

**ONTARIO**

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

PROCEEDING COMMENCED AT TORONTO

**TENTH REPORT OF THE MONITOR**

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# Appendix “E”

## to the Twelfth Report of the Monitor

Court File No.: CV-20-00649558-00CL

**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.**

**ELEVENTH REPORT OF THE MONITOR**

**September 12, 2022**

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- A Endorsement of Justice McEwen dated August 17, 2022
- B Ninth Report of the Monitor dated June 10, 2022
- C Tenth Report of the Monitor dated August 16, 2022
- D Revised Cash Flow Forecast
- E Letter from Department of Justice to the Tax Court dated August 19, 2022
- F Letter from Dentons to the Tax Court dated August 22, 2022
- G Fee Affidavit of Warren Leung dated September 12, 2022
- H Fee Affidavit of Robert Kennedy dated September 12, 2022

## INTRODUCTION

1. On October 15, 2020, Express Gold Refining Ltd. (“**EGR**” or the “**Applicant**”) filed for and obtained protection under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”). Pursuant to the Order of this Court granted on October 15, 2020 (the “**Initial Order**”), Deloitte Restructuring Inc. was appointed as the Monitor in these proceedings (in such capacity, the “**Monitor**”). The proceedings commenced by the Applicant under the CCAA are referred to herein as the “**CCAA Proceedings**”. The Initial Order also provided for, among other things, a stay of proceedings with respect to the Applicant until and including October 19, 2020 (the “**Stay Period**”). In his endorsement, Justice Hainey scheduled the comeback hearing (the “**Comeback Hearing**”) for October 19, 2020.

2. At the Comeback Hearing on October 19, 2020, Justice McEwen amended the Initial Order (the “**Amended Initial Order**”) to, among other things, extend the Stay Period until and including October 27, 2020.

3. On October 27, 2020, the Amended Initial Order was amended a second time to approve a monitoring protocol (the “**Monitoring Protocol**”) agreed to among the Applicant, Canada Revenue Agency (“**CRA**”) and the Monitor, and to extend the Stay Period until and including December 15, 2020.

4. Since then, a number of further Orders and endorsements have been issued in the CCAA Proceedings. The following provides a summary of select Orders and endorsements of the Court that are material to the CCAA Proceedings:

- (a) on March 8, 2021, the Court granted an Order approving an amendment to the Monitoring Protocol dated March 1, 2021, among the Applicant, CRA and the Monitor (the “**Amended Monitoring Protocol**”);
- (b) on May 20, 2021, the Monitor filed a motion (the “**Production Motion**”) for an Order granting the Monitor unfettered access to the full and complete books and records of EGR and, in particular, all documents in EGR’s possession and control that have been provided to EGR or its tax counsel, Baker McKenzie LLP (“**Tax Counsel**”), by CRA in connection with all GST/HST assessments and

reassessments that have been issued or will be issued by CRA (the “**Tax Documents**”). The Production Motion was returnable on May 25, 2021 and was adjourned to be heard on June 8, 2021 at 11:00 a.m. The CRA opposed the Production Motion;

- (c) on June 9, 2021, the Court issued an endorsement (the “**June 9 Endorsement**”) in respect of the Production Motion. In summary, the June 9 Endorsement provided reasons supporting the Court’s jurisdiction to direct the delivery of the Tax Documents by EGR to the Monitor (notwithstanding CRA’s objections) and further directed an additional hearing, if necessary, to determine any restrictions to be imposed upon certain documents, as identified by CRA;
- (d) on August 17, 2021, the Court issued an Order (the “**Production Order**”), dated June 8, 2021, for EGR to produce and make available to the Monitor all Tax Documents;
- (e) on December 15, 2021, EGR, CRA and the Monitor agreed to amend the Amended Monitoring Protocol (the “**Second Amended and Restated Monitoring Protocol**”) to account for current business volumes and reduce the costs associated with implementing the Amended Monitoring Protocol;
- (f) on January 18, 2022, the Court issued an Order, dated December 14, 2021, approving the Second Amended and Restated Monitoring Protocol;
- (g) on August 17, 2022, the Court issued an endorsement (the “**August 17 Endorsement**”) in respect of a case conference held to discuss the Monitor’s intention to attend the examinations for discovery (the “**Examinations**”) scheduled to begin on September 6, 2022 (the “**August 17 Case Conference**”). The Examinations are discussed further below. A copy of the August 17 Endorsement is attached hereto as **Appendix “A”**.

5. During the CCAA Proceedings, the Stay Period has been extended numerous times by further Order, most recently up to and including September 16, 2022.

## PURPOSE

6. The purpose of this eleventh report of the Monitor (the “**Eleventh Report**”) is to provide the Court with information and updates on the following:

- (a) the activities of EGR and the Monitor from June 10, 2022, the date of the Ninth Report of the Monitor (the “**Ninth Report**”), filed in connection with the previous motion to extend the Stay Period granted in the CCAA proceedings, to the date of this Eleventh Report;
- (b) EGR’s cash flow results for the 12-week period from May 30, 2022 to August 19, 2022, with a comparison to forecast amounts;
- (c) EGR’s revised cash flow forecast (the “**Revised Cash Flow Forecast**”) for the 17-week period from August 22, 2022 to December 16, 2022, and the Monitor’s comments thereon;
- (d) the Monitor’s recommendation regarding the Applicant’s request to extend the Stay Period until December 16, 2022 (the “**Stay Extension Period**”); and
- (e) the Monitor’s request for the approval of: (i) the Monitor’s Fees (as defined herein) for the fee period from February 21, 2022 to August 21, 2022 and Dentons Fees (as defined herein) for the fee period from March 1, 2022 to July 31, 2022, as set out in the Fee Affidavits (as defined herein), and (ii) the Monitor’s activities and the Eleventh Report, together with the previously filed Ninth Report and Tenth Report of the Monitor dated August 16, 2022 (the “**Tenth Report**”). Copies of the Ninth Report and Tenth Report (without appendices) are attached hereto as **Appendix “B”** and **Appendix “C”**, respectively.

7. This Eleventh Report should be read in conjunction with the Affidavit of Atef Salama sworn September 9, 2022 in support of the Applicant’s motion for the extension of the Stay Period (the “**Salama Affidavit**”).

## **TERMS OF REFERENCE AND DISCLAIMER**

8. In preparing this Eleventh Report and making the comments herein, the Monitor has been provided with, and has relied upon the following information (collectively, the “**Information**”): unaudited financial information, books and records and financial information prepared by EGR, and discussions with management of the Applicant (“**Management**”).

9. The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Generally Accepted Assurance Standards (“**Canadian GAAS**”) pursuant to the Chartered Professional Accountants Canada Handbook and, accordingly, the Monitor expresses no opinion or other form of assurance contemplated under Canadian GAAS in respect of the Information.

10. Some of the information referred to in this Eleventh Report consists of forecasts and projections. An examination or review of the financial forecasts and projections, as outlined in the Chartered Professional Accountants Canada Handbook, has not been performed.

11. Future oriented financial information referred to in this Eleventh Report was prepared based on Management’s estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be significant.

12. Unless otherwise stated, all monetary amounts noted herein are expressed in Canadian dollars.

## **ACTIVITIES OF EGR SINCE THE NINTH REPORT**

13. The activities of EGR since the Ninth Report are set out at paragraphs 16-21 of the Salama Affidavit, and such activities of EGR that are related to or arising out of these CCAA Proceedings include:

- (a) complied with the terms of the Second Amended and Restated Monitoring Protocol;
- (b) continued to manage its relationships with customers and suppliers to minimize business disruption;
- (c) continued to provide regular updates and information to the Monitor with respect to the business and the Tax Litigation; and
- (d) continued its efforts to advance the Tax Litigation. A status update of the Tax Litigation is provided in paragraphs 9 to 15 of the Salama Affidavit.

#### **ACTIVITIES OF THE MONITOR SINCE THE NINTH REPORT**

14. Since the Ninth Report, the Monitor has undertaken the following activities:

- (a) monitored EGR's business in accordance with the Second Amended and Restated Monitoring Protocol;
- (b) reviewed EGR's GST/HST filings and communicated with CRA regarding the processing status. In this regard, CRA processed and released net tax refunds for GST/HST filings for the periods from October 16, 2020 to May 31, 2022. The GST/HST filings for the June 2022 and July 2022 periods are currently under review;
- (c) communicated with EGR's restructuring counsel regarding developments in the CCAA Proceedings and Tax Counsel regarding the status of the Tax Litigation;
- (d) communicated with CRA regarding developments in these CCAA Proceedings;
- (e) communicated with EGR and CRA in relation to the Tax Litigation timeline and the Examinations;
- (f) issued the Monitor's Tenth Report outlining the Monitor's intention to attend the Examinations;

- (g) attended to inquiries the Monitor received from EGR's creditors regarding the status of the CCAA Proceedings; and
- (h) assisted EGR in preparing the Revised Cash Flow Forecast and cash flow variance reporting.

#### **CASH FLOW FORECAST AND RESULTS RELATIVE TO FORECAST**

15. Summarized in the following table are EGR's actual cash receipts and disbursements for the 12-week period ended August 19, 2022 (the "**Reporting Period**") as compared to the corresponding weeks in the cash flow forecast included in the Ninth Report.

<b>Express Gold Refining Ltd.</b>				
<b>Summary of Actual versus Forecast Cash Flows</b>				
<b>For the 12-week period from May 30, 2022 to August 19, 2022</b>				
<b>(\$CAD '000s)</b>				
<b>Unaudited</b>				
	<b>Actual</b>	<b>Forecast</b>	<b>Variance</b>	<b>Note</b>
<b>Receipts</b>				
Collection from Sales and Accounts Receivable	12,312	12,882	(570)	<b>A</b>
HST refunds	564	909	(345)	<b>B</b>
Interest income	4	1	3	
Other	1	-	1	
<b>Total Receipts</b>	<b>12,881</b>	<b>13,792</b>	<b>(911)</b>	
<b>Disbursements</b>				
Purchases	(11,309)	(12,367)	1,058	<b>C</b>
Customer accounts and hedging	(433)	-	(433)	<b>D</b>
Salaries and wages	(184)	(207)	23	<b>E</b>
Consulting and professional fees	(22)	(40)	18	<b>F</b>
General Administrative Expenses	(63)	(57)	(6)	
Insurance	(20)	(11)	(9)	
Rent	(50)	(50)	-	
Advertising and promotion	(29)	(31)	2	
Vehicle	(7)	(4)	(3)	
Freight	(30)	(33)	3	
Income Tax	-	-	-	
<b>Total Disbursements</b>	<b>(12,147)</b>	<b>(12,800)</b>	<b>653</b>	
Litigation Costs	(535)	(505)	(30)	<b>G</b>
Restructuring Costs	(238)	(485)	247	<b>H</b>
<b>Total Litigation and Restructuring Costs</b>	<b>(773)</b>	<b>(990)</b>	<b>217</b>	
Intercompany loan	(60)	(150)	90	<b>I</b>
<b>Total Intercompany loan</b>	<b>(60)</b>	<b>(150)</b>	<b>90</b>	
<b>Net Cash Flow</b>	<b>(99)</b>	<b>(148)</b>	<b>49</b>	
<b>Opening Cash</b>	<b>1,490</b>	<b>1,490</b>	<b>-</b>	
<b>Ending Cash</b>	<b>1,391</b>	<b>1,342</b>	<b>49</b>	

16. EGR's actual net cash outflow for the Reporting Period was negative \$99,000 compared to forecast net cash outflow of negative \$148,000, resulting in a favourable variance of \$49,000. The following are the reasons for the major variances, identified by the notes in the above table:

- A** An unfavourable variance of \$570,000 in sales receipts is a timing difference due to seasonal fluctuations and decrease in customer traffic due to the decrease in gold price during the Reporting Period;
- B** An unfavourable variance of \$345,000 in HST refunds is a timing difference due to the delay in receipt of May and June 2022 net tax refunds from CRA. This timing difference will reverse in the future. The May 2022 net tax refund of \$290,744 was subsequently received on August 22, 2022, while the June 2022 net tax refund has not been received;
- C** A favourable variance of \$1.06 million in purchases is a permanent difference due to decreased customer traffic as a result of the decrease in gold price during the Reporting Period;
- D** An unfavourable variance of \$433,000 in customer accounts and hedging is primarily due to transfers out totaling \$412,800 to EGR's hedging/trading accounts held at Saxo Bank and FXDD. EGR takes positions in the gold futures markets using the Saxo Bank and FXDD hedging/trading account to hedge against short and long-term fluctuations in the price of gold;
- E** A favourable variance of \$23,000 in salaries and wages is due to a timing difference that will reverse in the future;
- F** A favourable variance of \$18,000 in consulting and professional fees is primarily a permanent difference due to management's cash conservation efforts;
- G** An unfavourable variance of \$30,000 in litigation costs is a permanent difference due to higher than expected activity in the Tax Litigation;

- H** A favourable variance of \$247,000 in restructuring costs is partially a timing difference as a result of a delay in receipt and payment of invoices that will reverse in the future and partially a permanent difference as a result of lower than expected activity; and
- I** A favourable variance of \$90,000 in intercompany borrowings is a timing difference due to borrowing funds from a related party for working capital needs in March 2022. The funds borrowed are expected to be fully repaid the week ending December 16, 2022 and the timing difference will reverse.

### **APPLICANT'S REVISED CASH FLOW FORECAST**

17. The Applicant, with the assistance of the Monitor, has prepared the Revised Cash Flow Forecast for the period from August 22, 2022 to December 16, 2022 (the “**Revised Cash Flow Period**”) for the purposes of projecting the cash position of the Applicant’s planned operations and other activities during the Revised Cash Flow Period. A copy of the Revised Cash Flow Forecast is attached hereto as **Appendix “D”**.

18. The Revised Cash Flow Forecast has been prepared by Management, using the probable and hypothetical assumptions set out in the notes to the Revised Cash Flow Forecast (the “**Assumptions**”), and is presented on a weekly basis during the Revised Cash Flow Period.

19. EGR’s opening cash balance on August 22, 2022 was \$1.4 million. The forecast cash flow surplus for the Revised Cash Flow Period before litigation and restructuring costs is estimated to be approximately \$1.1 million. Litigation and restructuring costs in connection with the Tax Litigation and these CCAA proceedings are estimated to be approximately \$855,000 and \$550,000, respectively, over the Revised Cash Flow Period. As a result, the forecast cash flow deficit for the Revised Cash Flow Period after litigation and restructuring costs is estimated to be \$352,000, resulting in an estimated ending cash balance of \$1.0 million on December 16, 2022.

20. Accordingly, the Applicant is expected to have sufficient liquidity to operate during the proposed Stay Extension Period.

21. The Monitor has reviewed the Revised Cash Flow Forecast to the standard required of a Court-appointed monitor by section 23(1)(b) of the CCAA. Section 23(1)(b) requires a monitor to review the debtor's cash flow statement as to its reasonableness and to file a report with the Court on the monitor's findings. The Canadian Association of Insolvency and Restructuring Professionals' Standards of Professional Practice include a standard for monitors fulfilling their statutory responsibilities under the CCAA in respect of a monitor's report on a cash flow statement.

22. In accordance with the standard, the Monitor's review of the Revised Cash Flow Forecast consisted of inquiries, analytical procedures and discussions related to the Information. Since the Assumptions need not be supported, the Monitor's procedures with respect to them were limited to evaluating whether they were consistent with the purpose of the Revised Cash Flow Forecast. The Monitor also reviewed the support provided by Management for the Assumptions and the preparation and presentation of the Revised Cash Flow Forecast.

23. Based on the Monitor's review, nothing has come to its attention that causes it to believe, in all material aspects, that:

- (a) the Assumptions are not consistent with the purpose of the Revised Cash Flow Forecast;
- (b) as at the date of this Report, the Assumptions are not suitably supported and consistent with the plans of the Applicant or do not provide a reasonable basis for the Revised Cash Flow Forecast, given the Assumptions; or
- (c) the Revised Cash Flow Forecast does not reflect the Assumptions.

24. Since the Revised Cash Flow Forecast is based on Assumptions regarding future events, actual results will vary from the information presented even if the Assumptions occur, and the variations could be material. Accordingly, the Monitor expresses no assurance as to whether the Revised Cash Flow Forecast will be achieved. In addition, the Monitor expresses no opinion or other form of assurance with respect to the accuracy of the financial information presented in the Revised Cash Flow Forecast or relied upon by the Monitor in preparing this Eleventh Report.

25. The Revised Cash Flow Forecast has been prepared solely for the purposes described above, and readers are cautioned that it may not be appropriate for other purposes.

## **TAX LITIGATION UPDATE**

26. On March 23, 2022, the Case Management Judge in the Tax Litigation issued an Order containing a timetable for the balance of the Tax Litigation (the “**Timetable Order**”). The next milestone in that proceeding is the completion of the Examinations, which began on September 6, 2022, and pursuant to the Timetable Order, have a completion deadline of October 31, 2022.

27. On August 17, 2022, counsel for the Monitor, EGR and CRA, among others, attended the August 17 Case Conference before this Court regarding the Monitor’s attendance at the Examinations on an “observer only” basis. Details regarding the Monitor’s requested attendance at the Examinations are set out at paragraphs 9 to 26 of the Tenth Report. As noted at paragraph 12 of the Salama Affidavit, EGR does not take issue with the Monitor’s attendance; however, CRA has objected to it.

28. Following the August 17 Case Conference, on August 19, 2022, counsel for CRA delivered a letter to the Tax Court requesting a “...Direction or Order, confirming the substance of the remarks provided by [Case Management Judge] ... during the Case Management conference call on August 16, 2022”. A copy the August 19, 2022 letter is attached hereto as **Appendix “E”**.

29. On August 22, 2022, counsel for the Monitor delivered a reply letter outlining its concerns with the CRA’s request, including the procedural unfairness in the Tax Court making an Order affecting the rights of the Monitor without (i) any formal motion from the CRA or (ii) giving the Monitor an opportunity to make submissions on the issue. At the time of issuing this Eleventh Report, the parties have not received a response from the Tax Court regarding CRA’s request. A copy of the August 22, 2022 reply letter is attached hereto as **Appendix “F”**.

30. Counsel for the Monitor and CRA have continued their discussions with each other regarding the parameters of the Monitor’s attendance at the Examinations and/or “real time” access to the daily transcripts generated at the Examinations (the “**Transcripts**”).<sup>1</sup> To date, the parties

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<sup>1</sup> The Monitor is of the view that EGR already has an obligation to produce the Transcripts to the Monitor pursuant to, and in accordance with, the Production and Confidentiality Order of this Court dated June 8, 2021.

have not reached a global consent agreement regarding the Monitor's role in respect of the Examinations but continue to hold discussions. In the meantime, EGR, at the Monitor's request, has begun delivering the Transcripts to the Monitor pursuant to the Production Order. The Monitor reserves its right to bring a motion for further relief from this Court, on an urgent basis, should any other issues arise regarding access to information or production of documents during the course of the Examinations.

### **STAY EXTENSION**

31. The current Stay Period expires on September 16, 2022. The Applicant is seeking the extension of the Stay Period up to and including December 16, 2022 in order to allow the Applicant, with the assistance of the Monitor, to:

- (a) preserve the *status quo* and continue to maintain the stability of operations;
- (b) work towards a resolution of the Tax Litigation with CRA; and
- (c) determine next steps in respect of the CCAA Proceedings.

32. As described above, the Revised Cash Flow Statement indicates that the Applicant will have sufficient liquidity during the Stay Extension Period.

33. In the Monitor's view, the Applicant has acted and continues to act in good faith and with due diligence in these CCAA Proceedings.

34. The Monitor supports EGR's request for the extension of the Stay Period to December 16, 2022.

### **REQUEST FOR APPROVAL**

35. The Monitor, and its legal counsel, Dentons Canada LLP ("**Dentons**"), have maintained detailed records of their professional time and costs since the date of the Monitor's appointment.

36. Pursuant to paragraph 29 of the Second Amended and Restated Initial Order, any expenditure or liability properly incurred by the Monitor, including the fees and disbursements of the Monitor and of its legal counsel, are authorized to be paid by the Applicant on a periodic basis.

37. The total fees of the Monitor during the period from February 21, 2022 to August 21, 2022 are \$365,539.50, together with expenses and disbursements in the sum of \$0.00 and HST in the amount of \$47,520.14, totalling \$413,059.64 (collectively, the “**Monitor’s Fees**”), as more particularly described in the Affidavit of Warren Leung sworn September 12, 2022 (the “**Leung Affidavit**”), attached hereto as **Appendix “G”**.

38. The total fees of Dentons, during the period from March 1, 2022 to July 31, 2022 are \$134,466, together with expenses and disbursements in the sum of \$4,033.98 and HST in the amount of \$18,004.99, totalling \$156,504.97 (collectively, the “**Dentons Fees**”), as more particularly described in the Affidavit of Robert Kennedy sworn September 12, 2022 (the “**Kennedy Affidavit**”, and together with the Leung Affidavit, the “**Fee Affidavits**”), attached hereto as **Appendix “H”**.

39. The Monitor is of the view that the Monitor’s Fees and Dentons Fees are appropriate and reasonable in the circumstances. Accordingly, the Monitor seeks the approval of the Monitor’s Fees and Dentons Fees for the periods outlined above.

40. The Monitor is also seeking Court approval of its activities since the Ninth Report. Such activities are summarized in the Ninth Report and this Eleventh Report.

All of which is respectfully submitted this 12<sup>th</sup> day of September, 2022.

**Deloitte Restructuring Inc., solely in its  
capacity as Court-appointed Monitor of  
Express Gold Refining Ltd.**



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Phil Reynolds, LIT  
Senior Vice-President



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Warren Leung, LIT  
Vice-President

**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.**

<p><b>ONTARIO</b> <b>SUPERIOR COURT OF JUSTICE</b> <b>(COMMERCIAL LIST)</b></p> <p><b>PROCEEDING COMMENCED AT TORONTO</b></p> <p><b>ELEVENTH REPORT OF THE MONITOR</b></p>	<p><b>DENTONS CANADA LLP</b> 77 King Street West, Suite 400 Toronto-Dominion Centre Toronto, ON M5K 0A1</p> <p><b>Robert J. Kennedy</b> (LSO # 474070) Tel: (416) 367-6756 Fax: (416) 863-4592 <a href="mailto:robert.kennedy@dentons.com">robert.kennedy@dentons.com</a></p> <p><b>Mark A. Freake</b> (LSO #63656H) Tel: (416) 863-4456 <a href="mailto:mark.freake@dentons.com">mark.freake@dentons.com</a></p> <p><i>Lawyers for Deloitte Restructuring Inc., the Monitor</i></p>
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Appendix “F”  
to the Twelfth Report of the Monitor

**Express Gold Refining Ltd.**  
**17-week cash flow forecast for the period November 28, 2022 to March 24, 2022**  
Amounts in CAD, unaudited

Notes	Week Ending	1 2-Dec	2 9-Dec	3 16-Dec	4 23-Dec	5 30-Dec	6 6-Jan	7 13-Jan	8 20-Jan	9 27-Jan	10 3-Feb	11 10-Feb	12 17-Feb	13 24-Feb	14 3-Mar	15 10-Mar	16 17-Mar	17 24-Mar	TOTAL
<b>Receipts</b>																			
1	Sales	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	1,013,860	15,816,222
2	HST refunds	-	-	-	-	-	811,088	217,170	-	-	-	194,024	-	-	-	-	-	-	893,681
3	Interest income	1,793	-	-	-	-	1,793	-	-	-	1,793	-	-	-	-	-	-	-	7,173
	<b>Total Receipts</b>	<b>1,015,654</b>	<b>1,013,860</b>	<b>1,013,860</b>	<b>1,013,860</b>	<b>1,013,860</b>	<b>1,824,882</b>	<b>1,231,030</b>	<b>1,013,860</b>	<b>1,013,860</b>	<b>1,015,654</b>	<b>1,207,884</b>	<b>1,013,860</b>	<b>811,088</b>	<b>1,015,654</b>	<b>1,013,860</b>	<b>1,207,884</b>	<b>1,013,860</b>	<b>16,717,076</b>
<b>Disbursements</b>																			
4	Purchases	(973,306)	(973,306)	(973,306)	(973,306)	(973,306)	(778,645)	(973,306)	(973,306)	(973,306)	(973,306)	(973,306)	(973,306)	(778,645)	(973,306)	(973,306)	(973,306)	(973,306)	(15,183,573)
5	Salaries and wages	(17,687)	(35,309)	(35,309)	(35,309)	(35,309)	(2,602)	(17,687)	(16,680)	(35,309)	(16,680)	(16,680)	(16,680)	(35,309)	(2,602)	(17,687)	(16,680)	(16,680)	(289,112)
6	Consulting and professional fees	-	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(5,141)	(41,127)
7	General Administrative Expenses	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(4,449)	(75,631)
8	Insurance	(7,000)	(7,000)	(7,000)	(7,000)	(7,000)	(11,401)	(7,000)	(7,000)	(7,000)	(7,000)	(7,000)	(7,000)	(7,000)	(7,000)	(7,000)	(7,000)	(7,000)	(50,605)
9	Rent	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(16,653)	(66,014)
10	Advertising and promotion	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(2,511)	(42,692)
11	Vehicle	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(226)	(10,398)
12	Freight	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(2,175)	(8,972)
13	Income Tax	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(30,300)	(120,900)
	<b>Total Disbursements</b>	<b>(899,671)</b>	<b>(1,059,249)</b>	<b>(1,023,117)</b>	<b>(1,023,117)</b>	<b>(1,023,117)</b>	<b>(856,665)</b>	<b>(1,005,495)</b>	<b>(1,000,235)</b>	<b>(1,024,117)</b>	<b>(1,023,149)</b>	<b>(1,023,149)</b>	<b>(1,000,235)</b>	<b>(828,456)</b>	<b>(1,016,671)</b>	<b>(1,023,149)</b>	<b>(1,000,235)</b>	<b>(1,023,117)</b>	<b>(15,586,329)</b>
	<b>Net Cash Flow Before Litigation and Restructuring Costs</b>	<b>25,983</b>	<b>(45,388)</b>	<b>302,088</b>	<b>(9,256)</b>	<b>(10,361)</b>	<b>(25,781)</b>	<b>225,535</b>	<b>13,625</b>	<b>(10,256)</b>	<b>5,983</b>	<b>178,736</b>	<b>13,625</b>	<b>(17,367)</b>	<b>4,983</b>	<b>(15,288)</b>	<b>207,649</b>	<b>(14,256)</b>	<b>830,253</b>
14	Litigation Costs	(150,000)	-	-	-	-	(150,000)	-	-	-	(150,000)	-	-	-	(150,000)	-	-	-	(600,000)
15	Restructuring Costs	-	(85,000)	-	(75,000)	-	(35,000)	-	-	-	(35,000)	-	-	-	(35,000)	-	-	-	(540,000)
	<b>Total Litigation and Restructuring Costs</b>	<b>(150,000)</b>	<b>(85,000)</b>	<b>-</b>	<b>(75,000)</b>	<b>-</b>	<b>(185,000)</b>	<b>-</b>	<b>(75,000)</b>	<b>-</b>	<b>(185,000)</b>	<b>-</b>	<b>(75,000)</b>	<b>-</b>	<b>(185,000)</b>	<b>-</b>	<b>(75,000)</b>	<b>-</b>	<b>(1,140,000)</b>
16	Intercompany loan	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(90,000)
	<b>Total Intercompany Loan</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>(90,000)</b>
	<b>Net Cash Flow</b>	<b>(124,017)</b>	<b>(130,388)</b>	<b>302,088</b>	<b>(84,256)</b>	<b>(10,361)</b>	<b>(210,781)</b>	<b>225,535</b>	<b>(61,375)</b>	<b>(10,256)</b>	<b>(179,017)</b>	<b>178,736</b>	<b>(61,375)</b>	<b>(17,367)</b>	<b>(180,017)</b>	<b>(15,288)</b>	<b>132,649</b>	<b>(154,256)</b>	<b>(399,747)</b>
17	Opening Cash	1,813,148	1,689,131	1,558,742	1,860,831	1,776,575	1,766,213	1,555,432	1,780,967	1,719,992	1,709,336	1,530,319	1,709,055	1,647,680	1,630,313	1,450,296	1,435,007	1,567,657	1,813,148
	<b>Ending Cash</b>	<b>1,689,131</b>	<b>1,558,742</b>	<b>1,860,831</b>	<b>1,776,575</b>	<b>1,766,213</b>	<b>1,555,432</b>	<b>1,780,967</b>	<b>1,719,992</b>	<b>1,709,336</b>	<b>1,530,319</b>	<b>1,709,055</b>	<b>1,647,680</b>	<b>1,630,313</b>	<b>1,450,296</b>	<b>1,435,007</b>	<b>1,567,657</b>	<b>1,413,400</b>	<b>1,413,400</b>

**Notes**

General Receipts and disbursements denominated in U.S. Dollars have been converted into Canadian Dollars using an exchange rate of CND\$1.35 = USD\$1.00.

Projected disbursements include GST and HST charged for purchases of goods and services.

EGR is closed for holidays from December 26 to December 30, January 02, 2022 and February 20, 2022.

Receipts from sales are estimated based on historical average monthly sales, collected weekly.

The projected tax refunds are estimated based on input tax credits claimed on GST and HST paid to vendors.

Receipts from interest income earned on deposits.

These projected disbursements represent payments to suppliers of precious metals such as gold, silver, platinum and palladium bullion in the form of bars. The Company also purchases unrefined bars and scrap gold for refining.

These projected disbursements include payroll costs for all salaried and hourly employees and expense reimbursements. The forecast amounts are based on historic run rates. Hourly employees are paid monthly.

These projected disbursements include payments to EGR's advisors for corporate matters.

These projected disbursements include payments to EGR's advisors for corporate matters.

These projected disbursements include premium payments for general, property and liability insurance, employee source deductions, employee and employer portions of CPP and EI, and other payroll-related taxes.

These projected disbursements include rent payments to Farag Properties Inc., a related party.

These projected disbursements include rent payments to Farag Properties Inc., a related party.

These projected disbursements relate to the various advertising and promotional initiatives.

These projected disbursements represent vehicle lease and other vehicle-related expenses.

These projected disbursements represent freight expenses to transport inventory for refining or for delivery to customers.

These projected disbursements represent corporate income tax instalments.

These projected disbursements represent corporate income tax instalments.

These projected disbursements include payments to EGR's legal advisor for specialist restructuring advice and the fees and costs of the Monitor and its counsel.

These projected disbursements include repayments to related parties for working capital purposes.

The opening cash balance reflects the bank balance and cash on hand balance at the start of the cash flow forecast.



# Express Gold Refining Ltd.

Precious Metals Dealer • Refining • Assaying

December 06, 2022

Deloitte Restructuring Inc.  
Bay Adelaide East  
8 Adelaide Street West  
Suite 200  
Toronto, Ontario M5H 0A9  
Canada

Attention: Phil Reynolds

Dear Sirs:

**Re: Proceedings under the *Companies' Creditors Arrangement Act* ("CCAA")  
Responsibilities/Obligations and Disclosure with Respect to Cash Flow Projections**

In connection with the CCAA proceedings in respect of Express Gold Refining Ltd. ("**EGR**"), the management of EGR ("**Management**") has prepared the attached Cash Flow Statement and the assumptions on which the Cash Flow Statement is based.

EGR confirms that:

1. The Cash Flow Statement and the underlying assumptions are the responsibility of EGR;
2. All material information relevant to the Cash Flow Statement and to the underlying assumptions has been made available to Deloitte Restructuring Inc., in its capacity as Monitor of EGR;
3. Management has taken all actions that it considers necessary to ensure:
  - a. That the individual assumptions underlying the Cash Flow Statement are appropriate in the circumstances;
  - b. That the individual assumptions underlying the Cash Flow Statement, taken as a whole, are appropriate in the circumstances; and
  - c. That all relevant assumptions have been properly presented in the Cash Flow Statement or in the notes accompanying the Cash Flow Statement.
4. Management understands and agrees that the determination of what constitutes a material adverse change in the projected cash flow or financial circumstances, for the purposes of our monitoring the on-going activities of EGR, is ultimately at your sole discretion, notwithstanding that Management may disagree with such determination;

215 Victoria St., Suite 400, Toronto, Ontario M5B1T9

**Phone:** (416) 366-4000 **Fax:** (416) 363-9633 **Email:** [info@xau.ca](mailto:info@xau.ca) **Website:** <http://www.xau.ca>



## Express Gold Refining Ltd.

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Precious Metals Dealer • Refining • Assaying

5. Management understands its duties and obligations under the CCAA and that a breach of these duties and obligations could make EGR's Management liable to fines and imprisonment in certain circumstances; and
6. The Cash Flow Statement and assumptions have been reviewed and approved by the EGR's board of directors or Management has been duly authorized by EGR's board of directors to prepare and approve the cash flow assumptions.

Yours truly,

Atef Salama  
Vice President

Appendix “G”  
to the Twelfth Report of the Monitor

July 25, 2022

File No. 569588-9

**Goldman Sloan Nash & Haber LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario, M5G 1V2

Attention: Mario Forte

**Department of Justice Canada**  
Ontario Regional Office  
National Litigation Sector  
120 Adelaide Street West, Suite #400  
Toronto, Ontario, M5H 1T1

Attention: Marilyn Vardy

Dear Mr. Forte and Ms. Vardy:

**Re: In the Matter of a Compromise or Arrangement of Express Gold Refining Ltd. (“EGR”) pursuant to the *Companies’ Creditors Arrangements Act (Canada)* (the “CCAA”)*****Express Gold Refining Ltd. v. Her Majesty the Queen – 2020-1214(GST)G* (the “Tax Litigation”)**

As you know, we are counsel to Deloitte Restructuring Inc., in its capacity as court-appointed monitor in the EGR CCAA proceedings (in such capacity, the “**Monitor**”).

We write in connection with the upcoming examinations for discovery in the Tax Litigation currently scheduled to begin in early September 2022 (the “**Examinations**”). With respect to those Examinations, the Monitor’s intention is to attend as an observer, which is consistent with its duties and obligations set out in the CCAA and the Second Amended and Restated Initial Order of Mr. Justice McEwen dated October 27, 2020. For greater clarity, the Monitor does not seek to actively participate in the Examinations by making any statements on the record, posing any questions to the witnesses or their counsel(s) or otherwise interfering with the parties’ processes, including scheduling. The Monitor does not intend to have more than two members of its team present at the Examinations (*i.e.* one person from the Monitor’s offices and one person from Dentons Canada LLP’s offices).

For your reference, we note that paragraph 23(1)(c) of the CCAA stipulates that the Monitor “...shall... make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company’s business and financial affairs and the cause of its financial difficulties or insolvency...”. Here, the anticipated subject matter of the Examinations goes to the

root cause of EGR's financial difficulties and the grounds under which EGR was able to obtain creditor protection pursuant to the CCAA.

We further note that the Monitor's attendance at the Examinations is harmonious with the spirit and intention of the Production and Confidentiality Order of Mr. Justice McEwen dated June 8, 2021 (the "PCO"), pursuant to which the Monitor was given access to all documents in EGR's possession and control that have been provided to EGR or its counsel in the Tax Litigation (subject to the confidentiality provisions contained in the PCO). In our view, the PCO alleviates any confidentiality concerns relating to the Monitor's attendance at the Examinations. Moreover, as you will recall, the PCO was obtained to allow the Monitor to independently review the nature of the tax claims against EGR.

We trust that the Monitor's attendance at the Examinations, solely as an observer, will not be controversial. If that is not the case, we would ask that you kindly let us know at your earliest convenience. Finally, we would also ask that you forward us the logistics for the Examinations, including the dates, format (in person or virtual) and location (or videoconference link).

We look forward to hearing from you.

Yours truly,

**Dentons Canada LLP**



Robert J. Kennedy  
Partner

# Appendix “H”

## to the Twelfth Report of the Monitor



**Department of Justice  
Canada**

**Ministère de la Justice  
Canada**

Ontario Regional Office  
National Litigation Sector  
120 Adelaide Street West, Suite  
400  
Toronto Ontario M5H 1T1  
Canada

Région de l'Ontario  
Secteur national du contentieux  
120, rue Adelaide ouest, pièce 400  
Toronto (Ontario) M5H 1T1

Telephone/Téléphone: 647-256-7454  
Fax /Télécopieur: 416-973-0810  
Email/Courriel: Marilyn.Vardy@justice.gc.ca  
Our File Number LEX-500025225

## **BY EMAIL**

August 10, 2022

Dentons Canada LLP  
772 King Street West, Suite 400  
Toronto-Dominion Centre  
Toronto, ON  
M5K 0A1

**Attention: Robert J. Kennedy**

**Re: EXPRESS GOLD REFINING LTD v HMQ – 2020-1214(GST)G**

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Thank you for your letter of July 25, 2022 informing us of the Monitor's desire to attend the examinations for discovery in the Tax Litigation and asking for our position. We oppose your request.

In your letter, you cite paragraph 23(1)(c) of the CCAA, which "stipulates that the Monitor '... shall ... make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings". You do not cite any case law or authority where paragraph 23(1)(c) has been invoked or recognized by the courts as a basis for permitting a Monitor to participate as an observer in examinations for discovery in litigation. If you are aware of any such jurisprudence, we invite you to provide us with that information as quickly as possible, so that we may review it and reconsider our position.

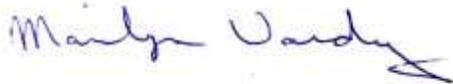
On its face, paragraph 23(1)(c) contemplates appraisals or investigations that are made or caused to be made by the Monitor. Examinations for discovery in the Tax Litigation are not appraisals or investigations made or caused to be made by the Monitor; the examination for discovery is a tool that a party in a Tax Court proceeding may choose to avail itself of to enable that party to advance its own case in the way that that party deems fit and appropriate. Each party to the Tax Litigation decides whether or not to conduct an examination for discovery of the opposing party and retains discretion as to which parts (if any) of those discovery transcripts will make their way into evidence at the Tax Court trial. Only the parties, their counsel, and the court reporter attend; judges are not present and are not aware of what transpires at the examinations (subject to any motions related to the discoveries that are subsequently brought by the parties). Paragraph 23(1)(c) appears to require the filing of a report with the court on the results of the Monitor's appraisal or investigation. Such a report could disclose more about what transpired on discovery to the CCAA court than the parties may disclose to the Tax Court.

Secondly, the cause of EGR's financial difficulties should by now be known to the Monitor. The Minister of National Revenue raised a GST/HST assessment against EGR disallowing input tax credits claimed. The Monitor has been provided with the pleadings and thousands upon thousands of documents related to that assessment. As we have previously stated, in our view, it is the role of the Tax Court of Canada to assess the correctness of the Minister's assessment. The Tax Court has exclusive jurisdiction to decide whether the assessment is correct; not the Monitor.

We are therefore unclear as to what the Monitor intends to do with any information gleaned from observing the examinations for discovery. We are deeply concerned about the potential for the usurping of the parties' rights to retain control over the use and disclosure of any information provided at the examinations for discovery by the Monitor. The parties' loss of control over the use of the information provided at the discoveries is potentially highly prejudicial to those parties. If the response is that the Monitor will not disclose any information from the discoveries to the Court or to anyone else, then we do not see the need for the Monitor to attend the examinations. The examinations for discovery belong to the parties to the Tax Litigation, not to the Monitor and not to the Courts. We are also very concerned about the substantial increase in Monitor's fees that will no doubt be charged as a result of the Monitor sitting in on the examinations for discovery.

We will therefore ask the Case Management Judge in the Tax Litigation to convene a call as soon as possible in order to seek the Case Management Judge's direction as to whether the Monitor ought to be permitted to attend and observe the examinations for discovery.

Sincerely,



Marilyn Vardy  
Senior General Counsel  
Tax Law Services Division

c. Jasmeen Mann, Pallavi Gotla, Kaitlin Coward and Alnashir Tharani – Counsel for the Respondent, Department of Justice (by email)

Jacques Bernier, Bryan Horrigan, David Gadsden, and Brendan O'Grady – Counsel for the Appellant, Baker & McKenzie (by email)

Mario Forte – Counsel for Express Gold Refining Ltd CCAA Proceedings, Goldman Sloan Nash and Haber LLP (by email)



Tax Court of Canada



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Your Reference Number is: **WEB815997**

## Session Details

**Submitted on:** August 10, 2022 4:38:11 EDT PM

**Company's Name (if appellant):** Express Gold Refining Ltd.

**Appeal Number:** 2020-1214(GST)G

Type of Document	Document Name
Miscellaneous	EXPRESS GOLD REFINING LTD v HMQ – 2020-1214(GST)G - Letter to the Court.pdf
Miscellaneous	EXPRESS GOLD REFINING LTD v HMQ 2020-1214(GST)G - Letter to R Kennedy.pdf
Miscellaneous	Letter to GSNH and DOJ regarding EGR Discoveries- July 25 2022.pdf

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# Appendix “I”

## to the Twelfth Report of the Monitor



**Department of Justice  
Canada**

**Ministère de la Justice  
Canada**

Ontario Regional Office  
National Litigation Sector  
120 Adelaide Street West Suite  
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Toronto, ON M5H 1T1

Région de l'Ontario  
Secteur national du contentieux  
120, rue Adelaide ouest, pièce 400  
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Telephone/Téléphone: 647-256-7454  
Fax /Télécopieur: 416- 973-0810  
Email/Courriel: Marilyn.Vardy@justice.gc.ca  
Our File Number: LEX-500025225

## **BY E-FILING**

August 10, 2022

Tax Court of Canada - Toronto  
180 Queen Street West  
Suite 200  
Toronto, ON  
M5V 3L6

**Attention: The Registrar**

**Re: EXPRESS GOLD REFINING LTD v HMQ - 2020-1214(GST)G**

---

We ask that you kindly bring this letter to the attention of the Honourable Justice Russell, the Case Management Judge assigned to this appeal. Thank you.

The respondent is enclosing a letter from counsel to Deloitte Restructuring Inc. (**Deloitte**) requesting that two members from Deloitte's team, be allowed to attend, as observers, the discoveries of the appellant and respondent scheduled to begin on September 6, 2022. The Monitor has advised that it will bring a motion in the Superior Court of Justice seeking an Order allowing it to attend the discoveries in this appeal, should the respondent object to its request.

The respondent opposes Deloitte's request and is enclosing her letter of response sent to Deloitte's today. Since the examinations for discovery are occurring within the context of the Tax Court appeal, the respondent requests that the Court schedule a case management call on an urgent basis to discuss and decide upon the propriety of the Monitor's request.

We appreciate the Court is currently closed for summer recess, but request that a call be scheduled immediately thereafter during the week of August 15, 2022, when the Court reopens.

Sincerely,

Marilyn Vardy  
Senior General Counsel  
Tax Law Services Division

cc. Jasmeen Mann, Pallavi Gotla, Kaitlin Coward and Alnashir Tharani– counsel for the Respondent, Department of Justice (by email)

**Canada**

Jacques Bernier, Brian Horrigan, David Gadsden and Brendan O'Grady - counsel for the Appellant, Baker & McKenzie (by email)

Robert J. Kennedy - counsel for Deloitte Restructuring Inc. (the Monitor), Dentons Canada LLP (by email)

encl. Letter dated July 25, 2022 from Robert J. Kennedy to Mario Forte and Marilyn Vardy  
Letter dated August 10, 2022 from Marilyn Vardy to Robert J. Kennedy



Tax Court of Canada



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## Session Details

**Submitted on:** August 10, 2022 4:38:11 EDT PM

**Company's Name (if appellant):** Express Gold Refining Ltd.

**Appeal Number:** 2020-1214(GST)G

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# Appendix “J”

## to the Twelfth Report of the Monitor



**Department of Justice  
Canada**

**Ministère de la Justice  
Canada**

Ontario Regional Office  
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Secteur national du contentieux  
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Telephone/Téléphone: 647-256-7454  
Fax /Télécopieur: 416- 973-0810  
Email/Courriel: Marilyn.Vardy@justice.gc.ca  
Our File Number: LEX-500025225

## **BY E-FILING**

August 15, 2022

Tax Court of Canada - Toronto  
180 Queen Street West  
Suite 200  
Toronto, ON  
M5V 3L6

### **Attention: The Registrar**

**Re: EXPRESS GOLD REFINING LTD v HMQ - 2020-1214(GST)G**

---

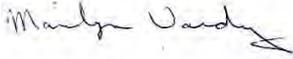
We ask that you kindly bring this letter to the attention of the Honourable Justice Russell, the Case Management Judge assigned to this GST/HST appeal.

The Monitor has advised us that it takes the position that the Tax Court may not issue any direction or order pertaining to the Monitor's request to attend the examinations for discovery in the above-noted tax appeal, absent leave of the Ontario Superior Court to do so. The Monitor relies on section 10(a) of the Second Amended and Restated Initial Order ("SARIO"), dated October 27, 2020, which provides in part that the Tax Court proceeding remains procedurally unaffected by the Stay, but that the Stay is applicable to the enforcement of any order made in such proceeding affecting the Monitor, the Business or the Property. A copy of the complete Order is attached to this letter for the Court's reference. The Respondent does not understand the import of section 10 of the SARIO to mean that this Court is unable to issue any enforceable direction or Order pertaining to the conduct of this litigation without leave of the Ontario Superior Court. However, we do wish to bring the Monitor's position and concerns to the attention of the Court.

The Monitor has informed us today that it has secured a 30-minute attendance before Justice McEwen on August 17, 2022, at 9:30 a.m.

We wish to bring these most current updates to the attention of the Case Management Judge and respectfully request that a case management call be convened at the Court's earliest convenience to seek the Court's direction and guidance moving forward. We leave it to the Tax Court to determine whether this case management call should take place before or after the hearing before the Ontario Superior Court on Wednesday, August 17, 2022 at 9:30 a.m. We will make ourselves available either before or after that hearing.

Sincerely,



Marilyn Vardy  
Senior General Counsel  
Tax Law Services Division

cc. Jasmeen Mann, Pallavi Gotla, Kaitlin Coward and Alnashir Tharani– counsel for the Respondent, Department of Justice (by email)

Jacques Bernier, Brian Horrigan, David Gadsden and Brendan O'Grady - counsel for the Appellant, Baker & McKenzie (by email)

Robert J. Kennedy and Mark Freake - counsel for Deloitte Restructuring Inc. (the Monitor), Dentons Canada LLP (by email)

*encl.*

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST



THE HONOURABLE MR. )

TUESDAY, THE 27<sup>TH</sup>

JUSTICE McEWEN )

DAY OF OCTOBER, 2020

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.  
(the "Applicant")

---

SECOND AMENDED AND RESTATED INITIAL ORDER

---

THE INITIAL APPLICATION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), was heard on October 15, 2020 at 330 University Avenue, Toronto, Ontario, by videoconference due to the COVID-19 pandemic.

THE APPLICANT'S MOTION for the first Amended and Restated Initial Order was heard on October 19, 2020, and THE APPLICANT'S MOTION for the herein Second Amended and Restated Initial Order was heard this day on October 19, 2020 at 330 University Avenue, Toronto, Ontario, also by videoconference due to the COVID-19 pandemic.

ON READING the affidavit of Atef Salama sworn October 14, 2020 and the exhibits thereto (collectively, the "**Salama Affidavit**"), and on reading the pre-filing report of Deloitte Restructuring Inc. ("**Deloitte**") as proposed monitor, and on reading the consent of Deloitte to act as the appointed monitor (in such capacity, the "**Monitor**"), and on hearing the submissions of counsel for the Applicant, Deloitte, and such other counsel as were present as indicated on the counsel slip, no one else appearing despite being served as evidenced in the affidavit of service, filed:

## **SERVICE**

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

## **APPLICATION**

2. THIS COURT ORDERS AND DECLARES that the Applicant is a company to which the CCAA applies.

3. THIS COURT ORDERS AND DECLARES that the herein Order continues the Initial Order made on October 15, 2020 by Hainey J. and effective as of 12:01 a.m. Eastern Standard/Daylight Time on such date, together with any amendment or restatement of the same.

## **POSSESSION OF PROPERTY AND OPERATIONS**

4. THIS COURT ORDERS that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “**Property**”). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the “**Business**”) and Property. The Applicant is authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively “**Assistants**”) currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. THIS COURT ORDERS that the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

- (b) the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges.

6. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay or otherwise deal with its creditors' claims, whether arising before or after the making of this Order, in accordance with the contracts and agreements in place as of the date of this Order, or that may be mutually agreed upon thereafter.

7. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;
- (b) payment for goods or services actually supplied to the Applicant following the date of this Order; and
- (c) payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date or thereafter.

8. THIS COURT ORDERS that the Applicant shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and

services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

9. THIS COURT ORDERS that the Applicant is hereby directed, until further Order of this Court:

- (a) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and
- (b) to not grant credit or incur liabilities except in the ordinary course of the Business.

**NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY**

10. THIS COURT ORDERS that from the date of the present Order and until and including [December 15, 2020], or such later date as this Court may order (the “Stay Period” or the “Stay”), no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”) shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, and any and all Proceedings currently underway against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended, but the Stay shall not apply:

- (a) to the proceeding in Tax Court File No. 2020-1214(GST)G, which for avoidance of doubt shall remain procedurally unaffected by the Stay, but the Stay is applicable to the enforcement of any order made in such proceeding affecting the Monitor, the Business or the Property; and

- (b) to any Proceeding the continuation or commencement of which is consented to in writing by the Applicant and the Monitor or allowed with leave of this Court.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

11. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities, as those terms may be understood in their broadest sense (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

#### **NO INTERFERENCE WITH RIGHTS**

12. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

#### **CONTINUATION OF SERVICES**

13. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal

payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

#### **NON-DEROGATION OF RIGHTS**

14. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

#### **PROTOCOL**

15. THIS COURT ORDERS AND DECLARES that the protocol agreed to on October 27, 2020 among the Applicant, the Canada Revenue Agency (the “CRA”) and the Monitor and appended as a confidential appendix to the Supplement to the Monitor’s First Report dated October 27, 2020 (the “Protocol”) is hereby approved.

16. THIS COURT ORDERS that (i) the Protocol is hereby sealed from the public record until further order of this Court, and (ii) no party to the Protocol shall disclose to any Person all or any portion of the Protocol which shall be confidential information among the Applicant, the CRA and the Monitor, unless (a) the parties thereto agree to such disclosure in advance and in writing, (b) subject to prior notice to the other parties which notice shall provide an opportunity to seek protective relief, disclosure is required by a party in order to satisfy any legal or regulatory requirement, or (c) upon further Order of this Court.

17. THIS COURT ORDERS that the Protocol shall not be amended, restated or supplemented, except with the written consent of the Monitor, the Applicant and the CRA, or further Order of this Court.

18. THIS COURT ORDERS that the Protocol and all monitoring and control measures described therein shall automatically terminate on the earlier of: (i) the mutual agreement of the Monitor, the Applicant and the CRA to terminate the Protocol; (ii) the termination of the CCAA

Proceedings and Deloitte's discharge as Monitor; or (iii) further Order of this Court providing for the termination of the Protocol.

### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

19. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations (including, but not limited to Proceedings arising from section 323 of the ETA), until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

### **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

20. THIS COURT ORDERS that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. THIS COURT ORDERS that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of \$100,000, as security for the indemnity provided in paragraph 16 of this Order. The Directors' Charge shall have the priority set out in paragraph 27 herein.

22. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 16 of this Order.

## **APPOINTMENT OF MONITOR**

23. THIS COURT ORDERS that Deloitte Restructuring Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicant's receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) advise the Applicant in its preparation of the Applicant's cash flow statements;
- (d) advise the Applicant as to the herein proceedings, including the eventual formulation of a plan of arrangement or compromise;
- (e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;
- (f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and
- (g) perform such other duties as are required by this Order or by this Court from time to time.

25. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

26. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

27. THIS COURT ORDERS that that the Monitor shall provide any creditor of the Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

28. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order or the Protocol, save and except for any gross negligence or wilful misconduct on its part. Nothing in

this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

29. THIS COURT ORDERS that the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant incurred in respect of these proceedings or attendant matters both before and during the period for which this Order is effective, and the Applicant is further hereby authorized to pay to the Monitor and counsel to the Applicant, retainers in the amount of \$50,000 for the former and \$40,000 for the latter, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

30. THIS COURT ORDERS that the Monitor, counsel to the Monitor, if any, and the Applicant's counsel, which for clarity includes all Applicant's counsel such as restructuring counsel and tax counsel, shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$300,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order, and both in respect of these proceedings and proceedings in respect of any tax assessment or reassessment or similar proceedings. The Administration Charge shall have the priority set out in paragraph 27 hereof.

#### **VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

31. THIS COURT ORDERS that the priorities of the Directors' Charge and the Administration Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$300,000); and

Second – Directors' Charge (to the maximum amount of \$100,000).

32. THIS COURT ORDERS that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the

Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

33. THIS COURT ORDERS that the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, “**Encumbrances**”) in favour of any Person.

34. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Charges unless the Applicant also obtains the prior written consent of the beneficiaries of the Charges, or further Order of this Court.

35. THIS COURT ORDERS that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the “**Chargees**”) shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an “**Agreement**”) which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicant entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and
- (c) the payments made by the Applicant pursuant to this Order and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances,

transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

36. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

### **SERVICE AND NOTICE**

37. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in the Globe and Mail (national edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than \$1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

38. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "E-Service Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the E-Service Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the E-Service Protocol, service of documents in accordance with the E-Service Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the E-Service Protocol with the following URL: [insolvencies.deloitte.ca/en-ca/ExpressGoldRefiningLtd].

39. THIS COURT ORDERS that if the service or distribution of documents in accordance with the E-Service Protocol is not practicable, the Applicant and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier,

personal delivery or facsimile transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

40. THIS COURT ORDERS that except to the extent incompatible with paragraphs 33 to 35 hereof, due to the COVID-19 pandemic and save Court instructions, the *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media* dated May 13, 2020, as amended (the "**Consolidated Notice**"), the text of which is available at [ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice], and the guidelines set out on the *Changes to Commercial List Operations in light of COVID-19* available at [ontariocourts.ca/scj/changes-to-commercial-list-operations-in-light-of-covid-19], as both may be amended or supplemented from time to time, shall apply to the herein proceeding.

#### **GENERAL**

41. THIS COURT ORDERS that the Applicant or the Monitor may apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

42. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

43. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

44. THIS COURT ORDERS that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

45. THIS COURT ORDERS that any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



---

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

OCT 28 2020

PER / PAR:



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

**AND IN THE MATTER OF A COMPROMISE OR ARRANGEMENT OF  
EXPRESS GOLD REFINING LTD.**

27 Oct 20

The Order shall go on an unopposed basis as per the draft filed and signed.  
It has the Monitor's support.

I have reviewed the draft with counsel. The provisions in the draft are fair and  
reasonable. The confidentiality terms meet the Sierra Club criteria.  
The stay extension meets the required legal test.



**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced in TORONTO

**SECOND AMENDED AND RESTATED INITIAL  
ORDER**

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario M5G 1V2  
Fax: 416-597-6477

**Mario Forte** (LSO #27293F)  
Tel: 416-597-6477  
Email: [forte@gsnh.com](mailto:forte@gsnh.com)

**Joël Turgeon** (Member of the Bar of Quebec,  
Ontario Student-at-Law)

Lawyers for the Applicant, Express Gold Refining Ltd.



[Home](#) > [File a Document](#) > File Documents

## Confirmation

Thank you for using the Tax Court of Canada's Online Filing System.

An electronic copy of your document(s) has(have) been received at the Tax Court of Canada.

Your Reference Number is: **WEB816409**

## Session Details

**Submitted on:** August 15, 2022 4:15:08 EDT PM

**Company's Name (if appellant):** Express Gold Refining Ltd.

**Appeal Number:** 2020-1214(GST)G

Type of Document	Document Name
Miscellaneous	Letter dated August 15, 2022 (with enclosure).pdf

Please save or print this page for your records.

Your comments are important to us. Please give us some [feedback](#) on the use of our Online Filing System.

[Close Session](#)

Appendix “K”  
to the Twelfth Report of the Monitor



**Department of Justice  
Canada**

**Ministère de la Justice  
Canada**

Ontario Regional Office  
National Litigation Sector  
120 Adelaide Street West Suite  
#400  
Toronto, ON M5H 1T1

Région de l'Ontario  
Secteur national du contentieux  
120, rue Adelaide ouest, pièce 400  
Toronto (Ontario) M5H 1T1

Telephone/Téléphone: 647-256-7454  
Fax /Télécopieur: 416- 973-0810  
Email/Courriel: Marilyn.Vardy@justice.gc.ca  
Our File Number: LEX-500025225

## **BY E-FILING**

August 19, 2022

Tax Court of Canada - Toronto  
180 Queen Street West  
Suite 200  
Toronto, ON  
M5V 3L6

### **Attention: The Registrar**

**Re: EXPRESS GOLD REFINING LTD v HMQ - 2020-1214(GST)G**

---

We ask that you kindly bring this letter to the attention of the Honourable Justice Russell, the Case Management Judge assigned to the above-noted appeal, as soon as possible.

Further to the Respondent's correspondence to the Court dated August 10, 2022 and August 15, 2022 and further to the Case Management hearing which took place before His Honour, Justice Russell, on Tuesday afternoon, August 16, 2022, we are writing to update Justice Russell regarding the events which took place at the hearing before Justice McEwen of the Ontario Superior Court (in the CCAA matter) on Wednesday morning, August 17, 2022.

Counsel for the Monitor, counsel for EGR (including Mr. Horrigan who attended the case management hearing on August 16, 2022) and counsel for the CRA and for the Respondent (including the undersigned) were present at the hearing before Justice McEwen on August 17, 2022. Counsel for the Monitor informed Justice McEwen that the Monitor intends to bring a motion to the Ontario Superior Court seeking an Order compelling the parties in the Tax Litigation to permit the Monitor to attend the examinations for discovery in the Tax Court proceeding (either virtually or in person).

The undersigned provided a brief summary of her understanding of this Court's observations and remarks/findings expressed during the Case Management conference call on August 16<sup>th</sup>, including the following:

- there is no provision in the *Tax Court of Canada Rules(General Procedure)* for persons other than the parties to the Tax Litigation (i.e. EGR and the Respondent) to attend the examinations for discovery;
- all superior courts recognize and conduct themselves on the basis that they control their own procedures;

**Canada** 

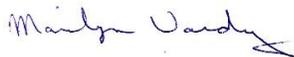
- clause 10(a) of the Second Amended and Restated Initial Order (“SARIO”) does not apply and the stay does not affect the procedure of the Tax Court of Canada. The opening words of clause 10 of the SARIO distinguish between a proceeding and an enforcement process. The issue of who is permitted to attend the examinations for discovery is a procedural issue, that is not affected by the stay (as opposed to an enforcement process) and is within the Tax Court’s jurisdiction to decide;
- the reasoning in the Tax Court’s correspondence of March 10, 2022 and March 15, 2022 denying the Monitor’s request for permission to attend a case management hearing in the Tax Court proceeding applies to the Monitor’s request to attend the discoveries.

Justice McEwen expressed his initial views to the Monitor and to the parties at the hearing on August 17, 2022 that the issue of the Monitor’s right to attend the examinations for discovery (whether virtually or in person) is a procedural matter in respect of which the Tax Court has jurisdiction and that he does not wish to issue an Order interfering with the Tax Court’s jurisdiction. He asked us whether the Case Management Judge had issued an endorsement or Order following the case management call on August 16, 2022.

Since we understand that the Monitor intends to bring a motion before the Ontario Superior Court seeking an Order requiring the Respondent to permit the Monitor to attend the examinations for discovery in September, notwithstanding Justice McEwen’s remarks at the August 17, 2022 hearing, the Respondent respectfully requests this Court to issue a Direction or Order, confirming the substance of the remarks provided by this Court to counsel for the Tax Litigation parties during the Case Management conference call on August 16, 2022. The Respondent will then be able to provide the Direction or Order to Justice McEwen (or to any other Ontario Superior Court judge who hears the Monitor’s motion) so as to inform that Court of the Tax Court’s findings.

Justice McEwen indicated that he will not be available for a hearing of the Monitor’s motion prior to September 6, 2022; however, the Respondent does not know whether the Monitor will seek to bring a motion on an urgent basis before another judge of the Ontario Superior Court prior to September 6<sup>th</sup>. In any event, as examinations for discovery are scheduled to commence on September 6, 2022 and the Respondent is anxious to resolve any ambiguity regarding this issue prior to the commencement of the examinations for discovery, the Respondent respectfully requests that this Court issue a Direction or Order as quickly as possible setting out this Court’s decision with respect to the Monitor’s request for permission to attend the examinations for discovery (whether virtually or in person).

Sincerely,



Marilyn Vardy  
Senior General Counsel  
Tax Law Services Division

cc. Jasmeen Mann, Pallavi Gotla, Kaitlin Coward and Alnashir Tharani– counsel for the Respondent, Department of Justice (by email)

Jacques Bernier, Brian Horrigan, David Gadsden and Brendan O'Grady - counsel for the Appellant, Baker & McKenzie (by email)

Appendix “L”  
to the Twelfth Report of the Monitor

August 22, 2022

File No.: 569588-9

**Delivered via Electronic Filing**Tax Court of Canada  
200 Kent Street,  
Ottawa, ON K1A 0M1Attention: Registrar

Dear Sir/Madam:

Re: Express Gold Refining Ltd. v. Her Majesty the Queen – 2020-1214(GST)G

We ask that you kindly bring this letter to the attention of the Honourable Justice Russell, the Case Management Judge assigned to the above-noted appeal, as soon as possible.

The Monitor has had an opportunity to review the correspondence of Marilyn Vardy dated August 19, 2022 (the "**Vardy Correspondence**"). Of note, the Monitor was not copied on the Vardy Correspondence but was provided a copy by counsel to Express Gold Refining Ltd. ("**EGR**"), in accordance with a previously granted Production and Confidentiality Order dated June 8, 2021.

The Monitor takes issue with the contents of Vardy's Correspondence, in particular to the references relating to Justice McEwen's "findings" at a scheduling hearing. In fairness to the parties, we view that a jurisdictional issue has arisen that needs to be determined fairly and consistent with the administration of justice. The Monitor is respectful of the Tax Court and its procedures which is why it elected to proceed with a scheduling hearing on Wednesday, August 17, 2022, only. For certainty, the Monitor has not yet filed its notice of motion, in fact a motion has not yet been scheduled. See the endorsement of Justice McEwen (attached).

As an officer of the Court appointed pursuant to an Second Amended and Restated Initial Order dated October 27, 2020 and the *Companies' Creditors Arrangement Act* (federal legislation), we urge the Tax Court to consider procedural fairness in addressing this jurisdictional issue and/or authority to make a determination on the appropriateness of a Court officer attending the discovery process of EGR and CRA, on a limited observer basis only. At minimum, the Monitor rights, duties and obligations should not be impacted without an opportunity to respond. For this Court's benefit, the Monitor only seeks to achieve a fair result for all parties.

We would be pleased to discuss this matter further at any time, should this Honourable Court so request.

Respectfully,

**Dentons Canada LLP**



Robert J. Kennedy  
Partner

RJK/ac

cc. Marilyn Vardy and Fozia Chaudary (*Department of Justice*)  
Jacques Bernier & Bryan Horrigan (*Baker McKenzie LLP*)  
Mario Forte (*Goldman Sloan Nash & Haber LLP*)  
Phil Reynolds & Warren Leung (*Deloitte Restructuring Inc.*)



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-20-00649558-00CL DATE: 17 August 2022

NO. ON LIST: 02

TITLE OF PROCEEDING: EXPRESS GOLD REFINING LTD. v. THE ATTORNEY GENERAL OF CANADA

BEFORE JUSTICE: MCEWEN

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
Bryan Horrigan	Express Gold Refining Ltd.	Bryan.horrigan@bakermckenzie.com
Atef Salama	Express Gold Refining Ltd.	info@xau.ca

**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info
Fozia Chaudary Sarah Mackenzie	Canada Revenue Agency	Fozia.chaudary@justice.gc.ca Sarah.mackenzie@justice.gc.ca
Marilyn Vardy	Her Majesty the Queen	Marilyn.vardy@justice.gc.ca

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Robert Kennedy	Deloitte Restructuring Inc.	Robert.kennedy@dentons.com
Warren Aleung	Monitor of EGR	waleung@deloitte.ca
Mark Freak	Deloitte Restructuring Inc.	Mark.freake@dentons.com
Phil Reynolds	CCAA Monitor of EGR	philreynolds@deloitte.ca

Superior Court of Justice  
Commercial List

**FILE/DIRECTION/ORDER**

In the Matter of Express Gold Ltd

Plaintiff(s)

AND

Defendant(s)

Case Management  Yes  No by Judge: McEwen J.

Counsel	Telephone No:	Facsimile No:
<u>see counsel slip</u>		

- Order  Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjudged to: \_\_\_\_\_
- Time Table approved (as follows):

I conducted a case conference today at the request of the Monitor on an urgent basis. The Monitor wishes to attend<sup>TM</sup> at the examination for discovery scheduled in the Tax Litigation "as an observer".

CRA objects to this. The Applicant is supportive of the Monitor's position.

17 Aug 21  
Date

McEwen J.  
Judge's Signature

Additional Pages one

Court File Number: \_\_\_\_\_

**Superior Court of Justice  
Commercial List**

**FILE/DIRECTION/ORDER**

**Judges Endorsment Continued**

Maunter may be bringing a motion  
in this regard.

Counsel will discuss scheduling &  
return to the Court when appropriate.

me [Signature]

Appendix “M”  
to the Twelfth Report of the Monitor

## Campbell, Amanda

---

**From:** Freake, Mark  
**Sent:** Friday, December 9, 2022 2:51 PM  
**To:** Campbell, Amanda  
**Subject:** FW: Tax Court of Canada- 2020-1214(GST)G- Express Gold Refining LTD.  
**Attachments:** 2020-1214(GST)G-Directive.pdf

---

**From:** Chaudary, Fozia <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>  
**Sent:** Friday, October 7, 2022 10:30 AM  
**To:** Kennedy, Robert <[robert.kennedy@dentons.com](mailto:robert.kennedy@dentons.com)>; Freake, Mark <[mark.freake@dentons.com](mailto:mark.freake@dentons.com)>; Leung, Warren <[waleung@deloitte.ca](mailto:waleung@deloitte.ca)>; Reynolds, Phil (CA - Toronto) (<[philreynolds@deloitte.ca](mailto:philreynolds@deloitte.ca)> <[philreynolds@deloitte.ca](mailto:philreynolds@deloitte.ca)>  
**Cc:** Winters, Diane <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>; Mackenzie, Sarah <[Sarah.Mackenzie@justice.gc.ca](mailto:Sarah.Mackenzie@justice.gc.ca)>; Vardy, Marilyn <[Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>  
**Subject:** FW: Tax Court of Canada- 2020-1214(GST)G- Express Gold Refining LTD.  
**Importance:** High

**[WARNING: EXTERNAL SENDER]**

---

Dear Robert and Mark,

I hope you are keeping well.

I am attaching the direction of the Tax Court in the EGR matter. It was sent to the parties to the Tax Court matter yesterday.

This directive would contradict any written agreement that parties to the CCAA matter may enter into pertaining to the transcripts. As such, it would be useful for us to discuss.

Is there a time next week that would work best for your team?

Fozia Chaudary  
**Counsel**  
Ontario Region  
120 Adelaide Street West  
Suite 400  
Toronto, Ontario  
M5H 1T1  
National Litigation Sector  
[fozia.chaudary@justice.gc.ca](mailto:fozia.chaudary@justice.gc.ca)  
Department of Justice Canada /  
Government of Canada  
Tel: (647)256-  
7347 Fax: (416) 973-  
0810

Fozia Chaudary  
**Avocate**  
Région de l'Ontario  
120, rue Adelaide Ouest  
Suite 400  
Toronto, Ontario  
M5H 1T1  
Secteur national du contentieux  
[fozia.chaudary@justice.gc.ca](mailto:fozia.chaudary@justice.gc.ca)  
Ministère de la Justice Canada /  
Gouvernement du Canada  
Tél: (647)256-7347  
Télé: (416) 973-0810

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Thank you.

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Renseignements confidentiels, etc.*

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Merci de votre collaboration.

---

**From:** CAS-SATJ Documents <[cas-satj-documents@cas-satj.gc.ca](mailto:cas-satj-documents@cas-satj.gc.ca)>

**Sent:** October 6, 2022 7:33 PM

**To:** [bryan.horrigan@bakermckenzie.com](mailto:bryan.horrigan@bakermckenzie.com); [jacques.bernier@bakermckenzie.com](mailto:jacques.bernier@bakermckenzie.com); Tharani, Alnashir <[Alnashir.Tharani@justice.gc.ca](mailto:Alnashir.Tharani@justice.gc.ca)>; Gotla, Pallavi <[Pallavi.Gotla@justice.gc.ca](mailto:Pallavi.Gotla@justice.gc.ca)>; Vardy, Marilyn <[Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>

**Cc:** TOR Tax Court Canada Decisions / Décisions de la Cour Canadienne de l'impôt (JUS / JUS)

<[#TOR.TaxCourtCanadaDecisions@justice.gc.ca](mailto:#TOR.TaxCourtCanadaDecisions@justice.gc.ca)>

**Subject:** Tax Court of Canada- 2020-1214(GST)G- Express Gold Refining LTD.

To whom it may concern

Please find enclosed a copy of the Directive concerning the above-noted matter. A certified copy will follow by mail.

NOTE: You will not be able to reply to this e-mail. Should you have any questions, please contact us at 1-800-927-5499 or visit our website at <http://www.tcc-cci.gc.ca/> for filing online documents.

Appendix “N”  
to the Twelfth Report of the Monitor

Docket: 2020-1214(GST)G

BETWEEN:

EXPRESS GOLD REFINING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Case Management Conference held on August 16, 2022,  
at Ottawa, Canada

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	Bryan Horrigan
Counsel for the Respondent:	Marilyn Vardy Jasmine Mann

---

DIRECTIVE

FURTHER TO the above case management conference held by telephone in which counsel and the undersigned discussed the request of the Appellant's assigned CCAA Monitor to attend at the Respondent's discovery examination of the Appellant, which request was supported by the Appellant and opposed by the Respondent;

AND UPON the undersigned expressing the view that this Court does not wish its discovery examinations, which are not public proceedings, attended by persons other than the parties and their respective counsel;

AND FURTHER UPON my recent review of correspondence on this topic sent to my attention dated August 19, 2022 from Respondent's counsel and from Appellant's counsel dated August 22, 2022;

I HEREBY DIRECT that each party's discovery examination in this matter is to be conducted without the CCAA Monitor and or its counsel present or in any other way observing or listening, particularly given that, unlike typical hearings and trials, discovery examinations including in this Court are not public proceedings.

Signed at Ottawa, Canada, this 8th day of September 2022.

"B. Russell"

---

Russell J.

# Appendix “O”

## to the Twelfth Report of the Monitor

---

**From:** Kennedy, Robert <robert.kennedy@dentons.com>

**Sent:** Tuesday, November 15, 2022 11:57 AM

**To:** Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>; Diane Winters (diane.winters@justice.gc.ca) <diane.winters@justice.gc.ca>

**Cc:** Reynolds, Phil (CA - Toronto) (philreynolds@deloitte.ca) <philreynolds@deloitte.ca>; Leung, Warren <waleung@deloitte.ca>; Freake, Mark <mark.freake@dentons.com>

**Subject:** EGR | Discoveries and Transcripts

Fozia / Diane:

Hope you are both doing well.

We understand that the examinations for discovery (the “**Discoveries**”) are now complete (subject to questioning that may arise from undertakings, etc.).

As you are aware, counsel to Express Gold Refining Ltd. (“**EGR**”) in the tax litigation (“**BM**”) has been providing the monitor with the Discovery rough transcripts on a rolling basis (up to approximately October 5, 2022) (the “**Transcripts**”). The Monitor has been reviewing the Transcripts on terms consistent with the Production and Confidentiality Order dated June 8, 2021 (the “**Production Order**”). We understand from BM that CRA/DOJ had no issue with this course of action.

On September 8, 2022, the Tax Court issued a Directive to each of EGR and DOJ in connection with the Monitor's request for "in person" attendance at the Discoveries (the "**Directive**"). We understand that this Directive was not delivered until October 6, 2022. Notably, the Directive addresses "in person" or "real time" presence during the Discoveries; in no way does the Directive address or contemplate the Monitor's receipt of transcripts consistent with the terms of the Production Order.

Shortly following the delivery of the Directive, the Monitor learned from communications with EGR's restructuring counsel, that Ms. Vardy queried if BM was going to continue providing copies of the Transcripts to the Monitor going forward, and also request for the return of any Transcripts delivered to the Monitor up to that point in time. EGR's restructuring counsel requested the Monitor's views in relation to this query. To encourage the completion of the Discoveries in accordance with the tax litigation timetable, the Monitor informed EGR's restructuring counsel that it is prepared to temporarily suspend the delivery of the Transcripts from the date of the Vardy correspondence, but that the Monitor was reserving its rights until the Discoveries are complete.

Now that Discoveries are complete, the Monitor is re-engaging with respect to the delivery of the remaining Transcripts. We have only heard from EGR and its counsel in relation to this issue; of course, EGR is supportive of the total Transcripts being delivered to the Monitor.

We are now requesting your position and we would welcome a discussion with CRA/DOJ in short order to discuss the remaining Transcripts (by Thursday of this week). The Monitor will make itself available based on scheduling on your side.

I look forward to hearing from you shortly.

Regards,



Robert J. Kennedy

Partner

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D +1 416 367 6756

[robert.kennedy@dentons.com](mailto:robert.kennedy@dentons.com)

[Bio](#) | [Website](#)

Dentons Canada LLP

77 King Street West, Suite 400, Toronto-Dominion Centre Toronto, ON M5K 0A1 Canada

[LuatViet](#) > [Fernanda Lopes & Associados](#) > [Guevara & Gutierrez](#) > [Paz Horowitz Abogados](#) > [Sirote](#) > [Adepetun Caxton-Martins Agbor & Segun](#) > [Davis Brown](#) > [East African Law Chambers](#) > [Eric Silwamba, Jalasi and Linyama](#) > [Durham Jones & Pinegar](#) > [LEAD Advogados](#) > For more information on the firms that have come together to form Dentons, go to [dentons.com/legacyfirms](https://www.dentons.com/legacyfirms)

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Appendix “P”  
to the Twelfth Report of the Monitor

Begin forwarded message:

**From:** "Chaudary, Fozia" <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>  
**Date:** November 16, 2022 at 5:18:26 PM EST  
**To:** "Kennedy, Robert" <[robert.kennedy@dentons.com](mailto:robert.kennedy@dentons.com)>  
**Cc:** "Winters, Diane" <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>, "Mackenzie, Sarah" <[Sarah.Mackenzie@justice.gc.ca](mailto:Sarah.Mackenzie@justice.gc.ca)>  
**Subject:** FW: EGR v HMK, Court File No. 2020-1214(GST)G

**[WARNING: EXTERNAL SENDER]**

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Dear Robert,

I hope you are keeping well.

Please find the email, below, from counsel for the CRA to counsel for EGR in the Tax Litigation matter.

Our position is that the endorsement, received October 6, 2022, relating to the Monitor's participation in the Tax Court Discovery, came from Justice Russell. Justice Russell is seized of the Tax Court matter. The question of the Monitor's review and future use of the discovery transcript is a matter that is within the absolute purview of Justice Russell/The Tax Court of Canada. As such, it is only appropriate that Justice Russell provide all parties with direction in this regard.

Fozia Chaudary  
**Counsel**  
Ontario Region  
120 Adelaide Street West  
Suite 400  
Toronto, Ontario  
M5H 1T1  
National Litigation Sector  
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Merci de votre collaboration.

---

**From:** Vardy, Marilyn <[Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca)>  
**Sent:** Wednesday, November 16, 2022 12:18 PM  
**To:** Horrigan, Bryan <[Bryan.Horrigan@bakermckenzie.com](mailto:Bryan.Horrigan@bakermckenzie.com)>  
**Cc:** Gadsden, David <[David.Gadsden@bakermckenzie.com](mailto:David.Gadsden@bakermckenzie.com)>; O'Grady, Brendan <[Brendan.O'Grady@bakermckenzie.com](mailto:Brendan.O'Grady@bakermckenzie.com)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>; Gotla,

Pallavi <[Pallavi.Gotla@justice.gc.ca](mailto:Pallavi.Gotla@justice.gc.ca)>; Coward, Kaitlin <[Kaitlin.Coward@justice.gc.ca](mailto:Kaitlin.Coward@justice.gc.ca)>; Chaudary, Fozia <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>; Winters, Diane <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>; Lawrence, Tessania <[Tessania.Lawrence@justice.gc.ca](mailto:Tessania.Lawrence@justice.gc.ca)>; [jacques.bernier@bakermckenzie.com](mailto:jacques.bernier@bakermckenzie.com); Mackenzie, Sarah <[Sarah.Mackenzie@justice.gc.ca](mailto:Sarah.Mackenzie@justice.gc.ca)>

**Subject:** RE: EGR v HMK, Court File No. 2020-1214(GST)G

Hi Bryan,

I hope all is well.

We understand that the Monitor is currently seeking to obtain access to the discovery transcripts.

Could you kindly advise whether you have communicated with the Monitor or the Monitor's counsel regarding the discovery transcripts since sending us the October 13, 2022 email on this topic (see below)? Has the Appellant asked the Monitor to return any discovery transcripts that the Appellant had previously provided to the Monitor? Has the Appellant taken any position on the Monitor's right to obtain copies of the discovery transcripts and if so, what is that position?

Given the Case Management Judge's Direction received by the parties on October 6, 2022 and the Case Management Judge's subsequent comments to the parties on October 19, 2022 regarding the Monitor not being permitted to listen in on the case management call that took place on October 19, 2022, the Respondent is of the view that it is inappropriate for the Monitor to be provided with copies of, or access to, the discovery transcripts. If there is any dispute between the Appellant and the Respondent on this issue, then the Respondent believes it appropriate to seek further direction forthwith from the Case Management Judge.

We would accordingly appreciate receiving your views and comments concerning the above on an expedited basis.

Thank you.

Marilyn Vardy

*(she, her, elle, la)*

Senior General Counsel | Avocate-générale principale  
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**Sent:** October 13, 2022 6:16 PM  
**To:** Vardy, Marilyn <[Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca)>  
**Cc:** Gadsden, David <[David.Gadsden@bakermckenzie.com](mailto:David.Gadsden@bakermckenzie.com)>; O'Grady, Brendan <[Brendan.O'Grady@bakermckenzie.com](mailto:Brendan.O'Grady@bakermckenzie.com)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>; Gotla, Pallavi <[Pallavi.Gotla@justice.gc.ca](mailto:Pallavi.Gotla@justice.gc.ca)>; Coward, Kaitlin <[Kaitlin.Coward@justice.gc.ca](mailto:Kaitlin.Coward@justice.gc.ca)>; Chaudary, Fozia <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>; Winters, Diane <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>; Lawrence, Tessania <[Tessania.Lawrence@justice.gc.ca](mailto:Tessania.Lawrence@justice.gc.ca)>; Bernier, Jacques <[Jacques.Bernier@bakermckenzie.com](mailto:Jacques.Bernier@bakermckenzie.com)>  
**Subject:** RE: EGR v HMK, Court File No. 2020-1214(GST)G

Hi Marilyn,

I can confirm that we received the Tax Court Directive dated September 8, 2022 via email on October 6, 2022 at 7:33 pm. About an hour earlier, on October 6, 2022 at 6:36 pm, we forwarded the transcript for that day's discovery to the Monitor. We have not forwarded any additional transcripts to the Monitor since and we are awaiting input from EGR's CCAA counsel regarding next steps.

Best regards,

**Bryan Horrigan** ([Bio](#))  
Partner, Indirect Tax  
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**Baker  
McKenzie.**

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---

**From:** Vardy, Marilyn <[Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca)>  
**Sent:** Tuesday, October 11, 2022 5:36 PM  
**To:** Bernier, Jacques <[Jacques.Bernier@bakermckenzie.com](mailto:Jacques.Bernier@bakermckenzie.com)>; Horrigan, Bryan <[Bryan.Horrigan@bakermckenzie.com](mailto:Bryan.Horrigan@bakermckenzie.com)>  
**Cc:** Gadsden, David <[David.Gadsden@bakermckenzie.com](mailto:David.Gadsden@bakermckenzie.com)>; O'Grady, Brendan <[Brendan.O'Grady@bakermckenzie.com](mailto:Brendan.O'Grady@bakermckenzie.com)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>; Gotla, Pallavi <[Pallavi.Gotla@justice.gc.ca](mailto:Pallavi.Gotla@justice.gc.ca)>; Coward, Kaitlin <[Kaitlin.Coward@justice.gc.ca](mailto:Kaitlin.Coward@justice.gc.ca)>; Chaudary, Fozia <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>; Winters, Diane <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>; Lawrence, Tessania <[Tessania.Lawrence@justice.gc.ca](mailto:Tessania.Lawrence@justice.gc.ca)>  
**Subject:** [EXTERNAL] EGR v HMK, Court File No. 2020-1214(GST)G

Good evening, Jacques and Bryan.

Last Thursday evening (October 6, 2022), we received an email from the Tax Court enclosing a Directive issued by the case management judge, the Honourable Justice Russell, directing that each party's discovery examination in this matter be conducted without the CCAA Monitor or its counsel present or in any other way observing or listening, particularly given that, unlike typical hearings and trials, discovery examinations are not public proceedings.

Although the Directive was apparently signed in Ottawa on September 8, 2022, the Respondent first received the Directive on the evening of October 6, 2022.

Can you please advise whether the Appellant also first received the Directive from the Tax Court of Canada on the evening of October 6, 2022 and whether, in light of the Tax Court's directive, the Appellant intends to continue providing copies of the discovery transcripts to the Monitor moving forward? Will EGR ask for the return of any transcripts that the Appellant has shared with the Monitor?

Thank you.

Marilyn Vardy

*(she, her, elle, la)*

Senior General Counsel | Avocate-générale principale  
Ontario Regional Office | Bureau régional de l'Ontario  
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Toronto, Ontario M5H 1T1  
National Litigation Sector | Secteur national du contentieux  
Department of Justice Canada | Ministère de la Justice Canada  
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Tel/Tél: 647-256-7454 / **647 871-3307**  
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Appendix “Q”  
to the Twelfth Report of the Monitor

---

**From:** Horrigan, Bryan <[Bryan.Horrigan@bakermckenzie.com](mailto:Bryan.Horrigan@bakermckenzie.com)>  
**Sent:** Friday, November 18, 2022 12:16 PM  
**To:** Vardy, Marilyn <[Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca)>  
**Cc:** Gadsden, David <[David.Gadsden@bakermckenzie.com](mailto:David.Gadsden@bakermckenzie.com)>; O'Grady, Brendan <[Brendan.O'Grady@bakermckenzie.com](mailto:Brendan.O'Grady@bakermckenzie.com)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>; Gotla, Pallavi <[Pallavi.Gotla@justice.gc.ca](mailto:Pallavi.Gotla@justice.gc.ca)>; Coward, Kaitlin <[Kaitlin.Coward@justice.gc.ca](mailto:Kaitlin.Coward@justice.gc.ca)>; Chaudary, Fozia <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>; Winters, Diane <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>; Lawrence, Tessania <[Tessania.Lawrence@justice.gc.ca](mailto:Tessania.Lawrence@justice.gc.ca)>; Bernier, Jacques <[Jacques.Bernier@bakermckenzie.com](mailto:Jacques.Bernier@bakermckenzie.com)>; Mackenzie, Sarah <[Sarah.Mackenzie@justice.gc.ca](mailto:Sarah.Mackenzie@justice.gc.ca)>; Kennedy, Robert <[robert.kennedy@dentons.com](mailto:robert.kennedy@dentons.com)>  
**Subject:** RE: EGR v HMK, Court File No. 2020-1214(GST)G

**[WARNING: EXTERNAL SENDER]**

---

Hi Marilyn,

Thanks for your email. I have copied counsel for the Monitor (Mr. Kennedy) on this email for visibility. We have reproduced your queries and comments "*italicized in red text*" here and provided our responses/comments to each.

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*Could you kindly advise whether you have communicated with the Monitor or the Monitor's counsel regarding the discovery transcripts since sending us the October 13, 2022 email on this topic (see below)?*

Response: We have had subsequent communication with the Monitor (and its counsel) regarding disclosure of transcripts since our October 13 email, which consisted of us informing the Monitor and its counsel that we would not be providing additional transcripts or otherwise discussing their content, given your email correspondence dated October 13, 2022. All transcripts disclosed to the Monitor on or before October 6, 2022, were disclosed in accordance with the clear and unequivocal agreement of the Respondent, as communicated to us by you at the beginning of the Examination for Discovery of Mr. Salama.

*Has the Appellant asked the Monitor to return any discovery transcripts that the Appellant had previously provided to the Monitor?*

Response: No. The Appellant has not asked the Monitor to return any discovery transcripts.

*Has the Appellant taken any position on the Monitor's right to obtain copies of the discovery transcripts and if so, what is that position?*

Response: The Appellant does not oppose the transcripts being disclosed to the Monitor, consistent with its position regarding disclosure of the parties' documentary productions in these proceedings and the Appellant's obligations under the CCAA.

*Given the Case Management Judge's Direction received by the parties on October 6, 2022 and the Case Management Judge's subsequent comments to the parties on October 19, 2022 regarding the Monitor not being permitted to listen in on the case management call that took place on October 19, 2022, the Respondent is of the view that it is inappropriate for the Monitor to be provided with copies of, or access to, the discovery transcripts. If there is any dispute between the Appellant and the Respondent on this issue, then the Respondent believes it appropriate to seek further direction forthwith from the Case Management Judge.*

Response: Again, the Appellant does not oppose disclosure of the transcripts to the Monitor. The Appellant is concerned that opposition may be inconsistent with its obligations under the CCAA. We understand that the Monitor and the Respondent (through their respective counsels, or otherwise) are in relatively frequent contact, so we would expect this issue to be resolved between the Monitor and the Respondent. The Appellant will not be taking any steps to seek authorization from any Court to disclose the transcripts. For completeness, we do not recall any comments made by Justice Russell during the October 19, 2022 Case Management Conference that were relevant to the issue of transcript disclosure or the Respondent raising this subject matter at that time.

---

Best regards,

**Bryan Horrigan** ([Bio](#))  
Partner, Indirect Tax  
Baker & McKenzie LLP  
181 Bay Street, Suite 2100  
Toronto, ON M5J 2T3  
Canada  
Tel: +1 416 863 1221  
Direct: +1 416 865 3905  
Fax: +1 416 863 6275  
[bryan.horrigan@bakermckenzie.com](mailto:bryan.horrigan@bakermckenzie.com)

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**From:** Vardy, Marilyn <[Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca)>  
**Sent:** Wednesday, November 16, 2022 12:18 PM  
**To:** Horrigan, Bryan <[Bryan.Horrigan@bakermckenzie.com](mailto:Bryan.Horrigan@bakermckenzie.com)>  
**Cc:** Gadsden, David <[David.Gadsden@bakermckenzie.com](mailto:David.Gadsden@bakermckenzie.com)>; O'Grady, Brendan <[Brendan.O'Grady@bakermckenzie.com](mailto:Brendan.O'Grady@bakermckenzie.com)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>; Gotla, Pallavi <[Pallavi.Gotla@justice.gc.ca](mailto:Pallavi.Gotla@justice.gc.ca)>; Coward, Kaitlin <[Kaitlin.Coward@justice.gc.ca](mailto:Kaitlin.Coward@justice.gc.ca)>; Chaudary, Fozia <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>; Winters, Diane <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>; Lawrence, Tessania <[Tessania.Lawrence@justice.gc.ca](mailto:Tessania.Lawrence@justice.gc.ca)>; Bernier, Jacques <[Jacques.Bernier@bakermckenzie.com](mailto:Jacques.Bernier@bakermckenzie.com)>; Mackenzie, Sarah <[Sarah.Mackenzie@justice.gc.ca](mailto:Sarah.Mackenzie@justice.gc.ca)>  
**Subject:** [EXTERNAL] RE: EGR v HMK, Court File No. 2020-1214(GST)G

Hi Bryan,

I hope all is well.

We understand that the Monitor is currently seeking to obtain access to the discovery transcripts.

Could you kindly advise whether you have communicated with the Monitor or the Monitor's counsel regarding the discovery transcripts since sending us the October 13, 2022 email on this topic (see below)? Has the Appellant asked the Monitor to return any discovery transcripts that the Appellant had previously provided to the Monitor? Has the Appellant taken any position on the Monitor's right to obtain copies of the discovery transcripts and if so, what is that position?

Given the Case Management Judge's Direction received by the parties on October 6, 2022 and the Case Management Judge's subsequent comments to the parties on October 19, 2022 regarding the Monitor not being permitted to listen in on the case management call that took place on October 19, 2022, the Respondent is of the view that it is inappropriate for the Monitor to be provided with copies of, or access to, the discovery transcripts. If there is any dispute between the Appellant and the Respondent on this issue, then the Respondent believes it appropriate to seek further direction forthwith from the Case Management Judge.

We would accordingly appreciate receiving your views and comments concerning the above on an expedited basis.

Thank you.

Marilyn Vardy  
*(she, her, elle, la)*  
Senior General Counsel | Avocate-générale principale  
Ontario Regional Office | Bureau régional de l'Ontario  
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**Cc:** Gadsden, David <[David.Gadsden@bakermckenzie.com](mailto:David.Gadsden@bakermckenzie.com)>; O'Grady, Brendan <[Brendan.O'Grady@bakermckenzie.com](mailto:Brendan.O'Grady@bakermckenzie.com)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>; Gotla, Pallavi <[Pallavi.Gotla@justice.gc.ca](mailto:Pallavi.Gotla@justice.gc.ca)>; Coward, Kaitlin <[Kaitlin.Coward@justice.gc.ca](mailto:Kaitlin.Coward@justice.gc.ca)>; Chaudary, Fozia <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>; Winters, Diane <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>; Lawrence, Tessania <[Tessania.Lawrence@justice.gc.ca](mailto:Tessania.Lawrence@justice.gc.ca)>; Bernier, Jacques <[Jacques.Bernier@bakermckenzie.com](mailto:Jacques.Bernier@bakermckenzie.com)>  
**Subject:** RE: EGR v HMK, Court File No. 2020-1214(GST)G

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I can confirm that we received the Tax Court Directive dated September 8, 2022 via email on October 6, 2022 at 7:33 pm. About an hour earlier, on October 6, 2022 at 6:36 pm, we forwarded the transcript for that day's discovery to the Monitor. We have not forwarded any additional transcripts to the Monitor since and we are awaiting input from EGR's CCAA counsel regarding next steps.

Best regards,

**Bryan Horrigan** ([Bio](#))  
Partner, Indirect Tax  
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181 Bay Street, Suite 2100  
Toronto, ON M5J 2T3  
Canada  
Tel: +1 416 863 1221  
Direct: +1 416 865 3905  
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**Cc:** Gadsden, David <[David.Gadsden@bakermckenzie.com](mailto:David.Gadsden@bakermckenzie.com)>; O'Grady, Brendan <[Brendan.O'Grady@bakermckenzie.com](mailto:Brendan.O'Grady@bakermckenzie.com)>; Mann, Jasmeen <[Jasmeen.Mann@justice.gc.ca](mailto:Jasmeen.Mann@justice.gc.ca)>; Gotla, Pallavi <[Pallavi.Gotla@justice.gc.ca](mailto:Pallavi.Gotla@justice.gc.ca)>; Coward, Kaitlin <[Kaitlin.Coward@justice.gc.ca](mailto:Kaitlin.Coward@justice.gc.ca)>; Chaudary, Fozia <[Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)>; Winters, Diane <[Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)>; Lawrence, Tessania

<[Tessania.Lawrence@justice.gc.ca](mailto:Tessania.Lawrence@justice.gc.ca)>

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Last Thursday evening (October 6, 2022), we received an email from the Tax Court enclosing a Directive issued by the case management judge, the Honourable Justice Russell, directing that each party's discovery examination in this matter be conducted without the CCAA Monitor or its counsel present or in any other way observing or listening, particularly given that, unlike typical hearings and trials, discovery examinations are not public proceedings.

Although the Directive was apparently signed in Ottawa on September 8, 2022, the Respondent first received the Directive on the evening of October 6, 2022.

Can you please advise whether the Appellant also first received the Directive from the Tax Court of Canada on the evening of October 6, 2022 and whether, in light of the Tax Court's directive, the Appellant intends to continue providing copies of the discovery transcripts to the Monitor moving forward? Will EGR ask for the return of any transcripts that the Appellant has shared with the Monitor?

Thank you.

Marilyn Vardy

*(she, her, elle, la)*

Senior General Counsel | Avocate-générale principale  
Ontario Regional Office | Bureau régional de l'Ontario  
120 Adelaide Street West, Suite 400 | 120, rue Adelaide Ouest, Pièce 400  
Toronto, Ontario M5H 1T1  
National Litigation Sector | Secteur national du contentieux  
Department of Justice Canada | Ministère de la Justice Canada  
E-mail/Courriel: [Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca)  
Tel/Tél: 647-256-7454 / **647 871-3307**  
Fax/Télé: 416-973-0810

**This communication contains information that may be confidential, exempt from disclosure, subject to litigation privilege or protected by the privilege that exists between lawyers or notaries and their clients. If you are not the intended recipient, you should not read, rely on, retain, or distribute it. Please delete or otherwise destroy this communication and all copies of it immediately, and contact the sender at (647) 256-7454 or by email at [Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca). Thank you.**

**Ce message contient des renseignements qui pourraient être confidentiels, soustraits à la communication, ou protégés par le privilège relatif au litige ou par le secret professionnel liant l'avocat ou le notaire à son client. S'il ne vous est pas destiné, vous êtes priés de ne pas le lire, l'utiliser, le conserver ou le diffuser. Veuillez sans tarder le supprimer et en détruire toute copie, et communiquer avec l'expéditeur au (647) 256-7454 ou à [Marilyn.Vardy@justice.gc.ca](mailto:Marilyn.Vardy@justice.gc.ca). Merci de votre collaboration.**

Appendix “R”  
to the Twelfth Report of the Monitor



JUL 25 2022

*Entered*

Court File No. CV-22-682646

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE ) FRIDAY, THE 22<sup>nd</sup> DAY  
JUSTICE KOEHNEN ) OF JULY, 2022

BETWEEN:

CHICAGO TITLE INSURANCE COMPANY

Plaintiff

- and -

JOHN DOE, WILLIAM SURIANI, AUSTIN PERSICO a.k.a  
AGOSTINO-AUSTIN PERSICO a.k.a. AGOSTINO PERSICO carrying on business as  
AAP LAW, MARCELLO CODISPOTI a.k.a MARCEL CODISPOTI,  
2723217 ONTARIO INC., LYNX EQUITY LIMITED and  
LYNX EQUITY INTERNATIONAL INC.

Defendants

**ORDER**

**NOTICE**

If you, the Defendant, disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized. You are entitled to apply on at least twenty-four (24) hours notice to the Plaintiff, for an order granting you sufficient funds for ordinary living expenses and legal advice and representation.

Any other person who knows of this order and does anything which helps or permits the Defendant to breach the terms of this Order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

**THIS MOTION**, made, without notice, by the Plaintiff CHICAGO TITLE INSURANCE COMPANY, for an interim Order in the form of a Mareva injunction restraining the Defendants from dissipating their assets and Norwich Order to compel non-party financial institutions and other non-parties to produce necessary documents, among other relief, was heard this day at the Courthouse at 330 University Avenue, Toronto, Ontario;

**ON READING** the Plaintiff's Motion Record, the Affidavit of Staci Ulrich and exhibits annexed thereto, filed, and upon hearing submissions of counsel for the Plaintiff, and on noting the undertaking of the Plaintiff to abide by any Order this Honourable Court may make concerning damages arising from the granting and enforcement of this Order,

1. **THIS COURT ORDERS** that the Defendants, and their servants, employees, agents, assigns officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this Order, are restrained from directly or indirectly, by any means whatsoever:
  - (a) Selling, removing, dissipating, alienating, transferring, assigning, encumbering or other dealing with any assets of the Defendants, wherever situated;
  - (b) Instructing, requesting, counselling, demanding, or encouraging any other person to do so; and
  - (c) Facilitating, assisting in, aiding, abetting, or participating in any acts the effect of which is to do so;

but that such restrictions shall apply only up to the monetary limits as set out for each respective Defendant at **Schedule "B"** hereto;

2. **THIS COURT ORDERS** that paragraph 1 above shall apply to all of the Defendants' assets whether or not they are in their own name and whether they are solely or jointly owned, and include any asset which they have the power, directly or indirectly to dispose of or deal with as if it were their own. The Defendants shall be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions;
3. **THIS COURT ORDERS** that the Defendants may apply for an Order, on at least twenty-four (24) hours' notice of the Plaintiff, specifying the amount of funds which the Defendants are entitled to spend on ordinary living expenses and legal advice and representation;
4. **THIS COURT ORDERS** that each of the Defendants shall prepare and provide to the Plaintiff within seven (7) days of the date of service of this Order, a sworn statement describing the nature, value, and location of their assets worldwide, whether in their own name or not and whether solely or jointly owned;
5. **THIS COURT ORDERS** that the Defendants shall submit to an examination under oath within seven (7) days of the delivery by the Defendants of the sworn statements referenced at paragraph four (4) above;
6. **THIS COURT ORDERS** that the non-party financial institutions with notice of this Order, including but not limited to those described at **Schedule "A"** hereto, shall forthwith freeze and prevent any removal or transfer of monies or assets of the Defendants held in any account or on credit on behalf of the Defendants, until further Order of the Court, but that

such restrictions shall apply only up to the monetary limits as set out for each respective Defendant at **Schedule "B"** hereto;

7. **THIS COURT ORDERS** that the non-party financial institutions forthwith disclose and deliver up to the Plaintiff, and the Plaintiff's own expense, copies of all documentation and records relating to the accounts and transactions and activities in relation thereto for the period of February 27, 2020 until the date of the expiry of the Order, such disclosure to include but not be limited to:

- (a) All files, communications, records, papers, notes, correspondence, memoranda, computer data, account statements, cheques, wire transfer confirmations, account opening forms, signature cards and other records and information in the Banks' possession power or control with respect to the Accounts, of any one of them;
- (b) The identity of any persons or entities who instructed the Banks, or any one of them, to conduct any business in relation to the Accounts, or any one of them, including the making of any payments or transfers to third parties, the identity of the payees and particulars of the instructions and transactions; and
- (c) The identity of any persons or entities to whom funds were transferred from the Accounts, or any one of them, and the particulars of the instructions and the transactions;

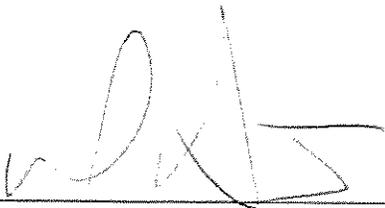
8. **THIS COURT ORDERS** that the Plaintiff shall be permitted to use the information obtained further to paragraph 7 above for the purpose of facilitating the tracing and preservation of funds and assets;
  
9. **THIS COURT ORDERS** that any non-party person or corporation with notice of this Order, who or which hold in trust and/or otherwise control funds and/or assets legally and/or beneficially held and/or otherwise controlled by any of the Defendants listed at **Schedule "B"** shall forthwith freeze and prevent any removal or transfer of monies or assets of the Defendants held or controlled by any such non-party until further Order of the Court, but that such restrictions shall apply only up to the monetary limits as set out for each respective Defendant at **Schedule "B"** hereto;
  
10. **THIS COURT ORDERS** that any non-party person or corporation with notice of this Order, who or which hold in trust and/or otherwise control funds and/or assets legally and/or beneficially held and/or otherwise controlled by any of the Defendants listed at **Schedule "B"** forthwith disclose and deliver up to the Plaintiff, at the Plaintiff's own expense, which expense shall reflect the reasonable costs actually and reasonably incurred by the said non-parties, copies of all documentation and records relating in any way to the funds or assets of the Defendants and all activities in relation thereto for the period of February 27, 2020 until the date of the expiry of the Order, such disclosure to include but not be limited to:
  - (a) All files, communications, records, papers, notes, correspondence, memoranda, computer data in any way related to bank accounts, account numbers, account balances, account statements, cheques, wire transfer confirmations, account opening forms, signature

cards, tax returns, financial statements, loan applications, net worth statements, shares, stocks, bonds, commercial paper, real estate, mortgages, leases, insurance policies, motor vehicle license and serial numbers, RRSP's, RHOSP's, pensions, term deposits, GIC's, jewelry, objects of art, furniture, appliances and other records and information in the Defendant Trustees' possession power or control with respect to the any funds or assets of the Defendants;

- (b) The identity of any persons or entities who instructed the Defendant Trustees to conduct any business in relation to the Defendants' assets, including the making of any payments or transfers to third parties, the identity of the payees and particulars of the instructions in relation to the payments or transfers and particulars of the payments or transfers themselves; and
- (c) The identity of any persons or entities to whom funds or assets of the Defendants were transferred, and the particulars of the instructions and the transfer;

11. **THIS COURT ORDERS** that the Plaintiff shall be permitted to use the information obtained further to paragraph 10 above for the purpose of facilitating the tracing and preservation of funds and assets;

12. **THIS COURT ORDERS** that the non-party financial institutions and any other party that has or obtains knowledge of this Order shall not disclose the existence of this Order, this proceeding, or any act or conduct undertaken in compliance with this Order to any other person or party, except for the limited purpose of complying with this Order or obtaining legal advice with respect to compliance with this Order;
13. **THIS COURT ORDERS** that service of the Plaintiff's Motion Record in respect of the within Motion is hereby dispensed with;
14. **THIS COURT ORDERS** that upon the Defendants providing security by paying the sum of \$2,750,000.00 for damages plus \$100,000.00 for costs to the Accountant of the Superior Court of Justice, paragraphs 1-6, 9 and 12 above will cease to have effect, and the Accountant of the Superior Court of Justice is hereby directed to accept such payment to the credit of this proceeding;
15. **THIS COURT ORDERS** that anyone served with or notified of this Order may apply to this Honourable Court at any time to vary or discharge this Order, or part thereof, on no less than seven (7) days' notice to the Plaintiff;
16. **THIS COURT ORDERS** that the Plaintiff shall apply for an extension of this Order within ten (10) days' of the date of this Order, failing which paragraphs 1-6, 9 and 12 above will terminate;



A handwritten signature in black ink, appearing to be 'W. J. B.', is written over a horizontal line.

**SCHEDULE "A" – THE BANKS**

**St. Stanislaus – St. Casimer's Credit Union Ltd.**

**St. Stanislaus – St. Casimer's Polish Parishes Credit Union**

**HSBC**

**TD Canada Trust**

**CIBC**

**SCHEDULE "B" – DEFENDANTS AGAINST WHOM MAREVA IS REQUESTED AND  
MONETARY LIMITS OF SAME**

<b>Defendant</b>	<b>Monetary Limit of Mareva Order</b>
MARCELLO CODISPOTI a.k.a MARCEL CODISPOTI	\$52,000.00
LYNX EQUITY LIMITED	\$30,000.00
LYNX EQUITY INTERNATIONAL INC.	\$30,000.00
AUSTIN PERSICO a.k.a AGOSTINO-AUSTIN PERSICO a.k.a. AGOSTINO PERSICO carrying on business as AAP LAW	\$2,199,333.98

CHICAGO TITLE INSURANCE COMPANY OF CANADA  
PLAINTIFF

- and -

WILLIAM SURIANI et. al.  
DEFENDANTS

(Short title of proceeding)

Court File No. CV-22-682646

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**ORDER**

**KATZMAN & ASSOCIATES**

Barristers and Solicitors  
393 University Avenue, Suite 2000  
Toronto, ON M5G 1E6

**MICHAEL A. KATZMAN (54021R)**

E: [mkatzman@katzmanlitigation.com](mailto:mkatzman@katzmanlitigation.com)

**JESSICA HEWLETT (71316A)**

E: [jhewlett@katzmanlitigation.com](mailto:jhewlett@katzmanlitigation.com)

Tel: (416) 593-7604

Fax: (416) 628-2224

Lawyers for the Plaintiff

# Appendix “S”

## to the Twelfth Report of the Monitor

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MR. ) THURSDAY, THE 6<sup>TH</sup> DAY  
 )  
JUSTICE MYERS ) OF OCTOBER, 2022

BETWEEN:

CHICAGO TITLE INSURANCE COMPANY

Plaintiff

- and -

*Entered Oct .11/2022 [Signature]*

JOHN DOE, WILLIAM SURIANI, AUSTIN PERSICO a.k.a  
AGOSTINO-AUSTIN PERSICO a.k.a. AGOSTINO PERSICO carrying on business as  
AAP LAW, MARCELLO CODISPOTI a.k.a MARCEL CODISPOTI,  
2723217 ONTARIO INC., LYNX EQUITY LIMITED and  
LYNX EQUITY INTERNATIONAL INC.

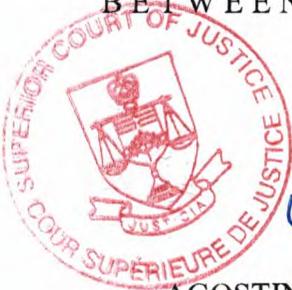
Defendants

**ORDER**

**NOTICE**

If you, the Defendant, disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized. You are entitled to apply on at least twenty-four (24) hours notice to the Plaintiff, for an order granting you sufficient funds for ordinary living expenses and legal advice and representation.

Any other person who knows of this order and does anything which helps or permits the Defendant to breach the terms of this Order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized.



**THIS MOTION**, made, without notice, by the Plaintiff CHICAGO TITLE INSURANCE COMPANY, for an Order extending the terms of the Order of Justice Koehnen dated July 22, 2022 as well as the terms of the Order of Justice Vermette dated August 2, 2022 as well as the terms of the Order of Justice Black dated August 12, 2022 as well as the terms of the Order of Justice Myers dated September 7, 2022, and for an Order that paragraphs 10 – 11 of the Order of Justice Koehnen dated July 22, 2022 shall apply to any non-party person or corporation with notice of the said Order who or which has ever held and/or otherwise has ever controlled funds or assets legally and/or beneficially owned and/or otherwise controlled by any of the Defendant listed at Schedule “B” to the said Order of Justice Koehnen dated July 22, 2022 was heard this day at the Courthouse at 330 University Avenue, Toronto, Ontario;

**ON READING** the Plaintiff’s Motion Record, the Affidavit of Staci Ulrich and exhibits annexed thereto, filed, and on reading the Supplementary Motion Record of the Plaintiff, the Affidavit of Daniel Kraus and exhibits annexed thereto, filed, and on reading the further Supplementary Motion Record of the Plaintiff, the Affidavit of Daniel Kraus and exhibits annexed thereto, filed, and on reading the further Supplementary Motion Record of the Plaintiff, the Affidavit of Daniel Kraus and exhibits annexed thereto, filed, and on reading the Amended Motion Record of the Plaintiff, the Affidavit of Francesca Ditullio and exhibits annexed thereto, filed and reading the Amended Amended Motion Record of the Plaintiff, the Affidavit of Francesca Ditullio and exhibits annexed thereto, filed, and on noting the undertaking of the Plaintiff to abide by any Order this Honourable Court may make concerning damages arising from the granting and enforcement of this Order, and upon hearing the submissions of counsel for the Plaintiff,

1. **THIS COURT ORDERS** that the terms of the Order of Justice Koehnen dated July 22, 2022, attached hereto as **Schedule “A”**, and the terms of the Order of Justice Vermette dated August 2, 2022, attached hereto as **Schedule “B”**, and the terms of the Order of Justice Black dated August 12, 2022, attached hereto as **Schedule “C”**, and the terms of the Order of Justice Myers dated September 7, 2022, attached hereto as **Schedule “D”** be and hereby are extended for a period of 30 days from the date of this Order;
  
2. **THIS COURT ORDERS** that paragraphs 10 and 11 of the Order of Justice Koehnen dated July 22, 2022, attached hereto as **Schedule “A”** shall apply to any non-party person or corporation with notice of the said Order who or which has ever held and/or otherwise has ever controlled funds or assets legally and/or beneficially owned and/or otherwise controlled by any of the Defendant listed at Schedule “B” to the said Order of Justice Koehnen dated July 22, 2022;
  
3. **THIS COURT ORDERS** that service of the Plaintiff’s supplementary materials in respect of the within Motion be, and the same hereby is dispensed with;
  
4. **THIS COURT ORDERS** that the Plaintiff shall file supplementary materials for an extension of this Order in advance of the 30 day extension granted by this Order, failing which paragraphs 1-6, 9 and 12 of the Order of Justice Koehnen dated July 22, 2022 attached hereto as **Schedule “A”** will terminate;

5. **THIS COURT ORDERS** that the balance of the Motion be and is hereby adjourned to November 2, 2022, to be spoken to;



Digitally signed by Frederick Myers  
DN: c=ca, st=on,  
o=Government of Ontario,  
ou=People,  
serialNumber=DSAP363620,  
cn=Frederick Myers  
Date: 2022.10.07 11:20:07  
-04'00'

CHICAGO TITLE INSURANCE COMPANY OF CANADA  
PLAINTIFF

- and -

WILLIAM SURIANI et. al.  
DEFENDANTS

(Short title of proceeding)

**Court File No. CV-22-682646-0000**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**ORDER**

**KATZMAN & ASSOCIATES**  
Barristers and Solicitors  
393 University Avenue, Suite 2000  
Toronto, ON M5G 1E6

**MICHAEL A. KATZMAN (54021R)**  
Tel: (416) 593-7604  
E: mkatzman@katzmanlitigation.com

**JESSICA HEWLETT (71316A)**  
Tel: (416) 593-7100 Ext. 226  
E: jhewlett@katzmanlitigation.com

Fax: (416) 628-2224

Lawyers for the Plaintiff

Appendix “T”  
to the Twelfth Report of the Monitor

AMENDED THIS Nov 3/2022 PURSUANT TO  
MODIFIÉ CE CONFORMÉMENT À  
 RULE/LA RÈGLE 26.02 ( \_\_\_\_\_ )  
 THE ORDER OF MYERS, J.  
L'ORDONNANCE DU  
DATED / FAIT LE Nov. 2/2022  
W. CAMPBELL ONTARIO  
REGISTRAR **SUPERIOR COURT OF JUSTICE**  
SUPERIEUR COUR SUPREME DE JUSTICE

Court File No. CV-22-682646

B E T W E E N:

CHICAGO TITLE INSURANCE COMPANY

Plaintiff

- and -

JOHN DOE, WILLIAM SURIANI, AUSTIN PERSICO a.k.a  
AGOSTINO-AUSTIN PERSICO a.k.a. AGOSTINO PERSICO carrying on business as  
AAP LAW, MARCELLO CODISPOTI a.k.a MARCEL CODISPOTI,  
2723217 ONTARIO INC., LYNX EQUITY LIMITED and  
LYNX EQUITY INTERNATIONAL INC., ARMoured SECURITY CANADA INC.,  
ODANIEL CAMPBELL, BERKSHIRE ENTERPRISES INC., DAO MY VUONG, ELAINE  
PERSICO, ASTORO PERSICO, FIRST CANADIAN ALUMINUM LTD., DUNG HUE THAI,  
KTI CORPORATION, NICHOLAS DISCOLA a.k.a. NICK DISCOLA, DAVID COLLIA a.k.a.  
DAVE COLLIA, PETER COLLIA, YA PING WANG, MAX MA, MA WAN MIN, 9898565  
CANADA INC., EXPRESS GOLD REFINING LTD., CHRIS GAROFALO, KOSMOS GATE  
INC., GEORGIOS GALANOS, DEMETRIOS TORIS, NOVA DIAMONDS INC., 1271470  
ONTARIO INC., JEREMY WILTSHIRE, MARIA ANNA BABIOLAKIS, GEORGIOS  
BABIOLAKIS, ANNETTE BABIOLAKIS, TORONTO RESERVE GOLD INC., THE GOLD  
SPOT REFINERY LTD., 2733287 ONTARIO INC., EDI SAPIR and MASTER LOGISTICS  
CANADA CORP.

Defendants

### AMENDED STATEMENT OF CLAIM

#### TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$2,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed by the Court. If you believe that the amount claimed for costs is excessive, you may pay the Plaintiff's claim and \$400.00 for costs and have the costs assessed by the Court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date of Issue: Jan 14/2022

Issued by: E. Filed  
Local Registrar

330 University Avenue  
Toronto, Ontario M5G 1R8

TO:

JOHN DOE

AND TO:

WILLIAM SURIANI

AND TO:

AUSTIN PERSICO a.k.a AGOSTINO-AUSTIN PERSICO a.k.a.  
AGOSTINO PERSICO carrying on business as AAP LAW

AND TO:

MARCELLO CODISPOTI a.k.a. MARCEL CODISPOTI

AND TO:

2723217 ONTARIO INC.

AND TO:

LYNX EQUITY LIMITED

AND TO:

LYNX EQUITY INTERNATIONAL INC.

AND TO:

ARMOURED SECURITY CANADA INC.

AND TO:

ODANIEL CAMPBELL

AND TO:

BERKSHIRE ENTERPRISES INC.

AND TO:

DAO MY VUONG

AND TO:

ELAINE PERSICO

AND TO:

ASTORO PERSICO

AND TO:

FIRST CANADIAN ALUMINUM LTD.

AND TO:

DUNG HUE THAI

AND TO:

KTI CORPORATION

AND TO:

NICHOLAS DISCOLA a.k.a. NICK DISCOLA

AND TO:

DAVID COLLIA a.k.a. DAVE COLLIA

AND TO:

PETER COLLIA

AND TO:

YA PING WANG

AND TO:

MAX MA

AND TO:

MA WAN MIN

AND TO:

9898565 CANADA INC.

AND TO:

EXPRESS GOLD REFINING LTD.

AND TO:

CHRIS GAROFALO

AND TO:

KOSMOS GATE INC.

AND TO:

GEORGIOS GALANOS

AND TO:

DEMETRIOUS TORIS

AND TO:

NOVA DIAMONDS INC.

AND TO:

1271470 ONTARIO INC.

AND TO:

JEREMY WILTSHIRE

AND TO:

MARIA ANNA BABIOLAKIS

AND TO:

GEORGIOS BABIOLAKIS

AND TO:

ANNETTE BABIOLAKIS

AND TO:

TORONTO RESERVE GOLD INC.

AND TO:

THE GOLD SPOT REFINERY LTD.

AND TO:

2733287 ONTARIO INC.

AND TO:

EDI SAPIR

AND TO:

MASTER LOGISTICS CANADA CORP.

## CLAIM

1. The Plaintiff CHICAGO TITLE INSURANCE COMPANY claims as against the Defendants JOHN DOE, WILLIAM SURIANI, AUSTIN PERSICO a.k.a. AGOSTINO-AUSTIN PERSICO a.k.a AGOSTINO PERSICO carrying on business as AAP Law, MARCELLO CODISPOTI a.k.a MARCEL CODISPOTI, 2723217 ONTARIO INC., LYNX EQUITY LIMITED, ~~and~~ LYNX EQUITY INTERNATIONAL INC. ARMOURED SECURITY CANADA INC., ODANIEL CAMPBELL, BERKSHIRE ENTERPRISES INC., DAO MY VUONG, ELAINE PERSICO, ASTORO PERSICO, FIRST CANADIAN ALUMINUM LTD., DUNG HUE THAI, KTI CORPORATION, NICHOLAS DISCOLA a.k.a. NICK DISCOLA, DAVID COLLIA a.k.a. DAVE COLLIA, PETER COLLIA, YA PING WANG, MAX MA, MA WAN MIN, 9898565 CANADA INC., EXPRESS GOLD REFINING LTD., CHRIS GAROFALO, KOSMOS GATE INC., GEORGIOS GALANOS, DEMETRIOUS TORIS, NOVA DIAMONDS INC., 1271470 ONTARIO INC., JEREMY WILTSHIRE, MARIA ANNA BABIOLAKIS, GEORGIOS BABIOLAKIS, ANNETTE BABIOLAKIS, TORONTO RESERVE GOLD INC., THE GOLD SPOT REFINERY LTD., 2733287 ONTARIO INC., EDI SAPIR and MASTER LOGISTICS CANADA CORP. (collectively, “the Defendants”):
  - a. Damages in the amount of \$2,750,000 CAD for:
    - i. Fraud and/or in the alternative civil conspiracy to defraud;
    - ii. Unjust enrichment; and
    - iii. Violations of the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act*;

- b. An interim, interlocutory and permanent Order that the Defendants, and their servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of the requested injunction, are restrained from directly or indirectly, by any means whatsoever:
- i. Selling, removing, dissipating, alienating, transferring, assigning, encumbering or otherwise dealing with any assets of the Defendants, wherever situate;
  - ii. Instructing, requesting, counselling, demanding, or encouraging any other person to do so; and
  - iii. Facilitating, assisting in, aiding, abetting, or participating in any acts the effect of which is to do so;
- c. An interim, interlocutory and permanent Order that the Order in paragraph (b) above applies to all of the Defendants' assets whether or not they are in their own name and whether they are solely or jointly owned; that for the purpose of the Order in paragraph (b) above, the Defendant's assets include any asset which they have the power, directly or indirectly, to dispose of or deal with as if it were their own; and that the Defendants are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions;
- d. An interim, interlocutory and permanent Order that each of the Defendants prepare and provide to the Plaintiff within seven (7) days of the date of service of the Order requested, a sworn statement describing the nature, value, and location

of their assets worldwide, whether in their own name or not and whether solely or jointly owned;

- e. An interim, interlocutory and permanent Order that the Defendants submit to an examination under oath within seven (7) days of the delivery by the Defendants of the aforementioned sworn statements;
- f. An interim, interlocutory and permanent Order that the non-party financial institutions with notice of the Order, including but not limited to those described at Schedule “A” hereto (“the Banks”) forthwith freeze and prevent any removal or transfer of monies or assets of the Defendants held in any account or on credit on behalf of the Defendants, with the Banks, until further Order of the Court, including but not limited to the following accounts (“the Accounts”):

Bank Name	Account Name	Transit and Account No.
St. Stanislaus – St. Casimer’s Credit Union Ltd.  St. Stanislaus – St. Casimer’s Polish Parishes Credit Union	AUSTIN PERSICO a.k.a AGOSTINO-AUSTIN PERSICO a.k.a AGOSTINO PERSICO operating as AAP Law  D.O.B: March 29, 1975  Address: a) 27 Westcliffe Crescent, Richmond Hill, ON L4E 0S1  b) 12901 Highway 27, Nobleton, ON L7B 1K4  c) 510 Deerhurst Drive, Brampton, ON L6T 5H9  d) 119 Gamble Glen Crescent, Richmond Hill, ON L4S 2T1  e) 331 Trowers Road, Unit 3, Vaughan, ON L4L 6A2  f) 9100 Jane Street, Concord, ON L4K 0A4  g) 491 Bowes Road Vaughan, ON L4K 1J5	Account – 10001785  Branch – 02562-828
HSBC	AUSTIN PERSICO a.k.a AGOSTINO-AUSTIN PERSICO a.k.a AGOSTINO PERSICO operating as AAP Law	Account: 751-013277-001

	<p>D.O.B: March 29, 1975</p> <p>Address:</p> <p>a) 27 Westcliffe Crescent, Richmond Hill, ON L4E 0S1</p> <p>b) 12901 Highway 27, Nobleton, ON L7B 1K4</p> <p>c) 510 Deerhurst Drive, Brampton, ON L6T 5H9</p> <p>d) 119 Gamble Glen Crescent, Richmond Hill, ON L4S 2T1</p> <p>e) 331 Trowers Road, Unit 3, Vaughan, ON L4L 6A2</p> <p>f) 9100 Jane Street, Concord, ON L4K 0A4</p> <p>g) 491 Bowes Road Vaughan, ON L4K 1J5</p>	<p>Account: 751-013277-002</p>
TD Canada Trust	<p>Marcello Codispoti a.k.a. Marcel Codispoti</p> <p>D.O.B.: November 18, 1943</p> <p>Address:</p> <p>a) 37 Ursini Court, Woodbridge, ON L4C 2N7</p> <p>b) 1436 Benson Street, Innisfil, ON L9S 0C8</p> <p>c) 304 Oxbow Park Drive, Wasaga Beach, ON L9Z 2V6</p>	<p>BRN: 0160220200317</p> <p>Cr:01602-5203499</p>
CIBC	<p>Lynx Equity Limited</p> <p>Address: 692 Queen Street, Unit 205 Toronto, ON M4M 1G9</p>	<p>00022-1604794</p>
CIBC	<p>Lynx Equity International Inc.</p> <p>Address: 692 Queen Street, Unit 205 Toronto, ON M4M 1G9</p>	<p>00022-1604794</p>

- g. An interim, interlocutory and permanent Order that the Banks forthwith disclose and deliver up to the Plaintiff at the Plaintiff's own expense, which expense shall reflect the reasonable costs actually and reasonably incurred by the Banks copies of all documentation and records relating to the Accounts and the transactions and

activities in relation thereto for the period of February 27, 2020 until the date of the expiry of the Order, such disclosure to include but not be limited to:

- i. All files, communications, records, papers, notes, correspondence, memoranda, computer data, account statements, cheques, wire transfer confirmations, account opening forms, signature cards and other records and information in the Banks' possession power or control with respect to the Accounts;
  - ii. The identity of any persons or entities who instructed the Bank to conduct any business in relation to the Accounts, including the making of any payments or transfers to third parties, the identity of the payees and particulars of the instructions and transactions; and
  - iii. The identity of any persons or entities to whom funds were transferred from the Account, and the particulars of the instructions and the transactions;
- h. An interim, interlocutory and permanent Order that the Plaintiff shall be permitted to use the information obtained pursuant to the Order requested in d. through g. above for the purpose of facilitating the tracing and preservation of funds and assets, the entitlement to which the Plaintiff makes claim;
- i. An interim, interlocutory and permanent Order that any other person or corporation with notice of the Order, who or which hold in trust or otherwise control funds or assets legally and/or beneficially held by the Defendants, or any of them ("Defendant Trustees"), forthwith freeze and prevent any removal or

transfer of monies or assets of the Defendants held or controlled by the Defendant Trustees until further Order of the Court;

- j. An interim, interlocutory and permanent Order that Defendant Trustees forthwith disclose and deliver up to the Plaintiff, at the Plaintiff's own expense, which expense shall reflect the reasonable costs actually and reasonably incurred by the Defendant Trustees, copies of all documentation and records relating in any way to the funds or assets of the Defendants and all activities in relation thereto for the period of February 27, 2020 until the date of the expiry of the Order, such disclosure to include but not be limited to:

- i. All files, communications, records, papers, notes, correspondence, memoranda, computer data in any way related to bank accounts, account numbers, account balances, account statements, cheques, wire transfer confirmations, account opening forms, signature cards, tax returns, financial statements, loan applications, net worth statements, shares, stocks, bonds, commercial paper, real estate, mortgages, leases, insurance policies, motor vehicle license and serial numbers, RRSP's, RHOSP's, pensions, term deposits, GIC's, jewellery, objects of art, furniture, appliances and other records and information in the Defendant Trustees' possession power or control with respect to the any funds or assets of the Defendants;
- ii. The identity of any persons or entities who instructed the Defendant Trustees to conduct any business in relation to the Defendants' assets, including the making of any payments or transfers to third parties, the

identity of the payees and particulars of the instructions in relation to the payments or transfers and particulars of the the payments or transfers themselves; and

- iii. The identity of any persons or entities to whom funds or assets of the Defendants were transferred, and the particulars of the instructions and the transfer;
- k. An interim, interlocutory and permanent Order that the Plaintiff shall be permitted to use the information obtained pursuant to the Order requested in i. through j. above for the purpose of facilitating the tracing and preservation of funds and assets, the entitlement to which the Plaintiff makes claim;
- l. An interim, interlocutory and permanent Order that the Banks and any other party that has or obtains knowledge of the requested interim Order shall not disclose the existence of such interim Order, this proceeding, or any act or conduct undertaken in compliance with such interim Order to any other person or party, except for the limited purpose of complying with such interim Order or obtaining legal advice with respect to compliance with the interim Order;
- m. A declaration that certain transactions, payments and conveyances conducted or effected by the Defendants, or any of them, were intended to defeat hinder or delay creditors, and in particular the Plaintiff, of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures, or did have the effect of preferring other creditors over the Plaintiff, and accordingly contravene the provisions of the *Fraudulent Conveyances Act* and *Assignments and Preferences Act* and, as a result, are void;

- n. An Order setting aside any and all transactions, payments and conveyances of a reviewable nature and contrary to the provisions of the *Fraudulent Conveyances Act* and *Assignments and Preferences Act*;
- o. An accounting of all funds received by the Defendants, or any of them, directly or indirectly as a result of the advance of funds pursuant to a charge registered as instrument number PR3622792 against title to the property municipally known as B3 Matheson Blvd E. being a vacant commercial lot in Mississauga, Ontario identified as PIN: 13297-0256;
- p. A tracing Order respecting all funds received by the Defendants, or any of them, directly or indirectly as a result of the advance of funds pursuant to a charge registered as instrument number PR3622792 against title to the property municipally known as B3 Matheson Blvd E. being a vacant commercial lot in Mississauga, Ontario identified as PIN: 13297-0256;
- q. Further and/or in the alternative, a declaration that the Defendants hold title to funds and assets in which the Plaintiff has a beneficial interest, and accordingly hold the said funds and assets on a resulting and/or constructive trust to the benefit of the Plaintiff;
- r. Further and/or in the alternative, a declaration that the Defendants are in breach of the said resulting and/or constructive trust to the extent of \$2,750,000.00 and an Order for damages accordingly for breach of resulting and/or constructive trust;
- s. Disgorgement of any profits, fees, interest or other benefits obtained by the Defendants, or any of them, in connection with the matters described herein;
- t. Aggravated damages in an amount to be determined prior to trial;

- u. Punitive or exemplary damages in the amount of \$500,000.00;
- v. A declaration that the debt owing to the Plaintiff falls under the exceptions set out at section 178 of the *Bankruptcy and Insolvency Act* and shall not be released, and instead shall survive the Defendants' discharge from bankruptcy if they or any of them are or become bankrupt;
- w. Pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*;
- x. Costs of the Action on a full indemnity basis, or in the alternative, on a substantial indemnity basis plus HST; and
- y. Such further and other relief as to this Honourable Court may seem just;

***The Plaintiff, the Policy of Title Insurance and the Fraudulent Mortgage***

2. The Plaintiff Chicago Title Insurance Company ("the Plaintiff") is an insurance company which carries on business as a provider of title insurance coverage in the Canadian market.
  
3. Sigma One Capital, Inc. ("the Insured Mortgagee"), a company incorporated pursuant to the laws of Ontario carrying on business as a private mortgage lender, entered into a loan agreement with 922815 Ontario Inc. ("922"), an Ontario numbered company which held title to the property municipally known as B3 Matheson Blvd E. in Mississauga ("the Property") in respect of which loan agreement the Insured Mortgagee agreed to advance funds to 922.

4. The said loan advance was to be secured by way of a mortgage registered against title to the Property, ultimately registered as instrument number PR3622792 (“the Fraudulent Mortgage”).
5. In connection with the Fraudulent Mortgage, the Plaintiff issued to the Insured Mortgagee a Loan Policy of Title Insurance No.: CL-810807-D318E (“the Policy”).
6. Pursuant to the Fraudulent Mortgage, the Insured Mortgagee advanced the funds as it was directed to do (“the Fraudulent Mortgage Proceeds”).
7. As will be further particularized herein, the Fraudulent Mortgage was procured by the Defendants through an orchestrated scheme in respect of which the Defendants fraudulently manipulated corporate records as kept by the Ministry of Government and Consumer Services (“the Ministry”) for 922 which had held legal title to the Property since 1994. An individual named Dominic Loconte (“Mr. Loconte”) was, at all material times, the true sole officer and director of 922.
8. In particular, the Defendants knowingly participated in a scheme whereby they, without the knowledge or authorization of Mr. Loconte, caused Change Notices to be filed with the Ministry respecting 922 so as to cause the Mr. Loconte to appear to have been removed as officer and director of 922, and further make it appear as if an individual named Marcello Disimone (“Mr. Disimone”) had been subsequently appointed as the sole officer and director of 922.

9. The Defendants also caused the registered mailing and head office address for 922 to appear to have been changed from 1176 Greyowl Point, Mississauga, Ontario, L4Y 2W4 to 7955 Torbram Road, Suite 8, Brampton, Ontario, L6T 5B9.
  
10. Mr. Disimone is an individual residing in Ontario who himself is a victim of identity theft as perpetrated by the Defendants in furtherance of their scheme as described herein. In particular the Defendant, John Doe, impersonated and held himself out to be Mr. Disimone with a view towards causing the Fraudulent Mortgage to be registered and to facilitate the Defendants' receipt of the Fraudulent Mortgage Proceeds so they could abscond with the same.

### ***The Defendants***

11. The Defendant John Doe is an individual who, by fraudulent means and false pretenses, impersonated and held himself out to be Marcello Disimone for the purposes of obtaining the Fraudulent Mortgage on behalf of 922 and/or is an individual who received the Fraudulent Mortgage Proceeds, or part of them, or otherwise facilitated the transfer of the Fraudulent Mortgage Proceeds to the other Defendants and to persons or corporations who and which are known by the Defendants but who and which are not known to the Plaintiff, which transfers were for the specific purpose of placing the Fraudulent Mortgage Proceeds beyond the reach of the Plaintiff as creditor.
  
12. The Defendant William Suriani ("Suriani") is an individual who is believed to reside in Ontario and who is believed to have impersonated Disimone for the purposes of effecting the subject transaction. Suriani and John Doe may be one and the same.

13. Suriani is also an individual who received the Fraudulent Mortgage Proceeds, or part of them, or otherwise facilitated the transfer of the Fraudulent Mortgage Proceeds to the other Defendants and to persons or corporations who and which are known by the Defendants but who and which are not known to the Plaintiff, which transfers were for the specific purpose of placing the Fraudulent Mortgage Proceeds beyond the reach of the Plaintiff as creditor.
14. The Defendant Austin Persico a.k.a Augustino-Austin Persico a.k.a Agostino Persico carrying on business as AAP Law (“Persico”) is an individual who is believed to reside in Ontario, who was, until June 19, 2020, a lawyer permitted to practice by the Law Society of Ontario, and who purported to act for John Doe while John Doe was impersonating and holding himself out to be Mr. Disimone in respect of the subject transaction.
15. On or about June 19, 2020, Persico’s license to practice with the Law Society of Ontario was suspended for failure to provide complete responses to five Law Society investigations into his conduct.
16. The Defendant 2723217 Ontario Inc. (“272”) is a company incorporated pursuant to the laws of Ontario which participated in the fraudulent scheme as described herein by, *inter alia*, receiving the Fraudulent Mortgage Proceeds, or part of them, and took further steps to place the Fraudulent Mortgage beyond the reach of creditors, in particular the Plaintiff.

17. The Defendants Lynx Equity Limited (“Lynx”) and Lynx Equity International Inc. are related companies incorporated pursuant to the laws of Ontario, which participated in the fraudulent scheme as described herein by, *inter alia*, receiving the Fraudulent Mortgage Proceeds, or part of them, and took further steps to place the Fraudulent Mortgage beyond the reach of creditors, in particular the Plaintiff.

17.1 The remaining Defendants (“the added Defendants”) were disclosed as a result of interim Norwich Orders obtained by the Plaintiff in the context of the within Action. The added Defendants are Ontario based individuals and corporations who at all material times were involved with and party to the fraudulent activities described herein.

### ***The Fraudulent Mortgage Transaction***

18. As detailed above, on October 25, 2019, the Defendants, without the knowledge or authorization of Mr. Loconte, acted in concert with one another so as to cause a Change Notice to be filed with the Ministry in respect of 922. The Change Notice purported to disclose that Mr. Loconte had ceased to be the President and Director of 922 as of September 15, 2010, and further disclosed that Mr. Disimone had been appointed as the President on the same day.

19. The Change Notices also caused the registered mailing and head office address for 922 to be changed from 1176 Greyowl Point, Mississauga, Ontario, L4Y 2W4 to 7955 Torbram Road, Suite 8, Brampton, Ontario, L6T 5B9.

20. Following the Defendants' submission of documentation to the Insured Mortgagee (some of which documentation had been fraudulently created by the Defendants and some of which the Defendants had obtained through improper and/or illegal means), the Insured Mortgagee agreed to advance the Fraudulent Mortgage Proceeds which totalled \$2,500,000.00 to 922 in exchange for an agreement to its loan terms along with the registration of the Fraudulent Mortgage against title to the Property.

21. John Doe impersonating Mr. Disimone authorized the registration of the charge on behalf of 922. For the purposes of the subject transaction, Persico acted as counsel for 922 and received the net proceeds of \$2,279,240.63 pursuant to an Authorization to Pay signed by John Doe impersonating Disimone on behalf of 922.

22. The instruments as registered against title reflecting the Fraudulent Mortgage and the assignment of rents associated with the same provided that the registration had been authorized on behalf of 922 by Mr. Disimone in his capacity as Director with authority to bind the corporation.

23. In connection with the Insured Mortgagees' advance, the Plaintiff issued the Policy to the Insured Mortgagee.

***The Fraudulent Mortgage Proceeds***

24. On March 5, 2020, the net Fraudulent Mortgage Proceeds in the amount of \$2,279,145.63 were deposited into an HSBC bank account held by Persico, bearing account no. 751-013277-001 ("the HSBC bank account").

25. Following deposit into the HSBC bank account, the following transactions were made by Persico using the Fraudulent Mortgage Proceeds:

- a. On March 5, 2020, a bank draft made payable to Codispoti in the amount of \$52,000.00 was purchased by Persico using a portion of the Fraudulent Mortgage Proceeds, which bank draft was thereafter deposited into TD bank account 01602-5203499;
- b. On March 5, 2020, a bank draft made payable to 272 in the amount of \$997,000.00 was purchased by Persico using a portion of the Fraudulent Mortgage Proceeds but which was ultimately not deposited and instead was redeemed;
- c. On March 5, 2020, a bank draft made payable to Lynx Equity and/or Lynx Equity Inc. in the amount of \$30,000.00 purchased by Persico using a portion of the Fraudulent Mortgage Proceeds, which bank draft was subsequently deposited into CIBC bank account no. 00022-1604794 on or about March 6, 2020;
- d. On March 5, 2020, \$10,000.00 of the Fraudulent Mortgage Proceeds was transferred to HSBC bank account no. 751-013277-002; and
- e. On March 10, 2020, a bank draft made payable to AAP Law in the amount of \$2,189,333.98 was purchased by Persico using the balance of the Fraudulent Mortgage Proceeds, which bank draft was subsequently deposited into St. Stanislaus St. Casimir's Polish Parishes Credit Union bank account March 25, 2020.

***Insured Mortgagee Discovers the Fraud, the Director of Titles' Tribunal Hearing***

26. On or about September 29, 2020, the Insured Mortgagee submitted a claim to the Plaintiff respecting a suspected fraud in the circumstances surrounding the Fraudulent Mortgage.
27. A Tribunal hearing was subsequently convened before the Deputy Director of Land Titles in respect of which 922 sought Orders declaring the instrument registered against title to the Property reflecting the terms of the Fraudulent Mortgage to be a “fraudulent instrument” as the term is defined in the *Land Titles Act*, and for the same to be deleted from title accordingly (“the Tribunal Hearing”).
28. Following the Tribunal Hearing, the Deputy Director of Land Titles released her decision (“the Tribunal Decision”) which contained her findings that, *inter alia* a) the corporate records for 922 were altered to make it appear that Disimone was a director and officer for the purposes of enabling him to authorize the Fraudulent Mortgage, b) the Fraudulent Mortgage was registered against title to the Property without 922’s consent and c) that the Fraudulent Mortgage was a “fraudulent instrument” as defined by the *Land Titles Act*.
29. The Deputy Director of Land Titles also issued an Order deleting the registration of the Fraudulent Mortgage against title.
30. As a result of the Tribunal Decision, the Plaintiff issued a loss payment to the Insured Mortgagee in the amount of \$2,750,000.00 to satisfy its obligations under the Policy.

**The Interim Norwich Relief**

30.1 The Plaintiff sought and obtained interim Norwich Orders and served the same on non-party financial institutions and other non-parties. The resulting disclosure and production made by the said non-party financial institutions and other non-parties demonstrated the added Defendants were parties to transfers of portions of the Fraudulent Mortgage Proceeds.

30.2 The identities of the added Defendants and their involvement in the occurrences from which the matters in issue arise was not discoverable by the Plaintiff until there was partial compliance with the interim Norwich Orders by the non-party financial institutions and other non-parties served with the said Orders.

***Fraud and Conspiracy to Defraud***

31. All of the Defendants are liable for fraud and civil conspiracy to defraud in connection with the Fraudulent Mortgage transaction as described herein, and any subsequent transactions involving the proceeds of the same, in which they were directly or indirectly involved or which resulted therefrom.

32. All of the Defendants are liable to account to the Plaintiff for all funds obtained as a result of the Fraudulent Mortgage in which they were directly or indirectly involved or which resulted therefrom.

33. The Defendants, by their conduct, caused the Plaintiff's Insured Mortgagee to advance funds under fraudulent circumstances. At all times, the funds advanced by the Insured

Mortgagee were intended to be advanced to 922 and not to the Defendants as they were so advanced.

34. But for the fraudulent acts of John Doe, and the false documents they provided to support their impersonation as an officer and director of 922, the Plaintiff's Insured Mortgagee would not have advanced the Fraudulent Mortgage Proceeds, and the Plaintiff would not have been obliged to indemnify the Insured Mortgagee for the losses that resulted up to the Policy's coverage limits.

35. But for the actions of the remaining Defendants in facilitating and assisting with the various transfers of the Fraudulent Mortgage Proceeds as between them and to others, the funds would remain available to the Plaintiff for collection.

36. But for the coordinated efforts of all Defendants, the losses to the Plaintiff would not have been incurred.

37. The scheme to obtain the Mortgage Proceeds by impersonating an officer and director of 922 and to effect a number of transactions with the specific purpose of putting the Fraudulent Mortgage Proceeds out of the Plaintiff's/the Insured Mortgagees' reach was arranged and orchestrated by the Defendants for their own benefit.

38. Certain portions of the Fraudulent Mortgage Proceeds were received by the Defendants and other individuals and/or corporations. The names of all participants in the Loan

Transaction are not yet known to the Plaintiff but are exclusively within the knowledge of the Defendants.

39. Full particulars of the fraudulent conduct of the Defendants is not yet known to the Plaintiff but is exclusively within the knowledge of the Defendants.

40. Further or in the alternative, the Defendants are liable for civil conspiracy. The Defendants used unlawful means with the intention of harming the Plaintiff/the Insured Mortgagees or knew or should have known that the Plaintiff/the Insured Mortgagee would be harmed, but were reckless as to the result. Alternatively, the Defendants used unlawful means, including but not limited to a) impersonating Mr. Disimone and otherwise facilitating the false pretenses utilized by John Doe to impersonate Mr. Disimone; and b) coordinating their efforts to effect improper transactions with non-arm's length parties for no or insufficient consideration with the specific intention of putting the Fraudulent Mortgage Proceeds out of reach of the Plaintiff/the Insured Mortgagee; all to accomplish an unlawful result, namely converting the Fraudulent Mortgage Proceeds to their own benefit.

41. Each of the Defendants committed some or all of the following overt acts to further the conspiracy:

- a. They met secretly by telephone or in person to discuss the false pretenses that would be adopted by John Doe in their impersonation of Disimone;

- b. They knowingly and intentionally created false versions of government issued photo identification to utilize in their ultimately successful attempt to impersonate Mr. Disimone;
- c. They improperly/illegally obtained private, personal and confidential documents belonging to Mr. Disimone also to utilize in their ultimately successful attempt to impersonate them to secure the Fraudulent Mortgage Proceeds;
- d. They participated in a scheme which they knew or ought to have known was designed to cause harm to the Plaintiff/the Plaintiff's Insured Mortgagees by fraudulently and under false pretenses obtaining the Fraudulent Mortgage Proceeds;
- e. They agreed between them to not disclose their conduct to the Plaintiff/the Insured Mortgagees or any others in authority in order to permit the fraudulent nature of the Fraudulent Mortgage to remain secret, with the intent and effect of permitting the Fraudulent Mortgage to proceed as the Defendants intended;
- f. They took active steps to conceal their conspiracy from the Plaintiff/the Insured Mortgagee and/or any other person of authority;
- g. The principals of the corporate Defendants acted with the intention of making available to themselves personal and private benefits as a result of the conversion of the Mortgage Proceeds;
- h. They effected transfers of the Fraudulent Mortgage Proceeds with non-arm's length parties for no or insufficient consideration with the specific intention to put the Fraudulent Mortgage Proceeds beyond the Plaintiff's reach;

42. Full further particulars of the conspiracy among the Defendants, including the dates and times of meetings, discussion or activities in furtherance of the conspiracy, are not yet known to the Plaintiff but are exclusively within the knowledge of the Defendants.
43. As a result of the actions of the Defendants as set out above, the Plaintiff has suffered substantial losses and damages totalling \$2,750,000.00 namely the amount which it was contractually obliged to pay the Insured Mortgagee under the Policy.
44. As a further result of the actions of the Defendants as set out herein, the Plaintiff has suffered aggravated damages consisting of the costs it has incurred to investigate the Insured Mortgagees' claim on the Policy, as well as for its representation costs incurred in connection with the Tribunal Proceeding.
45. The Plaintiff seeks immediate interim and interlocutory relief as set out in the prayer for relief herein to preserve any assets currently held by the Defendants that may be at risk of being transferred out of this Honourable Court's jurisdiction or fraudulently dissipated in an effort to avoid enforcement of any Judgment which may arise from the within Action. The Plaintiff similarly seeks immediate interim and interlocutory relief in the form of the Norwich Order as set out in the prayer for relief herein.
46. The Plaintiff seeks Judgment against all Defendants for the full amount claimed herein, on a joint and several basis for fraud and conspiracy to defraud as set out in the prayer for relief herein.

### ***Unjust Enrichment***

47. The Plaintiff states that the Defendants were enriched by the Fraudulent Mortgage Proceeds to Plaintiff's corresponding deprivation. The Plaintiff states that no juristic reason exists for the said enrichment to remain with the Defendants.

48. The Plaintiff accordingly claims damages for unjust enrichment as set out in the prayer for relief herein.

### ***Fraudulent Conveyances Act and Assignments and Preferences Act***

49. Further and/or in the further alternative, the Plaintiff states that the Defendants have conducted themselves with the intentions of delaying, defeating, or hindering the Plaintiff as a creditor of the Defendants, contrary to the provisions of Sections 2, 4 and 5 of the *Fraudulent Conveyances Act* and Sections 4 and 5 of the *Assignments and Preferences Act*.

50. In particular, the Plaintiff states that the Defendants have diverted funds from themselves to others for no or insufficient consideration, thereby depleting funds and assets owned by them, which funds and assets ought to be applied to the debt owed to the Plaintiff.

51. The Plaintiff states that the details of the diversion of funds and impugned transactions are solely within the knowledge of the Defendants, and were made without the Plaintiffs knowledge with the intention of defeating, hindering or delaying creditors, in particular the Plaintiff.

52. The Plaintiff accordingly claims entitlement to damages as set out in the prayer for relief for the Defendants' violations of the *Fraudulent Conveyances Act* and *Assignments and Preferences Act*, along with an Order or Orders setting aside any transactions of a reviewable nature.

***Order for Accounting, Tracing Order***

53. The Plaintiff claims a full and complete accounting of any and all portions of the Mortgage Proceeds, as set out in the prayer for relief herein.

54. The Plaintiff further claims entitlement to a tracing Order respecting any and all portions of the Mortgage Proceeds, as set out in the prayer for relief herein.

***Breach of Resulting/Constructive Trust***

55. Further and/or in the further alternative, the Plaintiff states that the amounts advanced to the Defendants were held by the Defendants on a resulting and/or constructive trust to the Plaintiff's benefit.

56. The Plaintiff states that by failing to repay the mortgage proceeds back to the Plaintiff, the Defendants are in breach of the resulting and or constructive trust, entitling the Plaintiff to damages as requested in the prayer for relief for breach of resulting and/or constructive trust.

### ***Disgorgement of Profits***

57. As a result of the conduct of the Defendants as described herein, the Plaintiff claims entitlement to disgorgement of any profits, fees, interest or other benefits obtained by the Defendants, or any of them, in connection with the matters described herein.

### ***Aggravated Damages***

58. As detailed above, the Plaintiff has suffered aggravated damages consisting of the costs it incurred to investigate its Insured Mortgagees' claim on the policy of insurance and for the costs of adjusting the same, as well as for its representation costs incurred in connection with the Tribunal Proceeding.

59. The full particulars of the Plaintiff's aggravated damages will be provided prior to trial.

60. The Plaintiff accordingly claims aggravated damages as against the Defendants as set out in the prayer for relief herein.

### ***Punitive Damages***

61. The conduct of the Defendants described herein was highhanded, reprehensible and was undertaken with full knowledge that such conduct was improper and would cause harm to the Plaintiff/the Plaintiff's Insured Mortgagee. The conduct of the Defendants constitutes a flagrant and outrageous violation of the Plaintiff's/the Plaintiff's Insured Mortgagees' rights such that the Plaintiff is entitled to punitive or exemplary damages in the amount claimed or as this Honourable Court may deem just. The conduct of all of the Defendants constitutes an independent actionable wrong.

***Debt Survives Bankruptcy – Exceptions Under Section 178 of BIA***

62. The Plaintiff states that the debts owing to it by the Defendants fall under the exceptions set out at section 178 of the *Bankruptcy and Insolvency Act*. The Plaintiff states accordingly that the amounts described herein will not be released upon the Defendants' discharge from Bankruptcy should they or any of them be or become Bankrupt.

63. The Plaintiff accordingly seeks a declaration that the amounts owing by the Defendants shall survive the Defendants' discharge from bankruptcy if they or any of them are or become bankrupt.

***Costs***

64. The Plaintiff states that the conduct of the Defendants as set out herein entitles the Plaintiff to costs on a full indemnity basis, or in the alternative on a substantial indemnity basis.

***Subrogated Claim, Further and/or in the Alternative***

65. The Plaintiff brings this Action, *inter alia*, pursuant to its rights of subrogation as set out in the Policy as well as pursuant to its own rights of recovery as claimed in the prayer for relief herein.

***Service out of Ontario, if Applicable***

66. The Plaintiff relies on Rule 17.02(g), (i) and (p), if necessary, for the service of the Statement of Claim outside Ontario, as applicable. The Plaintiff states that its claims are in respect of a tort committed in Ontario, for injunctive relief, and against persons who are resident and/or carrying on business in Ontario.

***Place of Trial***

67. The Plaintiff proposes that the trial of this action be heard in Toronto.

Dated: June 14, 2022

**KATZMAN & ASSOCIATES**  
Barristers and Solicitors  
393 University Avenue, Suite 2000  
Toronto, ON M5G 1E6

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Lawyers for the Plaintiff

**SCHEDULE "A" – THE BANKS**

Bank Name	Account Name	Transit and Account No.
<p>St. Stanislaus – St. Casimer’s Credit Union Ltd.</p> <p>St. Stanislaus – St. Casimer’s Polish Parishes Credit Union</p>	<p>AUSTIN PERSICO a.k.a AGOSTINO-AUSTIN PERSICO a.k.a AGOSTINO PERSICO operating as AAP Law D.O.B: March 29, 1975</p> <p>Address:</p> <p>a) 27 Westcliffe Crescent, Richmond Hill, ON L4E 0S1</p> <p>b) 12901 Highway 27, Nobleton, ON L7B 1K4</p> <p>c) 510 Deerhurst Drive, Brampton, ON L6T 5H9</p> <p>d) 119 Gamble Glen Crescent, Richmond Hill, ON L4S 2T1</p> <p>e) 331 Trowers Road, Unit 3, Vaughan, ON L4L 6A2</p> <p>f) 9100 Jane Street, Concord, ON L4K 0A4</p> <p>g) 491 Bowes Road Vaughan, ON L4K 1J5</p>	<p>Account – 10001785</p> <p>Branch – 02562-828</p>
<p>HSBC</p>	<p>AUSTIN PERSICO a.k.a AGOSTINO-AUSTIN PERSICO a.k.a AGOSTINO PERSICO operating as AAP Law D.O.B: March 29, 1975</p> <p>Address:</p> <p>a) 27 Westcliffe Crescent, Richmond Hill, ON L4E 0S1</p> <p>b) 12901 Highway 27, Nobleton, ON L7B 1K4</p> <p>c) 510 Deerhurst Drive, Brampton, ON L6T 5H9</p> <p>d) 119 Gamble Glen Crescent, Richmond Hill, ON L4S 2T1</p> <p>e) 331 Trowers Road, Unit 3, Vaughan, ON L4L 6A2</p> <p>f) 9100 Jane Street, Concord, ON L4K 0A4</p> <p>g) 491 Bowes Road Vaughan, ON L4K 1J5</p>	<p>Account: 751-013277-001</p> <p>Account: 751-013277-002</p>
<p>TD Canada Trust</p>	<p>Marcello Codispoti a.k.a. Marcel Codispoti D.O.B.: November 18, 1943</p>	<p>BRN: 01602 20200317 Cr:01602-5203499</p>

	<p>Address:</p> <p>a) 37 Ursini Court, Woodbridge, ON L4C 2N7</p> <p>b) 1436 Benson Street, Innisfil, ON L9S 0C8</p> <p>c) 304 Oxbow Park Drive, Wasaga Beach, ON L9Z 2V6</p>	
CIBC	<p>Lynx Equity Limited</p> <p>Address: 692 Queen Street, Unit 205 Toronto, ON M4M 1G9</p>	00022-1604794
CIBC	<p>Lynx Equity International Inc.</p> <p>Address: 692 Queen Street, Unit 205 Toronto, ON M4M 1G9</p>	00022-1604794

CHICAGO TITLE INSURANCE COMPANY  
PLAINTIFF

-and -

JOHN DOE et. al.  
DEFENDANTS

(Short title of proceeding)

Court File No. CV-22-682646

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**AMENDED STATEMENT**  
**OF CLAIM**

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Lawyers for Plaintiff

**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.**

**ONTARIO**

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

PROCEEDING COMMENCED AT TORONTO

**TWELFTH REPORT OF THE MONITOR**

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