

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

MOTION RECORD
(extension of stay period, approval and sealing of amended monitoring protocol,
approval of monitor's fees and activities)
(returnable March 8, 2021)

March 4, 2020

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ONTARIO
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IN THE MATTER OF THE *COMPANIES' CREDITORS*
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INDEX

Tab	Description	Page
1	Notice of motion returnable March 8, 2021	1
2	Affidavit of Atef Salama sworn March 3, 2021	8
A	Exhibit "A" – Second amended and restated initial order dated October 27, 2020	16
B	Exhibit "B" – Affidavit of Atef Salama sworn December 9, 2020 (without exhibits)	31
3	Draft order	41

TAB 1

Notice of motion returnable March 8, 2021

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 (the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF EXPRESS GOLD REFINING LTD.
(the "Applicant")

**NOTICE OF MOTION
(extension of stay period, approval and sealing of amended monitoring protocol,
approval of monitor's fees and activities)
(returnable March 8, 2021)**

The Applicant will make a motion to Mr. Justice McEwen of the Commercial List at 330 University Avenue, Toronto, on Monday, March 8, 2021, at 11:00 am or as soon thereafter as the motion can be heard, via Zoom teleconference the details for which are in Schedule "A" hereto.

PROPOSED METHOD OF HEARING: orally.

THE MOTION IS FOR: an order, substantially in the form of the suggested draft in the motion record, extending the "Stay Period" defined in the Second Amended and Restated Initial Order made by McEwen J. on October 27, 2020 (the "SARIO") to and including June 11, 2021 (3 months).

THE GROUND FOR THE MOTION ARE:

I. BACKGROUND

1. This is not an operational restructuring. An application under the CCAA was necessary to maintain a *status quo* and allow the Applicant to obtain, as a first milestone of a financial restructuring, a decision on the merits of its ongoing case before the Tax Court of Canada wherein the Applicant is appealing notices of reassessments totaling more than \$189,000,000 issued by the Canada Revenue Agency ("CRA") on July 28, 2020.

2. On October 15, 2020, Hainey J. made the initial CCAA order. On October 27, 2020, McEwen J. made the SARIO. On December 14, 2020, McEwen J. made an order extending the Stay Period to March 11, 2021.

II. ACTIONS SINCE THE DECEMBER EXTENSION ORDER

3. Since the December extension order, the Applicant has:
 - a. worked with the Monitor with respect to the implementation of the Protocol (as defined in the SARIO), including with the involvement of CRA,
 - b. negotiated certain amendments to the Protocol with the Monitor and CRA (the “**Amended Monitoring Protocol**”), the particulars of which are set out in the confidential supplement (the “**Confidential Supplement**”) to the Monitor’s third report, to be filed separately in support of this motion (the “**Third Report**”),
 - c. continued operating its business while complying with COVID-19 legal requirements and best practices, and
 - d. continued managing the tax litigation.
4. The Applicant’s activities since the December extension order are further described in the affidavit of Atef Salama sworn March 3, 2021 filed in support of this motion (the “**Salama March Affidavit**”).

III. RELIEF SOUGHT

- a. **Extension of Stay Period**
5. The need for extension of the Stay Period, with the caveat for the tax litigation, is necessary considering the \$180 million reassessments would otherwise be enforceable notwithstanding contestation. Enforcement of the reassessments would prevent the Applicant from obtaining a decision on the merits in the tax litigation and attempting any restructuring.
- b. **Protocol**
6. The Amended Monitoring Protocol reflects adjustments and amendments to the Protocol agreed to among all the parties with a view to accommodate the recent lockdown conditions

prevalent in Toronto and recent disclosures by CRA which have enabled the monitor and the Applicant to better monitor the customer base in keeping with the intent of the Protocol.

7. It is appropriate to make the Amended Monitoring Protocol subject to the orders made in the SARIO in respect of the original Protocol, including its confidentiality and sealing from the public record. It is also appropriate to seal the Confidential Supplement to the Third Report as it contains sensitive information, notably for CRA.

c. Approval of Monitor's activities and fees

8. The activities of the Monitor were reported to the court and stakeholders in the first report of the Monitor dated October 18, 2020 as supplemented on October 27, 2020, the second report of the Monitor dated December 10, 2020, and the Third Report. Such activities are appropriate, commercially reasonable, and conducted in the best interest of stakeholders. The Monitor's fees as well as those of its independent counsel, Dentons LLP, are proportionate, fair and reasonable, as more fully appears from the Fee Affidavits (as defined in the Third Report). This court may therefore approve the Monitor's activities and fees.
9. With the above in place, the Applicant has and will continue to act with due diligence and good faith with respect to the tax litigation, its business and operations, and its relationship with CRA more generally.

IV. MAIN STATUTORY PROVISIONS

10. CCAA s. 11, 11.02, 11.03, 11.09, and 18.6.
11. Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rules 2.03 and 3.02.
12. Such other and further grounds as counsel may advise and the court permit.

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

- a. the Salama March Affidavit,
- b. the Third Report, to be filed separately, and
- c. such further and other evidence as counsel may advise and the court may permit.

March 4, 2021

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Lawyers for Express Gold Refining Ltd.

TO: THE SERVICE LIST

Schedule “A” – Videoconference Details

Zoom details:

Join Zoom Meeting

<https://zoom.us/j/93889417400?pwd=ZUx3cnBEZWNwR3p4aU5nMjlza2hTQT09>

Meeting ID: 938 8941 7400

Passcode: 953029

One tap mobile

+16699006833,,93889417400#,,,,*953029# US (San Jose)

+19292056099,,93889417400#,,,,*953029# US (New York)

Dial by your location

+1 669 900 6833 US (San Jose)

+1 929 205 6099 US (New York)

+1 253 215 8782 US (Tacoma)

+1 301 715 8592 US (Washington D.C)

+1 312 626 6799 US (Chicago)

+1 346 248 7799 US (Houston)

Meeting ID: 938 8941 7400

Passcode: 953029

Find your local number: <https://zoom.us/u/acwg9E6b1w>

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced in TORONTO

NOTICE OF MOTION
(extension of stay period)
(returnable March 8, 2021)

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Lawyers for the Applicant, Express Gold Refining Ltd.

TAB 2

Affidavit of Atef Salama sworn March 3, 2021

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
(the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF EXPRESS GOLD REFINING LTD.
("EGR")

**AFFIDAVIT OF ATEF SALAMA
(sworn March 3, 2021)**

I, Atef¹ Salama, of the City of Toronto, in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am EGR's Vice-President and have been since 2001. As such I have personal knowledge of the facts and matters deposed in this affidavit save where the same are stated to be based upon information or belief, and where so stated I verily believe the same to be true.
2. This affidavit is in support of EGR's motion for an extension of these CCAA proceedings, approval and sealing of the Amended Monitoring Protocol (defined below), and approval of the Monitor (defined below)'s fees and activities.

I. OVERVIEW OF THESE PROCEEDINGS

3. EGR is in the precious metal (predominantly, gold) refining business.
4. EGR's resort to relief under the CCAA was necessary due to **(i)** the Canada Revenue Agency ("CRA")'s refusal to pay EGR's net tax refunds, including input tax credits

¹ Sometimes spelled "Atif".

- under the *Excise Tax Act*, since August 2018, and (ii) reassessments in excess of \$189,000,000 issued to EGR on July 28, 2020 (the “**2020 Reassessments**”).
5. The 2020 Reassessments are being challenged by EGR (the “**Tax Litigation**”) in the Tax Court of Canada (“**Tax Court**”). However, they are enforceable notwithstanding contestation,² and on or around October 8, 2020, CRA announced it would commence enforcement measures on October 15, 2020.
 6. The orders made so far in this proceeding are:
 - a. the October 15, 2020 initial order made by Hainey J.,
 - b. the October 19, 2020, amended and restated initial order made at the comeback hearing by McEwen J.,
 - c. the October 27, 2020, second amended and restated initial order (the “**SARIO**”) made by McEwen J., of which a copy is **Exhibit “A”** hereto, and
 - d. the December 14, 2020 order of McEwen J. extending to March 15, 2021 the “**Stay Period**” defined in the SARIO.
 7. This is not an operational restructuring. But for CRA’s refusal to pay EGR’s net tax refunds and the 2020 Reassessments, EGR would be solvent and its business would be profitable. An application under the CCAA was necessary to maintain a *status quo* and allow EGR to obtain, as a first milestone of a restructuring, a decision on the merits in the Tax Litigation.
 8. Hence, the SARIO provides:
 - a. that EGR remains, under a stay of proceedings, in possession of its business and property and is entitled to pay its normal business expenses and to satisfy its creditor obligations whether incurred before or after the making of the initial order,³

² I am referred to the *Excise Tax Act*, s. 315.

³ I am referred to paragraphs 4 to 9 of the SARIO.

- b. that a stay of proceedings applies but the Tax Litigation may continue,⁴ and
- c. for the court's approval and sealing of a protocol (the "**Protocol**") agreed to on October 27, 2020 among EGR, CRA and the Deloitte Restructuring Inc. as monitor in the herein proceedings (in such capacity, the "**Monitor**"), further discussed below.⁵

9. This motion seeks an extension of the Stay Period to and including June 11, 2021 (3 months).

II. ACTIONS SINCE LAST INITIAL ORDER EXTENSION

10. Since the last extension made on December 14, 2020, EGR has notably:

- a. worked with the Monitor with respect to the implementation of the Protocol, including with the involvement of CRA,
- b. negotiated certain amendments to the Protocol with the Monitor and CRA (the "**Amended Monitoring Protocol**"), the particulars of which are set out in the confidential supplement (the "**Confidential Supplement**") to the Monitor's third report, to be filed separately in support of this motion (the "**Third Report**"),
- c. continued operating its business while complying with COVID-19 legal requirements and best practices, and
- d. continued managing the Tax Litigation.

11. Each of the above is discussed below.

A. Implementation and adjustment of the Protocol

i. Background on the necessity of the Protocol

12. I provided such background in my prior affidavit sworn December 9, 2020 in support of the last motion for extension. I attach hereto a copy of that affidavit, without exhibits, as **Exhibit "B"**.

⁴ I am referred to paragraph 10 of the SARIO.

⁵ I am referred to paragraphs 15 to 18 of the SARIO.

13. In a nutshell, the Protocol was proposed, developed and implemented at EGR's initiative with input from CRA and the Monitor to, among other things and in combination with the stay of proceedings, allow EGR to receive, in accordance with the applicable tax statutes, its net tax refunds payable in respect of periods postdating the stay of proceedings.
14. The Protocol, as may be amended by common accord of the parties, is subject to a sealing order and confidentiality terms. I will not discuss its terms but will update the court on its implementation and the developments towards the Amended Monitoring Protocol.

- ii. Implementation and adjustment

15. Since the SARIO, the Protocol has been implemented and is ongoing. The Monitor is performing its role thereunder, including at EGR's premises. I understand that this will be discussed in further details in the Confidential Supplement.
16. On January 20, 2021, EGR's lawyers, the Monitor and its lawyers, and CRA and its lawyers (the Ministry of Justice), held a call originally planned for discussion of possible amendments to the Protocol in light of recent COVID-19 lockdown developments.
17. During that call, CRA stated they had identified a situation which, in their position, raised issues under the Protocol. This came as a surprise to EGR and the Monitor. The parties thereafter exchanged memoranda including additional information and respective positions. Briefly, the issue is as follows.
 - a. Between February 3 and October 2, 2020 (i.e. before this CCAA proceeding and before the Protocol), EGR conducted gold and silver refining business (the "**Transactions**") with a corporation (the "**Supplier**").
 - b. Due to the particular timing of the invoices issued by the Supplier, EGR claimed input tax credits for GST/HST payable to the Supplier on the Transactions in its November 2020 tax filings.⁶

⁶ For context, very briefly, I am advised of the following, which was also my understanding: EGR's refining business is generally treated as a buy/sell of gold. EGR must thus pay GST/HST on its "purchase" of unrefined gold. It is generally entitled to recovery of that GST/HST as input tax credits because the unrefined gold is acquired for use in commercial activities. However, under the ETA, a sale of precious metals is a "zero-rated supply", meaning EGR does not charge/collect GST/HST on its "sales" of pure gold. Thus, EGR is in a constant large monthly

- c. CRA raised issues with the Transactions, which I understand will be discussed in the Confidential Supplement.
 - d. I understand that CRA believes EGR should not have claimed, as it did, input tax credits in respect of the Transactions (although CRA has indicated that these input tax credits are being reviewed by CRA). I disagree, including for the following reason: there is a formal procedure to claim GST/HST refunds under the *Excise Tax Act* and a limitation period to do so.
 - e. From the moment EGR reasonably believes, as it does, that there is an input tax credit available, it has to protect this potential asset by reporting it to CRA, as the tax statutes require. EGR strongly believes in fact and in law that GST/HST is payable on the Transactions and that EGR is entitled to correspondent input tax credits, and accordingly filed its November 2020 claiming the same. Such procedural, mechanical compliance was done in good faith for the benefit of all of EGR's stakeholders – a central element in this CCAA proceeding.
18. Following an exchange of memoranda among the parties, CRA, EGR and the Monitor agreed on the Amended Monitoring Protocol. The changes reflect the middle ground struck among the parties to address the above situation and similar ones, if any, going forward.
19. EGR seeks on this motion that the Amended Monitoring Protocol be made subject to the orders made at paragraphs 16 to 18 of the SARIO in respect of the original Protocol, including for confidentiality and sealing from the public record. EGR also seeks the sealing of the Confidential Supplement to the Third Report. I believe this is appropriate in the circumstances because those documents contain sensitive information, notably for CRA.

B. State of the business

20. EGR continues its business operations in accordance with this court's orders.
21. Around November 22, 2020, i.e. approximately one month following the SARIO, the Toronto and Peel regions were put under a form of temporary lockdown by the government of Ontario. Lockdown measures continue to be in force, and EGR continues to operate its business as a "business that may open" in accordance with the regulations in place, as further discussed in my December 9, 2020 affidavit (Exhibit "B"). Since and for the duration of the temporary lockdown, EGR has and will, in cooperation with the Monitor, continue to take all necessary steps to ensure it operates in accordance with the applicable regulations.
22. Beyond COVID-19, however, I believe that the additional issues and factors noted in paragraph 22 of my December 9, 2020 affidavit (Exhibit "B") continue to adversely affect the business. I refer to that paragraph instead of restating it here. I understand that the details and figures regarding EGR's business since the latest Monitor's report will be set out in the Third Report.
23. Notwithstanding such decline in business, EGR generates revenues. I believe EGR will be able to support its operations, the Tax Litigation, the herein proceeding and the Amended Monitoring Protocol for the duration of the extension sought, as I understand will more fully appear from the Third Report.


C. Status of the Tax Litigation

24. The only notable development in the Tax Litigation since the last extension is that EGR was served, on January 29, 2021, with the Crown's Reply.
25. Otherwise, the upcoming material steps in the Tax Litigation continue to be as noted in paragraphs 26 to 29 of my December 9, 2020 affidavit (Exhibit "B"). EGR and the Monitor are considering what steps within the CCAA proceedings may be taken to expedite and facilitate a timely hearing or resolution of issues as might arise in the Tax Litigation, with a view to benefitting all stakeholders.

III. NEED FOR CONTINUED CCAA RELIEF

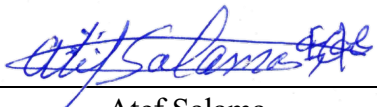
26. The need for extension of the stay provisions is self-explanatory considering the \$180 million 2020 Reassessments are otherwise enforceable notwithstanding contestation. The continuation of the stay is intended to maintain the *status quo* so that EGR may obtain, as a first milestone of its restructuring, a decision on the merits of its case in the Tax Litigation.
27. The SARIO provides that the Protocol terminates automatically upon termination of these CCAA proceedings, and so EGR requests the continuation of these proceedings to allow the Amended Monitoring Protocol to remain within this court's jurisdiction to enforce, as the case may be.
28. With the above in place, EGR has and will continue to act with due diligence and good faith with respect to the Tax Litigation, its business and operations, and its relationship with CRA more generally.

SWORN BEFORE ME via Zoom at the City of Toronto, in the Province of Ontario, this 3rd day of March, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



Commissioner for taking affidavits
(present at Toronto at the time of swearing)

Joël Turgeon
LSO No. 80984R



Atef Salama
(present at Toronto at the time of swearing)

This is **Exhibit "A"** to the affidavit of Atef Salama sworn before me via Zoom this 3rd day of March, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



A Commissioner, etc.

Joël Turgeon
LSO No. 80984R

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST



THE HONOURABLE MR.)

TUESDAY, THE 27TH

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:



This is **Exhibit “B”** to the affidavit of Atef Salama sworn before me via Zoom this 3rd day of March, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



A Commissioner, etc.

Joël Turgeon
LSO No. 80984R

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
(the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF EXPRESS GOLD REFINING LTD.
("EGR")

**AFFIDAVIT OF ATEF SALAMA
(sworn December 9, 2020)**

I, Atef¹ Salama, of the City of Toronto, in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am EGR's Vice-President and have been since 2001. As such I have personal knowledge of the facts and matters hereinafter deposed to save and except where the same are stated to be based upon information or belief, and where so stated I verily believe the same to be true.
2. This affidavit is in support of EGR's motion for an extension of these CCAA proceedings.

I. OVERVIEW OF THESE PROCEEDINGS

3. EGR's resort to relief under the CCAA was necessary due to **(i)** the Canada Revenue Agency ("CRA")'s refusal to pay EGR's net tax refunds, including input tax credits under the *Excise Tax Act*, since August 2018, and **(ii)** reassessments in excess of \$189,000,000 issued to EGR on July 28, 2020 (the "**2020 Reassessments**").

¹ Sometimes spelled "Atif".

4. The 2020 Reassessments are being challenged by EGR (the “**Tax Litigation**”) in the Tax Court of Canada (“**Tax Court**”). However, they are enforceable notwithstanding contestation,² and on or around October 8, 2020, CRA announced it would commence enforcement measures on October 15, 2020.
5. On October 15, 2020, Hainey J. made an initial order in respect of EGR (the “**Initial Order**”), a copy of which is **Exhibit “A”** hereto. On October 19, 2020, at the comeback hearing, McEwen J. made the first amended and restated initial order. On October 27, 2020, McEwen J. made the second amended and restated initial order (the “**SARIO**”), a copy of which is **Exhibit “B”** hereto. Deloitte Restructuring Inc. is the monitor in these CCAA proceedings (in such capacity, the “**Monitor**”).
6. This is not an operational restructuring. But for CRA’s refusal to pay EGR’s net tax refunds and the 2020 Reassessments, EGR would be solvent and its business would be profitable. An application under the CCAA was necessary to maintain a *status quo* and allow EGR to obtain, as a first milestone of a restructuring, a decision on the merits in the Tax Litigation.
7. Hence, the SARIO provides:
 - a. that EGR remains, under a stay of proceedings, in possession of its business and property and is entitled to pay its normal business expenses and to satisfy its creditor obligations whether incurred before or after the making of the Initial Order,³
 - b. that a stay of proceedings applies but the Tax Litigation may continue,⁴ and
 - c. for the court’s approval and sealing of a protocol agreed to on October 27, 2020 among EGR, CRA and the Monitor (the “**Protocol**”), further discussed below.⁵

² I am referred to the [Excise Tax Act](#), s. 315.

³ I am referred to paragraphs 4 to 9 of the SARIO.

⁴ I am referred to paragraph 10 of the SARIO.

⁵ I am referred to paragraphs 15 to 18 of the SARIO.

8. CRA is the principal party immediately affected by the SARIO (although there are many parties aside from EGR that may be affected by CRA's actions prior to and during this proceeding, as discussed below).

II. ACTIONS SINCE LAST INITIAL ORDER EXTENSION

9. The last initial order extension was made through the SARIO. Since that time, EGR has notably:
 - a. worked with the Monitor with respect to the implementation of the Protocol, including with the involvement of CRA,
 - b. continued operating its business while complying with COVID-19 legal requirements and best practices, and
 - c. continued managing the Tax Litigation.
10. Each of the above is discussed below.

A. Implementation of the Protocol

- i. Background on the necessity of the Protocol
11. From January 2018 to July 2018, EGR claimed monthly net tax refunds in the range of approximately \$6.4 million to over \$9 million. The amount EGR so claims is always multiples higher than EGR's total profits for the same period.
12. Prior to the Protocol, CRA was withholding payment of any net tax refunds due to EGR in respect of August 2018 and later periods, even to the extent that the 2020 Reassessments have allowed certain refunds, by setting off those allowed refunds against the debt raised in the 2020 Reassessments. CRA confirmed this to EGR's restructuring counsel.
13. In other words, every time EGR paid GST/HST which it was entitled to be repaid (e.g., GST/HST on legal fees, GST/HST paid on expenses incurred in furtherance of its business such as scrap gold, office supplies, etc.), CRA refused to remit the corresponding net tax refunds to EGR. For obvious reasons, if this was allowed to continue, EGR's financial position would be continuously eroded until eventually it

would be prevented from attempting any restructuring and obtaining determination of its case in Tax Court.

14. In addition, CRA's set-offs cause harm to EGR's suppliers with respect to which CRA has made no allegation of wrongdoing. This is because EGR and certain such suppliers operate under an agreement that EGR pays the GST/HST on its purchases of scrap gold only when it receives the corresponding tax refund. Since CRA sets off the refunds, EGR cannot pay the GST/HST to the suppliers. Meanwhile, those suppliers were obliged under the statutes to remit or otherwise deal with the GST/HST amount "out of pocket". This causes three main issues: **(i)** it potentially creates claims by such suppliers against EGR, which would add to EGR's dire situation, **(ii)** it disincentives new suppliers from doing business with EGR, which also adds to its difficulties, and **(iii)** it presumably places a large cash-flow burden on those suppliers who find themselves to be "innocent bystanders" of CRA's actions.
15. The Protocol was developed and implemented at EGR's initiative with input from CRA and the Monitor, to address, among other things, those issues of set-off, transparency and harm to adversely affected suppliers. In combination with the stay of proceedings, the Protocol is intended to allow EGR to receive, in accordance with the statutes, its net tax refunds payable in respect of periods postdating the stay of proceedings.
16. At this early stage, EGR has yet to receive net tax refunds pursuant to the Protocol. This is due to the timing of its GST/HST filing and the recent implementation of the Protocol itself. EGR will look forward to receipt of its net tax refunds over the near term and throughout the term of the Protocol as these are essential to EGR remaining in a position to effectively carry on its business.

ii. Implementation

17. The Protocol is subject to a sealing order and confidentiality terms. For purposes hereof, I report that the Protocol has been implemented and that EGR is complying with its terms as noted in the Monitor's report filed in support of this motion. The impact of COVID-19 on the Protocol is discussed below.

B. Continuance of business and impact of COVID-19

18. In accordance with this court's orders in these CCAA proceedings, EGR has continued its business operations.
19. Around November 22, 2020, i.e. approximately one month following the SARIO, the Toronto and Peel regions were put under a form of temporary lockdown by the government of Ontario.
20. EGR has concluded with assistance from its legal counsel that it operates a "business that may open" in accordance with the regulations currently in place. For the duration of the temporary lockdown, EGR will continue to take all necessary steps to ensure it operates in accordance with the applicable regulations. I understand that the Monitor and its counsel have analysed the relevant directives and regulations and concur that EGR's business may remain open.
21. COVID-19 obviously still has an impact on EGR's business, however, as discussed below.
 - i. Diminished business
22. I understand that the details and figures regarding EGR's business and its decline since the Initial Order will be set out in the report of the Monitor filed in support of this motion. The decline can in fact be traced back to 2019. While no one cause can be isolated, I believe the following factors are at play.
 - a. **The CCAA filing itself** – restructuring costs have affected the business' profitability. Also, the potentially negative appearances and uncertainty associated with a creditor protection filing may have impacted the business.
 - b. **COVID-19 restrictions** – self-explanatorily, those have caused decreased traffic to the business since March 2020.
 - c. **The 2020 Reassessments and CRA's actions regarding EGR's net tax refunds** – as seen above, this has had negative consequences for EGR directly but also indirectly through the financial harm and business disincentives it also

imposes on EGR's suppliers. This may be alleviated in part by the Protocol in respect of reporting periods postdating the stay of proceedings but remains in respect of reporting periods predating the stay.

- d. **CRA has made demands on EGR's suppliers** – I understand that CRA has taken steps to obtain payment from EGR's suppliers with respect to amounts of GST/HST collectable by such suppliers and that such amounts are referable, in whole or in part, to GST/HST that EGR has been unable to pay those suppliers as a result of CRA's set-off. This compounds the financial harm, business disincentives and potential adverse claims issues discussed above. If CRA paid EGR's corresponding net tax refunds, EGR would be able to pay its suppliers who in turn would be able to pay CRA. The net result would be neutral for EGR and CRA (no financial loss or gain), positive for the applicable suppliers (whose liability to CRA could be satisfied), and this would cure the issues mentioned. EGR has discussed this adverse state of affairs with the Monitor and hopes to address this through these proceedings on a mutually-agreeable basis.

ii. Impact of COVID-19 on the implementation of the Protocol

23. The November temporary lockdown measures, in combination with EGR's and the Monitor's own internal COVID-19 policies, have necessitated discussions on the possible adaptation of the Protocol to the circumstances.
24. Among other things (and independently from the Protocol), CRA queried whether EGR was a business that could remain open. As discussed above, EGR and the Monitor agree that the answer to this question is, yes.
25. The Monitor's development and implementation of proposed amendments to the Protocol to address any issues in respect of the temporary lockdown have the full support of EGR. We are hopeful such amendments will be accepted by CRA as necessary and appropriate accommodations.

C. Status of the Tax Litigation

26. EGR filed with the Tax Court its Fresh as Amended Notice of Appeal on September 11, 2020. EGR consented to the Respondent having until January 29, 2021 to file its reply, a pleading that effectively sets out its case. This extension was required by the Respondent and consented to by EGR on the condition that the Respondent agreed to case management, proceeding with full disclosure of documents (as opposed to partial disclosure), and that documents be exchanged by March 31, 2021.
27. The parties are jointly requesting that the matter be assigned for case management to assist in the efficient conduct of the appeal. They will then exchange their lists of documents and documents in their possession relevant to the appeal by March 31, 2021. The parties have yet to determine dates for examinations for discovery, but tax counsel expects them to be scheduled for spring 2021.
28. EGR continues to work with tax counsel and CRA to expedite the Tax Litigation as much as possible while ensuring it can put its best foot forward. EGR is also considering what steps within the CCAA proceedings may be taken to expedite and facilitate a timely hearing or resolution of issues as might arise in the Tax Litigation, with a view to benefitting all stakeholders.
29. Notwithstanding the current accommodations in the tax proceedings, EGR must remain mindful that its business is being placed in very difficult financial circumstances by these CCAA proceedings. They are expensive and create uncertainty in the marketplace for EGR and its customers and suppliers until clarity and the effectiveness of the Protocol can be accepted and understood by EGR's stakeholders. Moreover, addressing the ongoing activities CRA has taken against EGR's suppliers in respect of the very claims for which EGR might expect to receive net tax refunds and from which refunds such suppliers could then remit GST/HST would be a substantially favourable correction and one in keeping with the spirit and intent of the Protocol.

III. NEED FOR CONTINUED CCAA RELIEF

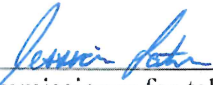
A. Stay of proceedings and stay of D&O claims

30. The need for extension of the stay provisions, with the caveat for the Tax Court proceeding, is self-explanatory considering the \$180 million 2020 Reassessments are otherwise enforceable notwithstanding contestation. The continuation of the stay is intended to maintain the *status quo* so that EGR may obtain, as a first milestone of its restructuring, a decision on the merits of its case in the Tax Litigation.

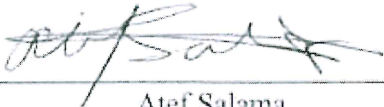
B. Protocol

31. The SARIO provides that the Protocol terminates automatically upon termination of these CCAA proceedings. The Protocol is an integral part of EGR's achieving the first milestone of its restructuring, and so EGR requests the continuation of these proceedings to allow the Protocol to remain within this court's jurisdiction to enforce, as the case may be.
32. With the above in place, EGR has and will continue to act with due diligence and good faith with respect to the Tax Litigation, its business and operations, and its relationship with CRA more generally.

SWORN BEFORE ME via Zoom at the City of Toronto, in the Province of Ontario, this 9th day of December, 2020 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



Commissioner for taking affidavits
(present at Toronto at the time of swearing)



Atef Salama
(present at Toronto at the time of swearing)

Jessica Josephine Rose Gahtan,
a Commissioner, etc.,
Province of Ontario,
while a Student-at-Law.
Expires November 6, 2023

**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.**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced in TORONTO

AFFIDAVIT OF ATEF SALAMA
(Sworn March 3rd, 2021)

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480 University Avenue, Suite 1600
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Lawyers for the applicant, Express Gold Refining Inc.

TAB 3

Draft order

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.)	MONDAY, THE 8 th
)	
JUSTICE McEWEN)	DAY OF MARCH, 2021

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
(the "**CCAA**")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF EXPRESS GOLD REFINING LTD.
(the "**Applicant**")

ORDER
**(extension of stay period, approval and sealing of amended monitoring protocol,
approval of monitor's fees and activities)**

THIS MOTION by the Applicant pursuant to the CCAA was heard before me on March 8, 2021 at 330 University Avenue, Toronto, by videoconference due to the COVID-19 pandemic.

ON READING the materials filed including the affidavit of Atef Salama sworn March 3, 2021 and the exhibits thereto (the "**Salama Affidavit**"), and on reading the third report (the "**Third Report**") of Deloitte Restructuring Inc. in its capacity as court-appointed monitor (in such capacity, the "**Monitor**"), and on hearing the submissions of counsel for the Applicant, the Monitor, and such other counsel as were present as may be indicated on the counsel slip, no one else appearing despite being served as further appears from the affidavit of service, filed:

SERVICE

1. THIS COURT ORDERS that the time for service of the motion record in respect of this motion and the Third Report is hereby abridged and validated so that the motion is properly returnable today, and that further service thereof is hereby dispensed with.

EXTENSION

2. THIS COURT ORDERS that the “Stay Period” defined in the Second Amended and Restated Initial Order made by this Court on October 27, 2020 in this file is hereby extended to and including June 11, 2021.

PROTOCOL

3. THIS COURT ORDERS that the amended protocol (the “**Amended Monitoring Protocol**”) agreed to on March 1, 2021 among the Applicant, the Canada Revenue Agency and the Monitor and appended to the confidential supplement (the “**Confidential Supplement**”) to the Third Report is hereby approved.

4. THIS COURT ORDERS that the Confidential Supplement and the Amended Monitoring Protocol are hereby sealed from the public record until further court order and that paragraphs 16, 17 and 18 of the second amended and restated initial order made in this file by McEwen J. on October 27, 2020 hereby apply to the Amended Monitoring Protocol as though named therein.

APPROVAL OF MONITOR’S FEES AND ACTIVITIES

5. THIS COURT ORDERS that the first report of the Monitor dated October 18, 2020 as supplemented on October 27, 2020, the second report of the Monitor dated December 10, 2020, and the Third Report, as well as the activities of the Monitor described therein, are hereby approved, provided, however, that only the Monitor in its personal capacity and only with respect to its own personal liability shall be entitled to rely upon or utilize in any way such approval.

6. THIS COURT ORDERS that the professional fees and disbursements of the Monitor and its independent legal counsel, Dentons LLP, as set out in the Fee Affidavits (term defined in the Third Report), are hereby approved.

7. THIS COURT ORDERS that the Applicant pay all such fees and disbursements from available funds.

GENERAL

8. 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.

9. 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.

10. This order is effective as of its date and does not need to be entered.

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

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**
Proceeding commenced in TORONTO

ORDER
**(extension of stay period, approval and sealing of
amended monitoring protocol, approval of monitor's
fees and activities)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced in TORONTO

MOTION RECORD
(extension of stay period, approval and sealing of
amended monitoring protocol, approval of monitor's
fees and activities)
(returnable March 8, 2021)

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