

**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.
(the "Applicant")**

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears in the following pages.

THIS APPLICATION will come on for a hearing on Thursday, October 15, 2020, at 3:45 p.m. Toronto time, at 330 University Avenue, Toronto, via videoconference. The videoconference details can be found in Schedule "A" to this Notice of Application.


IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: October 15, 2020

Issued by:



Local registrar

Address of court office: 330 University Avenue, 9th Floor
Toronto (ON) M5G 1R8 7a
C. Irwin
Registrar

APPLICATION

1. Express Gold Refining Ltd. (“EGR”) makes this application for an initial order pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”) substantially in the form of the draft order attached as Tab 4 of the application record principally seeking:
 - a. abridgment of the time for and validation of the service of this notice of application and the attendant application record,
 - b. comeback hearing and attendant provisions,
 - c. the appointment of Deloitte Restructuring Inc. as monitor in respect of EGR with the duties, powers and protections set out in the CCAA and the draft order (the “Monitor”),
 - d. orders that EGR remains in possession and control of all its current and future assets, undertakings and properties, continues to carry on and preserve its business, and is authorized to continue to retain assistants including counsel and employees,
 - e. orders that EGR be authorized to formalize and perform existing and new trust agreements as in the normal course of its business,
 - f. orders that EGR be authorized to pay or otherwise deal with its creditors’ claims, whether arising before or after the making of the initial order, in accordance with the contracts and agreements in place or that may be agreed to, with the exception of certain claims by the Canada Revenue Agency (“CRA”) as set out in the draft order,
 - g. orders that EGR continue paying in the normal course any amounts arising due after the making of the initial order in respect of employee source deductions, sales taxes, and certain other taxes and amounts payable to governments,

- h. a stay of all proceedings, rights and remedies in respect of EGR, the Monitor, or EGR's business or property, except with the written consent of EGR and the Monitor or with leave of the court, and save specific exceptions as set out in the draft order,
- i. as part of such general stay, a stay of the Reassessments (as defined below), including a stay of any right of set-off between any Pre-Filing Tax Liability and any Post-Filing Tax Assets (as those terms are defined in the draft order),
- j. orders allowing the normalization of certain tax matters, including (i) orders that EGR, the Monitor and CRA make all reasonable efforts to agree on a protocol for the vetting and payment of post-filing input tax credits ("ITCs") under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "ETA"),¹ (ii) orders that any ITC allowed by CRA or any Tax Enforcement Entity (as defined in the draft order) ("Allowed ITCs") before the initial order is made be paid to EGR without any set-off, and (iii) orders that ITCs claimed by EGR in respect of pre-filing reporting periods and that are assessed as Allowed ITCs after the initial order is made be paid without any set-off,
- k. a stay of proceedings against EGR's former, current and future directors,
- l. a directors' and officers' indemnity and charge (the "**Directors' Charge**") in the amount of \$100,000,
- m. an administration charge (the "**Administration Charge**") to secure payment of the standard professional fees and disbursements of the monitor, its counsel, and all of EGR's counsel, including restructuring and tax counsel, incurred both before and after the initial order and in respect of the herein proceedings and proceedings in

¹ Herein, "ITC" will also for simplicity broadly refer to net tax refund, i.e. the net amount CRA owes EGR in respect of GST/HST or otherwise for a GST/HST reporting period. Given the nature of EGR's business, this would be constituted almost exclusively of ITCs under the ETA.

respect of the Reassessments or similar proceedings, such Administration Charge being for a maximum amount of \$300,000,

- n. orders that the Administration Charge ranks first on all Property (as defined in the draft order) and that the Directors' Charge ranks immediately after the Administration Charge on all Property,
- o. that the E-Service Protocol of the Commercial List apply to the herein proceeding, and
- p. such other and attendant relief as set out in the draft order,

the whole as more fully set out in the draft order and along with such further and other relief as the court deems just.

I. OVERVIEW

- 2. Resort to CCAA relief is required due to (i) CRA's refusal to pay EGR's ITCs since August 2018 and (ii) the reassessments issued to EGR on or about July 28, 2020 in respect of reporting periods from June 1, 2016 to October 31, 2018 which are in excess of \$189,000,000, inclusive of interest and penalties (the "**Reassessments**").
- 3. The Reassessments are being challenged in the Tax Court of Canada ("**Tax Court**"). However, the Reassessments are enforceable notwithstanding contestation, EGR cannot pay them, and on or around October 8, 2020, CRA told EGR's Vice-President, Mr. Atef Salama, that CRA would commence enforcement measures on October 15, 2020. Subsequent discussions among counsel and CRA representatives confirmed enforcement would not begin before the 15th.
- 4. The relief sought in the initial order is intended for EGR to continue in its normal business operations, avoid liquidation, and obtain, as a first milestone of this restructuring, a decision on the merits of its case in Tax Court.

II. EGR'S BUSINESS DEPENDS ON ITCs

5. EGR is a corporation incorporated pursuant to the *Business Corporations Act*, R.S.O. 1990, c. B-16 with its head office in Toronto. EGR is in the gold refining business.²
6. EGR is generally required to pay GST/HST to its customers on its "purchase" of unrefined gold.³ However, it does not collect GST/HST on its "sales" of pure gold because those are "zero-rated" under the ETA.⁴
7. This is unlike a typical GST/HST-registered business, who is usually collecting GST/HST on its sales, paying GST/HST on its inputs, and allowed to deduct the latter from the former without having to claim ITCs with CRA.
8. Instead, EGR must claim large amounts of ITCs from CRA and so EGR is in a constant, substantial monthly GST/HST net tax refund position as a normal part of its business operations. For example, for reporting periods from January 2018 to July 2018, EGR claimed monthly net tax refunds from around \$6.4 million to over \$9 million.
9. EGR's going concern capacity is therefore directly dependent on CRA acting with diligence in approving and paying ITCs.

III. THE AUDIT AND ITC WITHHOLDING

10. EGR's large monthly tax refunds subjects it to constant CRA audit and requests, with which EGR has always complied.
11. On November 6, 2018, CRA expanded an ongoing audit to cover the period from June 1, 2016 to October 31, 2018 (29 months) (the "**Audit**").
12. On November 7, 2018, CRA announced it would withhold payment of any ITC due for August 2018 until completion of the Audit. EGR's tax counsel ("**Tax Counsel**") wrote to

² EGR also deals with silver, platinum and palladium in a negligible proportion. For simplicity, and because the Reassessments relate only to gold transactions, this notice of application mostly refers to gold.

³ See the ETA, s. 165, 169(1)(c), and 123(1).

⁴ See the ETA, s. 165(3), s. 123(1), and s. 3 of Schedule VI of Part IX.

CRA demanding payment of the ITCs in accordance with the Minister's obligation to do so "with all due dispatch" under ETA s. 229.

13. On November 26, 2018, CRA announced it would not only continue to withhold any August 2018 ITCs, but also any future ITCs until completion of the Audit. It is unclear whether legal grounds exist to withhold payment of such off-audit ITCs.
14. In December 2018, EGR applied to the Tax Court for a *mandamus* order to compel CRA to process all August 2018 and later ITCs with due dispatch, which was heard before Justice Pentney on July 3, 2019.
15. On July 7, 2019, a mere 4 days after the hearing, CRA announced that the Audit would be expanded to also cover the period from November 1, 2018 to May 31, 2019 (an additional 7 months).
16. On May 12, 2020, Justice Pentney dismissed EGR's application for an order of *mandamus*, holding that, based on the evidence before him (i.e. as of early 2019), it was premature.

IV. THE PROPOSAL AND REASSESSMENTS

17. On May 27, 2020, CRA issued a proposal⁵ (the "**May 27, 2020 Proposal**") stating its intention to issue the Reassessments, i.e. reassess EGR for the period from June 1, 2016 to October 31, 2018 with the effect of (i) denying over \$133,000,000 in ITCs, (ii) imposing gross negligence penalties in excess of \$34,000,000, and (iii) the whole with interest, for a total of roughly \$189,000,000.
18. CRA revealed in the May 27, 2020 Proposal that it believes EGR knowingly participated in a type of tax refund fraud called a "carousel scheme". It states that CRA had completed a survey of the unrefined gold market in the greater Toronto area that determined average volumes and purities of unrefined gold and, effectively, that EGR's transactions with customers that fell outside these average ranges must have been transactions made as part

⁵ A "proposal" is a CRA letter notifying a taxpayer of the fact and reasons for an intended reassessment, and affording the taxpayer a reasonable opportunity to respond and/or normalize the situation before the reassessment is issued and becomes enforceable notwithstanding contestation.

of a “part of a carousel scheme” for which EGR was “a willing participant”. CRA says such transactions were therefore not in respect of “commercial activities” and did not give rise to ITCs.

19. Unfortunately, the May 20, 2020 Proposal is grossly imprecise and unsubstantiated, factually and legally. EGR, through Tax Counsel, responded in a letter dated July 10, 2020, vigorously denying those allegations, and explaining their imprecision and lack of factual and legal support.
20. In a letter dated July 28, 2020, CRA stated that it had completed the Audit, disagreed with Tax Counsel, and confirmed it would issue the Reassessments. Unfortunately, this July 10, 2020 response is also grossly inadequate. For example, CRA states on numerous occasions that information is deliberately *not* provided due to alleged “confidentiality” concerns. On another occasion, CRA also admitted to Tax Counsel that its assessment position had never been tested in the courts.
21. There are many other issues with the July 28, 2020 letter, and justification of the Reassessments generally. CRA persistently refused to respond to Tax Counsel’s reasonable requests for information.⁶
22. The Reassessments were issued on or about July 28, 2020 and EGR’s revenues and assets are insufficient to pay them. The Reassessments are being contested by Tax Counsel in Tax Court File No. 2020-1214(GST)G, but they enforceable notwithstanding contestation. EGR cannot pay them, and CRA represented it would commence enforcement measures on October 15, 2020.
23. In a letter dated August 12, 2020, CRA advised EGR that it was commencing a new audit for EGR’s reporting periods from November 1, 2018 to June 30, 2020 (19 months) (i.e., virtually all reporting periods directly following those targeted by the Reassessments).

⁶ See the CCAA, s. 18.6.

V. CRA CONTINUES TO WITHHOLD AUGUST 2018 AND LATER ITCs

24. CRA continues to withhold payment of any Allowed ITCs in respect of August 2018 and later periods, by offsetting those Allowed ITCs against the debt raised in the Reassessments, whether pursuant to section 318 of the ETA or otherwise.
25. If this is not normalized, as sought in the initial order, it is likely to prevent, in itself, the continuation of EGR's business and EGR obtaining determination on its case in Tax Court.

VI. REASONS FOR INSOLVENCY

26. But for the Reassessments and CRA's non-payment of ITCs, EGR would not be insolvent. Due solely to the Reassessments and CRA's non-payment of ITCs, EGR is insolvent.

VII. CREDITORS AND 13-WEEK CASHFLOW FORECAST

27. EGR is current in its ordinary course obligations except in respect of the Reassessments. This is despite an approximately 95% decline in its refining business due to COVID-19.
28. EGR has only one secured creditor in respect of a vehicle lease. EGR however holds deposits, gold bullion and forward contracts on behalf of some of its customers as part of its normal business operations. This, without admission, could be seen as some form of trust.
29. Provided the ITC situation can be normalized as sought in the draft initial order, EGR intends to operate normally and pay its pre- and post-filing creditors (excluding CRA as to the Reassessments) in the normal course during the CCAA proceeding. Based on its 13-week cash flow, it may require some cash infusions to do so, which will be addressed if and when necessary.

VIII. APPROPRIATENESS OF RELIEF SOUGHT

30. The relief sought in the draft order is within the court's CCAA jurisdiction and is appropriate in the circumstances. It aims to allow EGR to continue its normal business operations, avoid liquidation, and obtain, as a first milestone of this restructuring, a decision on the merits of its case in Tax Court. If successful in Tax Court, it is anticipated that EGR

is likely to formulate a viable arrangement (if one remains necessary) and continue in operations, to the benefit of its creditors, shareholders and employees.

31. Specifically, if CRA is allowed to continue withholding and/or offsetting Allowed ITCs, this will hamper EGR's ability to fund its operations, let alone an arrangement, and prevent EGR from exercising its rights against the Reassessments. In effect, CRA would hold EGR's restructuring attempts and Tax Court case in hostage. This is against the purpose of the CCAA and is within the court's jurisdiction to remedy.
32. Because of the immediate materiality of those issues, the relief sought is reasonably necessary for the continued operations of EGR in the ordinary course of business during the initial 10-day stay period.⁷

IX. MAIN LEGAL PROVISIONS APPLICABLE

33. The CCAA, including primarily its sections 10, 11, 11.001, and 11.02, 11.03 and 18.6.
34. The Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including primarily rules 1.05, 2.03, 3.02 and 14.05(2).
35. 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 affidavit of Mr. Atef Salama sworn October 14, 2020,
- b. the consent of Deloitte Restructuring Inc. to act as Monitor,
- c. the pre-filing report of the proposed Monitor, and
- d. such further and other materials as counsel may advise and the court may permit.

⁷ CCAA, s. 11.001.

October 14, 2020

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Schedule "A" – Videoconference Details

Join Zoom Meeting

<https://zoom.us/j/96744819249?pwd=Nm9EcXFzZS9vaVZ6NVVnOFVONExZz09>

Meeting ID: 967 4481 9249

Passcode: 913745

One tap mobile

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Meeting ID: 967 4481 9249

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CV-20-00649558-0001
Court File No.

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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 APPLICATION
(CCAA Initial Order)**

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