

**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.

**AFFIDAVIT OF KAYLA VIETH**

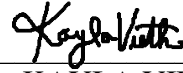
I, Kayla Vieth, of the city of Campbellford, in the province of Ontario, AFFIRM AND SAY:

1. I am employed as a legal assistant in the Tax Law Services Section of the Department of Justice in Toronto, Ontario, and am assisting counsel for the respondent in the conduct of this appeal. As such, I have personal knowledge of the matters hereinafter deposed to, save and except what I state to be on information and belief, and where I so state, I verily believe that information and belief to be true.
2. Attached hereto and marked as Exhibit "A" is a letter with enclosures (9pp) dated September 3, 2021, which counsel for Canada Revenue Agency ("CRA") prepared in response to Express Gold Refining Ltd.'s motion record dated August 30, 2021, and which has been sent to counsel for Express Gold Refining Ltd. and the Monitor in this matter.

AFFIRMED remotely by Kayla Vieth of the city )  
of Campbellford, in the province of Ontario, )  
before me at the city of Toronto, in the province )  
of Ontario, on September 3, 2021 in accordance )  
with O. Reg. 431/20, Administering Oath or )  
Declaration Remotely. )



\_\_\_\_\_  
SARAH MACKENZIE,  
A Commissioner for Taking Affidavits )



\_\_\_\_\_  
KAYLA VIETH

This is **Exhibit “A”** referred to in the affidavit of

Kayla Vieth

AFFIRMED remotely by Kayla Vieth stated as being  
located in the city of Campbellford, in the Province of Ontario, before me at the City of Toronto,  
in the Province of Ontario, on this September 3, 2021,  
in accordance with O.Reg 431/20,  
Administering Oath or Declaration Remotely



---

Commissioner for Oaths in and for  
the Province of Ontario



**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: 416-952-7722  
Fax /Télécopieur: 416-973-0810  
Email/Courriel: Fozia.Chaudary@justice.gc.ca

**VIA EMAIL**

Our File Number: LEX-500032494

September 3, 2021

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, ON M5G 1V2

**Attention: Mario Forte & Joël Turgeon**

**DENTONS CANADA LLP**  
77 King Street West, Suite 400  
Toronto-Dominion Centre  
Toronto, ON M5K 0A1

**Attention: Robert Kennedy & Mark Freake**

**Re: EXPRESS GOLD REFINING LTD. - CCAA  
CV-20-00649558-00CL**

---

We are writing in response to the submissions made by Express Gold Refining Ltd. (“EGR”) in their motion record returnable September 7, 2021.

Although the Canada Revenue Agency (“CRA”) does not oppose the motion for an extension of the Stay Period, we feel it is necessary to address the mischaracterizations made in the Affidavit of Atef Salama sworn August 30, 2021, found at tab 2, page 9 of EGR’s motion materials (the “Salama Affidavit”). As per the Endorsements of Justice McEwen, dated December 7, 2020 and June 8, 2021, the CRA took issue with numerous mischaracterizations that formed parts of the Affidavits of Atef Salama in the previous stay motion materials. Given that these mischaracterizations continue to occur, we felt it was necessary to clarify these issues in writing, as opposed to in oral submissions, for the benefit of all parties to this proceeding.

In response to the Salama Affidavit, there are four major areas we would like to address:

- 1) the disclosure process in the tax litigation between EGR and the CRA (the “Tax Litigation”);
- 2) the timelines and timeliness of litigation steps in the Tax Litigation;
- 3) the actions of the CRA in respect of EGR’s audits and refunds; and

**Canada**<sup>Canada</sup>

- 4) the CRA's general concern about the duplication of Tax Litigation steps in the CCAA Litigation process, as EGR's affidavit touches on areas of the Tax Litigation which would be more efficiently and economically addressed in the Tax Litigation.

**1) The disclosure process in the Tax Litigation between EGR and the CRA has been complex**

The ongoing disclosure effort

At paragraphs 3 and 4 of the Salama Affidavit, Mr. Salama raises concerns about the disclosure process in the Tax Litigation.

As referenced at paragraph 15 of the Salama Affidavit and in the letter dated July 27, 2021 at tab 2C to the Salama Affidavit, the CRA has identified the following data:

- more than 350,000 pages of disclosure in the CRA's internal system (Integras), consisting of more than 100 gigabytes of data; and
- an additional 81.2 gigabytes of data that has been collected from 131 custodians.

By way of joint letter to the Tax Court of Canada ("TCC") on August 6, 2021 (enclosed), EGR's tax counsel and tax counsel for the CRA described their continued efforts to work collaboratively. EGR indicated it would not pursue a motion seeking additional documentary disclosure at this time.

Both parties to the Tax Litigation have expressed an interest in working cooperatively to resolve disclosure. However, EGR has taken the position that relevance is incredibly broad and has requested documents that the TCC normally does not order parties to disclose, including, for example, documents about the audit process and progress. In the spirit of collaboration, the Crown has produced many more documents than it would ordinarily produce within a Tax Court proceeding. Disclosure therefore has taken a significant amount of time and reviewing that disclosure will be a very costly process given that the review will essentially be conducted twice – by EGR's counsel and CRA tax counsel on the TCC matter and then once again by the Monitor.

The disclosure status

Many documents have already been disclosed to EGR in the Tax Litigation. Additional documents are forthcoming, and a Case Management Conference will follow shortly thereafter. EGR's Tax Litigation counsel are already reviewing that disclosure and will have an opportunity to question the CRA about that disclosure at examinations for discovery.

**2) The timelines and timeliness of litigation steps in the Tax Litigation**

The Salama Affidavit raises the issue of a timely trial in the Tax Court at paragraphs 3-4 and paragraph 21. The Crown disagrees with such characterizations.

EGR requested that the TCC litigation be case managed. The CRA agreed to this request. As mentioned in paragraph 12(f) of the Salama Affidavit, the tax litigation now has a Tax Court

Judge that has been appointed to manage all issues pertaining to timelines relating to disclosure and any other preliminary issues that EGR may wish to raise.

The Tax Litigation has proceeded cooperatively and in a timely manner

The Salama Affidavit does not acknowledge the steps taken by both parties in the Tax Litigation to advance the litigation in a timely manner, and in good faith. The timelines in the disclosure process are a result of the extensive disclosure process, which has been expanded at the request of EGR. However, the CRA has taken the position – and continues to take the position – that full disclosure has captured a large number of minimally relevant documents. Further, the CRA has expressed its commitment toward the expectations and procedures contained within the Sedona Principles for Electronic Discovery, including the principles of proportionality and collaboration. The sheer volume of disclosure, including disclosure of transitory documents and third party information, has been done at the sole request of EGR, and not the CRA. Finally, if EGR is displeased with any aspect of the Tax Litigation, it may bring a motion before their Case Management Judge in the Tax Court of Canada.

**3) The actions of the CRA in respect of EGR’s audits and refunds**

Audit for the periods following that of the 2020 reassessments up to CCAA filing

At paragraph 23 of the Salama Affidavit, EGR makes a series of claims about the CRA actions to date. While the Crown takes issue with many of the claims in this paragraph, we note the following:

- Pre-CCAA amounts that have been assessed (August - October 2018) - The CRA has not withheld tax refunds. The CRA has assessed the periods and the amount of net tax payable after that assessment has been applied to the pre-CCAA debts assessed under the *Excise Tax Act*. This process was fully complete by July 2020, prior to the filing under CCAA;
- Pre-CCAA amounts that have not yet been assessed (Nov 2018-Oct 15 2020) – these periods have not yet been assessed as CRA continues the audit of these periods. This audit action is consistent with the Federal Court’s interpretation of the Minister’s duties under s. 229 of the *Excise Tax Act*, including in the decision of *EGR v MNR* before the Federal Court (below);
- Amounts that post-date the CCAA proceedings - As the Salama Affidavit confirms in paragraph 22(c), CRA has held-back amounts from identified high-risk transactions while it audits those transactions but has otherwise released refunds to EGR, with the understanding that these amounts flow out to third parties under the Monitoring Protocol.

At paragraph 12, the Salama Affidavit also makes reference to the CRA’s actions. The Crown disputes the characterizations made in that paragraph, including:

- The CRA takes issue with Mr. Salama’s description of the audit report and position paper at paragraph 12(e), in particular the description of the assessment as “sensational, completely and demonstrably false allegations,” and further states that the determination as to the correctness of the assessment is exclusively within the jurisdiction of the Tax Court of Canada.

The Minister of National Revenue is acting within the meaning of s.229 of the *Excise Tax Act*, as confirmed in *EGR v MNR*, 2020 FC 614

CRA's audit division is working diligently to complete this audit work and anticipates being able to update the Monitor and EGR prior to the next stay extension which is scheduled for December 10, 2021.

In the Salama Affidavit at paragraph 3(c), 22 and 23, Mr. Salama refers to refunds to EGR and to the time taken to complete the CRA's audit of the November 1, 2018 to October 16, 2020 reporting periods. The issue of refunds pertaining to reporting period audits that are not yet complete has already been considered by the Federal Court in EGR's application for Judicial Review of the Minister's decision to withhold refunds. If EGR wishes to revisit this issue, the remedy lies in another judicial review in the Federal Court.

The complexity of the EGR audits means they require more time to complete. As Justice Pentney of the Federal Court affirmed, quoting CRA's auditors, the decision to withhold some refunds is "to enable the CRA to ensure that registrants receive only the correct amount of refund to which they are entitled in order to protect the GST/HST revenue base."<sup>1</sup> Justice Pentney stated that the audit of EGR is a "complex audit, which is being completed with 'all due dispatch.'"<sup>2</sup>

While Justice Pentney's Federal Court decision related to an earlier period, the 11 months the CRA estimated would be required to complete the audit – which began prior to the start of the COVID-19 pandemic – was considered a reasonable amount of time given the complexity and risk associated with the scrap gold industry. Moreover, without completing its audit, the CRA cannot reasonably carry out any request for a refund.<sup>3</sup> As Justice Pentney said, the CRA's "obligation to pay the refund with all due dispatch was not intended to displace the Minister's obligation to verify the claim is not unreasonable."<sup>4</sup> In other words, the term "with all due dispatch" does not impose a specific deadline on the Minister to complete any obligation found in the *Excise Tax Act*.<sup>5</sup>

#### **4) EGR's affidavit touches on areas of the Tax Litigation which would be more efficiently and economically addressed in the Tax Litigation**

When the Second Amended and Restated Initial Order was made by this Court in October 2020, the parties in the TCC litigation had not yet agreed to full disclosure and could not have anticipated the extraordinary quantity of data and documents involved, which exceeds the amount of disclosure necessary to review and assess EGR's case for the purposes of the CCAA. Moreover, any assessment of the strength of that litigation can properly be made by EGR's very experienced tax litigation counsel, who are already reviewing the documents, are responsible for advising EGR on their tax litigation, and presumably have a shared interest with the Monitor in streamlining and understanding the litigation from a financial perspective.

---

<sup>1</sup> 2020 FC 614 at para 12.

<sup>2</sup> *Ibid* at para. 43.

<sup>3</sup> *Ibid* at para. 48.

<sup>4</sup> *Ibid* at para. 55.

<sup>5</sup> *Ibid* at paras. 65-69.

## Conclusion

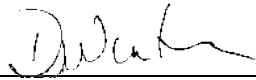
Many of the issues raised in the Salama Affidavit mischaracterize the relationship between the parties to the Tax Litigation and do not properly reflect the ongoing good faith negotiations between their counsel. The CRA has throughout this process worked collaboratively with EGR wherever possible, including agreeing to extensive disclosure above and beyond the normal TCC expectation.

To the extent that these issues raise concerns about timeliness and the quality of disclosures made in the Tax Litigation, those issues are directly linked to that litigation, and should be raised before the Case Management Judge in the Tax Court of Canada. This approach would also help narrow the issues placed before this Court, which would in turn help contain the cost of the CCAA litigation from continuing to grow at a high rate. This approach would therefore increase the capacity of both parties to proceed with both CCAA and Tax Litigation efficiently and effectively with a view to preserving court resources and time.

Sincerely,

### ATTORNEY GENERAL OF CANADA

Department of Justice Canada  
Ontario Regional Office  
Tax Law Services Division  
Per:



Diane Winters  
General Counsel



Fozia Chaudary  
Counsel



Sarah Mackenzie  
Counsel

Enclosure



**Asia Pacific**

Bangkok  
Beijing  
Brisbane  
Hanoi  
Ho Chi Minh City  
Hong Kong  
Jakarta  
Kuala Lumpur\*  
Manila\*  
Melbourne  
Seoul  
Shanghai  
Singapore  
Sydney  
Taipei  
Tokyo  
Yangon

**Europe, Middle East  
& Africa**

Abu Dhabi  
Almaty  
Amsterdam  
Antwerp  
Bahrain  
Baku  
Barcelona  
Berlin  
Brussels  
Budapest  
Cairo  
Casablanca  
Doha  
Dubai  
Dusseldorf  
Frankfurt/Main  
Geneva  
Istanbul  
Jeddah\*  
Johannesburg  
Kyiv  
London  
Luxembourg  
Madrid  
Milan  
Moscow  
Munich  
Paris  
Prague  
Riyadh\*  
Rome  
St. Petersburg  
Stockholm  
Vienna  
Warsaw  
Zurich

**The Americas**

Bogota  
Brasilia\*\*  
Buenos Aires  
Caracas  
Chicago  
Dallas  
Guadalajara  
Houston  
Juarez  
Lima  
Mexico City  
Miami  
Monterrey  
New York  
Palo Alto  
Porto Alegre\*\*  
Rio de Janeiro\*\*  
San Francisco  
Santiago  
Sao Paulo\*\*  
Tijuana  
Toronto  
Valencia  
Washington, DC

\* Associated Firm  
\*\* In cooperation with  
Trench, Rossi e Watanabe  
Advogados

August 6, 2021

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

Dear Sir/Madam:

**RE: Express Gold Refining Ltd. v. HMQ**  
**Court File No. 2020-1214(GST)G**

The parties are reporting to the Honourable Justice B. Russell, as Case Management Judge of the above-noted appeal, in compliance with the attached Order dated July 16, 2021.

The Order required the parties to advise the Case Management Judge by July 19, 2021 whether an agreement (or partial agreement) had been reached between the parties with respect to the Respondent's disclosure. In a letter from both parties dated July 14, 2021, the parties advised that some issues have been resolved but overall agreement had not been achieved.

The Order further requires that, if an agreement between the parties has not been achieved, the Appellant may by August 6, 2021 file and serve a motion seeking additional documentary disclosure, intended to be returnable between September 7 and 15, 2021.

In the intervening period since the parties' letter to the Court, the parties have continued to negotiate and make headway. Overall agreement has not been achieved, however the parties are hopeful a motion could be avoided if they are afforded more time to continue negotiations which includes the production and review of further documents. As such, the parties have agreed that the Appellant will not bring a motion returnable between September 7 and 15, 2021 without prejudice to the Appellant's right to bring such a motion in the future. The parties have further agreed that any such motion will be served on the opposing party with at least four weeks notice so that the responding party has at

**By Electronic Filing**

least three weeks to prepare responding materials, including written submissions, and the Court has at least one week to review the materials.

The Respondent intends to produce significant additional documents to the Appellant by September 10, 2021. In the circumstances, the parties request the holding of a Case Management Conference shortly after that date, namely, on a date between September 15, 2021 and September 22, 2021, subject to the Court's availability. The parties respectfully request that the Court issue a new Order, amending the Order of July 16, 2021, providing for the foregoing.

Yours truly,

Counsel for the Appellant:

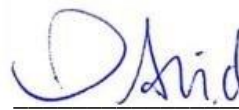


---

Jacques Bernier and Bryan Horrigan  
Baker & McKenzie LLP

(416) 865-6903  
Jacques.Bernier@bakermckenzie.com  
Bryan.Horrigan@bakermckenzie.com

Counsel for the Respondent:



---

Marilyn Vardy and Diana Aird  
Department of Justice Canada

(647) 256-0810  
Marilyn.Vardy@justice.gc.ca  
Diana.Aird@justice.gc.ca

Enclosure (1)

BETWEEN:

EXPRESS GOLD REFINING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ORDER

UPON reading the parties' joint letter to the Court dated July 7, 2021 requesting an amendment to the Order dated May 11, 2021;

THE ORDER dated May 11, 2021 is amended to read:

2. The parties are to advise the Case Management Judge herein by July 19, 2021 whether an agreement (or partial agreement) has been reached between the parties with respect to the Respondent's disclosure.
3. If an agreement between the parties has not been achieved, the Appellant may by August 6, 2021 file and serve a motion seeking additional documentary disclosure, intended to be returnable between September 7 and 15, 2021.

Signed at Halifax, Nova Scotia, this 16<sup>th</sup> day of July 2021.

“B. Russell”

---

Russell J.



[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: **WEB784354**

## Session Details

**Submitted on:** August 6, 2021 3:37:03 EDT PM

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

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

Type of Document	Document Name
Miscellaneous	20210806-1 (LT - TCC - Joint LT re Respondents Productions).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](#)

**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")**

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

Proceeding Commenced at Toronto

**AFFIDAVIT OF KAYLA VIETH**

**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Ontario Regional Office, Tax Law Section  
120 Adelaide Street West, Suite 400  
Toronto, Ontario M5H 1T1  
Per: Diane Winters, General Counsel  
LSO #20824V  
Fozia Chaudary, Counsel  
LSO #52787D  
Sarah Mackenzie, Counsel  
LSO #75127I  
Fax: 416-973-0810  
Email: [Diane.Winters@justice.gc.ca](mailto:Diane.Winters@justice.gc.ca)  
Email: [Fozia.Chaudary@justice.gc.ca](mailto:Fozia.Chaudary@justice.gc.ca)  
Email: [Sarah.Mackenzie@justice.gc.ca](mailto:Sarah.Mackenzie@justice.gc.ca)

Lawyers for Canada Revenue Agency