

**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.

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**MOTION RECORD**  
(extension of stay period, approval of 2<sup>nd</sup> amended monitoring protocol)  
(returnable December 14, 2021)

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December 11, 2021

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**ONTARIO**  
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**TAB 1**

Notice of motion returnable December 14, 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**")

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**NOTICE OF MOTION  
(extension of stay period,  
approval of 2<sup>nd</sup> Amended Protocol)  
(returnable December 14, 2021)**

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The Applicant will make a motion to Mr. Justice McEwen of the Commercial List at 330 University Avenue, Toronto, on Tuesday, December 14, 2021, at 12:01 pm (noon) 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:

- a. extending the "Stay Period" as defined in the second amended and restated initial order made on October 27, 2020 to and including March 15, 2021 (3 months).
- b. approving the 2<sup>nd</sup> Amended Protocol (as that term is defined in the affidavit of Atef Salama sworn December 11, 2021 (the "**Salama December 11 Affidavit**"), if the same is finalized in time for the hearing on this motion.

**THE GROUND FOR THE MOTION ARE:**

2. Capitalized terms are defined in the Salama December 11 Affidavit.
3. Since the last extension (excluding the December 8 “bridge” extension) made on September 7, 2021, EGR has notably:
  - a. continued operating its business in accordance with the court’s orders and the Protocol, while complying with COVID-19 legal requirements and best practices, and
  - b. continued managing the Tax Litigation.
4. EGR will be able to support its operations, the Tax Litigation, the herein proceeding and the Protocol for the duration of the extension sought.
5. The Applicant has acted, is acting and will continue to act in good faith and with due diligence, and the sought extension is appropriate, as more fully appears from the Salama December 11 Affidavit.
6. However, the Application is unable to advance any restructuring for the reasons fully set out in the Salama December 11 Affidavit which are all attributable to and within the control of CRA. The Applicant wishes to use the opportunity of this motion to engage with the court (if it deems it appropriate) and all stakeholders, in a plenary session, with a view to simplification, communication and resolution of those pressing issues.
7. CCAA s. 11, 11.02, 11.03, 11.09, and 18.6.
8. Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rules 2.03 and 3.02.
9. 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 December 11 Affidavit,
- b. the Seventh Report, and
- c. such further and other evidence as counsel may advise and the court may permit.

December 11, 2021

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Lawyers for the Applicant, Express Gold Refining Ltd.

**TO: THE SERVICE LIST**

**Schedule “A” – Videoconference Details**

Zoom details:

Join Zoom Meeting

<https://us06web.zoom.us/j/89255604398?pwd=N1hQWDhwdHkwUFNvZVZlNkRnVUa3RnZz09>

Meeting ID: 892 5560 4398

Passcode: 176639

To join by phone, find your local number: <https://us06web.zoom.us/u/ku8G7ArA>

**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.**

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

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**Proceeding commenced in TORONTO**

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**NOTICE OF MOTION  
(extension of stay period,  
approval of 2<sup>nd</sup> Amended Protocol)  
(returnable December 14, 2021)**

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Lawyers for the Applicant, Express Gold Refining Ltd.



**TAB 2**

Affidavit of Atef Salama sworn December 11, 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")

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**AFFIDAVIT OF ATEF SALAMA  
(sworn December 11, 2021)**

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I, Atef 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. I make this affidavit in support of:
  - a. EGR's fifth motion for an extension of these CCAA proceedings to March 15, 2022 (3 months), and
  - b. EGR's motion for the approval of the 2<sup>nd</sup> Amended Protocol (defined below), if the same is finalized in time for the hearing on this motion.

**I. BACKGROUND OF THESE PROCEEDINGS**

**A. Initial and continued need for CCAA protection**

3. EGR is in the precious metal (predominantly, gold) refining and trading 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 under the *Excise Tax Act*, since August 2018, and **(ii)** reassessments in excess of \$189,000,000 issued to EGR on July 28, 2020 for the period from June 1, 2016 to October 31, 2018 (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,<sup>1</sup> and on or around October 8, 2020, CRA announced it would commence enforcement measures on October 15, 2020.
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 create a *statu quo* and allow EGR to obtain, as a first milestone of a restructuring, a decision on the merits in the Tax Litigation.

**B. Salient aspects of this proceeding**

7. Accounting for the unique aspects of this restructuring, the October 27, 2020 second amended and restated initial order (the "**SARIO**"), of which I attach a copy as **Exhibit "A"**, 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

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<sup>1</sup> I am referred to the [Excise Tax Act](#), s. 315.

creditor obligations whether incurred before or after the making of the initial order,<sup>2</sup>

- b. that a stay of proceedings applies but the Tax Litigation may continue,<sup>3</sup> and
- c. for the court's approval and sealing of a protocol (the "**Protocol**") agreed to on October 27, 2020 among EGR, CRA and Deloitte Restructuring Inc. as monitor in the herein proceedings (in such capacity, the "**Monitor**"),<sup>4</sup> as such Protocol was amended with court approval provided in the order made on March 8, 2021, of which I attach a copy as **Exhibit "B"**.

8. The current extension expires at the end of December 15, 2021.

## **II. PRESSING ISSUES**

9. EGR cannot advance any restructuring as it stands.

10. EGR and its stakeholders need:

- a. proper and prompt disclosure from CRA in the Tax Litigation.
- b. a reasonable and enforceable timetable for the Tax Litigation.
- c. final tax assessments for all post-2020 Reassessments, pre-filing periods.

11. Otherwise there may never be a determination in the Tax Litigation, nor a plan developed for the benefit of EGR's stakeholders.

12. EGR and I are hereby not only asking for a CCAA extension, but also engaging with the court and CRA towards making this CCAA process what it can be: a tool for simplification, communication and resolution. Not just basic life support.

13. Each of the issues is addressed below.

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<sup>2</sup> I am referred to paragraphs 4 to 9 of the SARIO.

<sup>3</sup> I am referred to paragraph 10 of the SARIO.

<sup>4</sup> I am referred to paragraphs 15 to 18 of the SARIO.

**A. Need for proper disclosure in Tax Litigation**

i. Background

14. Around December 9, 2020, EGR and CRA agreed that disclosure in the Tax Litigation would be governed by Rule 82 of the *Tax Court of Canada Rules* as a condition for EGR's consent to a 60-day extension of the time for CRA to file its Reply.
15. I am informed that proceeding under Rule 82 means that CRA must list and disclose to EGR all documents relevant to any matter in question between the parties and not only those documents that CRA intends to use at trial.
16. Affidavits of documents were exchanged on March 31, 2021. CRA's lead auditor of EGR's audit ("**Lead Auditor**") affirmed CRA's List of Documents (which CRA titled an "Affidavit of Documents"), which states that the Lead Auditor provided to the Department of Justice two categories of documents: (1) her audit file in respect of EGR; and (2) the position papers or audit reports for the other entities that CRA concluded were participants in the same carousel scheme as EGR. CRA subsequently produced the documents for inspection.
17. CRA produced some of the documents stored in one file referred to as the "CRA EGR Audit File." CRA did not produce documents from other sources such as documents from the Lead Auditor's hard-drive or CRA shared drive or emails, nor any documents from the related audits carried out in preparation for the reassessments of EGR which are under appeal (aside from certain position papers and audit reports).
18. EGR considered CRA's affidavit of documents and productions grossly deficient. For example, very minimal internal communications were disclosed or produced, and many

of the documents disclosed contained significant redactions to the point that some documents were completely unintelligible.

19. On April 23, 2021, EGR's tax counsel wrote to CRA<sup>5</sup> listing categories of standard audit documents that were not included in its Affidavit of Documents.
20. From May 5, 2021 on, CRA advanced a range of untenable positions to resist further production. Through the course of numerous lengthy exchanges between counsel, CRA reversed many of those positions and produced in piece-meal many highly material documents that it had initially withheld.
21. On May 11, 2021, the Tax Court ordered a timetable to resolve the productions issue by June 30, 2021, failing which EGR was to bring a motion by July 30, 2021. EGR did not pursue its motion at that time based on assurances that CRA would work diligently to provide full disclosure. The parties agreed to push back the motion timeline twice.
22. On July 9, 2021, CRA stated that it had received 73.5 GB of data from other custodians comprised mainly of auditors and persons from CRA Business Intelligence who worked on the audits of EGR and the other companies that CRA alleges were participating in a carousel scheme. Also at this time, CRA refused to produce relevant documents provided by the Royal Canadian Mint and refused to provide collection diaries concerning other alleged carousel scheme participants.
23. On July 27, 2021, CRA advised that it now had received a total of 81.2 GB of documents in response to litigation hold letters it had sent to 131 custodians (inclusive of the aforementioned 73.5 GB).

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<sup>5</sup> I am advised that the respondent in the Tax Litigation is technically the Crown, but I will continue to refer to it as CRA for simplicity.

24. On August 6, 2021, the parties agreed to further extend the deadline for EGR to bring a motion for full productions in compliance with Rule 82.
25. On September 22, 2021, CRA stated that it had completed a de-duplication of the documents from the 131 custodians but had not begun to review a sampling of the documents – despite the passage of almost a year since CRA agreed to full disclosure. CRA admitted that those documents are “potentially relevant”. CRA also indicated that the Royal Canadian Mint may consent to disclosure of its documents by October 5, 2021, which never occurred. CRA moreover asserted that collection diaries of other alleged scheme participants are irrelevant. Finally, CRA suggested that its disclosure obligations would be completed by November 3, 2021.

- ii. EGR’s motion in tax court

26. Notwithstanding the abovementioned additional piecemeal disclosure and representations of CRA, there remains some major deficiencies in CRA’s disclosures.
27. EGR was compelled to serve CRA with and file with the Tax Court a motion to resolve the matter. I attach a copy of the notice of motion dated November 18, 2021 as **Exhibit “C”**.
28. As more fully set out in the notice of motion, EGR has identified five categories of relevant documents that CRA has confirmed are in its control/possession but failed/refused to disclose, as follows:
  - a. all documents collected by CRA from 131 identified custodians who have a relationship to this appeal by having worked on the audit of EGR and/or on the audits of other persons audited in relation to the alleged carousel scheme(s) at

issue in the Tax Litigation (including, but not limited to, purported participants in such alleged scheme(s)) [paras. 10 to 16 of the notice of motion].

- b. all documents provided to CRA by the Royal Canadian Mint in the course of the EGR audit [paras. 17 to 22 of the notice of motion].
- c. all documents contained in certain CRA case files that are either in respect of EGR audits or relied upon in CRA's conclusions in respect of EGR [paras. 23 to 32 of the notice of motion].
- d. all Collection Diaries of the purported participants in the alleged carousel scheme.
- e. all documents that the Respondent stated that it would re-produce with less or no redactions [paras. 33 and 34 of the notice of motion].<sup>6</sup>

iii. EGR's proposed mediation of the matter, refused by CRA

- 29. After the December 2, 2021 plenary meeting discussed below, EGR's tax counsel sent a note to the Monitor stating that EGR would be amenable to having the disclosure matter mediated by a third-party (e.g., a seasoned tax litigation practitioner) on an urgent basis.
- 30. I am informed that this is appropriate including for the following reasons:
  - a. the matter is not so complex so as to necessitate a court's determination.
  - b. the parties could agree that the mediation outcome would be binding or non-binding, but in either case it would likely bring progress by allowing the resolution of at least part of the disclosure issue.
  - c. the case management judge in the Tax Litigation indicated at a case conference that he anticipated rendering his decision on EGR's motion, were it to proceed, at

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<sup>6</sup> Since service of the notice of motion, CRA has provided less redacted productions as initially promised, so this category of documents is no longer at issue in the motion.



the earliest between late-January and early-February 2022. Mediation would likely yield a faster result.

d. mediation would likely be less costly than a full-blown court hearing, and would be more flexible and informal, favouring resolution.

31. The Monitor followed-up on that offer with CRA. On December 9, 2021, the Monitor informed EGR's counsel that CRA refused to consider mediation because its tax litigation team is focused on the court hearing.

32. I am once more disappointed, but not surprised, of such lack of practicality and openness to simplification from CRA, who seems determined to make it as procedural, expensive and time-consuming as possible for EGR to obtain the disclosure it is entitled to in the Tax Litigation.

iv. Implications for CCAA proceeding

33. I attach as **Exhibit "D"** a copy of this court's production and confidentiality order dated June 8, 2021. This order was granted notwithstanding CRA's opposition and allows EGR to disclose to the Monitor documents disclosed in the Tax Litigation.

34. Since that June 8 order, the Monitor has been involved in the Tax Litigation disclosure process and discussions. I understand that the Monitor does not take a position regarding the merits of the Tax Court motion but is actively seeking to expedite the Tax Litigation timeline, which will be described in the Monitor's seventh report (the "**Seventh Report**"), to be filed.

35. Ideally, the Tax Court motion would not have to proceed. EGR and CRA, with the assistance of the Monitor, would meet and agree on disclosure, and CRA would follow-through within a reasonable time.

36. Another viable option is for the disclosure issue to be handled within the CCAA process.

I am informed this would present many advantages including:

- a. the ability to directly involve the Monitor in the matter, including the Monitor's supervision of and reporting on the parties' adherence to the timetable.
- b. the ability to expedite and resolve or fine-tune the matter directly within the "bigger picture" of the restructuring exigencies.
- c. the possibility of obtaining a determination regarding the pressing disclosure issue, and any follow-up disclosure issues, on a real-time basis.

37. On the other hand, I anticipate that CRA will object to the matter being dealt with by this court, as it has (unsuccessfully) in respect of the Monitor's disclosure motion noted above.

38. EGR has not yet made any formal motion to this court regarding disclosure, and is not asking the court to make any determination at this time. However, EGR is using the opportunity of the stay extension hearing to put this potential avenue on the record and engage with CRA (and the court, if it deems it appropriate) on it. EGR will make such a motion if, despite this attempted dialogue, insufficient progress is made.

**B. Need for reasonable and enforceable Tax Litigation timetable**

i. December 2 plenary meeting

39. On December 2, 2021, the Monitor hosted a plenary meeting among EGR's restructuring counsel, EGR's tax litigation counsel, CRA's restructuring counsel, CRA's tax litigation counsel, and some other CRA personnel, including audit team members. I was not present but I have been debriefed by EGR's restructuring and tax litigation counsel.

40. The main purpose of the meeting was:
- a. for the Monitor to voice its concern that the Tax Litigation is be unlikely to reach a final determination of the merits within the timeframe afforded by EGR's finances (which the Monitor stated was approximately 16 months from now, an evaluation with which I agree based on the information available at this time), considering, among other things, the costs of these CCAA proceedings.
  - b. to afford an opportunity to EGR and CRA to answer this concern, including by providing an explanation for the delays involved.
41. EGR unequivocally expressed that:
- a. it had met its disclosure obligations under Rule 82.
  - b. it could and would commit to the following timetable which had been put to CRA before, including at a recent case management hearing in Tax Court:

Step	Deadline
Receipt of CRA's full documentary disclosure (including items sought on disclosure motion)	January 31, 2022
Additional disclosure from EGR and resolving related issues	January 31, 2022
Complete examinations for discovery	April 15, 2022
Satisfy undertakings, if any	May 15, 2022
Communicate questions arising from undertakings, if any	May 31, 2022
Provide answers to questions arising from undertakings, if any	June 15, 2022
Resolution of issues arising from Examinations for Discovery, if any	July 15, 2022
Trial commencement	October 1, 2022

42. In response, CRA said that:
- a. *but for EGR's disclosure motion in Tax Court*, it could consider a Fall trial.

- b. it was now putting its resources *into resisting EGR's disclosure motion* rather than working on disclosure itself, and for that reason, it is “unfortunate” that EGR makes such a motion.
  - c. assuming EGR was successful on its motion, CRA would require *between 4 ½ and 5 months after a final determination* to effect the disclosure before any remaining steps in the litigation could be completed.
43. I am deeply disconcerted by that response. Some of my thoughts include:
- a. to imply that EGR's disclosure motion is against its own interest, or that EGR is in any way responsible for the delays in disclosure by seeking to redress an obvious, harmful and egregious procedural irregularity, is authoritarian, obfuscating, and plainly wrong.
  - b. what would have obviously been fastest is CRA's disclosure to have been compliant in the first place, and EGR's motion not being necessary at all.
  - c. I do not understand what could possibly take 5 months to effect disclosure. No explanation was given by CRA to justify such delay despite EGR's tax counsel asking the direct question. I could accept disclosure taking 10 days at worst, but almost half a year seems absurd. CRA has all the documents in its possession. I understand CRA has stated that the documents sought by EGR on the motion have already largely, if not completely, been compiled and de-duplicated.
    - ii. Implications for CCAA proceeding
44. It is notable that obtaining a decision on the merits in the Tax Litigation is the *first* milestone that must be achieved in this proceeding, before any restructuring plan can be

developed. Yet after more than a year under CCAA protection, there is still not even an agreed tentative timetable, much less a binding one, for the Tax Litigation.

45. The current *statu quo* is, with respect, at best inconsequential and at worst strategically desirable for CRA. But it is expensive and paid for by EGR and its stakeholders. The longer the Tax Litigation takes, the longer EGR must remain under CCAA protection, which necessitates costs and may drive EGR out of business regardless of the merits of the Tax Litigation.
46. EGR owes it to its stakeholders that this does not happen. CRA has a positive duty to act in good faith which is not reconcilable with a continuation of the current state of affairs.
47. An enforceable litigation timetable is the inevitable milestone from which to work backwards. Without one, this restructuring will stray and be unstructured, aimless and of indefinite length.
48. EGR is ready to commit and abide by the aforementioned litigation timetable it proposes.
49. I am informed by counsel in the Tax Litigation that this proposed timeframe is markedly accelerated by comparison to what can be expected of Tax Court timeframes in ordinary circumstances. However, I am also informed by tax counsel that the Tax Court can be responsive to such exigencies as are present in this case, such that if the parties commit to the above timetable, it is anticipated that the Tax Court will be able to accommodate it.
50. I am satisfied that the above proposed timeframe is rigorous and reasonable for EGR. The steps occur within a foreseeably sustainable period for EGR.
51. As for the disclosure matter, EGR does not yet make any formal motion to this court in respect of the litigation timeframe. EGR is using the opportunity of the extension hearing

to firmly put its proposal on the record and engage with CRA (and the court, if it deems it appropriate) on it. EGR will make such a motion if, despite this attempted dialogue, no sufficient progress is made.

**C. Need for assessments in respect of post-2020 Reassessments, pre-filing periods**

52. Those periods remain under audit since the summer of 2020.
53. To state the obvious, there can be no viable arrangement that is subject to any CRA assessment or reassessment in respect of pre-filing periods. EGR cannot work towards advancing a restructuring until EGR's obligations in respect of those periods are determined.
54. CRA has mentioned that those assessments are potentially months away. EGR is largely powerless facing this situation because it is contemplated that CRA would oppose the matter being dealt with under a CCAA claims process overseen by the Monitor. If CRA were to be successful in such opposition, then EGR could do essentially nothing but wait for assessments, thereby extending these CCAA proceedings (and associated costs) indefinitely.
55. Again, EGR does not yet make any formal motion to this court on this matter. EGR will make such a motion, however, if, despite this attempted dialogue, no real progress is made.

**III. OTHER ACTIVITIES SINCE LAST EXTENSION**

**A. Operationally**

56. Throughout these CCAA proceedings and as mentioned at every extension, EGR has continued to operate its business in accordance with the Protocol and while complying with COVID-19 legal requirements and best practices.

57. This is not an operational restructuring. There are no material changes or developments under this rubric since my August 30, 2021 affidavit filed in support of the last motion for extension. EGR's day to day business remains the same, in the normal course.
58. I understand that the details and figures regarding EGR's business since the latest Monitor's report will be set out in the Seventh Report.
59. I believe EGR will be able to support its operations, the Tax Litigation, the herein proceeding and the Protocol for the duration of the extension sought, as I understand will more fully appear from the Seventh Report.
60. However, as discussed above and noted in prior affidavits, I continue to be deeply concerned about EGR's mid- to long-term ability to bear CCAA and Tax Litigation costs. Substantial progress needs to be made in the shortest order on the matters discussed.

**B. 2<sup>nd</sup> Amended Protocol**

61. The content of the Protocol is subject to a sealing order, as will be sought in respect of the second amended Protocol (the "**2<sup>nd</sup> Amended Protocol**"). I will therefore not discuss its content in details, but will give some of the background for context.
62. The Protocol generally sets out EGR's, the Monitor's and CRA's agreement in respect of CRA's assessment and payment of post-filing net tax refunds that are not in respect of suppliers targeted by CRA's allegations of wrongdoing.
63. EGR, the Monitor and CRA have agreed that a 2<sup>nd</sup> Amended Protocol should be agreed upon in order to partly address the cost concerns arising out of this CCAA proceeding.

64. It is possible though unfortunately uncertain that the 2<sup>nd</sup> Amended Protocol will be finalized in time for the hearing on this motion. I will nevertheless describe below the main lines of the current amending approach.
65. In short, the 2<sup>nd</sup> Amended Protocol would provide for an adaptative monitoring protocol as soon as and as long as EGR's scrap gold purchase volume stays below a certain threshold. Should the scrap gold purchase volume exceed the threshold, the 2<sup>nd</sup> Amended Protocol would provide for the reengagement of the original, full suite of Protocol measures, until the volume purchased goes below the threshold again for a continuous period of time that is provided, and so on.
66. The adaptative monitoring would not affect the amount or quality of the information collected under the Protocol: it would merely focus the Monitor's analysis of the information while transaction volumes are below the agreed-upon thresholds. There would therefore be no loss of data should there need to be any lookback or audit.
67. The added flexibility would allow the Protocol to be responsive and adaptable to one of the central variable for the appropriate degree of daily oversight – the volume of scrap gold purchased:
  - a. when volume is low, CRA would accept that there be reduced in-depth analysis, including in consideration of the “good track record” that EGR has so far shown under the Protocol, and the Monitor's continuous presence.
  - b. when volume is high, EGR would accept to augment the monitoring, bearing the costs it represents, including in consideration of CRA's treatment of post-filing tax returns under the Protocol.



68. Overall, the parties will need to ensure that the monitoring mechanisms are capable of responding to the variability of customer needs while preserving the cost-effectiveness of the Protocol and overall amelioration of risk.
69. EGR believes the current amending approach would be a great improvement in the circumstances and, if the 2<sup>nd</sup> Amended Protocol is ready in time, EGR would respectfully request the court's approval of the same, in order to bring it within this court's jurisdiction to oversee and enforce, as the case may be.

**C. Handling other CCAA and restructuring matters**

70. The above sets out what EGR has been working on since the last extension and, to an extent, since the beginning of this proceeding, in terms of restructuring matters. EGR will continue to work on those matters alongside the Monitor and all stakeholders with diligence and good faith.

**D. Handling of Tax Litigation**

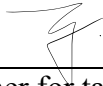
71. The above sets out the notable developments in the Tax Litigation since the last extension. EGR will continue to work on those matters alongside its tax counsel, the Monitor and CRA with diligence and good faith.

**II. NEED FOR CONTINUED CCAA RELIEF**

14. 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 *statu 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.

15. 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 Protocol to remain within this court's jurisdiction to enforce, as the case may be.
16. 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 11<sup>th</sup> day of December, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



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

**Joël Turgeon**



---

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 11<sup>th</sup> day of December, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



A Commissioner, etc.

Joël Turgeon

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

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST



THE HONOURABLE MR. )

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

JUSTICE McEWEN )

DAY OF OCTOBER, 2020

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

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

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SECOND AMENDED AND RESTATED INITIAL ORDER

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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.



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

OCT 28 2020

PER / PAR:



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

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

27 Oct 20

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

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



**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced in TORONTO

**SECOND AMENDED AND RESTATED INITIAL  
ORDER**

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

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

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

Lawyers for the Applicant, Express Gold Refining Ltd.

This is **Exhibit “B”** to the affidavit of Atef Salama sworn before me via Zoom this 11<sup>th</sup> day of December, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



A Commissioner, etc.

Joël Turgeon

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE MR. ) MONDAY, THE 8<sup>th</sup>  
 )  
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)**

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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.



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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  
OF EXPRESS GOLD REFINING LTD.**

8 March 21

The order shall go as per the draft filed and signed.  
No one opposes, and the Monitor supports the Order. There is sufficient cash flow and the remainder of the terms, including the activities/fees and protocol, are fair and reasonable.  
A sealing order shall also go as the Sierra Club criteria have been met.



**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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Lawyers for the Applicant, Express Gold Refining Ltd.

This is **Exhibit “C”** to the affidavit of Atef Salama sworn before me via Zoom this 11<sup>th</sup> day of December, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



A Commissioner, etc.

Joël Turgeon



Court File No: 2020-1214(GST)G

**TAX COURT OF CANADA**

B E T W E E N:

**EXPRESS GOLD REFINING LTD.**

Appellant

- and -

**HER MAJESTY THE QUEEN**

Respondent

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**NOTICE OF MOTION**  
**(For Further List and Production of Documents)**

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**TAKE NOTICE THAT** the Appellant will make a motion to the Court on December 16, 2021 at 10:00 a.m., or such other date and time as directed by the Court, at 180 Queen Street, Suite 200, Toronto, Ontario M5V 3L6.

**THE MOTION IS FOR:**

1. An order pursuant to section 82 and paragraphs 91(b) and (e) of the *Tax Court of Canada Rules (General Procedure)*<sup>1</sup> directing the Respondent to make and serve on the Appellant within 10 days of the Order sought, a further List of Documents, verified by Affidavit in prescribed form, listing all of the documents that are or have been in the Respondent's

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<sup>1</sup> SOR/90-688a ("**Rules**"). For convenience, section(s), subsection(s), paragraph(s) and subparagraph(s) of the Rules are simply referred to as "Rule(s)" in this Notice of Motion.

possession, control or power relevant to any matter in question between or among the parties in this appeal, including, but not limited to:

- (a) all documents collected by the Respondent from 131 identified custodians who have a relationship to this appeal by having worked on the audit of the Appellant and/or on the audits of other persons audited in relation to the alleged carousel scheme(s) at issue in this appeal (including, but not limited to, purported participants in such alleged scheme(s));
- (b) all documents provided to the Respondent by the Royal Canadian Mint in the course of the Respondent's audits leading to the reassessments presently under appeal;
- (c) all documents contained in the following Canada Revenue Agency's ("**CRA**") Integras Cases:
  - (i) #49411921;
  - (ii) #44815431;
  - (iii) #34690331;
  - (iv) #54629031;
  - (v) #20317131;
  - (vi) #97502131;
  - (vii) #78739231;
  - (viii) #15810131;
  - (ix) #6810131;
  - (x) #14643932;
  - (xi) #90382031;
  - (xii) #84273921;
  - (xiii) #36201231;

- (xiv) #36921631;
- (xv) #25921631;
- (xvi) #29446431;
- (xvii) #92721631;
- (xviii) #64961231;
- (xix) #97739231;
- (xx) #45710831;
- (xxi) #39050821; and
- (xxii) #65121821.

(d) all Collection Diaries of the purported participants in the alleged carousel scheme at issue in this appeal; and

(e) all documents that the Respondent stated that it would re-produce with less or no redactions.

2. An order pursuant to Rules 85 and 91(e) directing the Respondent to produce all the above mentioned documents for inspection, within 10 days of the Order sought.

3. Costs (including costs thrown away) payable forthwith to the Appellant.

**THE GROUNDS FOR THE MOTION ARE:**

*The issues between the parties in this Appeal*

4. This appeal involves \$120 million in denied Input Tax Credits with respect to GST/HST paid by the Appellant and \$30 million in gross negligence penalties.

5. Central in this appeal are the Respondent's allegations that the Appellant participated in a supposed "carousel scheme" as a "willing and knowing participant" or because it was

"wilfully blind". The Respondent alleges that the supposed scheme involved at least 63 of the Appellant's suppliers and a large volume of transactions occurring during the periods from June 1, 2016 to July 31, 2018 ("**Reporting Periods**").

6. The Appellant categorically denies those allegations. The Appellant was not involved in any nefarious activity. All of its transactions were made in good faith and within its legal obligations.
7. In attempting to support its core allegations, the Respondent also alleges that the Appellant's transactions were not in line with industry standards (at paras. 22.33-22.34 of the Reply) and that there was substantial GST/HST leakage (at paras. 22.41-22.42 of Reply, including footnote 3).
8. Given the nature, magnitude and seriousness of the allegations against the Appellant – indeed, the Respondent has acknowledged that this is an "extremely complex GST/HST appeal involving huge amounts of tax" – fundamental fairness dictates that the Respondent disclose to the Appellant the case it has to meet and the principle of proportionality dictates that full disclosure of productions should be commensurately thorough.
9. Rule 82 governs this appeal. The Respondent agreed to proceed under Rule 82 in December 2020, subsequent to the Appellant delivering its Notice of Appeal and prior to the Respondent delivering its Reply. It follows that the Respondent must list and disclose to the Appellant all documents relevant to any matter in question between the parties and not only those documents that the Respondent intends to use at trial. While the Appellant cannot know which or how many documents the Respondent has withheld, the Appellant

has identified five categories of relevant documents that the Respondent has confirmed are in its control/possession but failed/refused to disclose, as detailed below.

*Documents from 131 CRA Custodians*

10. The Appellant moves for production of all documents collected by the Respondent from 131 identified custodians who have a relationship to this appeal by having worked on the audit of the Appellant and/or on the audits of other persons audited in relation to the alleged carousel scheme(s) at issue in this appeal (including, but not limited to, purported participants in such alleged scheme(s)).
11. The Appellant is alleged to have acted as the critical "zero-rater" in a massive carousel scheme in the scrap gold recycling industry. The CRA engaged forty auditors from seven locations across Canada (as well as other CRA personnel) to carry out a collaborative "group audit", which involved an exhaustive review of the scrap gold industry with coordinated audits of over 100 different taxpayers or GST/HST registrants including the Appellant's direct and indirect suppliers. This group audit led to the reassessments issued against the Appellant which are the subject of this appeal.
12. The CRA's auditor of the Appellant, Jaclyn Bartlett ("**Lead Auditor**"), had a leadership role in coordinating the entire group audit. The CRA shared information between the auditors (and other CRA personnel), all with the goal of building the case against the Appellant. The Respondent then used findings and conclusions from those many other audits in the reassessment of the Appellant.
13. The Respondent sent litigation hold letters to 131 CRA personnel who had a relationship with the present appeal, such as a role in the group audit. These personnel occupied

different positions including auditors, Business Intelligence officers, business analysts, technical specialists, computer audit specialists, team leads and managers. The Respondent received 81.2 GB of documents in response to its litigation hold letters. The Respondent has represented that there are 26,183 unique documents. The Respondent has not reviewed these documents and has instead refused to produce the documents.

14. The documents are relevant because they originate from the CRA's review into the alleged carousel scheme at issue in this appeal. Importantly, the documents were used in the audit of the Appellant which resulted in the reassessments under appeal. The custodians were either directly involved in the audit of the Appellant or were involved in the wider group audit of other purported participants in the alleged scheme. The documents from those custodians will provide the full factual record made available to the CRA during its group audit into the alleged carousel scheme, which ultimately culminated in the reassessments under appeal. The Respondent is the only party with this information, and the information is relevant to the core issues on appeal.
  
15. The coordinated group audit approach taken by the CRA is revealed in the documents already produced by the Respondent. In auditing and reassessing the Appellant, the CRA relied heavily on the audits of the Appellant's suppliers (and other alleged participants in the supply chain). Care was taken to ensure that those audits of the Appellant's suppliers (and other participants) were carried out in such a way to support the work being done on the entire group of files. For that purpose, audit steps and templates were mandated to be used by the CRA auditors across Canada, and the information was centrally collected and analyzed. Information sharing among CRA personnel was viewed as critical to ensure that the CRA's audit position was well developed and supported. The audits of the Appellant's

suppliers were systematically examined on a case-by-case basis before their findings were included in the audit of the Appellant.

16. The reassessments presently under appeal were the product of the wide-scale coordinated review into the scrap gold industry and collaborative group audit carried out by at least 131 CRA personnel. All of the facts uncovered or assumed by the CRA are therefore relevant to the determination of the matters in issue in this appeal. To the extent the Respondent has documents containing those facts or assumptions, those documents must be produced.
17. The Appellant moves for production of all documents provided to the Respondent by the Royal Canadian Mint in the course of the Respondent's audit leading to the reassessments presently under appeal.
18. During the Reporting Periods, the Appellant transacted with three major refiners: Asahi Refining Canada Ltd., the Royal Canadian Mint and Johnson Matthey USA. The Respondent has put the Appellant's transactions with all three refiners at issue at paragraph 22.9 of the Reply.
19. During the course of the audit leading to the reassessments under appeal, the CRA collected documents from and interviewed both the Royal Canadian Mint and Asahi Refining Canada Ltd. The Respondent has not produced all of the documents and information it received from the Royal Canadian Mint.
20. Those documents are relevant because they are found in the CRA's audit files. More importantly, they are also relevant because the CRA (the Lead Auditor in particular) used these documents to create benchmarks for gold purity levels and volumes that are allegedly

"industry standards" for scrap gold recyclers. The Appellant was compared against and ultimately reassessed on these benchmarks.

21. A central pillar of the Respondent's case is that the Appellant allegedly traded in gold with higher levels of purity and in greater volumes than is typical in the industry, which is set out in paragraphs 22.33-22.34 of the Reply.
22. The documents from the Royal Canadian Mint are relevant and will allow the Court to scrutinize the factual support for the Respondent's assertion that the Appellant transacted in unusually high volumes and purities of gold.

***CRA's Integras Cases #44411921 and #44815431***

23. The Appellant moves for production of all documents contained in the CRA Integras Cases #44411921 and #44815431.
24. Documents produced by the Respondent reveal that the CRA's benchmarking of gold purity levels and volumes was also based on the findings gathered from audits of other cash for gold operations and jewellers found in the CRA's Integras Cases #44411921 and #44815431.
25. Those documents are relevant and must be produced on the same grounds that the documents from the Royal Canadian Mint must be produced.

***CRA's Integras Case #34630331***

26. The Appellant moves for production of all documents contained in the CRA Integras Case #34630331.



27. Documents produced by the Respondent reveal that CRA Integras Case #34630331 is the number assigned to the Appellant's audit file referable to the July 2019 reassessments.
28. Those documents are relevant and must be produced as they are central to the July 2019 reassessments issued against the Appellant.

***Further CRA Integras Cases***

29. The Appellant moves for production of all documents contained in the following CRA Integras Cases: #54629031; #20317131; #97502131; #78739231; #15810131; #6810131; #14643932; #90382031; #84273921; #36201231; #36921631; #25921631; #29446431; #92721631; #64961231; #97739231; #45710831; #39050821; and #65121821.
30. The Respondent relied on findings from audits of other purported participants of the same alleged carousel scheme(s) to inform the reassessments under appeal. The original documents supporting those findings are located in the above-listed CRA Integras Cases.
31. Documents produced by the Respondent reveal that the CRA's findings across various scrap gold audits as they pertain to disclosure of the alleged scheme are based on documents in these Integras files.
32. Those documents are relevant and must be produced on the grounds that they are material to the existence and nature of the alleged scheme.

***Collection Diaries from other Alleged Carousel Scheme Participants***

33. The Appellant moves for production of all Collection Diaries of the purported participants in the alleged carousel scheme.

34. Collection diaries from other purported scheme participants are relevant because the Respondent alleged at paragraphs 22.41 and 22.42 of the Reply that there is a carousel scheme giving rise to tax leakage, and these documents will reveal whether or not there was tax leakage. Collection diaries from other purported scheme participants are also relevant because the Respondent alleged at paragraph 22.20 of the Reply that certain participants in the alleged scheme are "missing traders" or "missing vendors" and these documents will reveal whether there are any such missing traders or missing vendors. The documents are also relevant because they were used by the Lead Auditor to arrive at her audit findings which lead to the reassessments presently under appeal.

#### ***Redacted Documents***

35. The initial set of documents produced by the Respondent to the Appellant in March 2021 included many documents with substantial redactions. By letter of July 27, 2021, the Respondent agreed to re-produce such documents with no or significantly reduced redactions. By letter of August 13, 2021, the Respondent stated that 219 previously produced, redacted documents remained to be re-produced. The Respondent subsequently re-produced 101 such documents, leaving 118 documents outstanding. The Respondent must fulfill its undertaking to re-produce these documents on an un-redacted basis, subject only to redactions necessary at law, if any.

#### ***Events Giving Rise to the Motion***

36. On December 4, 2020, the parties agreed that discovery would proceed under the Full Disclosure regime pursuant to Rule 82. From that moment, the Respondent was obliged to begin collecting and reviewing for production in a List of Documents listing all the

documents that are or have been in the Respondent's possession, control or power relevant to any matter in question between or among the parties in this appeal.

37. On March 31, 2021, the Lead Auditor affirmed the Respondent's List of Documents (which the Respondent titled an "Affidavit of Documents"), which states that the Lead Auditor provided to the Department of Justice two categories of documents: (1) her audit file in respect of the Appellant; and (2) the position papers or audit reports for the other entities that the CRA concluded were participants in the same carousel scheme as the Appellant. The Respondent subsequently produced the documents for inspection.
38. The productions were grossly deficient. The Respondent produced some of the documents stored in one file referred to as the "CRA EGR Audit File." The Respondent did not produce documents from other sources such as documents from the auditor's hard-drive or emails, nor any documents from the related audits carried out in preparation for the reassessments of the Appellant which are under appeal (aside from certain Position Papers and Audit Reports).
39. On April 23, 2021, the Appellant wrote to the Respondent listing categories of standard audit documents that were not included in the Respondent's Affidavit of Documents.
40. From May 5, 2021 on, the Respondent advanced a range of untenable positions to resist further production. Through the course of numerous lengthy exchanges between counsel, the Respondent reversed most of those positions and produced in piece-meal many highly material documents that it had initially withheld. The Respondent has nevertheless failed to produce the documents now sought on this motion.

41. On May 11, 2021, this Court ordered a timetable to resolve the productions issue by June 30, 2021, failing which the Appellant was to bring a motion by July 30, 2021. The Appellant did not pursue its motion at that time based on assurances that the Respondent would work diligently to provide full disclosure. The parties agreed to push back the motion timeline twice.
42. On July 9, 2021, the Respondent stated that it had received 73.5 GB of data from other custodians comprised mainly of auditors and persons from CRA Business Intelligence who worked on the audits of the other companies CRA determined participated in the carousel scheme. Also at this time, the Respondent refused to produce relevant documents provided by the Royal Canadian Mint and refused to provide collection diaries concerning other alleged carousel scheme participants.
43. On July 27, 2021, the Respondent advised that it now had received a total of 81.2 GB of documents in response to litigation hold letters it had sent to 131 custodians (inclusive of the aforementioned 73.5 GB).
44. On August 6, 2021, the parties agreed to further extend the deadline for the Appellant to bring this motion.
45. On September 22, 2021, the Respondent stated that it had completed a de-duplication of the documents from the 131 custodians but had not begun to review even a sampling of the documents — despite the passage of almost a year since the Respondent agreed to full disclosure. The Respondent admitted that those documents are "potentially relevant". The Respondent also indicated that the Royal Canadian Mint may consent to disclosure of its documents by October 5, 2021, which never occurred. The Respondent must produce

relevant documents, whether or not the Royal Canadian Mint consents to production. Waiting for the consent has simply caused delay. The Respondent also asserted that collection diaries of other alleged scheme participants are irrelevant. Finally, the respondent suggested that its disclosure obligations would be completed by November 3, 2021. They were not.

***Further Grounds***

46. The Appellant relies on:

- (a) Rules 65, 70, 82, 87, 88, 91 and 147;
- (b) Section 295 of the ETA; and
- (c) Such further additional grounds as counsel may advise and this honourable Court may deem just.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion: Affidavit of Edna Domingues, affirmed on November 18, 2021.

Date: November 18, 2021

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Her Majesty the Crown

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Counsel for Deloitte Restructuring Inc. in its capacity  
as Court Appointed Monitor of Express Gold Refining Ltd.

This is **Exhibit “D”** to the affidavit of Atef Salama sworn before me via Zoom this 11<sup>th</sup> day of December, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*



A Commissioner, etc.

Joël Turgeon

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

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

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

B E T W E E N :

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

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



**PRODUCTION AND CONFIDENTIALITY ORDER**

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

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



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

### **INTERPRETATION**

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

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

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

**PRODUCTION**

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

**CONFIDENTIALITY**

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

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

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

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

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

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

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

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

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

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

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

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

A handwritten signature in black ink, appearing to read "McE T.", is positioned above a horizontal line.

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c C-36 AS AMENDED  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO EXPRESS GOLD REFINING LTD.

8 June 21

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



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

PROCEEDING COMMENCED AT TORONTO

**PRODUCTION AND CONFIDENTIALITY ORDER**

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

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

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

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

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

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**AFFIDAVIT OF ATEF SALAMA**  
**(Sworn December 11, 2021)**

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**TAB 3**

Draft order



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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE MR. ) TUESDAY, THE 14<sup>th</sup>  
 )  
JUSTICE McEWEN ) DAY OF DECEMBER, 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**")

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**ORDER**  
(**extension of stay period,**  
**approval of 2<sup>nd</sup> Amended Protocol**)

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**THIS MOTION** by the Applicant pursuant to the CCAA was heard before me on December 14, 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 December 11, 2021 and the exhibits thereto (the "**Salama December 11 Affidavit**"), and on reading the seventh report (the "**Seventh 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, Canada Revenue Agency and such other counsel as were present as may be indicated on the counsel slip, no one else appearing despite being served as appears from the affidavit of service, filed:

1. THIS COURT ORDERS that the time for service of the motion record in respect of this motion and the Seventh Report is hereby abridged and validated so that the motion is properly returnable today, and that further service thereof is hereby dispensed with.
2. THIS COURT ORDERS that the “Stay Period” as defined in the second amended and restated initial order made by this court on October 27, 2020 in this proceeding is hereby extended to and including March 15, 2021.
3. THIS COURT ORDERS PROTOCOL that the 2<sup>nd</sup> Amended Protocol (term defined in the Salama December 11 Affidavit), a copy of which is appended to the confidential supplement to the Seventh Report (the “**Confidential Supplement**”) is hereby approved.
4. 4. THIS COURT ORDERS that the Confidential Supplement and the 2<sup>nd</sup> Amended 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 2<sup>nd</sup> Amended Protocol as though named therein.
5. This order is effective as of its date at 12:01 am and does not need to be issued or entered.

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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  
OF EXPRESS GOLD REFINING LTD.**

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

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**ORDER**  
**(extension of stay period,  
approval of 2nd Amended Protocol)**

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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  
OF EXPRESS GOLD REFINING LTD.**

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

**Proceeding commenced in TORONTO**

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**MOTION RECORD**  
**(extension of stay period, approval of 2nd amended  
monitoring protocol)**

**(returnable December 14, 2021)**

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