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

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

MOTION RECORD
(extension of stay period)
(returnable March 11, 2022)

March 11, 2022

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Lawyers for the Applicant, Express Gold Refining Ltd.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
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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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TAB 1

Notice of motion returnable March 11, 2022

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

NOTICE OF MOTION
(extension of stay period)
(returnable March 11, 2022)

The Applicant will make a motion to Mr. Justice McEwen of the Commercial List at 330 University Avenue, Toronto, on Friday, March 11, 2022, at 9:30 a.m. 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 December 10, 2021 (3 months).

b. approving the seventh report (the "**Seventh Report**") of Deloitte Restructuring Inc. in its capacity as monitor in the present proceeding (in such capacity, the "**Monitor**") dated December 13, 2021 and the eight report of the Monitor to be served and filed separately (the "**Eighth Report**"), as well as the activities described therein.

c. approving the Monitor's and its counsel's fees and disbursements set out in the Fee Affidavits (term defined in the Eighth Report).

THE GROUND FOR THE MOTION ARE:

2. Capitalized terms are defined in the affidavit of Atef Salama sworn March 8, 2022 (the "**Salama March 2022 Affidavit**").

3. Since the last extension made on December 14, 2021, EGR has notably:

   a. won its motion in Tax Court requesting that CRA comply with its obligations to list and disclose all documents relevant to any matter in question between the parties in the Tax Litigation, confirming that CRA's disclosure until then had been tainted with serious deficiencies.

   b. continued operating its business in accordance with the court's orders and the Protocol, while complying with COVID-19 legal requirements and best practices.

   c. 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 March 2022 Affidavit.

6. The activities of the Monitor were reported to the court and stakeholders in the Seventh and Eighth Reports. Such activities are appropriate, commercially reasonable, and conducted in the best interest of stakeholders. The Monitor's and its counsel's fees and disbursements are proportionate, fair and reasonable, and supported by the Fee Affidavits.

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 March 2022 Affidavit,

b. the Eighth Report,

c. the Fee Affidavits, and

d. such further and other evidence as counsel may advise and the court may permit.

March 8, 2022

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Lawyers for the Applicant, Express Gold Refining Ltd.

TO: THE SERVICE LIST

Schedule "A" – Videoconference Details

Zoom details:

Topic: CCAA proceeding of Express Gold Refining Ltd., No. CV-20-00649558-00CL | Motion for extension of CCAA initial order

Time: March 11, 2022, 9:30 a.m. Eastern Time (US and Canada)

Join Zoom Meeting

https://us06web.zoom.us/j/87649906851?pwd=akxoeTFiaVBRSzdQU3BJZWFTRzVyUT09

Meeting ID: 876 4990 6851

Passcode: 045118

***

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced in TORONTO

NOTICE OF MOTION
(extension of stay period)
(returnable March 11, 2022)

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Lawyers for the Applicant, Express Gold Refining Ltd.

TAB 2

Affidavit of Atef Salama sworn March 8, 2022

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

AFFIDAVIT OF ATEF SALAMA
(sworn March 8th, 2022)

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 EGR's sixth motion for an extension of these CCAA proceedings and the October 27, 2020 second amended and restated initial order (the "**SARIO**"), of which I attach a copy as **Exhibit "A"**, to June 17, 2022 (3 months).

3. The current extension expires at the end of March 15, 2022.

I. INITIAL AND CONTINUED NEED FOR CCAA PROTECTION

4. EGR is in the precious metal (predominantly, gold) refining and trading business.

5. 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**").

6. 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,[1] and on or around October 8, 2020, CRA announced it would commence enforcement measures on October 15, 2020.

7. This is not an operational restructuring. But for CRA's refusal to pay EGR's net tax refunds and the 2020 Reassessments, EGR would be solvent and its business would be profitable. An application under the CCAA was necessary to 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.

8. The SARIO provides that a stay of proceedings applies but the Tax Litigation may continue.[2]

II. PRESSING ISSUES

9. In my December 11, 2021 affidavit filed in support of the last motion for a stay extension, of which I attach a copy without exhibits as **Exhibit "B"** (my "**December Affidavit**"), I set out three issues preventing EGR to advance any restructuring:

   a. proper and prompt disclosure from CRA in the Tax Litigation,

   b. a reasonable and enforceable timetable for the Tax Litigation, and

   c. final tax assessments for all post-2020 Reassessments, pre-filing periods (the "**Pre-Filing Periods**").

[1] I am referred to the *Excise Tax Act*, s. 315.
[2] I am referred to paragraph 10 of the SARIO.

10. I will discuss the status on each below.

A. Need for proper disclosure in Tax Litigation

i. Background

11. I set out the full background on this issue at paragraphs 14 to 32 of my December Affidavit (Exhibit "B"), to which I refer.

12. In its most relevant part for purposes of this update, such background includes:

a. the fact that as early as 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.

b. 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.

c. the gross deficiencies of CRA's "affidavit of documents" dated March 31, 2021 and initial "disclosure".

d. discussions among CRA and EGR regarding the same, and CRA's resistance to effect proper disclosure through untenable positions.

e. EGR being compelled to make a motion in Tax Court to resolve the matter.

f. the three categories of relevant documents that CRA has confirmed are in its control/possession but failed/refused to disclose, i.e., in the words of EGR's notice of motion:

i. all such documents that are or were part of the 81.2 GBs of documentation that CRA collected from 131 CRA personnel, referenced in the Reasons for Order as "Scrap Gold Audits Documentation".

ii. all such documents that are or were part of various CRA Integras cases.

iii. all such documents that are or were part of the CRA collections diaries pertaining to any of the alleged tax carousel scheme(s) at issue.

g. EGR's offer in early December 2021 to have the disclosure matter mediated by a third-party (e.g., a seasoned tax litigation practitioner) on an urgent basis, which would have been appropriate, efficient, and would have been more likely to foster resolution than adversity.

h. CRA's refusal of the proposed mediation, citing that its team was rather in the process of preparing for the court hearing.[3]

i. EGR being once more disappointed, but not surprised, with CRA's lack of practicality and openness to simplification when it comes to Tax Litigation procedures. CRA seemed instead determined to make it as procedural, expensive and time-consuming as possible for EGR to obtain the disclosure to which it is entitled and to which CRA had agreed.

ii. Status

13. The Tax Court has ruled entirely in EGR's favour, with costs against CRA, in its order and reasons for decision released and dated February 22, 2022, a copy of which I attach as **Exhibit "C"** (the "**Tax Court Disclosure Ruling**").

14. The Tax Court Disclosure Ruling orders CRA to effect the disclosure sought by EGR within 30 days, i.e. on or before March 24, 2022.

[3] The best that can be said about this position is that it is circular, because the mediation was offered specifically to circumvent the need for a full-blown hearing, which would have been better for every party in the totality of the circumstances, including EGR's insolvency and the fact that the disclosure matter is overall simple.

15. Specifically, the Tax Court stated in the Tax Court Disclosure Ruling:

a. Rhetorically, "…how can the respondent, without review or sampling, take the position that none of this mass of documentation ought to be listed per Rule 82?... References in CRA documents already produced are pointedly indicative of the Scrap Gold Audits Documentation being comprised of a significant measure of relevant documentation."

b. "That the [81.2 GBs of documentation] category exists at all is due to 131 CRA personnel identifying each such document as being potentially relevant in respect of the tax carousel allegations central to this litigation. It would be startling now to forego review of same for Rule 82 purposes."

c. "The quantum of this documentation presents all the more reason for review for purposes of Rule 82 listing; rather than that large quantum being construed a reason to refrain from review for Rule 82 listing purposes [as posited by the CRA]".

d. "The fact that a CCAA monitor is urging the parties to proceed apace is well understandable. But respectfully, in my view that is not reason to curtail EGR's entitlement to full application of Rule 82, including in respect of the Scrap Gold Audits Documentation. At risk for EGR are millions of dollars and its business reputation, specifically due to these appealed reassessments."

e. "Review of so much documentation for Rule 82 purposes is no slight undertaking. Yet the respondent Crown presumably would have considered this in committing to application of Rule 82."

iii. Next steps and effect on CCAA process

16. The next steps in the disclosure process will depend on whether CRA intends to appeal the Tax Court Disclosure Ruling (which set clear and unequivocal parameters on proper compliance with the principles of full disclosure under Rule 82), or CRA accepts the ruling and proceeds in good faith to address these issues on a timely basis as contemplated in the Tax Court Disclosure Ruling.

17. In terms of effect on the CCAA process, it is important to note that EGR was forced to proceed with a motion in Tax Court, which it has now won in all respects, confirming that CRA's resistance was not only time-wasting but improper in terms of compliance with its responsibilities under Rule 82.

18. EGR has in its December materials, filed in connection with the last stay extension motion, set forth the possibility that the CCAA court may have an interest in insuring that the parties to the Tax Litigation adhere to standards which take into account the exigences of the CCAA process and its expectations.

19. For its part, EGR has been forced to resort to litigation to address CRA's shortcomings, the latest example being the necessity for the disclosure motion. EGR may be forced into further litigation by having to respond should CRA appeal the Tax Court Disclosure Ruling.

20. In this context, EGR reiterates the opportunity and benefits of the CCAA court's attention to the conduct of the parties as it pertains to any further procedural, disclosure or other Tax Litigation issues.

B. Need for reasonable and enforceable Tax Litigation timetable

i. December 2 plenary meeting

21. At paras. 39 to 43 of my December Affidavit (Exhibit "B"), I reported that on December2, 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.

22. The main purpose of the meeting was:

a. for the Monitor to voice its concern that the Tax Litigation is 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 then), considering, among other things, the costs of these CCAA proceedings and the Tax Litigation.

b. to afford an opportunity to EGR and CRA to answer this concern, including by providing an explanation for the delays involved.

23. EGR unequivocally expressed that it could and would commit to the following timetable (updated with the Tax Court Disclosure Ruling as the new starting point) which had been put to CRA before, including at a recent case management hearing in Tax Court (in its prior version in which all the below timeframes were the same but dates were earlier by about 2 months):

Step	Deadline
Complete Examinations for Discovery (except for further questions arising from subsequent CRA disclosure)	April 15, 2022
Satisfy undertakings, if any	May 15, 2022
Communicate questions arising from undertakings, if any	May 31, 2022

Step	Deadline
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
Commence Trial	**October 1, 2022**

24. 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.

25. I am satisfied that the above-proposed timeframe is rigorous and reasonable. The steps occur within a foreseeably sustainable period for EGR, which is central to this CCAA proceeding.

26. In response, CRA said that:

    a. *but for EGR's disclosure motion in Tax Court*, it could consider a fall trial.

    b. it was 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.

27. At para. 43 of my December Affidavit (Exhibit "B"), I expressed how this response was deeply concerning and highly indicative of CRA's *modus operandi* with relation to the Tax Litigation which apparently excludes any semblance of efficiency or self-awareness.

ii. Developments since December 2, 2021

28. CRA addressed a letter to the Tax Court dated February 14, 2022 in which it said that EGR's proposed timetable was too abridged, that CRA could be able to start examinations for discovery in the last week of April or in May if no further documentary disclosure were ordered to be made, and that CRA would like to schedule a case management call after the issuance of the decision on EGR's disclosure motion.

29. As seen above, the Tax Court Disclosure Ruling has since issued, ruling that CRA must effect disclosure on or before March 24, 2022. It is unclear what CRA's expected timeline for examinations for discovery is now.

30. The litigation timetable will now depend on whether or not CRA effects the Tax Court Disclosure Ruling in accordance with its terms or appeals it.

31. In any event, setting a timetable (with or without an appeal of the Tax Court Disclosure Ruling) must remain a true priority for EGR and its stakeholders, which CRA has the obligation to act upon in good faith under the CCAA.

32. As I stated in my December Affidavit (Exhibit "B"), 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 and a half under CCAA protection, there is still not even an agreed tentative timetable, much less a binding one, for the Tax Litigation.

33. 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.

34. EGR owes it to its stakeholders that this process does not drag unnecessarily. CRA has a positive duty to act in good faith which is not reconcilable with a continuation of the current state of affairs (which has now been ongoing and repeated numerous times).

35. 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.

36. EGR is ready to commit and abide by the aforementioned litigation timetable and to presently engage with CRA on the matter. EGR urges CRA to do the same.

C. Need for assessments in respect of post-2020 Reassessments, pre-filing periods (Pre-Filing Periods)

37. The Pre-Filing Periods had remained under audit since the summer of 2020.

38. CRA issued a proposal letter dated January 12, 2022 proposing adjustments in respect of the Pre-Filing Periods *inter alia* denying approximately $7.4M in input tax credits and imposing approximately $1.85M in penalties. I am informed by EGR's tax counsel that such a proposal is not a formal reassessment and creates no debt *per se*.

39. On March 1, 2022, EGR's tax counsel received from CRA some of the supporting documentation to be reviewed in connection with the January proposal letter.

40. At this stage, EGR understands that CRA proposes to reassess EGR for the Pre-Filing Periods on a similar basis as the 2020 Reassessments, and to that extent EGR would oppose such reassessments for the same reasons it opposes the 2020 Reassessments.

III. OTHER ACTIVITIES SINCE LAST EXTENSION

A. Operationally

41. Throughout these CCAA proceedings and as mentioned at every extension, EGR has continued to operate its business in accordance with the Protocol (as defined in my December Affidavit (Exhibit "B")) and while complying with COVID-19 legal requirements and best practices.

42. As noted above, this is not an operational restructuring. There are no material changes or developments under this rubric since my December Affidavit filed in support of the last motion for extension (Exhibit "B"). EGR's day-to-day business remains the same, in the normal course.

43. I understand that the details and figures regarding EGR's business since the latest Monitor's report will be set out in the Monitor's eighth report (the "**Eighth Report**"), to be filed and served separately.

44. 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 Eighth Report.

45. However, I believe substantial progress needs to be made in the shortest order on the matters discussed.

B. Handling other CCAA and restructuring matters

46. 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.

C. Handling of Tax Litigation

47. 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 extension of the stay provisions is necessary considering that 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 8th day of March, 2022 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*

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

Joël Turgeon

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 8th day of March, 2022 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*

A Commissioner, etc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 27TH
	)	
JUSTICE McEWEN	)	DAY OF OCTOBER, 2020

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

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

SECOND AMENDED AND RESTATED INITIAL ORDER

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

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

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

SERVICE

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

APPLICATION

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

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

POSSESSION OF PROPERTY AND OPERATIONS

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

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

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

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

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

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

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) payment for goods or services actually supplied to the Applicant following the date of this Order; and

(c) payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date or thereafter.

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

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and

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

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

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

(a) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

(b) to not grant credit or incur liabilities except in the ordinary course of the Business.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

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

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

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

NO EXERCISE OF RIGHTS OR REMEDIES

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

NO INTERFERENCE WITH RIGHTS

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

CONTINUATION OF SERVICES

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

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

NON-DEROGATION OF RIGHTS

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

PROTOCOL

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

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

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

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

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

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

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

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

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

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

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

APPOINTMENT OF MONITOR

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

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

(a) monitor the Applicant's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the Applicant in its preparation of the Applicant's cash flow statements;

(d) advise the Applicant as to the herein proceedings, including the eventual formulation of a plan of arrangement or compromise;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(g) perform such other duties as are required by this Order or by this Court from time to time.

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

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

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

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

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

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

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

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

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

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

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

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

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

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

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

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

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicant entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicant pursuant to this Order and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances,

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

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

SERVICE AND NOTICE

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

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

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

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

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

GENERAL

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

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

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

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

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

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

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.

McEwen J.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced in TORONTO

SECOND AMENDED AND RESTATED INITIAL ORDER

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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 8th day of March, 2022 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*

A Commissioner, etc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

AFFIDAVIT OF ATEF SALAMA
(sworn December 11, 2021)

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 2nd 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,[1] 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

[1] I am referred to the *Excise Tax Act*, s. 315.

creditor obligations whether incurred before or after the making of the initial order,[2]

b. that a stay of proceedings applies but the Tax Litigation may continue,[3] 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**"),[4] 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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[2] I am referred to paragraphs 4 to 9 of the SARIO.
[3] I am referred to paragraph 10 of the SARIO.
[4] 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[5] 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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[5] 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].[6]

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

[6] 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. <u>December 2 plenary meeting</u>

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. <u>Implications for CCAA proceeding</u>

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. 2nd 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 "**2nd 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 2nd 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 2nd 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 2nd 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 2nd 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 2nd 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 11th day of December, 2021 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*

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

Joël Turgeon

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

This is **Exhibit "C"** to the affidavit of Atef Salama sworn before me via Zoom this 8th day of March, 2022 in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*

A Commissioner, etc.

Docket: 2020-1214(GST)G

BETWEEN:

EXPRESS GOLD REFINING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard December 17, 2021 at Ottawa, Canada

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Jacques Bernier Bryan Horrigan
Counsel for the Respondent:	Marilyn Vardy Jasmine Mann Michael Ding Pallavi Gotla

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ORDER

It is Ordered pursuant to section 82 and paragraphs 91(b) and (e) of the *Tax Court of Canada Rules (General Procedure)* and in accord with the accompanying Reasons for Order, that the Respondent make and serve on the Appellant within 30 days of this Order a further List of Documents, verified by Affidavit in prescribed form, listing all documents not previously listed that are or were in the Respondent's 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 such documents that are or were part of the 81.2 GBs of documentation the Respondent collected from 131 Canada Revenue

Agency (CRA) personnel, referenced in the Reasons for Order as Scrap Gold Audits Documentation;

b. all such documents that are or were part of the CRA Integras cases #49411921, #44815431 and #34630331;

c. all such documents that are or were part of the CRA Collections diaries pertaining to any of the alleged tax carousel scheme(s) at issue.

Submissions as to costs of this motion are to be filed with the Court within 30 days of the date this Order is issued.

Signed at Halifax, Nova Scotia, this 22nd day of February 2022.

"B. Russell"

Russell J.

Citation: 2022 TCC 33
Date: 20220222
Docket: 2020-1214(GST)G

BETWEEN:

EXPRESS GOLD REFINING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Russell J.

I. Introduction:

[1] The appellant, Express Gold Refining Ltd. (EGR), has brought an interlocutory motion seeking orders that as part of pre-trial discovery the respondent Crown further list and produce documents in or formerly in that party's possession, control or power that are relevant to any matter at issue.[1]

[2] The motion pertains to EGR's appeal of twenty-six GST/HST reassessments raised July 29, 2020 under the federal *Excise Tax Act*. These reassessments are of monthly reporting periods covering from June 1, 2016 to July 31, 2018. They collectively assess EGR for almost $120 million for input tax credits (ITCs) and almost $30 million for gross negligence penalties.

II. Background:

[3] At all material times EGR, based in Toronto, has been involved in the scrap gold industry, carrying on a business of facilitating refinement of scrap gold.

[1] Appellant's notice of motion

[4] In the respondent's Reply are pleaded the asserted bases of the Minister of National Revenue (Minister) in raising the subject reassessments:

a. EGR engaged in many transactions involving one or more GST/HST "carousel schemes", involving "at least 63" of 82 purported EGR scrap gold vendors;

b. purported gold scrap transactions of EGR did not reflect industry norms as to volume and purity; and

c. EGR was aware of or wilfully blind to substantial GST/HST leakage.[2]

[5] The respondent pleads that the purported tax carousel scheme(s) involving EGR operated as follows:

> EGR was involved in what is commonly known as a "carousel scheme" in the scrap gold industry. The sole purpose of the [s]cheme was to generate the false impression of entitlement to ITCs by converting GST/HST exempt or zero-rated gold bars (pure gold) into taxable property (scrap gold) in circumstances where EGR knew or ought to have known that GST/HST collectible in respect of these alleged supplies would not be remitted to the Receiver General, but rather would be kept and distributed amongst the various participants to the [s]cheme.
>
> Participants in the [s]cheme turned pure gold bars, which are exempt or zero-rated, into scrap gold, which is taxable at 13% [Ontario], by adding base metals such as silver, zinc or copper or a small quantity of legitimate scrap gold to them (this process is called "debasing").
>
> Purported vendors sold the debased gold to EGR and purportedly charge EGR 13% GST/HST on the sales.
>
> EGR purportedly paid the vendors cash or refined pure gold (zero-rated goods) as consideration for EGR's alleged purchases of scrap gold from them.
>
> EGR's purported vendors took the pure gold, which was debased again or used the cash received from EGR to make new purchases of gold for debasing.
>
> The process of purchasing debased gold, refining it, returning it as consideration to the vendors, and debasing it again for resale was repeated many times over to

[2] Reply, paras. 22.24, 22.33 – 22.40, 22.41, 22.42

> create the false appearance of significant bona fide commercial activity occurring between EGR and the vendors, when in fact this was not the case at all.[3]

[6] In respect of EGR's above-referenced tax appeal, in late 2020 EGR and the respondent Crown agreed to conduct documentary discovery by way of section 82 of the *Tax Court of Canada Rules (General Procedure)* (Rule(s), Rule 82, etc.).

[7] Rule 82 is headed, "List of Documents (Full Disclosure)". Rule 82(1) provides that in an appeal before this Court:

> The parties may agree……that each party shall serve on each other party a list of all the documents that are or have been in that party's possession, control or power relevant to any matter in question between or among them in the appeal.
>
> (underlining added)

[8] As noted, Rule 82 requires each party to list all documents "relevant" to any issue in the particular appeal, that are or have been in that party's possession, control or power.

[9] By March 31, 2021 EGR and the respondent had served upon each other their respective Rule 82 document lists, with listed documents then being produced. Subsequently, negotiations between the parties initiated by EGR led to the respondent on several occasions producing additional documentation.

[10] The respondent's produced documents include those that had been looked at and/or relied upon by Canada Revenue Agency (CRA) auditor, J. Bartlett.

[11] J. Bartlett was lead auditor of CRA's audit of EGR (Lead Auditor). Concurrently the Lead Auditor co-ordinated CRA audits of numerous purported scrap gold suppliers in various Canadian cities.

[12] The respondent's productions include CRA's audit file for EGR, and so-called "key documents" pertaining to the numerous co-ordinated CRA audits of purported direct and indirect suppliers of EGR in the scrap gold industry. These audits are relevant in respect of the herein carousel allegations. The respondent's term "key documents" is said to include, for each such audited supplier, the

[3] Reply, paras. 22.14 – 22.19

particular CRA auditor's position paper, audit report, penalty report, T2020 notes and interview notes.[4]

[13] The respondent Crown states that as of December 8, 2021 it, "…has produced the relevant documentation to the Appellant." Note use of the less specific term "the relevant" instead of "all relevant". The respondent submits further that its productions, "include everything that factored into the (re)assessments…for the reporting periods under appeal."[5]

[14] EGR seeks by this motion that the respondent provide a further or added-to list per Rule 82 of relevant documentation, particularly including documentation within the following three categories, possessed, etc. by CRA:

a. 81.2 gigabytes (GBs) of documentation that 131 CRA personnel who individually had worked on CRA's EGR audit and/or on CRA's audits of purported scrap gold suppliers (Scrap Gold Audits Documentation). This documentary agglomeration was identified in response to an internal CRA "litigation hold" request for documents potentially relevant to the alleged carousel scheme(s), to which request the said 131 CRA personnel individually had responded;

b. documentation in CRA Integras cases #49411921 and #44815431, pertaining to average scrap gold transaction purity levels and volumes; and also documentation in CRA Integras case #34630331 pertaining to the 2019 set of EGR reassessments for the subject periods; and

c. CRA Collections documentation respecting any of the alleged carousel scheme(s) at issue.

III. Issue:

[15] The issue is what if any documentation, including but not limited to documentation from these three categories of CRA possessed documentation, should be listed per Rule 82(1) and accordingly produced.

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[4] Respondent's written representations, paras. 24, 25

[5] *Ibid*., paras. 55, 56

IV. Law:

[16] As noted, the concept of relevance drives Rule 82. The law as to scope of relevance in a pre-trial discovery context is well settled. In *CIBC v. The Queen*, 2015 TCC 280 at paras. 14-18, Rossiter, C.J. reviewed relevant jurisprudence, concluding:

> Relevancy is extremely broad and should be liberally construed. The threshold for relevancy on discovery is very low but does not allow for a fishing expedition, abusive questions, delaying tactics or completely irrelevant questions;
>
> Everything is relevant that may directly or indirectly aid the party seeking the discovery to maintain its case or combat that of its adversary. If the questions are broadly related to the issues raised, they should be answered;
>
> Discovery is limited by the pleadings to some extent; and
>
> The examining party conducting the discovery is doing so for the purposes: of supporting his or her own case; obtaining admissions; attacking the opponent's case; limiting the issues at trial; and revealing the case that he or she must meet at trial and the facts that the opponent relies upon.
>
> (underlining added)

[17] Also noted in *CIBC* (para. 14), are C. Miller J.'s statements in *HSBC Bank Canada v. The Queen*, 2010 TCC 228, "gleaned from…other recent Tax Court of Canada case authority", that:

1. The examining party is entitled to "any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party": *Teelucksingh v. The Queen*, 2010 TCC 94, 2010 DTC 1085.

2. The court shall preclude only questions that are "(1) clearly abusive; (2) clearly a delaying tactic or (3) clearly irrelevant": *John Fluevog Boots & Shoes v. The Queen*, 2009 TCC 345, 2009 DTC 1197.

[18] The respondent *inter alia* cites *Burlington Resources Finance Company v. The Queen*, 2015 TCC 71 at para.15 (in turn citing *The Queen v. Lehigh Cement Limited*, 2011 FCA 120 at paras. 34 – 35) for the proposition:

> Even where relevance is established, the Court retains discretion to disallow a question where, for example, responding to it would place undue hardship on the answering party, there are other means of obtaining the information sought or the question forms part of a fishing expedition.[6]

V. Analysis:

(a) Scrap Gold Audits Documentation category:

[19] As stated the Scrap Gold Audits Documentation category encompasses 81.2 GBs of documentation identified by 131 CRA personnel as being of potential relevance to issues in the herein appeal, particularly in respect of the alleged carousel scheme(s). The respondent opposes having to review this very large category of documentation for listing per Rule 82.

[20] The respondent asserts that these documents, "…are likely to have no relevance or only marginal relevance to the issues under appeal in this case (or which will duplicate information which has already been produced)…".[7]

[21] As noted, the Scrap Gold Audits Documentation, which the respondent resists listing and thus producing, specifically were identified by CRA personnel on the basis they were potentially relevant. Jurisprudence has established relevance as having a low threshold. Jurisprudence has established that on the relevancy spectrum, only documents "clearly irrelevant"[8] ought not be listed per Rule 82. As asked by EGR, how can the respondent, without review or sampling, take the position that none of this mass of documentation ought to be listed per Rule 82?

[22] References in CRA documents already produced are pointedly indicative of the Scrap Gold Audits Documentation being comprised of a significant measure of relevant documentation.

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[6] *Ibid*., para. 37
[7] *Ibid*., para. 63
[8] *John Fluevog Boots & Shoes,* para. 17 *supra*

[23] For example, in a CRA memo titled, "Express Gold Refining Ltd., May 2019 Update and Action Plan, Group Audit Approach, Aggressive GST/HST Planning"[9] is written, under the heading "Audit of Express Gold Refining":

> As stated previously this [EGR] audit relies very heavily on the audits of EGR's suppliers. In order to support denial of ITCs on these suppliers the audits of the suppliers must be well done and contain enough information and audit work to support the group position. This approach is systematic but quite time consuming.
>
> …We may not be able to deny ITCs at the EGR level if there is not enough audit evidence in the audit of the supplier.
>
> – In order to secure the position to assess EGR we need to have evidence of collusion, this is the most difficult all the evidence to obtain.
>
> – We will have to look at the audits of suppliers on a case by case basis and decide if they can be included in the audit of EGR.
>
> (underlining added)

[24] In this CRA memo also appears the statement, "104 active audits identified as likely participants in a GST/HST carousel scheme". As well, in a section titled, "Top Down Audit Approach", is written:

> We are using a top-down collaborative audit approach to complete these files. The amount of coordination is significant and relies on the flow of information in both directions. While the ultimate support of the audit position flows from EGR down to the various levels, the audits must be closed from the bottom up. Each level of the supply chain relies on the audit conclusions of their suppliers (the level below them)…
>
> Consistency in our audit position is key. Maintaining consistency requires communication between all auditors in the group. Information sharing and coordination of file closing is absolutely critical. This collaboration is the only way to ensure that our audit position is well developed and supported.…
>
> (underlining added)

[9] Appellant's motion record, tab 2ZZZ

[25] Additionally, in a CRA document headed, "May 30, 2019 Scrap Gold Conference Call Notes" is stated:[10] "Current population approximately 150 files, 40 auditors, seven locations." Also, "EGR's audit relies heavily on the information obtained in, and the analysis done on the intermediary audits."

[26] These extracts from CRA memos *etc.*, created in the course of CRA's extensive scrap gold audits, provide a solid basis for linking CRA's co-ordinated audits with EGR's appealed reassessments. The respondent's assumptions pointing to GST/HST carousel schemes involving EGR and at least 63 out of 82 suppliers rest on the work carried out in these co-ordinated audits of the scrap gold industry, being the basis for the subject Scrap Gold Audits Documentation.

[27] That the Scrap Gold Audits Documentation category exists at all is due to 131 CRA personnel identifying each such document as being potentially relevant in respect of the tax carousel allegations central to this litigation. It would be startling now to forego review of same for Rule 82 purposes.

[28] The quantum of this documentation presents all the more reason for review for purposes of Rule 82 listing; rather than that large quantum being construed a reason to refrain from review for Rule 82 listing purposes.

[29] The respondent submits that the principle of proportionality precludes further productions. Proportionality in this context is said to be determined by sufficiency of the productions to date, the exceptional circumstances of this litigation and the additional cost and time incurred by yet further disclosure.

[30] The referenced exceptional circumstances essentially involve the federal *Companies' Creditors Arrangement Act* (CCAA) situation, whereby a monitor appointed pursuant to the CCAA is urging the parties to move this litigation along, without delay. The respondent maintains that having to review the 81.2 GBs of Scrap Gold Audits Documentation would take much more time than would justify any usefulness of this documentation for EGR.

[31] The respondent acknowledges that EGR's appeal is,

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[10] Ibid., tab 2AAAA

> …an important and complex file, which involves a substantial quantum of tax dollars. The nature of the allegations are serious - they involve allegations of non bona fide conduct on the part of [EGR], which has had the effect of depriving the Receiver General of approximately $20 million of tax revenue.[11]

[32] Here, EGR is appealing reassessments totalling millions of dollars, due in large measure to the many CRA audits, carried out in co-ordinated fashion, of purported participants in the scrap gold industry. It is hardly surprising that an auditing program so extensive would yield such a large quantity of documentation potentially fitting within Rule 82's wide parameters of relevancy.

[33] The fact that a CCAA monitor is urging the parties to proceed apace is well understandable. But respectfully, in my view that is not reason to curtail EGR's entitlement to full application of Rule 82, including in respect of the Scrap Gold Audits Documentation. At risk for EGR are millions of dollars and its business reputation, specifically due to these appealed reassessments.

[34] Over a year ago the respondent Crown and EGR committed to each other that Rule 82 would apply for purposes of pre-trial documentary discovery. Yet to date the respondent Crown has left its large cache of Scrap Gold Audits Documentation unreviewed for Rule 82 listing purposes.

[35] Review of so much documentation for Rule 82 purposes is no slight undertaking. Yet the respondent Crown presumably would have considered this in committing to application of Rule 82.

[36] Finally, in *CIBC*, above, the following comment of the Chief Justice is apt:

> As for any issue of proportionality, the principle is certainly a worthy and important one, and efforts should certainly be made to keep costs down. But proportionality is not something to be used as a shield. In considering these appeals, and particularly the issues at stake and the quantum, proportionality is not the primary focus of decisions on discovery for these appeals. Relevancy is the key driver. As I have already stated, the Respondent has shown that the process by which CIBC arrived at its decision could yield information relevant to both its own case and to its countering of CIBC's case. The same goes for information such as working papers that may ordinarily seem tangential but that

[11] Respondent's written submissions, para. 61

> in this case provide a potential window into the decision-making process and justification behind the deduction of the Settlement Amounts. Proportionality must not defeat the purposes of discovery, particularly in appeals of this magnitude.[12]
>
> (underlining added)

[37] For these reasons I do not accept the respondent Crown's proportionality submission.

[38] The respondent Crown will be ordered to review the Scrap Gold Audit Documentation for the purposes of Rule 82 listing, keeping in mind that the threshold for relevance is a low bar, and that on the spectrum of relevancy only "clearly irrelevant" documents should be considered not relevant.

(b) Integras Cases Documents category:

[39] Should documents contained in CRA's Integras Cases #44411921 and #44815431 be listed per Rule 82? EGR understands this documentation to relate to the Minister's determinations as to standard transactional gold purities and volumes. Such determinations constitute a particular element of the respondent's alleged tax carousel schemes involving EGR.

[40] That such documentation may not have been directly used in making pleaded ministerial assumptions does not render same irrelevant to any of the issues at bar. A central function of Rule 82 is to oblige a party to include in its listing relevant documentation, whether or not supportive of that party's case.

[41] As well, EGR seeks Rule 82 listing and consequential production of documentation in CRA's Integras Case #34630331, understood as containing CRA's EGR audit file relating to the first set of reassessments of EGR, raised July 22, 2019, pertaining to the same monthly periods as herein appealed. The reassessments at issue, being the second set of reassessments, were raised a year later.

[42] I concur that such documentation would be relevant, by Rule 82 standards, in respect of the appealed second set of reassessments. The respondent should

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[12] *CIBC*, *supra*, para. 276

review the material in these three specified Integras files for listing per Rule 82, excepting as to relevance only documents "clearly irrelevant"; again keeping in mind the low bar of relevancy.

(c) Collections Diaries category:

[43] Lastly, EGR seeks listing and production per Rule 82 of CRA Collections diaries referencing any of the purported carousel scheme(s) at issue.

[44] It is understood that the Lead Auditor reviewed CRA Collections diaries which record conversations and actions upon a GST/HST debt being registered, usually after an audit is completed. The Lead Auditor primarily was looking for any references re gold carousel schemes or a registrant's alleged scrap gold business. Such information was found and is said to have been summarized in a 924 page working paper CRA has produced.[13]

[45] This particularly is a question of accessing source documentation pertaining to relevant factual aspects reflected in CRA's said 924 page summary. Listing of the relevant Collections diaries per Rule 82 allows for testing as to accuracy and completeness of the CRA summary. Identification for Rule 82 purposes of course should include all relevant references in Collections diaries, whether or not consistent with the respondent's case.

VI. Conclusion:

[46] An Order will issue, reflecting the foregoing, providing for a prompt timeline for completion. Written submissions as to costs may be filed with the Court within 30 days of the issuance date of the Order.

Signed at Halifax, Nova Scotia, this 22nd day of February 2022.

"B. Russell"

Russell J.

13 *Ibid*., paras. 30, 31

CITATION:	2022 TCC 33
COURT FILE NO.:	2020-1214(GST)G
STYLE OF CAUSE:	EXPRESS GOLD REFINING LTD. AND THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	December 17, 2021
REASONS FOR ORDER BY:	The Honourable Justice B. Russell
DATE OF ORDER:	February 22, 2022

APPEARANCES:

Counsel for the Appellant:	Jacques Bernier Bryan Horrigan
Counsel for the Respondent:	Marilyn Vardy Jasmine Mann Michael Ding Pallavi Gotla

COUNSEL OF RECORD:

For the Appellant:

Name:	Jacques Bernier Bryan Horrigan
Firm:	Baker and McKenzie LLP

For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced in TORONTO

AFFIDAVIT OF ATEF SALAMA
(Sworn March 8th, 2022)

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Lawyers for the applicant, Express Gold Refining Inc.

TAB 3

Draft order

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 11th
	)	
JUSTICE McEWEN	)	DAY OF MARCH, 2022

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)

THIS MOTION by the Applicant pursuant to the CCAA was heard before me on March 11, 2022 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 8, 2022 and the exhibits thereto, and on reading the eighth report (the "**Eighth Report**") of Deloitte Restructuring Inc. in its capacity as court-appointed monitor (in such capacity, the "**Monitor**") dated _____, 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 Eighth 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 June 17, 2022.

3. THIS COURT ORDERS that the seventh report of the Monitor dated December 13, 2021 and the Eighth Report, as well as the activities described therein, are hereby approved, provided, however, that only the Monitor in its personal capacity and with respect to its personal liability shall be entitled to rely upon or utilize in any way such approval.

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

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

6. This order is effective as of its date at 12:01 am and does not need to be issued or entered.

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced in TORONTO

ORDER
(extension of stay period)

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Lawyers for the Applicant, Express Gold Refining Ltd.

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced in TORONTO

MOTION RECORD
(extension of stay period)
(returnable March 11, 2022)

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