

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**

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

**TENTH REPORT OF THE MONITOR**

**August 16, 2022**

## Table of Contents

Introduction.....	1
Purpose.....	2
Tax Litigation Update.....	2

## Appendices

- A Appendix “A”: Endorsement of Justice McEwen dated June 9, 2022
- B Appendix “B”: Production and Confidentiality Order of Justice McEwen dated June 8, 2021
- C Appendix “C”: Letter from Monitor’s Counsel to CRA’s Counsel dated July 25, 2022
- D Appendix “D”: Responding Letter from CRA’s Counsel to Monitor’s Counsel dated August 10, 2022
- E Appendix “E”: Letter from CRA Counsel to the Case Management Judge (Tax Court) dated August 10, 2022
- F Appendix “F”: Letter from CRA Counsel to the Case Management Judge (Tax Court) dated August 15, 2022

## INTRODUCTION

1. On October 15, 2020, Express Gold Refining Ltd. (“**EGR**” or the “**Applicant**”) filed for and obtained protection under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”). Pursuant to the Order of this Court granted on October 15, 2020 (as amended, the “**Initial Order**”), Deloitte Restructuring Inc. was appointed as the Monitor in these proceedings (in such capacity, the “**Monitor**”). The proceedings commenced by the Applicant under the CCAA are referred to herein as the “**CCAA Proceedings**”. The Initial Order also provided for, among other things, a stay of proceedings with respect to the Applicant until and including October 19, 2020 (the “**Stay Period**”). In his endorsement, Justice Hainey scheduled the comeback hearing (the “**Comeback Hearing**”) for October 19, 2020.

2. At the Comeback Hearing, Justice McEwen amended the Initial Order to, among other things, order that the stay of proceedings shall not apply to the Tax Litigation (as defined herein) and extend the Stay Period until and including October 27, 2020.

3. On May 20, 2021, the Monitor filed a motion (the “**Production Motion**”) for an Order granting the Monitor unfettered access to the full and complete books and records of EGR and, in particular, all documents in EGR’s possession and control that have been provided to EGR or its tax counsel, Baker McKenzie LLP (“**EGR’s Tax Counsel**”), by CRA in connection with all GST/HST assessments and reassessments that have been issued or will be issued by CRA (the “**Tax Documents**”). The Production Motion was returnable on May 25, 2021 and was adjourned to be heard on June 8, 2021 at 11:00 a.m. CRA opposed the Production Motion.

4. On June 9, 2021, the Court issued an endorsement (the “**June 9 Endorsement**”) in respect of the Production Motion. In summary, the June 9 Endorsement provided reasons supporting the Court’s jurisdiction to direct the delivery of the Tax Documents by EGR to the Monitor (notwithstanding CRA’s objections) and further directed an additional hearing, if necessary, to determine any restrictions to be imposed upon certain documents, as identified by CRA. A copy of the June 9 Endorsement is attached as **Appendix “A”**.

5. On August 17, 2021, the Court issued a Production and Confidentiality Order, dated June 8, 2021, for EGR to produce and make available to the Monitor all Tax Documents (the “**Production Order**”). A copy of the Production Order is attached as **Appendix “B”**.

6. During the CCAA Proceeding, the Stay Period has been extended numerous times by further Order, most recently up to and including September 16, 2022.

7. Copies of all orders and endorsements granted in the CCAA Proceedings are located on the Monitor’s website accessible at: <https://www.insolvencies.deloitte.ca/en-ca/pages/ExpressGoldRefiningLtd.aspx> (the “**Monitor’s Website**”). The Monitor encourages interested stakeholders to review the Monitor’s Website for a complete history of the CCAA Proceedings, including the various Orders and endorsements issued to date.

## **PURPOSE**

8. The purpose of this tenth report of the Monitor (the “**Tenth Report**”) is to provide the Court with information and updates on the following:

- (a) the status of the appeal commenced by EGR at the Tax Court of Canada (“**Tax Court**”) bearing Court File No. 2020-1214(GST)G (“**Tax Litigation**”) and the next steps in the CCAA Proceedings; and
- (b) the Monitor’s proposed attendance at the examinations for discovery in the Tax Litigation (the “**Examinations**”), which are scheduled to begin on September 6, 2022.

## **TAX LITIGATION UPDATE**

### ***The Examinations***

9. CRA’s re-assessments and potential enforcement against EGR were the catalyst for EGR’s filing for creditor protection and the Tax Litigation (which is EGR’s appeal from such re-assessments) is a central component of the CCAA Proceedings and EGR’s efforts to restructure.

10. The next milestone in the Tax Litigation is the Examinations.

11. On March 23, 2022, the Case Management Judge issued an Order containing a timetable for the Tax Litigation (the “**Timetable Order**”), including a deadline of October 31, 2022, for completion of the Examinations.
12. In subsequent correspondence, EGR advised the Monitor that EGR’s representative is to be examined over a multi-week period beginning on September 6, 2022, and CRA’s representative is to be examined in October 2022.
13. On July 25, 2022, the Monitor’s counsel wrote to EGR’s CCAA counsel and CRA’s Counsel advising of the Monitor’s intention to attend the Examinations “as an observer” (the “**July 25 Letter**”). In the July 25 Letter, the Monitor’s counsel was clear regarding scope of the Monitor’s attendance stating that “the Monitor does not seek to actively participate in the Examinations by making any statements on the record, posing any questions to the witnesses or their counsel(s) or otherwise interfering with the parties’ processes, including scheduling”. A copy of the July 25 Letter is attached as **Appendix “C”**.
14. EGR is supportive of the Monitor’s attendance at the Examinations.
15. On August 10, 2022, CRA’s Counsel delivered a responding letter in which it opposed the Monitor’s request (the “**August 10 Letter**”). A copy of the August 10 Letter is attached as **Appendix “D”**. The basis for CRA’s Counsel’s objection appears to be twofold:
  - (a) CRA believes that the parties to the Tax Litigation have absolute control as to whether and how an adverse party’s examination evidence is used and the Monitor’s reporting obligations in the CCAA Proceeding could interfere with the parties’ control of “information gleaned from observing” the Examinations; and
  - (b) CRA believes that the cause of EGR’s financial difficulties should by now be known to the Monitor.
16. Each of these points will be addressed below.
17. On the same date, August 10, 2022, CRA’s Counsel sent a separate letter to the Case Management Judge, a copy of which is attached as **Appendix “E”**, requesting a case management call on an urgent basis to discuss the Monitor’s request. On August 15, 2022, CRA’s Counsel sent

a second letter to the Case Management Judge, a copy of which is attached as **Appendix “F”**. EGR’s Tax Counsel advises the Monitor that the Case Management Judge convened a conference call during the afternoon of August 16, 2022. At the time of issuing this Tenth Report, the Monitor is unaware of the outcome of that conference call.

***The Monitor’s Right to Attend Examination***

18. CRA’s request to exclude the Monitor from the Examinations puts the Monitor in a difficult position, given its duties and obligations under the CCAA, the Initial Order and this Court’s holdings in the June 9 Endorsement.

19. In particular, this Court already addressed the procedural and jurisdictional issues in relation to the Monitor’s participation in the Tax Litigation discovery process in the June 9 Endorsement. This Court was clear that there is no prejudice or harm to either party in either court proceeding if the Monitor is granted access to the discovery process in the Tax Litigation in a monitoring capacity. CRA did not appeal the June 9 Endorsement (and the Production Order) and indeed has abided by its terms.

20. Although the Production Motion centred on documentary discovery, oral discovery is a mere extension of the same discovery process and the same principles apply with respect to the Monitor’s continued involvement. In other words, the Monitor’s right to attend examinations for discovery in relation to documents to which it has access (pursuant to the Production Order) is a logical continuation of the June 9 Endorsement and the Production Order. It would make little sense for the Monitor to have the same access as EGR with respect to documentary discovery but restricted access with respect to oral discovery.

21. With respect to CRA’s two specific objections contained in the August 10 Letter:

- (a) regarding control of information, there is no credible concern in this regard since the Monitor’s attendance to observe the Examinations will be subject to the strict confidentiality provisions contained in the Production Order (as may be amended or supplemented by this Court); and

- (b) regarding the cause of EGR's financial difficulties, the Monitor is only aware of the allegations asserted by CRA against EGR. Based on the documentary evidence it has reviewed, the Monitor is unable to determine the validity of the allegations. The Examinations will supplement the documentary evidence and provide crucial insight into the credibility of the allegations and witnesses, the causes of EGR's insolvency and whether EGR has been acting in good faith and with due diligence prior to and during the CCAA Proceedings.

22. The Monitor seeks to have a "real time" understanding of the Tax Litigation and cannot discharge its duties by repeating or attempting to interpret periodic reports it receives from EGR and/or CRA.

23. Moreover, over the last year, the Monitor has made a substantial effort to facilitate: (i) the potential resolution of the Tax Litigation, and (ii) the restructuring and emergence of EGR from the CCAA Proceedings. The Monitor has frequently corresponded with the CRA and EGR to consider alternate avenues to expedite the Tax Litigation, given there are other creditors and stakeholders who have an interest in seeing a resolution of the Tax Litigation and CCAA Proceedings. The Monitor has also brought motions before this Court to receive Tax Litigation-related documents to better understand the pertinent, substantive issues. The Monitor's attendance at the Examinations will also benefit the parties should they seek to engage in any settlement or alternative dispute resolution discussions.

24. There is no prejudice to the parties if the Monitor attends. The Monitor is cognizant of the of the Timetable Order made by the Case Management Judge and believes that the Monitor's request to attend the Examinations will have no adverse effect on the Timetable Order and fully supports the parties adherence to such Order. As noted, the Monitor will fully abide by the schedule agreed to by the parties and will not pose any questions or make any statements on the record.

25. Although the Examinations will be conducted in person, the Monitor understands there will also be a live video link to the Examinations and therefore the Monitor's attendance will not cause any logistical or crowding concerns in relation to the examination room.

26. Given the nexus between the CCAA Proceedings and the Tax Litigation, the Monitor can only discharge its duties in accordance with the CCAA and the Initial Order if it is able to *independently* monitor and assess the status and progress of the Tax Litigation, and not simply repeat and rely upon the selected reporting of the parties to the Tax Litigation (*i.e.* EGR and CRA).

27. For the foregoing reasons, the Monitor seeks an Order affirming its right to attend the Examinations as an observer.

All of which is respectfully submitted this 16<sup>th</sup> day of August, 2022.

**Deloitte Restructuring Inc., solely in its  
capacity as Court-appointed Monitor of  
Express Gold Refining Ltd.**



---

Phil Reynolds, LIT  
Senior Vice-President



---

Warren Leung, LIT  
Senior Vice-President



Appendix “A”  
to the Tenth Report of the Monitor

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

In the Matter of Express Gold Refinancing Ltd.  
Plaintiff(s)

AND

Defendant(s)

Case Management  Yes  No by Judge: McBWA

Counsel	Telephone No:	Facsimile No:
<u>(see counsel slip)</u>		

- Order
- Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: \_\_\_\_\_
- Time Table approved (as follows):

The Monitor seeks documentary disclosure made by the Canada Revenue Agency ("CRA") to the Applicant within the Applicant's appeal from GST/HST assessments and reassessments to the Tax Court of Canada ("TCC").

The CRA submits that this Court lacks jurisdiction to make such an order. It submits that

9 June 21  
Date

McBWA  
Judge's Signature

Additional Pages seven

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

the motion must be brought before the  
TTC.

For the reasons that follow, I  
disagree.

First, s. 11 of the CCAA provides this  
Court with broad jurisdiction and  
allows it to "make any order that  
it considers appropriate in the circumstances."

This is consistent with the purpose  
of the CCAA: see *Matter of JTI/*  
*Imperial/BBH* 2019 ONSC 2222 paras 15-21.  
The CCAA <sup>im provides</sup> ~~allows~~ this Court, therefore,  
with jurisdiction to deal with  
proceedings other than those that arise  
before the Ontario Superior Court of  
Justice (see above case at para 19).

Second, I believe that CRA's  
submission is misplaced. Both the  
Applicant and CRA are significant  
parties/stakeholder in both actions.



Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

In both actions non-privileged relevant documentation has to be produced in fairness to the parties and to allow the Courts to fulfill their truth seeking function.

I see no tension between this Court and the TCC in this regard and respectfully believe there is no prejudice or harm to either proceeding by my accepting jurisdiction to order the production requested by the Monitor in the CCAA matter. Counsel for CRA could not identify any such concerns. Further, ~~both~~<sup>the</sup> implied undertaking rule offers protection in both actions.

I am further of the view that it is reasonable and necessary to order such production so that the CCAA process can be properly



Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

carried out. I say this for the following reasons:

- the Applicant consents to the Order sought by the Monitor and submits that the documents sought are critical to its right to defend CRA's accusations;
- the Monitor, at this stage, only seeks the exact same redacted documents that the CRA has already provided to the Applicant;
- the Monitor is prepared to agree to an extensive Production and Confidentiality Order;
- the Monitor requires the documents to fulfill its mandate and this Court cannot manage these CCAA proceedings in a vacuum;
- the Monitor is not a party to the TCC proceedings and may have issues with standing based on the



Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

caselaw provided by CRA at his motion,  
• para 24(e) of the Second Amended  
and Restated Initial Order allows for  
the production sought by the Monitor and  
CRA did not oppose that relief.

In addition to the above, the  
cases relied upon by the CRA are  
distinguishable and CRA concedes  
it has no caselaw directly on  
point that supports its position.

For example, in Silver Wheaton  
Group [2019] TCT No 152 the party  
analogous to the Applicant objected to  
making production for reasons specific  
to that case. In *Tunan v. Doucette*  
[2008] 1 SCR 157 the court dealt  
with the issue of disclosing civil  
transcripts in a criminal proceeding -  
which raises much different  
concerns.



Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

For all of the reasons above I am satisfied that I have jurisdiction to order the documents currently sought by the Monitor in the TTC proceeding.

As noted at the hearing, at the request of CRA, I will now convene a hearing (if necessary and I urge the parties to attempt to work out this issue) to determine exactly what documents are to be produced and the form of the order.

I want to deal with this matter quickly.

Counsel are to provide me (in an email after consultation) with mutually agreeable dates for a 90 minute motion in June or July. If problems arise I can

Court File Number: \_\_\_\_\_

**Superior Court of Justice  
Commercial List**

**FILE/DIRECTION/ORDER**

**Judges Endorsment Continued**

be spoken to at a case conference.

*McInt*



Appendix “B”  
to the Tenth Report of the Monitor

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

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

B E T W E E N :

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

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

**PRODUCTION AND CONFIDENTIALITY ORDER**

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

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



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

### **INTERPRETATION**

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

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

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

## **PRODUCTION**

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

## **CONFIDENTIALITY**

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

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

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

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

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

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

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

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

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

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

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

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

  
\_\_\_\_\_

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

8 June 21

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



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

PROCEEDING COMMENCED AT TORONTO

**PRODUCTION AND CONFIDENTIALITY ORDER**

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

**Robert Kennedy** (LSO #474070)  
Tel: (416) 367-6756  
Fax: (416) 863-4592  
[robert.kennedy@dentons.com](mailto:robert.kennedy@dentons.com)

**Mark Freake** (LSO # 63656H)  
Tel: (416) 863-4456  
[mark.freake@dentons.com](mailto:mark.freake@dentons.com)

*Lawyers for Deloitte Restructuring Inc., in its capacity  
as court-appointed Monitor of Express Gold Refining  
Ltd.*



Appendix “C”  
to the Tenth Report of the Monitor

July 25, 2022

File No. 569588-9

**Goldman Sloan Nash & Haber LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario, M5G 1V2

Attention: Mario Forte

**Department of Justice Canada**  
Ontario Regional Office  
National Litigation Sector  
120 Adelaide Street West, Suite #400  
Toronto, Ontario, M5H 1T1

Attention: Marilyn Vardy

Dear Mr. Forte and Ms. Vardy:

**Re: In the Matter of a Compromise or Arrangement of Express Gold Refining Ltd. (“EGR”) pursuant to the *Companies’ Creditors Arrangements Act* (Canada) (the “CCAA”)*****Express Gold Refining Ltd. v. Her Majesty the Queen – 2020-1214(GST)G* (the “Tax Litigation”)**

As you know, we are counsel to Deloitte Restructuring Inc., in its capacity as court-appointed monitor in the EGR CCAA proceedings (in such capacity, the “**Monitor**”).

We write in connection with the upcoming examinations for discovery in the Tax Litigation currently scheduled to begin in early September 2022 (the “**Examinations**”). With respect to those Examinations, the Monitor’s intention is to attend as an observer, which is consistent with its duties and obligations set out in the CCAA and the Second Amended and Restated Initial Order of Mr. Justice McEwen dated October 27, 2020. For greater clarity, the Monitor does not seek to actively participate in the Examinations by making any statements on the record, posing any questions to the witnesses or their counsel(s) or otherwise interfering with the parties’ processes, including scheduling. The Monitor does not intend to have more than two members of its team present at the Examinations (*i.e.* one person from the Monitor’s offices and one person from Dentons Canada LLP’s offices).

For your reference, we note that paragraph 23(1)(c) of the CCAA stipulates that the Monitor “...shall... make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company’s business and financial affairs and the cause of its financial difficulties or insolvency...”. Here, the anticipated subject matter of the Examinations goes to the

root cause of EGR's financial difficulties and the grounds under which EGR was able to obtain creditor protection pursuant to the CCAA.

We further note that the Monitor's attendance at the Examinations is harmonious with the spirit and intention of the Production and Confidentiality Order of Mr. Justice McEwen dated June 8, 2021 (the "PCO"), pursuant to which the Monitor was given access to all documents in EGR's possession and control that have been provided to EGR or its counsel in the Tax Litigation (subject to the confidentiality provisions contained in the PCO). In our view, the PCO alleviates any confidentiality concerns relating to the Monitor's attendance at the Examinations. Moreover, as you will recall, the PCO was obtained to allow the Monitor to independently review the nature of the tax claims against EGR.

We trust that the Monitor's attendance at the Examinations, solely as an observer, will not be controversial. If that is not the case, we would ask that you kindly let us know at your earliest convenience. Finally, we would also ask that you forward us the logistics for the Examinations, including the dates, format (in person or virtual) and location (or videoconference link).

We look forward to hearing from you.

Yours truly,

**Dentons Canada LLP**



Robert J. Kennedy  
Partner

Appendix “D”  
to the Tenth Report of the Monitor



**Department of Justice  
Canada**

**Ministère de la Justice  
Canada**

Ontario Regional Office  
National Litigation Sector  
120 Adelaide Street West, Suite  
400  
Toronto Ontario M5H 1T1  
Canada

Région de l'Ontario  
Secteur national du contentieux  
120, rue Adelaide ouest, pièce 400  
Toronto (Ontario) M5H 1T1

Telephone/Téléphone: 647-256-7454  
Fax /Télécopieur: 416-973-0810  
Email/Courriel: Marilyn.Vardy@justice.gc.ca  
Our File Number LEX-500025225

## **BY EMAIL**

August 10, 2022

Dentons Canada LLP  
772 King Street West, Suite 400  
Toronto-Dominion Centre  
Toronto, ON  
M5K 0A1

**Attention: Robert J. Kennedy**

**Re: EXPRESS GOLD REFINING LTD v HMQ – 2020-1214(GST)G**

---

Thank you for your letter of July 25, 2022 informing us of the Monitor's desire to attend the examinations for discovery in the Tax Litigation and asking for our position. We oppose your request.

In your letter, you cite paragraph 23(1)(c) of the CCAA, which "stipulates that the Monitor '... shall ... make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings". You do not cite any case law or authority where paragraph 23(1)(c) has been invoked or recognized by the courts as a basis for permitting a Monitor to participate as an observer in examinations for discovery in litigation. If you are aware of any such jurisprudence, we invite you to provide us with that information as quickly as possible, so that we may review it and reconsider our position.

On its face, paragraph 23(1)(c) contemplates appraisals or investigations that are made or caused to be made by the Monitor. Examinations for discovery in the Tax Litigation are not appraisals or investigations made or caused to be made by the Monitor; the examination for discovery is a tool that a party in a Tax Court proceeding may choose to avail itself of to enable that party to advance its own case in the way that that party deems fit and appropriate. Each party to the Tax Litigation decides whether or not to conduct an examination for discovery of the opposing party and retains discretion as to which parts (if any) of those discovery transcripts will make their way into evidence at the Tax Court trial. Only the parties, their counsel, and the court reporter attend; judges are not present and are not aware of what transpires at the examinations (subject to any motions related to the discoveries that are subsequently brought by the parties). Paragraph 23(1)(c) appears to require the filing of a report with the court on the results of the Monitor's appraisal or investigation. Such a report could disclose more about what transpired on discovery to the CCAA court than the parties may disclose to the Tax Court.

Secondly, the cause of EGR's financial difficulties should by now be known to the Monitor. The Minister of National Revenue raised a GST/HST assessment against EGR disallowing input tax credits claimed. The Monitor has been provided with the pleadings and thousands upon thousands of documents related to that assessment. As we have previously stated, in our view, it is the role of the Tax Court of Canada to assess the correctness of the Minister's assessment. The Tax Court has exclusive jurisdiction to decide whether the assessment is correct; not the Monitor.

We are therefore unclear as to what the Monitor intends to do with any information gleaned from observing the examinations for discovery. We are deeply concerned about the potential for the usurping of the parties' rights to retain control over the use and disclosure of any information provided at the examinations for discovery by the Monitor. The parties' loss of control over the use of the information provided at the discoveries is potentially highly prejudicial to those parties. If the response is that the Monitor will not disclose any information from the discoveries to the Court or to anyone else, then we do not see the need for the Monitor to attend the examinations. The examinations for discovery belong to the parties to the Tax Litigation, not to the Monitor and not to the Courts. We are also very concerned about the substantial increase in Monitor's fees that will no doubt be charged as a result of the Monitor sitting in on the examinations for discovery.

We will therefore ask the Case Management Judge in the Tax Litigation to convene a call as soon as possible in order to seek the Case Management Judge's direction as to whether the Monitor ought to be permitted to attend and observe the examinations for discovery.

Sincerely,



Marilyn Vardy  
Senior General Counsel  
Tax Law Services Division

c. Jasmeen Mann, Pallavi Gotla, Kaitlin Coward and Alnashir Tharani – Counsel for the Respondent, Department of Justice (by email)

Jacques Bernier, Bryan Horrigan, David Gadsden, and Brendan O'Grady – Counsel for the Appellant, Baker & McKenzie (by email)

Mario Forte – Counsel for Express Gold Refining Ltd CCAA Proceedings, Goldman Sloan Nash and Haber LLP (by email)



Fr

Tax Court of Canada



Cour canadienne de l'impôt

[Home](#) > [File a Document](#) > File Documents

## Confirmation

Thank you for using the Tax Court of Canada's Online Filing System.

An electronic copy of your document(s) has(have) been received at the Tax Court of Canada.

Your Reference Number is: **WEB815997**

## Session Details

**Submitted on:** August 10, 2022 4:38:11 EDT PM

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

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

Type of Document	Document Name
Miscellaneous	EXPRESS GOLD REFINING LTD v HMQ – 2020-1214(GST)G - Letter to the Court.pdf
Miscellaneous	EXPRESS GOLD REFINING LTD v HMQ 2020-1214(GST)G - Letter to R Kennedy.pdf
Miscellaneous	Letter to GSNH and DOJ regarding EGR Discoveries- July 25 2022.pdf

Please save or print this page for your records.

Your comments are important to us. Please give us some [feedback](#) on the use of our Online Filing System.

[Close Session](#)

Appendix “E”  
to the Tenth Report of the Monitor





**Department of Justice  
Canada**

**Ministère de la Justice  
Canada**

Ontario Regional Office  
National Litigation Sector  
120 Adelaide Street West Suite  
#400  
Toronto, ON M5H 1T1

Région de l'Ontario  
Secteur national du contentieux  
120, rue Adelaide ouest, pièce 400  
Toronto (Ontario) M5H 1T1

Telephone/Téléphone: 647-256-7454  
Fax /Télécopieur: 416- 973-0810  
Email/Courriel: Marilyn.Vardy@justice.gc.ca  
Our File Number: LEX-500025225

## **BY E-FILING**

August 10, 2022

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

**Attention: The Registrar**

**Re: EXPRESS GOLD REFINING LTD v HMQ - 2020-1214(GST)G**

---

We ask that you kindly bring this letter to the attention of the Honourable Justice Russell, the Case Management Judge assigned to this appeal. Thank you.

The respondent is enclosing a letter from counsel to Deloitte Restructuring Inc. (**Deloitte**) requesting that two members from Deloitte's team, be allowed to attend, as observers, the discoveries of the appellant and respondent scheduled to begin on September 6, 2022. The Monitor has advised that it will bring a motion in the Superior Court of Justice seeking an Order allowing it to attend the discoveries in this appeal, should the respondent object to its request.

The respondent opposes Deloitte's request and is enclosing her letter of response sent to Deloitte's today. Since the examinations for discovery are occurring within the context of the Tax Court appeal, the respondent requests that the Court schedule a case management call on an urgent basis to discuss and decide upon the propriety of the Monitor's request.

We appreciate the Court is currently closed for summer recess, but request that a call be scheduled immediately thereafter during the week of August 15, 2022, when the Court reopens.

Sincerely,

Marilyn Vardy  
Senior General Counsel  
Tax Law Services Division

cc. Jasmeen Mann, Pallavi Gotla, Kaitlin Coward and Alnashir Tharani– counsel for the Respondent, Department of Justice (by email)

**Canada**

Jacques Bernier, Brian Horrigan, David Gadsden and Brendan O'Grady - counsel for the Appellant, Baker & McKenzie (by email)

Robert J. Kennedy - counsel for Deloitte Restructuring Inc. (the Monitor), Dentons Canada LLP (by email)

encl. Letter dated July 25, 2022 from Robert J. Kennedy to Mario Forte and Marilyn Vardy  
Letter dated August 10, 2022 from Marilyn Vardy to Robert J. Kennedy

Tax Court of Canada



Cour canadienne de l'impôt

[Home](#) > [File a Document](#) > File Documents

## Confirmation

Thank you for using the Tax Court of Canada's Online Filing System.

An electronic copy of your document(s) has(have) been received at the Tax Court of Canada.

Your Reference Number is: **WEB815997**

## Session Details

**Submitted on:** August 10, 2022 4:38:11 EDT PM

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

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

Type of Document	Document Name
Miscellaneous	EXPRESS GOLD REFINING LTD v HMQ – 2020-1214(GST)G - Letter to the Court.pdf
Miscellaneous	EXPRESS GOLD REFINING LTD v HMQ 2020-1214(GST)G - Letter to R Kennedy.pdf
Miscellaneous	Letter to GSNH and DOJ regarding EGR Discoveries- July 25 2022.pdf

Please save or print this page for your records.

Your comments are important to us. Please give us some [feedback](#) on the use of our Online Filing System.

[Close Session](#)

Appendix “F”  
to the Tenth Report of the Monitor



**Department of Justice  
Canada**

**Ministère de la Justice  
Canada**

Ontario Regional Office  
National Litigation Sector  
120 Adelaide Street West Suite  
#400  
Toronto, ON M5H 1T1

Région de l'Ontario  
Secteur national du contentieux  
120, rue Adelaide ouest, pièce 400  
Toronto (Ontario) M5H 1T1

Telephone/Téléphone: 647-256-7454  
Fax /Télécopieur: 416- 973-0810  
Email/Courriel: Marilyn.Vardy@justice.gc.ca  
Our File Number: LEX-500025225

## **BY E-FILING**

August 15, 2022

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

### **Attention: The Registrar**

**Re: EXPRESS GOLD REFINING LTD v HMQ - 2020-1214(GST)G**

---

We ask that you kindly bring this letter to the attention of the Honourable Justice Russell, the Case Management Judge assigned to this GST/HST appeal.

The Monitor has advised us that it takes the position that the Tax Court may not issue any direction or order pertaining to the Monitor's request to attend the examinations for discovery in the above-noted tax appeal, absent leave of the Ontario Superior Court to do so. The Monitor relies on section 10(a) of the Second Amended and Restated Initial Order ("SARIO"), dated October 27, 2020, which provides in part that the Tax Court proceeding remains procedurally unaffected by the Stay, but that the Stay is applicable to the enforcement of any order made in such proceeding affecting the Monitor, the Business or the Property. A copy of the complete Order is attached to this letter for the Court's reference. The Respondent does not understand the import of section 10 of the SARIO to mean that this Court is unable to issue any enforceable direction or Order pertaining to the conduct of this litigation without leave of the Ontario Superior Court. However, we do wish to bring the Monitor's position and concerns to the attention of the Court.

The Monitor has informed us today that it has secured a 30-minute attendance before Justice McEwen on August 17, 2022, at 9:30 a.m.

We wish to bring these most current updates to the attention of the Case Management Judge and respectfully request that a case management call be convened at the Court's earliest convenience to seek the Court's direction and guidance moving forward. We leave it to the Tax Court to determine whether this case management call should take place before or after the hearing before the Ontario Superior Court on Wednesday, August 17, 2022 at 9:30 a.m. We will make ourselves available either before or after that hearing.

Sincerely,



Marilyn Vardy  
Senior General Counsel  
Tax Law Services Division

cc. Jasmeen Mann, Pallavi Gotla, Kaitlin Coward and Alnashir Tharani– counsel for the Respondent, Department of Justice (by email)

Jacques Bernier, Brian Horrigan, David Gadsden and Brendan O'Grady - counsel for the Appellant, Baker & McKenzie (by email)

Robert J. Kennedy and Mark Freake - counsel for Deloitte Restructuring Inc. (the Monitor), Dentons Canada LLP (by email)

*encl.*

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST



THE HONOURABLE MR. )

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

JUSTICE McEWEN )

DAY OF OCTOBER, 2020

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

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

---

SECOND AMENDED AND RESTATED INITIAL ORDER

---

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

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

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

## **SERVICE**

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

## **APPLICATION**

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

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

## **POSSESSION OF PROPERTY AND OPERATIONS**

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

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

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



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

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

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

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;
- (b) payment for goods or services actually supplied to the Applicant following the date of this Order; and
- (c) payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date or thereafter.

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

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and

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

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

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

- (a) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and
- (b) to not grant credit or incur liabilities except in the ordinary course of the Business.

#### **NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY**

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

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

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

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

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

#### **NO INTERFERENCE WITH RIGHTS**

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

#### **CONTINUATION OF SERVICES**

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

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

#### **NON-DEROGATION OF RIGHTS**

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

#### **PROTOCOL**

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

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

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

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

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

### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

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

### **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

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

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

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



## **APPOINTMENT OF MONITOR**

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

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

- (a) monitor the Applicant's receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) advise the Applicant in its preparation of the Applicant's cash flow statements;
- (d) advise the Applicant as to the herein proceedings, including the eventual formulation of a plan of arrangement or compromise;
- (e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;
- (f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and
- (g) perform such other duties as are required by this Order or by this Court from time to time.

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

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

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

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

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

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

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

#### **VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

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

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

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

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



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

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

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

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

- (a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicant entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and
- (c) the payments made by the Applicant pursuant to this Order and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances,

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

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

### **SERVICE AND NOTICE**

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

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

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

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

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

#### **GENERAL**

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

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

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

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

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



---

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

OCT 28 2020

PER / PAR:



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

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

27 Oct 20

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

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



**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced in TORONTO

**SECOND AMENDED AND RESTATED INITIAL  
ORDER**

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

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

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

Lawyers for the Applicant, Express Gold Refining Ltd.



[Home](#) > [File a Document](#) > File Documents

## Confirmation

Thank you for using the Tax Court of Canada's Online Filing System.

An electronic copy of your document(s) has(have) been received at the Tax Court of Canada.

Your Reference Number is: **WEB816409**

## Session Details

**Submitted on:** August 15, 2022 4:15:08 EDT PM

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

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

Type of Document	Document Name
Miscellaneous	Letter dated August 15, 2022 (with enclosure).pdf

Please save or print this page for your records.

Your comments are important to us. Please give us some [feedback](#) on the use of our Online Filing System.

[Close Session](#)

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

**ONTARIO**

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

PROCEEDING COMMENCED AT TORONTO

**TENTH REPORT OF THE MONITOR**

**DENTONS CANADA LLP**

77 King Street West, Suite 400  
Toronto-Dominion Centre  
Toronto, ON M5K 0A1

**Robert J. Kennedy** (LSO # 474070)

Tel: (416) 367-6756

Fax: (416) 863-4592

[robert.kennedy@dentons.com](mailto:robert.kennedy@dentons.com)

**Mark A. Freake** (LSO #63656H)

Tel: (416) 863-4456

[mark.freake@dentons.com](mailto:mark.freake@dentons.com)

**Daniel Loberto** (LSO # 79632Q)

Tel: (416) 863-4760

[daniel.loberto@dentons.com](mailto:daniel.loberto@dentons.com)

*Lawyers for Deloitte Restructuring Inc., the Monitor*