

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.

FOURTH REPORT OF THE MONITOR
May 19, 2021

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 October 15, 2020 (as may be amended, restated or supplemented from time to time, the “**Initial Order**”), Deloitte Restructuring Inc. (“**Deloitte**”) was appointed as the Monitor in these proceedings (in such capacity, the “**Monitor**”). 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. On October 18, 2020, Deloitte filed the First Report of the Monitor (the “**First Report**”) which, among other things, described the activities of EGR and the Monitor and the

development of a monitoring protocol, in conjunction with the Applicant, with respect to the business operations of EGR.

3. At the Comeback Hearing on October 19, 2020, Justice McEwen amended the Initial Order (the “**Amended Initial Order**”) to, among other things, extend the Stay Period until and including October 27, 2020.
4. On October 27, 2020, the Amended Initial Order was amended a second time (the “**Second Amended Initial Order**”) to approve the monitoring protocol (the “**Monitoring Protocol**”) agreed to among the Applicant, the Canada Revenue Agency (“**CRA**”) and the Monitor, and to extend the Stay Period until and including December 15, 2020.
5. On December 14, 2020, the Court granted an Order extending the Stay Period until and including March 15, 2021.
6. On March 8, 2021, the Court granted an Order approving the amended protocol (the “**Amended Monitoring Protocol**”) agreed to on March 1, 2021 among the Applicant, CRA and the Monitor, and extending the Stay Period until and including June 11, 2021.

PURPOSE

7. The purpose of this fourth report of the Monitor dated May 19, 2021 (the “**Fourth Report**”) is to provide information to the Court on the relief sought by the Monitor related to access to certain books and records of the Applicant that may be restricted by CRA as it relates to the Tax Litigation (defined below).

ACCESS TO EGR'S BOOKS AND RECORDS

8. In his affidavit sworn October 14, 2020 (the “**First Salama Affidavit**”), EGR’s Vice-President, Atef Salama, states that the sole reason for EGR’s application for creditor protection under the CCAA is its ongoing tax disputes with CRA, most notably a GST/HST reassessment by CRA resulting in tax liability in excess of \$180 million. At paragraph 4 of the First Salama Affidavit, Mr. Salama goes as far as to state that “... but for the disputes with the [CRA]... [EGR] would be a solvent and successful business with no need for the protections afforded by these proceedings.” A copy of the First Salama Affidavit (without exhibits) is attached hereto as **Appendix “A”**.
9. EGR’s financial statements appear to support Mr. Salama’s assertions. For example, for the year ended May 31, 2020, EGR had earnings before tax of approximately \$8.4 million and, for the year ended May 31, 2019, EGR had earnings before tax of approximately \$3.3 million. EGR appears to be able to service its debt obligations in the ordinary course except for the tax liability related to the GST/HST reassessment.
10. Pursuant to section 23(1)(c) of the CCAA, the Monitor is required to report to this Court regarding “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...”.
11. The Monitor’s investigation into EGR’s business and financial affairs must include a full investigation into the ongoing tax disputes/assessments/litigation between EGR and CRA (collectively, the “**Tax Litigation**”), as the Tax Litigation is the root cause of EGR’s

insolvency. To date, the Monitor has faced continuing challenges in accessing certain records related to the Tax Litigation, either from EGR or the CRA.

12. Section 24(e) of the Second Amended Initial Order stipulates that the Monitor shall have “...full and complete access to the... books, records, data, including data in electronic form, and other financial documents of the Applicant...”
13. The Monitor further notes that section 24 of the CCAA provides that “for the purposes of monitoring the company’s business and financial affairs, the monitor shall have access to the company’s property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that it is necessary to adequately assess the company’s business and financial affairs.”
14. To date, EGR has granted the Monitor access to its books and records but it has not been at liberty to provide access to documents produced by CRA to its tax counsel, Baker McKenzie LLP (“**EGR’s Tax Counsel**”) in the course of the Tax Litigation which are subject to the implied undertaking rule which binds EGR’s Tax Counsel (collectively, the “**Tax Documents**”).¹ EGR does not oppose the Monitor’s request for unfettered access to *all* of EGR’s books and records, including the Tax Documents. However, the issue, as the Monitor understands it, is that CRA produced the Tax Documents to EGR in the course of the Tax Litigation and therefore the Tax Documents are protected by operation of the implied undertaking rule to which EGR’s Tax Counsel is subject by operation of law.

¹ The Tax Litigation includes an appeal proceeding that EGR has commenced at the Tax Court of Canada bearing Court File No. 2020-1214(GST_G).

Access to the Tax Documents will allow the Monitor to understand and independently report to this Court, and to EGR's stakeholders, regarding the Tax Litigation.

THE MONITOR'S EFFORTS TO DATE

15. On January 25, 2021, the Monitor requested from CRA, via its counsel in the CCAA Proceedings, the Department of Justice (the "**CCAA DOJ**"), information that would allow the Monitor to substantively understand the Tax Litigation and the carousel scheme that is being alleged by CRA, which includes but is not limited to the Tax Documents.
16. The CCAA DOJ responded to the Monitor's request for information on February 11, 2021, advising that CRA is unable to provide this information to the Monitor directly, due to confidentiality restrictions imposed on CRA pursuant to section 241 of the *Income Tax Act* (Canada). However, CRA then stated that if EGR authorizes the Monitor to obtain a copy of the requested documents, then it would be amenable to the Monitor seeking an Order authorising limited disclosure, provided the Order mandates that the contents of the disclosure be confidential and not form a part of the public record or be shared with anyone else.
17. Separately, the Monitor requested copies of the Tax Documents, including a CRA "position paper" and "audit report", from EGR's Tax Counsel, but it told the Monitor that it cannot produce the Tax Documents unless CRA or its counsel in the Tax Litigation, the Department of Justice Canada ("**Tax DOJ**"), agree to waive the implied undertaking rule which binds EGR's Tax Counsel.

18. The Monitor notes that EGR's Tax Counsel has made two written requests, on January 18 and February 1, 2021, to Tax DOJ asking for its consent to EGR's Tax Counsel's disclosure of the Tax Documents to the Monitor. Tax DOJ responded on February 17, 2021, advising that CRA would consent to an Order authorizing EGR to share the position paper and audit report with the Monitor, but only on the basis that the contents of the disclosure would be kept confidential and not form a part of the public record or be shared in any capacity.
19. In short, both CCAA DOJ and Tax DOJ have told the Monitor that they will only agree to disclose the Tax Documents to the Monitor if such disclosure is made under a Court Order preserving confidentiality.
20. In an effort to avoid the time and cost of a court attendance, on March 1, 2021, Monitor's counsel, Dentons Canada LLP ("**Dentons**"), proposed to satisfy CRA's confidentiality concerns by way of executing a written undertaking.
21. On March 22, 2021, following email and telephone correspondence among Dentons, the Monitor and CCAA DOJ, Dentons provided CCAA DOJ with a draft confidentiality undertaking (the "**Draft Undertaking**") setting out terms under which CRA would provide the Monitor with access to confidential documents in the Tax Litigation, including but not limited to the Tax Documents. On April 14, 2021, CCAA DOJ provided the Monitor's counsel with a revised Draft Undertaking, which limited disclosure to CRA's position paper and audit report. In a separate email, CCAA DOJ advised that it was unable to extend the undertaking to all confidential documents in the Tax Litigation, as a waiver of the implied undertaking rule was required in respect of each specific document. Copies of the email correspondence between Dentons and CCAA DOJ regarding the Draft Undertaking

is attached as **Appendix “B”**. Given the volume of documents in the Tax Litigation, this is not a tenable solution.

22. The Monitor has exhausted its efforts to obtain access to information that is critically important to its ability to understand the Tax Litigation and fulfil its obligations under the CCAA and the Orders issued by this Court. The Monitor is therefore seeking an Order of this Court that would facilitate the unfettered access to the books and records of EGR, including all documents in EGR’s possession in connection with the Tax Litigation. It is important to note that the proposed Order would add and contain necessary protections and safeguards to ensure that no confidential information is disclosed to third parties, or used by the Monitor for any purpose other than fulfilling its duties under the Second Amended Initial Order and the CCAA (subject to further Order(s) of the Court).
23. To be clear, the Monitor does not seek access to the Tax Documents in order to “insert” itself into the Tax Litigation. The Monitor’s aims are to discharge its duties to this Court and to EGR’s stakeholders, and to advance the CCAA Proceeding. In this regard, the Monitor is hopeful that such disclosure will also allow the Monitor to report to this Court regarding the *bona fides* of EGR’s filing for creditor protection, the state of EGR’s business and financial affairs and the cause of its insolvency, and whether EGR “has acted, and is acting, in good faith and with due diligence”, as required by section 11.02(3) of the CCAA. A fulsome understanding of the Tax Litigation will also enable the Monitor to assess the prospects of the business continuing as a going concern, to assist with possible non-litigation resolutions, potentially aiding in preserving value for all stakeholders and to assist EGR and its stakeholders in facilitating a plan of compromise or arrangement.

24. The Monitor's current efforts to facilitate a compromise or arrangement are being frustrated by its inability to fully access EGR's books and records in connection with the Tax Litigation and better assess the nature of CRA's claims against EGR.
25. The Monitor understands that the Tax Litigation will not be judicially determined in the near-term (*i.e.* 1-2 years) and that the *status quo* is having a material adverse effect on EGR's financial position. For example, the cash flow forecast appended to the Monitor's Third Report shows a net cash outflow of \$1.4 million during the 17-week period – from a cash position of \$5.3 million in February 2021 to a projected cash position of \$3.9 million in June 2021. The forecast decline in cash position is a result of estimated litigation and restructuring costs totaling \$1.5 million during the 17-week period. The Monitor is concerned that a further delay in the CCAA Proceeding, under the *status quo*, may put EGR's chances of successfully restructuring through a plan of compromise or arrangement at risk.

All of which is respectfully submitted this 19th day of May, 2021.

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

A handwritten signature in cursive script, appearing to read "Phil Reynolds".

Phil Reynolds, LIT
Senior Vice-President

Appendix “A”

to the Fourth Report of the Monitor

Court File No.: _____

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, AS AMENDED

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

AFFIDAVIT OF ATEF SALAMA
(sworn October 14, 2020)

I, Atef¹ Salama, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Vice-President of the Applicant, Express Gold Refining Ltd. ("EGR"), and have been since 2001, and as such I have personal knowledge of the facts and matters hereinafter deposed to save and except 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 graduated from the University of Toronto in 1998 with a degree in computer engineering. I also obtained a Masters of Engineering in Telecommunication, having graduated in 2001. Since 1999, I have been a licensed Engineer with Professional Engineers Ontario.

3. This Affidavit is sworn in support of an application by EGR for an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), to preserve and protect the business and undertakings of EGR.

OVERVIEW

4. As will be discussed in greater detail below, EGR is a family business that was established in 1994 by my father. Its primary business is refining gold. It enjoys a good

¹ Sometimes spelled "Atif".

reputation among its suppliers and customers, and, but for the disputes with the Canada Revenue Agency (the “CRA”), which will be described in detail, would be a solvent and successful business with no need for the protections afforded by these proceedings.

5. EGR employs 14 people and operates a specialized facility in downtown Toronto. It performs various refining functions in that facility, and also arranges for the final stages of refining to be conducted by third-party refiners offsite. Its customer base is comprised primarily of jewellery manufacturers, wholesalers, importers/exporters, scrap gold consolidators/resellers, cash-for-gold buyers, prospectors and miners who seek to have their unrefined gold converted to pure gold so it can be used in industry, manufacturing, trade, investment or speculation.

6. EGR has historically viewed its refining activities as a service it provides to its customers. It typically earns 1 to 2% of the value of the gold refined as, in effect, fees for such refining services. However, despite that historical view and the economic reality that EGR’s refining activities are effectively services, I understand that, further to a CRA ruling, under Part IX of the *Excise Tax Act* (R.S.C., 1985, c. E-15) (the “ETA”), which governs the Goods and Services Tax/Harmonized Sales Tax (“GST/HST”), the relevant transactions are treated as a purchase of unrefined gold and a sale back of refined gold for GST/HST purposes.

7. This “buy/sell” treatment of gold refining transactions has important GST/HST implications. I understand that supplies of unrefined gold are subject to GST/HST, but supplies of refined gold are generally not. As a result, EGR pays GST/HST on the unrefined gold it is considered to have purchased from its customers, but does not collect GST/HST on the refined gold it is considered to have sold back to its customers. Since the GST/HST EGR pays is refundable in the form of input tax credits (“ITCs”), EGR is in a constant, large GST/HST refund position.

8. EGR lobbied against the buy/sell treatment with the CRA and the Department of Finance on the basis that it would have negative cash flow implications for EGR and would increase tax leakage risk for the CRA. With respect to the tax leakage risk, EGR was concerned that customers could potentially collect the GST/HST payable in connection to transactions with refiners like EGR, and then abscond with the GST/HST without remitting it to the CRA. EGR advocated for several alternative approaches to address those problems.

9. However, the approaches that EGR advocated for were rejected by the CRA and the Department of Finance. The buy/sell treatment of EGR's refining activities was confirmed in a ruling by the CRA Rulings Directorate in 2013 (the "**2013 Ruling**").

10. EGR has been under constant scrutiny from the CRA for over two decades, including two full-blown, multi-year audits from 2004 to 2013. EGR was fully cooperative with the CRA and devoted considerable resources to those audits. While the CRA proposed several substantial adjustments at various times during the audits, the audits ended without any material unrecoverable GST/HST being assessed. During those audits, the CRA withheld EGR's GST/HST refunds for months and years at a time, causing significant cash flow problems to EGR. However, the CRA ultimately paid the refunds, as it was obliged to do.

11. In September 2018, the CRA again stopped paying GST/HST refunds to EGR and commenced a GST/HST audit of EGR's reporting periods beginning in June 2016 to October 2018.

12. That audit spiralled out of control and ultimately resulted in this application becoming necessary. The CRA made inflammatory accusations of wrongdoing against EGR, but has refused to provide any evidentiary basis for those allegations. The only context that the CRA has provided for its allegations relate to its conclusions that the volume and purity level of unrefined gold purchased by EGR differed from certain volume and purity levels that the CRA considers benchmarks for the gold market in the Greater Toronto area. The CRA has never explained the details of the market it considers EGR to participate in. This matter is being challenged in the Tax Court of Canada.

13. I am confident that EGR will be able to disprove the CRA's allegations in the Tax Court of Canada. EGR has never participated in any wrongdoing.

14. However, EGR urgently needs this Court's protection because, the CRA has issued assessments totaling approximately \$180 million, rendering EGR insolvent and EGR has been contacted by CRA Collections officials threatening to take enforcement action forthwith.

15. Perhaps more importantly for purposes of this application, the CRA has also failed to refund any of the GST/HST that EGR has paid to its customers or any other commercial

suppliers from the August 2018 reporting period onwards. To date, the CRA has withheld approximately \$37 million of GST/HST refunds from EGR. EGR requires such refunds to pay its suppliers and operate its business – as discussed, it generally earns gross revenue of 1 to 2% of the value of the unrefined gold that it refines for its customers, but it is generally required to pay 13% in GST/HST to its customers and 13% GST/HST to its non-customer commercial suppliers. It is simply untenable for the CRA to require EGR to pay GST/HST on an ongoing basis but to refuse to refund that GST/HST to EGR.

16. It is not the purpose of this restructuring to compromise or seek to otherwise impair the ordinary course customers and suppliers of the business, but rather to provide a platform to accelerate the process to a hearing or resolution of the issues that have been alleged by CRA in the appropriate forum.

BACKGROUND

(a) EGR's Business and Ownership

17. EGR is a corporation duly incorporated under the laws of Ontario. It is a family-owned and operated business and the current iteration of the Salama family's involvement in the precious metals business that spans back four generations.

18. My parents immigrated to Canada from Egypt with me and my two brothers in July 1984, when I was 7 years old. My father is a third-generation precious metal dealer and jeweller, as well as a lawyer in Egypt

19. In April 1991, my father developed an interest in refining methods for precious metal and his interest extended into research and experimentation. EGR was incorporated in 1994 as a result of these activities.

20. In 2001, the same year that I received my Masters of Engineering, I took over most of the management responsibilities at EGR rather than pursuing a career in telecommunications. My father and my mother continue to be involved in EGR's activities.

21. All of the issued and outstanding shares in EGR are owned by family members through a corporation or the Atef Salama Family Trust.

22. I am the Vice President of EGR and a director. The other officers and directors are Nabil Salama, my father, who is President, and Mary Salama, my mother, who is Secretary.

23. EGR's primary business, which generates the substantial portion of its revenue has been gold refining.² A typical refining transaction in EGR's business primarily involves the following steps:

- a) receiving unrefined gold (typically in the form of gold jewelry or bars of melted scrap recycled gold) from a customer;
- b) melting and assaying the unrefined gold to determine the gold content;
- c) consolidating various lots of unrefined gold and forwarding them to a third-party refiner for the final stages of refining to convert the lots into pure gold; and
- d) payment in pure gold, wire, cheque or cash or sale of pure gold to the (often, same) customers.

24. As noted above, I understand that the receiving of unrefined gold from a customer and the transfer back of pure gold are treated as a purchase and sale for purposes of the ETA and that this was confirmed in the 2013 Ruling.

25. While its sales volume has been high, due in part to the high value of gold, EGR's gross profit margin on gold transactions is low (i.e., typically 1-2%) while being consistent with market rates. This margin is what EGR historically considered its "fee" for refining gold. Specifically:

- a) EGR purchased its unrefined gold based on the volume of gold content times the market rate, less a 1-2% discount;
- b) in turn, EGR sold the refined product (i.e., pure gold) at the market price; and

² More specifically, EGR's business also involves three other types of precious metals, silver, platinum and palladium. However, since gold refining is far more important to EGR's business than the refining of those other precious metals, since the dispute with the CRA involves only gold refining transactions, and for the sake of simplicity, gold is the focus of this affidavit.

- c) from that gross margin, EGR had to pay third-party refining fees, operating expenses and income tax.

26. At all relevant times, EGR has dealt with well-established third-party, final refiners, including the Royal Canadian Mint and, primarily, Asahi Refining Canada Limited (“**Asahi Refining**”) to perform the last stages in the refining process: chemical separation of the gold, pouring the pure gold into ingots or bars, and affixing London Bullion Market Association purity seals. Asahi Refining is the Canadian subsidiary of Asahi Holdings, Inc. a publicly traded company on the Tokyo Stock Exchange.

27. EGR also participates in the trading of gold bullion and forward contracts. EGR takes positions for EGR and for its clients based on short and long-term fluctuations in the price of gold, either for hedging purposes or for investment purposes. It buys and sells physical gold bullion on its own account. It takes positions in the gold futures markets using accounts with Asahi Refining, RJ O’Brien, FXDD, as well as Saxo Bank.

28. In connection with both its refining and trading activities, EGR holds deposits, gold bullion (and other precious metals) and forward contracts on behalf of its customers. In connection with its refining business, customers deliver unrefined gold to EGR, as discussed above. The transfer of the unrefined gold is considered a purchase. Once the customer’s gold has been valued, there is a settlement report created and the customer is paid at that time in cash, by wire, or in gold bullion.

29. In the ordinary course, for GST/HST-registered customers, EGR is charged 13% GST/HST on EGR’s purchase of the unrefined gold. EGR claims the GST/HST payable as an ITC and, after receiving the corresponding net tax refund for the ITC a few months later, EGR pays the applicable GST/HST to its customers by cheque or wire transfer to the customer’s account.

30. EGR also stores gold bullion on behalf of several of its customers with which it has a long-standing relationship of trust and, as noted above, takes positions on behalf of several of its long-standing customers in the gold futures markets using EGR’s accounts, either for hedging purposes or for investment purposes. EGR also occasionally holds cash in its accounts with

Asahi Refining, RJ O'Brien, FXDD as well as Saxo Bank on behalf of several of its long-standing customers, to facilitate the trading of gold bullion or gold future contracts.

31. EGR maintains a large transaction volume; however, its profit margins are small. For example, the purchase price for unrefined gold is dictated by the market price for gold times the purity of the recycled precious metal being purchased, less the 1 to 2% margin. Hedging contracts are used to protect against fluctuations in market price as they relate to buy and sell transactions. Unrefined gold purchased from a customer is hedged – for example where EGR accumulates 100 ounces of gold in bullion purchases plus gold content in unrefined gold purchases, then a sale contract is entered into at that time to balance the market fluctuation risks.

32. The business is conducted from a 5200 square foot facility located at 215 Victoria Street in Toronto comprising a dedicated customer area, with 11 customer booths as well as a melt room with 5 induction furnaces, 1 gas torch, 1 large burning oven, 3 x-ray assay machines, 3 wet chemical assay machines, 13 scales, 2 class 3 safes, and multiple desks and computers.

33. EGR enjoys a good reputation with its customers arising from its long history, its trustworthiness and its ability to refine gold in a timely manner. Both myself, my father and my mother are usually at EGR's business premises. Competitors often take two to three days to process a purchase of unrefined gold. At EGR, customers leave with their settlement payment right away. EGR has instantaneous assay machines, although some competitors have acquired similar machines. The combination of instant assay, transparent melting on the premises where customers can witness their gold being processed, and advanced access to pure gold and funds through the business relationship with Asahi, permit EGR to offer the "express" service for which it is known. Over the years, EGR has dealt with over 7000 customers. Its refining customers consist of jewellers, jewellery manufacturers, wholesalers, resellers/consolidators and prospectors and miners.

34. As a Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") reporting entity, EGR complied (and complies) with strict FINTRAC rules regarding customer identification.

35. EGR verifies that its customers who supply EGR with unrefined gold to be refined and charge EGR GST/HST are duly registered for GST/HST purposes using the CRA's online GST/HST registry.

(b) The GST/HST Implications of EGR's Business

36. EGR is a GST/HST registrant under Part IX of the ETA. It has monthly reporting periods under the ETA and therefore files its GST/HST returns on a monthly basis.

37. I understand that EGR's sales of unrefined gold are "taxable supplies" under the ETA, and subject to GST/HST at the full rate applicable in the relevant province (*i.e.*, 13% in Ontario),³ whereas EGR's supplies of refined gold (*i.e.*, gold with a purity level of at least 99.5% and in ingot or bar form) are "zero-rated",⁴ and therefore subject to GST/HST at a rate of 0%.⁵

38. I also understand that GST/HST that is paid to suppliers in the course of a commercial activity gives rise to ITCs,⁶ and that when a registrant's ITCs exceed the GST/HST it has collected in a reporting period, it is entitled to a net tax refund from the CRA.⁷

(c) EGR's Historical Interactions With the CRA

39. Prior to September 2004, EGR was subject to periodic audits by the CRA to verify EGR's ITC claims. Those audits generally involved EGR providing the CRA with information and documentation to support its ITC claims, and the CRA reviewing such information and documentation without conducting any on-site visits of EGR's premises. Despite those audits, EGR consistently received its net tax refund from CRA within approximately 30 to 45 days of filing each monthly GST/HST return.

40. Between 2004 and 2013, EGR was subject to constant and extensive CRA GST/HST audit activity including two full-scale GST/HST audits spanning multiple years each. EGR was

³ See the general taxing provisions contained in subsections 165(1) and (2) of the ETA and the CRA Ruling.

⁴ Section 3 of Part IX of Schedule VI and of the ETA and the definition of "precious metal" in section 123 of the ETA.

⁵ Subsection 165(3) of the ETA.

⁶ Subsection 169(1) of the ETA.

⁷ Subsection 225(1) and subsections 228(1) and (3) of the ETA.

always fully cooperative and devoted considerable resources to complying with the CRA's requests for information and documentation. During that time, the CRA withheld EGR's net tax refunds for many months at a time, causing considerable cash flow difficulties. Multiple audit theories were raised by the CRA and ultimately abandoned.

(i) *The CRA's First Full-Scale Audit*

41. During a full-scale audit from October 2004 until January 2006, the CRA performed a substantial review of EGR's records and accessed EGR's premises for several weeks. During that audit, the CRA proposed adjustments on the basis that EGR sold "gold cut bars" to its customers, which would be subject to GST/HST, rather than standard gold bars. However, the CRA ultimately abandoned that position and did not issue any reassessments. EGR's net tax refunds had been withheld for 16 months, causing significant cash flow issues.

42. Later in 2006, a second auditor recreated much of the work that the first auditor had performed, and EGR's net tax refunds were again put on hold.

43. In an internal CRA note dated May 2006 (which EGR obtained under an access to information request), a CRA official stated as follows:

[EGR's audit and certain audits of other unrelated parties] have been ongoing for over a year/two years [...]. Our auditees are understandably applying pressure to obtain the requested refunds and are in a position to apply for writs of mandamus.

44. A copy of that note is attached to this Affidavit as **Exhibit "A"**.

45. Later in 2006, a third auditor again recreated much of the work that the first and second auditors had performed. In November 2006, that auditor proposed to issue reassessments to EGR for \$12 million in uncollected GST/HST based on an interpretation of the ETA that differed from EGR's interpretation. The interpretive issue was essentially whether refined gold in grain form (rather than a bar, ingot, etc.) constitutes a "precious metal" under the definition of that term in subsection 123(1) of the ETA (and is thus zero-rated for GST/HST purposes). At that time, EGR would from time to time deliver refined gold to its customers in grain form. A copy of the CRA's reassessment proposal letter is attached to this Affidavit as **Exhibit "B"**.

46. However, under the CRA's interpretation, EGR would also have been entitled to ITCs for GST/HST payable to the third-party refiners. That point was made by EGR to the CRA in a submission dated January 3, 2007, a copy of which is attached as **Exhibit "C"**.⁸

47. In a letter dated June 29, 2007, the CRA agreed that such ITCs would be available, reducing the proposed adjustments from approximately \$12 million to approximately \$3,000 in net tax. A copy of the CRA's letter dated June 29, 2007 is attached as **Exhibit "D"**.

48. Nonetheless, even though the CRA had concluded that EGR was entitled to the net tax refunds it had claimed, the CRA continued to withhold the refunds. EGR requested multiple times for the CRA to pay the refunds, including in a letter dated January 11, 2008, a copy of which is attached as **Exhibit "E"**. The CRA finally issued reassessments in accordance with the letter dated June 29, 2007 on March 28, 2008, and thereafter paid refunds totaling over \$750,000. A copy of the results portion of those notices of reassessment are attached as **Exhibit "F"**.

49. The CRA again inexplicably withheld EGR's net tax refunds for months at a time in 2008 and 2009 but those refunds were eventually paid.

(ii) *The Second Full-Scale Audit*

50. In March 2010, the CRA commenced a second full scale GST/HST audit of EGR and began withholding EGR's net tax refunds.

51. During that audit, the CRA again performed a substantial review of EGR's records. The CRA auditor indicated early in the audit that GST/HST paid by EGR on its purchases of unrefined gold might constitute "business losses", such that ITCs would not be recoverable. Thankfully, the CRA ultimately abandoned that position.

52. On August 6, 2010, EGR sent a letter to the CRA outlining its previous interactions with the CRA and requesting that its net tax refunds be paid. At that point, more than \$350,000 worth of net tax refunds were outstanding dating back to August 2009. Having received no response

⁸ Note that the relevant letter was sent on behalf of EGR by its counsel, Stephen K. D'Arcy, then of Bennett Jones LLP (now Justice at the Tax Court of Canada). Much of EGR's correspondence with the CRA over the years was made by EGR's representatives acting on behalf of EGR. For purposes of this Affidavit, references to interactions between EGR and the CRA should be considered to include such interactions that were conducted by way of EGR's representatives.

from the CRA, follow up letters were sent October 6, November 2, and December 22, 2010. Copies of these letters are attached to this Affidavit as **Exhibit “G”**.

53. In January 2011, the CRA issued reassessments confirming EGR’s entitlement to the net tax refunds, but the CRA only refunded approximately \$250,000 of a total of about \$800,000 in net tax refunds owing.

54. By way of letter dated March 14, 2011, the CRA proposed to reassess EGR on two bases that also depended on alternative interpretations of the ETA and alternative characterizations of EGR’s transactions with its customers and third-party refiners. A copy of that letter is attached as **Exhibit “H”**.

55. Between May 2011 and January 2012, a meeting was held with the CRA, and several detailed submissions were made to the CRA in connection with the CRA’s audit theory. A copy of EGR’s submission dated July 15, 2011 is attached as **Exhibit “I”**.

56. In January 2012, the CRA audit team indicated that the issue would be referred to the Rulings Directorate at CRA Headquarters. A letter referencing that referral is attached as **Exhibit “J”**.

57. Following the referral to CRA Headquarters, there were numerous discussions and correspondence between EGR, the CRA and the Department of Finance regarding the treatment that should be afforded to gold refining activities under the ETA. EGR and its advisors submitted that EGR’s transactions with its customers should be treated as a service under the ETA (such that GST/HST would only apply on the fee charged for the refining). Alternatively, EGR submitted that subsection 153(3) of the ETA could apply to those transaction on the basis that they involve the exchange of property of same class or kind (i.e., gold), which would result in no GST/HST applying whatsoever.

58. EGR and its advisors noted that, if EGR’s transactions with its customers were instead treated as a purchase of unrefined gold and a sale back of refined gold, it would have negative cash flow implications for EGR and would increase tax leakage risk for the CRA.

59. Specifically, on March 29, 2012, EGR's representatives wrote a letter warning the Department of Finance that the CRA's position "will have the obvious but unfortunate consequence of increasing the risk of further tax evasion in an industry where fraudulent practices have already been identified (and prosecuted)." A copy of that letter is attached to this Affidavit as **Exhibit "K"**. Similarly, in a November 9, 2011 submission to the CRA, a copy of which is attached as **Exhibit "L"**, EGR's representatives stated:

Ironically, the CRA's proposal increases the risk of tax leakage and tax fraud. In fact, given the CRA's recent experience with fraud in the gold industry, which primarily involved suppliers who collected but failed to remit GST/HST, it is to the CRA's benefit that subsection 153(3) of the ETA apply to the transactions between EGR and its clients. That is, the CRA's proposal contemplates the collection of GST/HST by large numbers of businesses, which complicates the administrative process for the CRA and increases the risk of tax leakage. As each of the parties would be able to recover the GST/HST payable by way of ITC, there is no financial benefit to the CRA in not applying subsection 153(3) to these transactions.

60. In January 2013, the Rulings Directorate issued the 2013 Ruling, which took the form of a detailed, 12-page memorandum with respect to the treatment of EGR's business operations under the ETA. A copy of the 2013 Ruling is attached as **Exhibit "M"**. Notwithstanding EGR's submissions, the 2013 Ruling held that EGR's transactions with its customers should be treated a purchase of unrefined gold and a sale back of refined gold.

61. EGR has subsequently followed the framework set out in the 2013 Ruling.

62. By way of letter dated February 11, 2013, the CRA proposed to issue reassessments to EGR in accordance with the approach set out in the 2013 Ruling. A copy of that letter is attached as **Exhibit "N"**. Specifically, the CRA proposed to assess EGR approximately \$1.5 million in GST/HST on transactions whereby EGR received unrefined gold from its customers and returned refined gold to them in grain form (i.e., a similar issue to the issue raised in 2006). The CRA assessed on the basis that the sale of refined gold in grain form was subject to GST/HST, which EGR had failed to collect and remit to the CRA. The CRA implemented its proposal by way of reassessments dated November 14, 2013. Those reassessments resulted in "wash transactions", as EGR was able to charge the relevant GST/HST to its customers and they were also presumably able to recover such GST/HST as ITCs.

(iii) *Interactions from 2013 to 2018*

63. Since 2013, EGR has been engaged in constant interactions with the CRA regarding its GST/HST practices, primarily in the form of responding to information requests from CRA with respect to EGR's customers.

64. EGR has hired a full-time staff member to deal with the added burden of CRA's on-going inquiries with respect to GST/HST matters.

65. Since the beginning of 2017, EGR has responded to at least 36 separate inquiries from tax authorities (primarily the CRA), generally involving GST/HST payments made to EGR's customers. Many of the responses included hundreds of pages of documentation. An EGR employee involved in handling those various information requests, prepared a chart summarizing these inquiries and EGR's responses since the beginning of 2017. That chart and copies of the requests themselves are attached as **Exhibit "O"** to this Affidavit.

66. The CRA also conducted a payroll account examination of EGR in late 2017, for which EGR provided the CRA examiner with extensive books and records for review. A copy of the CRA's letter in connection with the audit is attached as **Exhibit "P"**.

67. After the 2013 Ruling was issued, EGR regularly received requests from its customers requesting that EGR pay them GST/HST on past purchases. These requests arose out of CRA reassessments issued to such customers. That, in turn, significantly increased EGR's monthly ITC claims. In a letter dated February 1, 2013, EGR requested confirmation from the CRA that the CRA reassessment proposal documentation EGR was provided by customers met documentary requirements for EGR to claim ITCs. A copy of that letter (without attachments) is attached as **Exhibit "Q"**.

68. Since the 2013 Ruling, EGR's core gold refining operations have not materially changed.

(iv) *2018 Meetings with Toronto West CRA Officials*

69. On February 22, 2018, EGR received a letter from CRA officials from the Toronto West Tax Services Office requesting to review EGR's books and records for the purpose of verifying the ITCs claimed. The CRA did not take issue with any of EGR's ITC claims as a result of this

review; however, these ITC claims were the subject of the later audit (discussed in detail below) and many of them were subsequently denied as a result of that audit. A copy of the letter is attached as **Exhibit “R”**.

70. In March and April 2018, I met with those CRA officials in connection with that review. During those meetings, one of the officials noted that he had initiated certain earlier audits of EGR, indicated that he was familiar with EGR’s affairs, highlighted general issues with GST/HST fraud in the gold industry, acknowledged that EGR was clearly not involved in any such fraud, and requested EGR’s assistance in combatting such fraud, both by remitting the GST/HST owing to customers directly to the CRA, and by supporting and advocating for legislative amendments with the Department of Finance.

71. Following that meeting, EGR made inquiries with other officials within the CRA about the aforementioned meetings with officials from the Toronto West Tax Services Office. EGR was informed that the CRA officials from the Toronto West Tax Services Office who had met with me had not been acting in their formal capacity as CRA officials, such that there would be no point in continuing interactions and discussions with them. On that basis, EGR took no further steps with respect to the meetings.

(d) The Most Recent Audit, Judicial Review Application and \$180 Million Assessments

72. By way of letter dated October 4, 2018, the CRA informed EGR that EGR’s August 2018 GST/HST return was under audit by the Toronto West Tax Services Office (by different officials than those who had been involved in the meetings in March and April 2018). The letter also requested certain information and documentation for purposes of the audit. A copy of that letter is attached to this Affidavit as **Exhibit “S”**.

73. On October 15, 2018, I met with the CRA auditor and her team leader and provided them with all requested information and documentation.

74. On November 6, 2018, a CRA auditor from the Saskatchewan Tax Services Office contacted me and advised me that the CRA was expanding the audit to a full-scale GST/HST audit covering the period from June 1, 2016 to October 31, 2018. That auditor requested EGR’s full software backup for the period and advised that she would be asking for numerous invoices

and other documents. The auditor also stated that the CRA would not be paying any net tax refunds to EGR for its reporting periods from August 2018 forward, including reporting periods not under audit (the “**Decision**”). She indicated that the basis for the Decision was that CRA had identified high risk in the gold industry. However, she stated that she could not identify any specific risk vis-à-vis EGR.

75. On November 7, 2018, EGR sent a letter to the auditor providing a detailed chronology of EGR’s interactions with the CRA over the years and demanding that EGR’s net tax refunds be paid pursuant to the CRA’s obligations under section 229 of the Act. A copy of that letter is attached as **Exhibit “T”**.

76. On November 26, 2018, the auditor responded and confirmed the Decision in writing, indicating that all net tax refunds claimed by EGR for its August 2018 reporting period forward were being withheld by CRA until the full audit was complete. A copy of that letter is attached as **Exhibit “U”**.

77. On the same day, the auditor also wrote to EGR requesting various information as part of the audit. A copy of that letter is attached as **Exhibit “V”**. I subsequently provided her with all requested information.

78. On December 6, 2018, EGR challenged the Decision by way of an application for judicial review in Federal Court. A copy of the notice of application is attached as **Exhibit “W”**. In the application, EGR took the position that the Minister of National Revenue (who acts through her delegates at the CRA) did not have the jurisdiction to withhold EGR’s net tax refunds, because she was required to pay the refunds “with all due dispatch” under section 229 of the Act. EGR sought an order of *mandamus* requiring the net tax refunds to be paid.

79. In January 2019, the auditor and her team leader traveled to Toronto and conducted on-site audit activity at EGR’s premises for a week. During that time, they interviewed me for a full day, toured EGR’s facilities and reviewed EGR’s records. When I asked them whether EGR should continue paying GST/HST to its GST/HST-registered customers, even though the CRA was refusing to pay ITC refunds for that GST/HST, they stated that EGR should. They also

informed me that they also attended Asahi Refining's premises and obtained documentation referable to EGR's transactions with Asahi Refining.

80. In connection with the judicial review application, a CRA official from CRA's Headquarters testified under oath that the CRA's goal was to complete the audit by September 2019, and that the CRA did not have concerns about EGR's compliance with the ETA. He also acknowledged under oath that the CRA's concerns about non-compliance by other industry participants, including EGR's customers, are irrelevant to EGR's entitlement to ITCs.

81. The judicial review application was heard by Justice Pentney on July 3, 2019. During the hearing, Justice Pentney asked the Department of Justice lawyer whether he could cite a legal basis for the CRA not paying net tax refunds for reporting periods that were not under audit. At that time, the CRA was withholding approximately \$10 million in net tax refunds for reporting periods outside of the period under audit. The Department of Justice lawyer acknowledged that he was unable to cite such a legal basis.

82. On July 9, 2019, just four business days after the hearing, the CRA sent a letter to EGR indicating that the audit was being expanded again to include additional reporting periods (for which net tax refunds were being withheld). A copy of that letter is attached as **Exhibit "X"**.

83. On July 22, 2019, the CRA issued GST/HST notices of reassessment to EGR with no warning whatsoever (the "**2019 Reassessments**"). The reassessments related to EGR's June 1, 2016 to July 31, 2018 reporting periods, for which no net tax refunds were outstanding. They increased EGR's net tax for those periods by almost \$10 million (approximately the same amount of outstanding net tax refunds as of the time of the hearing) and imposed gross negligence penalties and interest. A copy of the 2019 Reassessments is attached as **Exhibit "Y"**.

84. The following day, EGR received letter from the CRA, which noted that the reassessed periods "remain under audit and subsequent (re)assessment(s) may be issued for the same periods". In other words, the reassessments were provisional. A copy of that letter is attached to this Affidavit as **Exhibit "Z"**.

85. With respect to the basis for the reassessments, the letter indicated that ITCs were denied in respect of invoices from 10 different customers. The letter also made various inflammatory (and contradictory) allegations, including the following:

The invoices created to support this business activity create the illusion of business activities and transactions that have legal rights and obligations that do not exist, or differ from the actual legal rights and obligations. [...]

Audit has concluded that [the relevant customers] did not, and in fact could not have, supplied the unrefined gold purportedly purchased by EGR. Audit has concluded that these 10 suppliers are missing traders [...]

As these missing traders are said to deal directly with EGR, and yet did not make supplies to EGR, EGR must have direct involvement in the GST/HST scheme, tantamount to intentional deceit. [...]

Audit has concluded that all of these suppliers are missing traders, and as a result did not supply EGR with the unrefined gold indicated on the invoices of accommodation. If it can be shown that there was the transfer of physical goods to EGR, it would be our position that this unrefined gold was a supply of debased gold as part of a carousel scheme, and/or that it did not come from the suppliers named on the invoices.

86. With respect to the CRA's alternative allegation that the transactions related to a "carousel scheme", the CRA explained that a carousel scheme involves a group of persons colluding to create fraudulent GST/HST refunds. The CRA explained that, in the gold refining context, a carousel scheme would involve a customer transacting with a refiner to refine gold, collecting the relevant GST/HST from the refiner, debasing the refined gold with other metals such as zinc, copper or silver in order to change its status for GST/HST purposes, transacting again with the refiner, collecting the relevant GST/HST, etc., until ultimately the customer absconds with the GST/HST without remitting it to the CRA.

87. The CRA's allegations are demonstrably false. The fact that the CRA felt the need to make contradictory, alternative allegations of wrongdoing is telling.

88. With respect to the CRA's first allegation that EGR created false invoices, EGR keeps scrupulous records and can prove beyond any doubt that it transacted with its customers as shown in its invoices (indeed, the CRA seemingly de-emphasized that allegation in subsequent reassessments, as discussed above).

89. EGR can (and will) also disprove the CRA's second allegation that EGR participated in a carousel scheme beyond any doubt. Over the years, EGR has always conducted its business with integrity and in compliance with its legal obligations. EGR has been exceedingly careful in ensuring that its customers are properly identified and GST/HST-registered. The steps that EGR has taken in this regard include the following:

- a) EGR turned away potential customers if they failed to meet EGR's strict onboarding identification requirements;
- b) EGR never transacted with customers if it had any suspicion that they might be engaged in nefarious activities;
- c) EGR stopped transacting with customers on several occasions when the CRA advised EGR that the customer was noncompliant with its GST/HST obligations;
- d) EGR has, for decades, always been fully cooperative with the CRA, other regulators and law enforcement agencies in many different contexts;
- e) EGR confirms that its customers' GST/HST registrations are in good standing with the CRA at the following times: (1) on the initial intake of a customer, (2) on a monthly basis when EGR claims ITCs for GST/HST paid or payable to a customer, and (3) prior to paying GST/HST to a customer; and
- f) EGR generally does not make GST/HST payments to its customers until it has received a corresponding net tax refund from the CRA (relying on the CRA's refund as validation of the customer's legitimacy) and has verified the customer's GST/HST registration number on the three separate occasions described above.

90. On August 20, 2019, EGR filed notices of objection to challenge the 2019 Reassessments. A copy of those notices of objection is attached as **Exhibit "AA"** (without appendices).

91. On September 20, 2019, EGR made a motion in connection with its judicial review application requesting that the hearing be reopened to allow additional evidence relating to the CRA's post-hearing actions. EGR submitted that the 2019 Reassessments appeared to be

intended to establish an artificial debt in order to mitigate against or completely blunt a potential *mandamus* order from the Federal Court, and represented further evidence that the CRA was refusing to pay net tax refunds with all due dispatch in the manner required under the ETA.

92. On March 16, 2020, EGR filed a Notice of Appeal in the Tax Court of Canada pursuant to paragraph 306(b) of the ETA in order to dispute the 2019 Reassessments. A copy of the Notice of Appeal is attached as **Exhibit “BB”**.

93. On May 12, 2020, the Honourable Justice Pentney dismissed EGR’s application for an order of *mandamus* and also dismissed the motion to reopen the hearing. Justice Pentney held that, based on the evidence before him, the application for *mandamus* was premature. He held that the CRA’s duty to pay net tax refunds with due dispatch does not displace the Minister’s authority to verify a claim before paying a refund so long as the audit is conducted with due dispatch. He stated:

[82] On the facts of this case, I am not persuaded that a sufficient time had elapsed for the conduct of the audit before the Applicant launched this application. It should be recalled that the argument centres on the audit of the August 2018 return, which was filed on September 6, 2018. The Applicant was advised on October 4, 2018 that an audit had commenced. On November 7, 2018, the Applicant’s representative wrote to demand that the net tax refund be paid, and it launched this proceeding on December 6, 2018. Unlike the situation in *Nautica Motors*, I do not find that this was a sufficient time to complete the audit.

94. A copy of Justice Pentney’s decision is attached as **Exhibit “CC”**.

95. By way of letter dated May 27, 2020 (the “**May 2020 Proposal Letter**”), the CRA proposed to deny ITCs totaling \$133,451,149.90 in connection with its audit of EGR’s reporting periods from June 1, 2016 to October 31, 2018 (which, apart from the periods from August 1 to October 31, 2018, had already been reassessed pursuant to the 2019 Reassessments). The CRA alleged that the ITCs related to invoices from 66 of EGR’s customers that were “part of a carousel scheme”, and that EGR “is a willing participant in the carousel scheme”. A copy of the May 2020 Proposal Letter is attached as **Exhibit “DD”**.

96. Unlike the proposal letter preceding the 2019 Reassessments, the CRA did not make any allegations that EGR had created false invoices or misrepresented its transactions with its customers.

97. It is notable that the CRA's conclusions in the May 2020 Proposal Letter were expressly only made "on a balance of probabilities". In addition, the only basis for the allegations relates to certain general calculations that the CRA apparently made regarding the gold refining market in the greater Toronto area, and purported differences between EGR's business and that of a typical market participant. The CRA's calculations were as follows:

- a) the weighted purity of unrefined gold purchased by EGR was 83%, while the "expected range" in the market would be 50% to 65%; and
- b) 90% of EGR's volume of unrefined gold purchases were from only 20% of EGR's customers, and those customers were, on average, doing almost double the weekly volume used as a "benchmark" by the CRA (while refusing, despite being asked, to provide any detail whatsoever of what either their "expected range" or "benchmark" is actually based upon).

98. In the May 2020 Proposal Letter, the CRA also alleged that EGR had failed to exercise sufficient diligence with respect to its customers, suggesting that EGR should have vetted customers based on factors like credit score (even though the CRA did not dispute that EGR was compliant with its customer identification obligations under the ETA and FINTRAC).

99. Following the issuance of the May 2020 Proposal Letter, EGR repeatedly requested that the CRA disclose the assumptions and data forming the basis for the CRA's calculations so that EGR could explain why EGR's business might be different from a typical market participant, or explain why the benchmarks used by the CRA are inapplicable to the market that EGR actually participates in. The CRA repeatedly refused under the guise of confidentiality.

100. On July 10, 2020, EGR wrote to the CRA and stated that the "lack of disclosure puts EGR in an impossible situation and deprives it of the most basic fairness and due process, especially given the nature and seriousness of the allegations contained in the [May 2020 Proposal Letter] and their potential fatal impact on EGR". EGR also noted that the CRA's assumptions and data would be general market information that would not contain identifying information, such that they would not be confidential. EGR also noted that, under paragraph 295(5)(b) of the ETA, the CRA would be permitted to provide EGR with confidential

information that can be reasonably regarded as necessary for the purposes of determining EGR's liability under the ETA. A copy of that letter is attached as **Exhibit “EE”**.

101. However, in a letter dated July 28, 2020, the CRA continued to refuse to release the information and insisted on issuing the proposed reassessments. The CRA even weaponized EGR's good faith attempts to lobby the CRA and the Department of Finance to address the risk of tax leakage in connection with the GST/HST treatment of gold refining. The CRA stated that “[t]he explicit warning by Salama to the CRA and Department of Finance only solidify our position that Salama knew the vulnerabilities of the GST/HST system, and took advantage of those vulnerabilities”.⁹ That EGR's pursuing in good faith the democratic processes which are part of our community, to effect positive change in suggesting legislative and policy steps, would be used by the CRA as evidence against us has disturbed me greatly.

102. On July 29, 2020, the CRA issued notices of reassessment for EGR's reporting periods from June 1, 2016 to October 31, 2018 (the “**2020 Reassessments**”). A copy of the 2020 Reassessments is attached as **Exhibit “FF”**. The 2020 Reassessments maintained the adjustments made by way of the 2019 Reassessments, denied additional ITCs, and also imposed gross negligence penalties. In total, the 2020 Reassessments imposed tax, penalties and interest totaling \$189,531,562.93.

103. Details regarding the current status of EGR's ITC refund claims and the amounts owing to and from EGR with respect to its reporting periods from June 1, 2016 to August 31, 2020, following the issuance of the 2019 Reassessments and the 2020 Reassessments, are contained in **Schedule 1** to this Affidavit.

104. By way of letter dated August 12, 2020, the CRA advised EGR that it was commencing a new GST/HST audit for EGR's reporting periods from November 1, 2018 to June 30, 2020.

105. On September 11, 2020, EGR amended its existing Tax Court appeal by filing a Fresh As Amended Notice of Appeal in connection with the 2020 Reassessments for the reporting periods that were also the subject of the 2019 Reassessments (*i.e.*, the June 1, 2016 to July 31, 2018 reporting periods). A copy of the Fresh As Amended Notice of Appeal is attached as **Exhibit**

⁹ Page 4.

“GG”. EGR will file notices of objection in due course to dispute the 2020 Reassessments for the remaining reporting periods (*i.e.*, the August 1 to October 31, 2018 reporting periods).

106. By way of letter dated September 17, 2020, the CRA denied EGR’s request for disclosure of the CRA’s audit file, citing the Tax Court appeal and involvement of Department of Justice. A copy of that letter is attached as **Exhibit “HH”**.

Comments on the Basis For the 2020 Reassessments

107. My family has operated honourably in the precious metals business for four generations, and EGR has built a reputation for trustworthiness since 1994. More than most businesses, EGR’s business depends on maintaining that reputation of trust. EGR’s customers regularly entrust EGR with possession of valuable precious metals and substantial amounts of money. I would never jeopardize my reputation, my family’s reputation and EGR’s reputation by participating in fraud.

108. The CRA’s allegations are based on “audit assumptions” unsupported by the disclosure of any evidence as discussed above. Furthermore, the CRA has never explained the benefit to a trusted and established market participant, EGR, of participating in the purported scheme. It simply does not stand to reason that EGR would pay 13% in GST/HST under fraudulent circumstances, placing it in a position of depending on the CRA to pay ITC refunds (which historically have been difficult to obtain), risking its business and risking criminal charges – all to earn a fee of 1 to 2%.

109. In particular, it does not stand to reason when it is considered that EGR has been under virtually constant audit scrutiny from the CRA since 2004.

110. What seems more reasonable is that the CRA is concerned about flaws in the GST/HST treatment of the gold refining industry that lead to tax leakage and, rather than seeking to address those flaws through changes in legislation or policy, it is seeking to wipe out that industry. If that is the case, it is particularly ironic that the CRA is seeking to destroy EGR, which had advocated to the CRA and the Department of Finance, in good faith, for legislative and policy fixes to those very flaws.

111. Moreover, as was noted in passing in Tax Counsel's letter to CRA dated July 10, 2020 (**Exhibit "EE"**), CRA acknowledges that their current position places a novel theory of responsibility on EGR, and one which in any practical sense is unable to be addressed in the real commercial world by market participants, including EGR.

112. Finally, the fact that EGR is requesting the transparency and oversight of these proceedings shows that the CRA's allegations are wrong. If EGR participated in wrongdoing, it would never expose itself to the scrutiny of the CCAA process and would never invite the proposed monitor to implement and oversee controls over its business.

FINANCIAL POSITION OF EGR

(a) Cash position

113. EGR is generally able to meet its ordinary course obligations as they become due apart from the liabilities associated with the 2019 Reassessments and the 2020 Reassessments.

114. As noted above, EGR's refining business generated approximately 80% of its revenue from the refining business. However, EGR's refining business has declined by approximately 95% as a result of the COVID-19 pandemic. I anticipate that the refining business will increase as businesses re-open.

115. As noted above, EGR also holds trading and hedging positions for certain customers in cash, precious metals and/or forward contracts. I will discuss this in greater detail under the heading "Customer Arrangements" commencing at paragraph 140, below. The following charts outline EGR and their customer positions as at September 30, 2020:

As at September 30, 2020	Held at		Total
	EGR	CIBC	
Total Cash Position			
CAD	864,528	2,518,754	3,383,282
USD	594,115	591,485	1,185,600
Less Customer Amounts			
CAD	-	451,250	451,250
USD	-	-	-
EGR's Cash Position			
CAD	864,528	2,067,503	2,932,032
USD in CAD equivalent	791,540	788,036	1,579,575
	<u>1,656,068</u>	<u>2,855,539</u>	4,511,607

As at September 30, 2020	Held at
	EGR
Total Inventory Position in Base Unit	
Gold	1,183.05
Silver	45,344.33
Platinum	112.98
Palladium	16.51
Less Customer Amounts	
Gold	689.54
Silver	11,793.93
Platinum	32.15
Palladium	-
EGR's Inventory Position	
Gold	493.51
Silver	33,550.39
Platinum	80.83
Palladium	16.51

As at September 30, 2020	
Total Account Value	
Held at	CAD equivalent
Asahi	3,776,215
Asahi Refining	393,429
RCM	55,001
Saxo	688,992
FXDD	370,817
RJO	174,074
Total	5,458,528
Customer Account Position in CAD	(4,912,686)
	545,842
Forward Contracts Positions (Unrealized)	
With Customers	(30,414)
With Third Parties	6,025
	(24,388)

(b) Bullion Buyers

116. EGR transacted business with 363 bullion buyer customers who purchased gold from EGR from May to July 2020 with sales totaling \$29.9 million, excluding GST/HST (\$30.0 million including GST/HST). EGR transacted with 25 bullion buyers with average monthly sales greater than \$100,000 (ranging from average monthly sales of \$772,302 to \$104,100). Such bullion buyers can be identified upon request (keeping in mind that identifying them in a public document could expose them to the risk of robbery).

(c) Gold vendors

117. During May to August, 2020, to supply bullion buyers, EGR purchased from bullion vendors and also supplied bullion derived from the refining of unrefined gold purchases. There were 468 gold vendors from May to August 2020 with EGR's purchases totaling \$40.5 million excluding GST/HST (\$40.7 million including GST/HST).

118. EGR transacted with 26 gold vendors with average monthly purchases greater than \$30,000 (ranging from average monthly purchases of \$3,573,026 to \$30,409). Such vendors can be identified upon request (keeping in mind that identifying them in a public document could expose them to the risk of robbery and theft).

119. Up to this point, we have been forced to advise our gold vendors that GST/HST payments on purchases cannot be made until a resolution is reached with the CRA regarding the CRA's payment of ITC refunds to EGR. This has caused EGR to lose certain vendors who will now only transact with competitors. However, EGR has been continuing business with certain long-term gold vendors under this new arrangement.

120. The chart below outlines a summary of EGR's aggregate creditors as of August 31, 2020:

Type of Creditor	Number of Creditors	Total Amount Owing
Customers with GST/HST owing	94	32,620,607
Customer Accounts	57	1,991,142
Other Suppliers	13	516,718

121. The foregoing is provided for illustration and does not change materially on a monthly basis

(d) Financial Statements

122. EGR's last compiled financial statements was for the year ended May 31, 2019:

Express Gold Refining Ltd.

Balance Sheet

As at May 31, 2019

(Unaudited)

	2019	2018
	\$	\$
Assets		
Current Assets		
Cash	5,355,214	12,251,750
Marketable securities	254,865	255,834
Accounts Receivable	35,515,994	11,684,967
Due from related parties	2,746,744	1,340,025

Express Gold Refining Ltd.**Balance Sheet**

As at May 31, 2019

(Unaudited)

Income taxes recoverable	-	16,995
Inventories	3,368,157	4,074,538
Prepaid Expenses	13,500	16,604
	47,254,474	29,640,263
Property and Equipment	280,091	305,662
	47,534,565	29,945,925
Liabilities		
Current Liabilities		
Accounts Payable and accrued liabilities	41,886,810	26,796,322
Income taxes payable	738,374	-
Due to related parties	911,965	915,449
	43,537,149	27,711,771
Shareholders' equity		
Share capital	98	105
Retained earnings	3,997,318	2,234,049
	3,997,416	2,234,154
	47,534,565	29,945,925

123. As at May 31, 2019, EGR had approximately \$5.4 million in net available cash on hand.

124. As at May 31, 2019, EGR's assets had a book value of approximately \$47.5 million and liabilities of approximately \$43.5 million. The majority of EGR's assets on its balance sheet relate to accounts receivable of \$35.5 million, while the majority of EGR's liabilities on its balance sheet relate to accounts payable and accrued liabilities of \$41.9 million.

125. EGR does not have any secured creditors except in relation to the customer funds, bullion and contracts referenced below in my affidavit.

(e) Cash Flow Forecast

126. With the assistance of the proposed monitor, EGR has prepared a 13-week cash flow forecast (the "**Cash Flow Forecast**") for the week commencing October 5, 2020 to the week ending January 1, 2021. A summary of the cash flow appears below.

Receipts	
Sales	28,382,312
HST refunds	-
Interest income	6,000
Total Receipts	28,388,312
Disbursements	
Purchases	26,726,044
HST	770,356
Salaries and wages	151,212
Consulting and professional fees	150,000
General Administrative Expenses	96,402
Insurance	112,500
Rent	43,440
Advertising and promotion	54,676
Vehicle	5,799
Freight	20,000
Income Tax	30,000
Total Disbursements	28,160,429
Net Cash Flow Before Litigation and Restructuring Costs	227,883
Litigation Costs	450,000
Restructuring Costs	550,000
Total Litigation and Restructuring Costs	1,000,000
Net Cash Flow	(772,117)
Opening Cash	2,566,637
Ending Cash	1,794,520

127. EGR's opening cash balance on October 12, 2020 was approximately \$2.6 million. The full 13-week cash flow is attached hereto as **Exhibit "II"**.

128. The forecast cash flow surplus for the 12-week period ("**Cash Flow Period**") before litigation and restructuring costs is estimated to be \$227,883. Sales are estimated to be \$28.4 million over the Cash Flow Period with corresponding purchases of bullion and scrap metals of approximately \$26.7 million. GST/HST payments on goods and services are estimated to total \$770,356. Other significant cash outflows during the Cash Flow Period are as follows:

- a) Salaries and wages: \$151,212

- b) Consulting and professional fees: \$150,000
- c) Insurance: \$112,500
- d) General and administrative expenses: \$96,402

129. Because of the 2019 Reassessments and the 2020 Reassessments, EGR will incur litigation and restructuring costs to defend and resolve the matter, even before considering any amount that may be needed to effect an early resolution. Litigation and restructuring costs are estimated to be \$450,000 and \$550,000 respectively over the Cash Flow Period. The forecast cash flow deficit for the Cash Flow Period after litigation and restructuring costs is estimated to be \$772,117.

130. Based on the cash flow forecast presented, EGR does not have the financial resources to pay the amounts assessed by way of the 2019 Reassessments and the 2020 Reassessments. Furthermore, EGR's liquidity position will continue to erode and additional financing will need to be considered should the restructuring and the litigation relating to the 2019 Reassessments and the 2020 Reassessments extend well past the 12-week cash flow forecast period, which I anticipate.

(f) Cash Management

131. EGR operates a CAD and USD bank account at CIBC. EGR also holds physical cash on hand at its head office. The physical cash on hand and bank accounts at CIBC are used to facilitate day-to-day operational needs. The chart in paragraph 115 above provides details on the September 30, 2020 cash balance held at EGR and at CIBC in CAD and USD.

132. EGR currently has one credit card. The credit cards facilitate payment of various expenses related to office, advertising, telephone and general and administrative expenses.

(g) Related Party Arrangements

133. The following table outlines related party balances as at September 30, 2020:

Related Party	Receivable / (Payable) as at September 30, 2020
---------------	---

Farag Properties Inc.	2,243,350
1420781 Ontario Ltd.	920,843
Express Forex Inc.	311,273
Mary/Nabil	32,000
Atef	16,710
Watchdeals.ca	1,362
Prestige Precious Metals Ltd.	(1,416,897)
Shareholders	(80)
Fr. Pishoy Family Trust	(15)

134. Details relating to those parties and balances are as follows:

- a) Farag Properties Inc. – EGR leases its head office from Farag Properties Inc. at a monthly rent of \$14,480, including GST/HST. EGR manages Farag Properties Inc.’s property and receives an annual management fee of \$60,000 including GST/HST.
- b) 1420781 Ontario Ltd. – EGR's parent company.
- c) Express Forex Inc. – A related company facilitating foreign exchange transactions for EGR and other clients. It holds funds at Luminus Financial and remits certain amounts to EGR on a monthly basis. The receivables balance owing to EGR is typically around \$200,000.
- d) Atef / Nabil / Mary / Fr. Pishoy Family Trust – Shareholders of EGR. The balances represent shareholder advances. There has been a further advance to me of approximately \$300,000 to complete the purchase of residential real estate. I will provide full particulars of this to the monitor.
- e) Watchdeal.ca – A related company with a small receivable balance that is uncollectible and will be written off.
- f) Prestige Precious Metals Ltd. – EGR pays \$150,000 annually in management fees.

NORMALIZING OPERATIONS POSTFILING

(a) Net Tax Refunds

135. In order to stabilize its business, EGR requires that the CRA pay net tax refunds for the ITCs generated when EGR pays GST/HST to its customers and other business suppliers. As discussed above, the GST/HST payments in connection with EGR's business are several times greater than the revenue that EGR generated through that business. Accordingly, by way of this application, EGR is seeking a mechanism overseen by the Court whereby EGR will pay GST/HST to customers that have been approved the Court and other business suppliers, and the CRA will regularly pay the corresponding net tax refunds to EGR.

136. In order to address the concerns raised by CRA relating to certain customers and former customers, EGR will work closely with the prospective monitor to achieve any reasonable commercial transparency that the CRA may suggest.

137. . But for the 2019 Reassessments, the 2020 Reassessments and the CRA's ongoing refusal to pay ITC refunds to EGR, EGR would have no need for these proceedings and would be entirely capable of meeting its obligations as they come due. Accordingly, EGR is asking the Court's permission to carry on its business in the ordinary course without regard to the distinctions usually drawn between pre-filing and post-filing creditors. EGR is also asking that the net tax refunds owing by the CRA to EGR following this application not be offset against the pre-filing amounts owing to the CRA in connection with the 2019 Reassessments or the 2020 Reassessments (as they already have been by the CRA to date).

138. It is my understanding that the prospective monitor is supportive of this approach in these circumstances.

(b) Customer/Supplier Arrangements

139. EGR is also seeking the Court's permission to continue to honour and pay all pre-filing obligations owing to customers and suppliers who have dealt with EGR in good faith.

140. In particular, as discussed above, EGR holds cash, gold and forward contracts for customers in connection with its refining business (the "**Refining Customer Assets**"). The

Refining Customer Assets are typically only held for the duration of the relevant refining transaction (i.e., between the time that the unrefined gold is delivered to EGR and the time that EGR delivers refined gold or equivalent funds to the customer).

141. As discussed above, EGR also holds cash, gold bullion and forward contracts on a longer-term basis for customers with which EGR has a long-standing, trusting relationship (the “**Trading Customer Assets**”).

142. EGR and its customers have always understood that EGR holds the Refining Customer Assets and the Trading Customer Assets on behalf of each relevant customer in a manner akin to a legal trust.

143. I have been advised by counsel that these arrangements should be formally documented in a manner to create legal trusts and accordingly, I am now asking for the Court’s permission to do so in a manner which will instil confidence in my customers to continue to transact business with EGR and provide oversight and transparency to the Monitor over all aspects of these arrangements.

144. I believe that these measures will assist EGR to preserve the status quo while the dispute with the CRA is dealt with in the Tax Court of Canada.

145. The proposed measures would not relate to the Refining Customer Assets, since such assets are of a short-term nature and constitute ordinary course obligations. The proposed measures would only relate only to Trading Customer Assets. In particular, the proposal is as follows:

- a) EGR would establish a separate bank account that would hold only funds in trust for customers, such that the trust funds would be segregated from the funds held by EGR on its own account;
- b) EGR would delineate a separate storage area that would hold only gold bullion in trust for customers, such that the bullion would be segregated from the bullion held by EGR on its own account;

- c) EGR would establish a separate account with Asahi Refining or Saxo bank that would hold only funds and forward contracts in trust for customers, such that the relevant funds and forward contracts would be segregated from the funds and forward contracts held by EGR on its own account; and
- d) EGR would provide each of the customers in respect of which EGR holds Trading Customer Assets with a monthly Trust Account Statement specifying the assets held in trust by EGR as of that month, and expressly stating that “the assets set out herein are held in trust by EGR on behalf of the beneficiary listed above”.

EGR IS AT IMMEDIATE RISK

146. On Thursday morning, October 8, 2021 I received a call from a collection officer with CRA seeking to, among other things, inform me that collection proceedings would be commencing against EGR in 7 days if arrangements were not put in place to deal with the approximately \$180 million balance on account with CRA and that I was being put on warning of this eventuality. While I briefly discussed what this entailed for the business, it was made clear to me that EGR was being asked to post security in the form of tangible assets such as real property, letters of credit, cash and the like for the full balance outstanding with CRA of approximately \$180 million. As I was unsure of how to respond to this call which came to me without warning, I instructed my collection advisor Michael Collinge of Deloitte LLP to contact the officer to determine what this meant.

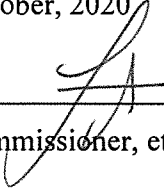
147. I understand from Michael Collinge’s discussion with the collections officer that no collection actions would be taken before the 15th. Attached is a letter as **Exhibit “JJ”** from Michael Collinge to the CRA confirming such an understanding with CRA.

148. EGR does not have the capacity to provide the requested security as demanded by CRA. If unstayed, such collection activities would immediately drive EGR out of business.

149. As such, EGR is seeking the protection of these proceedings while is pursues its appeal to the Tax Court and further seeks to normalize interactions with CRA to ensure a stable cash flow


to the business and preserve the status quo in accordance with the principles of restructuring as I understand them under the CCAA.

Sworn before me via)
videoconferencing this 14th day)
of October, 2020)



A Commissioner, etc.

JANINE ABULUYAN
LSO No. 80807R



ATEF SALAMA

SCHEDULE 1

Status of ITC Refunds – June 1, 2016 to August 31, 2020

Reporting Period	Net HST Claimed	Refunds Received by EGR	ITCs Denied By 2019 Reassessments	ITCs Denied By 2020 Reassessments	Total Denied ITCs	Total Accepted ITCs	Balance Owed to EGR/ (From EGR)
30/06/2016	2,221,450.67	36,238.54	1,990,205.67	2,026,444.21	195,006.46	2,221,450.67	
31/07/2016	2,375,524.81	-	2,067,401.02	2,067,401.02	308,123.79	2,375,524.81	
31/08/2016	2,481,091.49	25,310.87	2,065,681.17	2,090,992.04	390,099.45	2,481,091.49	
30/09/2016	2,430,081.17	97,947.85	1,659,086.46	1,757,034.31	673,046.86	2,430,081.17	
31/10/2016	2,447,802.60	120,810.69	1,655,893.10	1,776,703.79	671,098.81	2,447,802.60	
30/11/2016	2,987,176.15	27,340.93	2,321,434.45	2,348,775.38	638,400.77	2,987,176.15	
31/12/2016	2,611,730.24	112,277.23	2,136,320.52	2,248,597.75	363,132.49	2,611,730.24	
31/01/2017	4,045,539.02	278,975.49	3,196,920.97	3,475,896.46	569,642.56	4,045,539.02	
28/02/2017	3,645,321.28	75,494.25	3,038,312.96	3,113,807.21	531,514.07	3,645,321.28	
31/03/2017	4,260,129.59	100,060.76	3,507,382.12	3,607,442.88	652,686.71	4,260,129.59	
30/04/2017	4,337,545.21	27,901.25	4,025,781.37	4,053,682.62	283,862.59	4,337,545.21	
31/05/2017	5,284,415.66	62,840.18	4,915,438.41	4,978,278.59	306,137.07	5,284,415.66	
30/06/2017	4,596,200.10	45,956.43	4,307,535.06	4,353,491.49	242,708.61	4,596,200.10	
31/07/2017	3,458,823.17	97,522.62	3,065,534.04	3,163,056.66	295,766.51	3,458,823.17	
31/08/2017	5,337,096.30	185,628.47	4,948,418.34	5,134,046.81	203,049.49	5,337,096.30	
30/09/2017	5,880,429.23	323,805.46	5,307,169.71	5,630,975.17	249,454.06	5,880,429.23	
31/10/2017	6,866,554.82	318,275.34	6,255,352.47	6,573,627.81	292,927.01	6,866,554.82	
30/11/2017	6,247,416.70	610,706.80	5,399,164.62	6,009,871.42	237,545.28	6,247,416.70	
31/12/2017	3,572,947.39	423,564.15	2,981,760.44	3,405,324.59	167,622.80	3,572,947.39	
31/01/2018	6,369,341.10	893,991.12	5,185,133.32	6,079,124.44	290,216.66	6,369,341.10	
28/02/2018	7,666,962.47	1,212,799.32	6,192,957.26	7,405,756.58	261,205.89	7,666,962.47	
31/03/2018	8,631,688.25	749,170.63	7,741,165.77	8,490,336.40	141,351.85	8,631,688.25	
30/04/2018	7,019,049.53	723,280.61	5,907,256.16	6,630,536.77	388,512.76	7,019,049.53	
31/05/2018	9,034,754.80	1,267,537.44	7,506,656.43	8,774,193.87	260,560.93	9,034,754.80	
30/06/2018	8,290,188.17	1,412,816.73	6,612,145.41	8,024,962.14	265,226.03	8,290,188.17	
31/07/2018	6,923,029.15	798,076.11	5,884,757.19	6,682,833.30	240,195.85	6,923,029.15	
31/08/2018	9,128,196.67		8,782,974.59	8,782,974.59	345,222.08		9,128,196.67
30/09/2018	8,595,018.21		8,052,022.81	8,052,022.81	542,995.40		8,595,018.21
31/10/2018	7,161,366.90		6,741,288.06	6,741,288.06	420,078.84		7,161,366.90
30/11/2018	1,953,385.55						1,953,385.55
31/12/2018	3,445,018.58						3,445,018.58
31/01/2019	1,859,239.75						1,859,239.75
28/02/2019	645,063.05						645,063.05
31/03/2019	327,637.82						327,637.82

Reporting Period	Net HST Claimed	Refunds Received by EGR	ITCs Denied By 2019 Reassessments	ITCs Denied By 2020 Reassessments	Total Denied ITCs	Total Accepted ITCs	Balance Owed to EGR/ (From EGR)
30/04/2019	392,521.51						392,521.51
31/05/2019	295,519.01						295,519.01
30/06/2019	337,458.61						337,458.61
31/07/2019	285,804.61						285,804.61
31/08/2019	535,029.07						535,029.07
30/09/2019	437,535.05						437,535.05
31/10/2019	307,115.23						307,115.23
30/11/2019	307,720.98						307,720.98
31/12/2019	417,923.99						417,923.99
31/01/2020	195,155.48						195,155.48
28/02/2020	207,825.70						207,825.70
31/03/2020	136,881.51						136,881.51
30/04/2020	73,408.00						73,408.00
31/05/2020	47,418.00						47,418.00
30/06/2020	11,986.56						11,986.56
31/07/2020	34,849.77						34,849.77
31/08/2020	79,122.75						79,122.75
	166,240,491.43	10,028,329.27	133,451,149.90	143,479,479.17	10,427,391.68	129,022,289.07	37,218,202.36
		Total Denied	143,479,479.17				
	Less Balance August, Sept, Oct 2018		-24,884,581.78				
		Balance alleged owing	118,594,897.39		118,594,897.39		
	Sept 24 2020	Interest and Penalty	60,409,088.19				
		Owing on CRA website	179,003,985.58				

**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. _____

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced in TORONTO

AFFIDAVIT OF ATEF SALAMA
(Sworn October 14, 2020)

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
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Mario Forte (LSO #27293F)
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Joël Turgeon (Member of the Bar of Quebec,
Ontario Student-at-Law)

Lawyers for the Applicant

Appendix “B”

to the Fourth Report of the Monitor

From: Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>
Sent: April 5, 2021 10:47 AM
To: Kennedy, Robert <robert.kennedy@dentons.com>
Cc: Freake, Mark <mark.freake@dentons.com>; Winters, Diane <Diane.Winters@justice.gc.ca>
Subject: RE: Express Gold

[WARNING: EXTERNAL SENDER]

Good Morning Robert,

Given that you have not yet reviewed the amended draft of the undertaking, can you kindly advise what you would like to discuss?

As soon as I receive the draft back from the CRA, I will send it your way. It may be more fruitful to have a discussion after you have reviewed the draft.

Having said that, if you would like to chat before that, we can arrange for something tomorrow.

Both Diane and I are off today, but tomorrow could work. Would a call at 1 pm work for you?

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Thank you.

Merci de votre collaboration.

From: Kennedy, Robert <robert.kennedy@dentons.com>
Sent: Monday, April 5, 2021 9:06 AM
To: Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>
Cc: Freake, Mark <mark.freake@dentons.com>
Subject: RE: Express Gold

Good morning Fozia:

Do you have some time to discuss today, or tomorrow?

Regards,



Robert J. Kennedy
 Partner

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Eric Silwamba, Jalasi and Linyama > Durham Jones & Pinegar > LEAD Advogados > Rattagan Macchiavello Arocena > Jiménez de Aréchaga, Viana & Brause > Lee International > Kensington Swan > Bingham Greenebaum > Cohen & Grigsby > Sayarh & Menjra > Larrain Rencoret > For more information on the firms that have come together to form Dentons, go to [dentons.com/legacyfirms](https://www.dentons.com/legacyfirms)

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From: Kennedy, Robert
Sent: April 1, 2021 10:09 AM
To: Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>
Subject: Re: Express Gold

Fozia:

Can we chat briefly this morning?



Robert J. Kennedy

Partner

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On Apr 1, 2021, at 9:41 AM, Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca> wrote:

[WARNING: EXTERNAL SENDER]

Thank you for your message Robert.

We are in the process of having the CRA review and approve the undertaking and provide amendments, as they deem fit.

Once that process is complete, we will be happy to send you the amended draft for your review.

Have a great day!

Fozia Chaudary
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Merci de votre collaboration.

From: Kennedy, Robert <robert.kennedy@dentons.com>
Sent: Thursday, April 1, 2021 9:13 AM
To: Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>
Subject: RE: Express Gold

Fozia:

Hope you are doing well. I left you a couple of voicemails to discuss the disclosure issue.

Can you provide an update, or can we schedule a time to speak briefly?

RK



Robert J. Kennedy

Partner

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From: Kennedy, Robert

Sent: March 24, 2021 12:13 PM

To: 'Chaudary, Fozia' <Fozia.Chaudary@justice.gc.ca>

Cc: Freake, Mark <mark.freake@dentons.com>; Winters, Diane <Diane.Winters@justice.gc.ca>;

Reynolds, Phil (CA - Toronto) (philreynolds@deloitte.ca) <philreynolds@deloitte.ca>

Subject: RE: Express Gold

Fozia:

Thank you for the email below.

I look forward to hearing from you shortly.

Regards,



Robert J. Kennedy

Partner

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robert.kennedy@dentons.com
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From: Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>
Sent: March 23, 2021 1:58 PM
To: Kennedy, Robert <robert.kennedy@dentons.com>
Cc: Freake, Mark <mark.freake@dentons.com>; Winters, Diane <Diane.Winters@justice.gc.ca>
Subject: RE: Express Gold

[WARNING: EXTERNAL SENDER]

Thank you kindly Robert.

We intend to review with our clients at the CRA and get back to you.

Fozia Chaudary
Counsel
 Ontario Region
 120 Adelaide Street West
 Suite 400
 Toronto, Ontario
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 National Litigation Sector
fozia.chaudary@justice.gc.ca
 Department of Justice Canada /
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Tel: (647)256-7347
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Télé: (416) 973-0810

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Merci de votre collaboration.

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Sent: Monday, March 22, 2021 5:37 PM
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From: Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>

Sent: March 4, 2021 7:01 PM

To: Winters, Diane <Diane.Winters@justice.gc.ca>; Kennedy, Robert <robert.kennedy@dentons.com>

Cc: Reynolds, Phil (CA - Toronto) (<philreynolds@deloitte.ca> <philreynolds@deloitte.ca>); Leung, Warren <waleung@deloitte.ca>; Williams, Richard <richwilliams@deloitte.ca>; Freaque, Mark <mark.freaque@dentons.com>

Subject: RE: Express Gold

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Dear Robert,

Thank you for your email.

We have consulted with Department of Justice counsel in the EGR tax litigation matter. They have advised that they have waived the implied undertaking rule, subject to the confidentiality provisions in regard to third party information, in regard to the redacted CRA's position paper and the audit report.

In light of this, so long as the monitor can provide a written undertaking that the position paper and audit report will be kept confidential, we will authorize EGR to share the redacted CRA position paper and the audit report with the Monitor.

Thank you in advance,

Fozia Chaudary
Counsel
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Merci de votre collaboration.

From: Winters, Diane <Diane.Winters@justice.gc.ca>

Sent: Monday, March 1, 2021 9:46 AM

To: 'Kennedy, Robert' <robert.kennedy@dentons.com>; Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>

Cc: Reynolds, Phil (CA - Toronto) (philreynolds@deloitte.ca) <philreynolds@deloitte.ca>; Leung, Warren <waleung@deloitte.ca>; Williams, Richard <richwilliams@deloitte.ca>; Freaque, Mark <mark.freaque@dentons.com>

Subject: RE: Express Gold

Thank you Robert. We will get back to you. Diane

From: Kennedy, Robert <robert.kennedy@dentons.com>

Sent: March 1, 2021 9:16 AM

To: Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>; Winters, Diane <Diane.Winters@justice.gc.ca>
Cc: Reynolds, Phil (CA - Toronto) (philreynolds@deloitte.ca) <philreynolds@deloitte.ca>; Leung, Warren <waleung@deloitte.ca>; Williams, Richard <richwilliams@deloitte.ca>; Freake, Mark <mark.freake@dentons.com>
Subject: Express Gold

Thank you for the discussion today.

Following on the suggestion that the Monitor obtain a Court Order in order to impose a Court confidentiality obligation on Deloitte, in its capacity as Court appointed Monitor, in relation to its receipt of a CRA position paper and audit report (currently in the possession of EGR) (collectively, the “**Documentation**”), we request that such exercise be completed by way of a written undertaking. The reasoning is as follows: (i) the Monitor is an officer of the Court, acts independently considering the interests of all stakeholders (including the CRA), and has underlying obligation to act reasonably, fairly, and in good faith, (ii) EGR is in receipt of the Documentation which, at one point or another, will ultimately form part of a public record in any event, and (iii) the Initial Order provides the Monitor with direct access to EGR records.

As an alternative, the Monitor is prepared to seek a Court Order requiring the delivery of the Documentation from the CRA (un-redacted), on the basis that the information contained the un-redacted Documentation remain confidential with the Monitor (and its advisors), not disclosed to any party including EGR, and disclosure to only occur on mutual agreement between the CRA and the Monitor, or further Order of the Court.

We have communicated why it is important and integral for the Monitor to obtain and have access to additional information. Generally, access to this information will allow the Monitor to assess the tax litigation in its entirety, allow the Monitor to investigate the business and affairs of EGR and the cause of financial difficulties, and balance the requirement that a CCAA debtor must act and continue to act in good faith and due diligence.

We look forward to hearing from you shortly.

<image001.jpg>

Robert J. Kennedy

Partner

Visit the [New Dynamic Hub](#), available to our clients and communities as part of the commitment that Dentons, the world’s largest law firm, is making across 75+ countries, to address accelerating change resulting from the pandemic.

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From: Chaudary, Fozia <Fozia.Chaudary@justice.gc.ca>
Sent: April 14, 2021 5:18 PM
To: Kennedy, Robert <robert.kennedy@dentons.com>
Cc: Winters, Diane <Diane.Winters@justice.gc.ca>
Subject: RE: Express Gold

[WARNING: EXTERNAL SENDER]

Dear Robert,

I hope you are keeping well.

Please find the draft undertaking, attached, with changes from the CRA reflected in red.

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Sent: March 4, 2021 7:01 PM
To: Winters, Diane <Diane.Winters@justice.gc.ca>; Kennedy, Robert <robert.kennedy@dentons.com>

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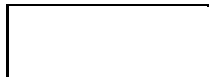
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Partner

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

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SUPERIOR COURT OF JUSTICE
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Mark Freake (LSO # 63656H)
Tel: (416) 863-4456
mark.freake@dentons.com

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