

Court File No. _____

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 OF EXPRESS GOLD REFINING LTD.**

FACTUM OF THE APPLICANT
(Initial Order Application)

October 14, 2020

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I. OVERVIEW

1. This factum supports an application for a *Companies' Creditors Arrangement Act*¹ (the "CCAA") initial order in respect of Express Gold Refining Ltd. ("EGR").
2. Resort to CCAA relief is required due to (i) the Canada Revenue Agency ("CRA")'s refusal to pay EGR's input tax credits ("ITCs"²) since August 2018, and (ii) reassessments in excess of \$189,000,000, inclusive of interest and penalties.
3. The above is being challenged in the Tax Court of Canada ("Tax Court"). However, the reassessments are enforceable notwithstanding contestation. On or around October 8, 2020, CRA told EGR's Vice-President, Mr. Atef Salama, that CRA would commence enforcement measures on October 15, 2020. Subsequent discussions among counsel and CRA representatives confirmed enforcement would not begin before the 15th.³
4. EGR primarily requires (i) a stay of the reassessments, including CRA's right, if any, to offset allowed ITCs against the reassessments, and (ii) normalization of certain tax matters, the whole so EGR may obtain, as a first milestone of this restructuring, a decision on the merits of its case in Tax Court.

II. FACTS

a. EGR

5. EGR is a family-owned corporation incorporated under the *Business Corporations Act* (Ontario). Its principal office is located at 215 Victoria Street, Toronto. EGR's core business activity is gold refining.⁴
6. EGR employs 14 people and operates a specialized facility where it carries on its refining business performing various refining functions while arranging for the final stages of refining to be conducted by world-class, third-party, refiners. Its customer base is comprised primarily

¹ [R.S.C. 1985, c. C-36](#) (the "CCAA").

² Herein, "ITC" will for simplicity broadly refer to net tax refund, i.e. the net amount CRA owes EGR in respect of GST/HST or otherwise for a GST/HST reporting period. Given the nature of EGR's business, this would be constituted almost exclusively of ITCs under the *Excise Tax Act*, [R.S.C. 1985, c. E-15](#) (the "ETA").

³ Affidavit of Atef Salama sworn October 14, 2020 filed in support of the herein application ("Salama Affidavit"), Tab 2 of EGR's application record (the "AR"), paras. 147-150.

⁴ Salama Affidavit, Tab 2 of the AR, paras. 17-22, 32. EGR also deals with silver, platinum and palladium in a negligible proportion. For simplicity, and because the 2020 Reassessments (as defined hereafter) relate only to gold transactions, this factum mostly refers to gold.

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 (a precious metal) so it can be used in industry, manufacturing, trade (mostly as currency), investment or speculation.⁵

7. Briefly, EGR's business mostly consists in refining unrefined (e.g., scrap) gold received from customers into refined gold, in exchange for 1-2% of the gold's value. Namely, EGR's business primarily involves:

- a. receiving/buying unrefined gold from customers,
- b. melting and assaying the unrefined gold to determine the gold content,
- c. consolidating various lots of unrefined gold and forwarding them to a world-class, 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.⁶

8. EGR is registered for Goods and Services Tax and Harmonized Sales Tax (collectively for simplicity, "GST/HST") and files its GST/HST returns with CRA monthly.⁷

b. The Crux of this Filing: ITC Dependency

9. EGR has historically viewed itself as a provider of a service, typically earning 1-2% of the value of the gold refined as gross revenue. Despite this historical view of its business, the ETA treats EGR's core refining business activity as a buy/sell of gold – namely, a purchase of GST/HST-taxable unrefined gold and a sale of GST/HST-zero-rated precious metal.⁸

10. As a result, EGR is generally required to pay GST/HST to its customers on its "purchase" of unrefined gold (equal to 13% of the gold value that it refines)⁹ and claim corresponding ITCs;

⁵ Salama Affidavit, Tab 2 of the AR, paras. 5, 33.

⁶ Salama Affidavit, Tab 2 of the AR, paras. 23, 25, 26.

⁷ Salama Affidavit, Tab 2 of the AR, para. 36.

⁸ Salama Affidavit, Tab 2 of the AR, paras. 6, 24.

⁹ See the [ETA](#), s. 165, 169(1)(c), and 123(1).

however, it does not collect GST/HST on its “sale” of pure gold,¹⁰ placing it in a constant large monthly GST/HST net tax refund position.¹¹

11. EGR historically advocated against this treatment for GST/HST purposes, on the basis that it would have negative cash flow implications and increase tax leakage risk. Such treatment was confirmed by CRA in a 2013 ruling (the “**2013 Ruling**”), which was the culmination of constant and extensive audit activity, as well as substantial interaction between EGR, CRA and the Department of Finance; EGR business having been conducted under the close and constant scrutiny of CRA ever since.¹²
12. This anomalous GST/HST treatment puts EGR into a position unlike a typical GST/HST-registered business, who is usually collecting GST/HST on its sales and paying GST/HST on its inputs. That typical business is generally allowed to deduct its GST/HST paid on inputs (i.e., ITCs) from its GST/HST collected/collectible in its GST/HST returns, and therefore does not rely on CRA to reimburse it for its ITCs.
13. For EGR, the ITC reimbursement must come from CRA since it is in constant net tax refund positions “as a normal part of its business operations.”¹³ EGR’s going concern capacity is dependent on CRA acting with diligence in approving and paying ITCs.¹⁴

c. GST/HST History

14. Over the years, EGR has been subject to constant CRA scrutiny. Up until September 2004, CRA periodically reviewed EGR’s monthly returns, asking for information and documentation to support EGR’s monthly ITCs which formed the basis for EGR’s net tax refund claims. EGR complied with all such requests, CRA conducted its examinations, and EGR consistently received its net tax refund payments from CRA within approximately 30-45 days of filing its monthly returns.¹⁵
15. Between 2004 and 2013, EGR was subject to constant and extensive CRA GST/HST review activity including two full scale audits, which lasted, respectively, 4.5 years and 3.5 years.

¹⁰ See the [ETA](#), s. 165(3), s. 123(1), and s. 3 of Part IX of Schedule VI.

¹¹ Salama Affidavit, Tab 2 of the AR, paras. 7, 29, 37, 38.

¹² Salama Affidavit, Tab 2 of the AR, paras. 8, 9, 60.

¹³ *Express Gold Refining Ltd. v The Minister of National Revenue*, [2020 FC 614](#), at para. 1.

¹⁴ Salama Affidavit, Tab 2 of the AR, paras. 7, 10, 14, 15, 29, 40, 108, 113, 122-130, 136-139, 147-150.

¹⁵ Salama Affidavit, Tab 2 of the AR, paras. 39.

During those years, CRA withheld EGR's net tax refunds for many months at a time without justification. Five different and sometimes conflicting audit theories were raised by almost a dozen different CRA auditors and/or audit teams; however, most of those audit theories were ultimately determined by CRA to be baseless and reassessments were not issued on the basis of such audit theories.¹⁶ The extensive audit activity largely culminated with the 2013 Ruling. EGR has also been subjected to constant information requests from CRA, with respect to EGR and its customers/suppliers. Without fail, EGR has complied with all such information requests and has always cooperated with CRA regarding these requests and CRA's extensive audit activities.¹⁷

16. In dealing with CRA, EGR has been assisted and counseled by tax lawyers (now Baker & Mackenzie LLP) ("**Tax Counsel**") and professional accountants (including Deloitte Accounting Inc.).
17. As expected, given the fact EGR is effectively required to pay GST/HST and claim ITCs equal to 13% of virtually all the gold it refines, EGR's monthly net tax refund claims were substantial over the years, including those years leading up to the audit. For example, for reporting periods spanning from January 2018 to July 2018, EGR claimed monthly net tax refunds in the range of approximately \$6.4 million to over \$9 million. CRA processed each of these returns and paid the corresponding net tax refunds to EGR within weeks.¹⁸
18. On September 6, 2018, EGR filed its August 2018 HST Return reporting \$9,128,196.67 in ITCs. On October 4, 2018, CRA advised EGR it would audit the month of August, 2018. EGR provided all the requested information and documentation.¹⁹
19. On November 6, 2018, CRA expanded the audit to cover the period from June 1, 2016 to October 31, 2018 (29 months) (the "**Audit**").²⁰
20. The next day, CRA announced it would withhold payment of any ITC due for August 2018, pending completion of the Audit. EGR, through Tax Counsel, wrote to CRA demanding payment of the ITCs in accordance with the Minister's obligation to do so "with all due

¹⁶ Salama Affidavit, Tab 2 of the AR, paras. 10, 40.

¹⁷ Salama Affidavit, Tab 2 of the AR, paras. 41-71.

¹⁸ Salama Affidavit, Tab 2 of the AR, Schedule 1.

¹⁹ Salama Affidavit, Tab 2 of the AR, paras. 11, 72, 73.

²⁰ Salama Affidavit, Tab 2 of the AR, para. 11.

dispatch” under ETA s. 229. In a letter dated November 26, 2018, CRA announced it would not only continue to withhold any August 2018 ITCs, but also any future ITCs until completion of the Audit.²¹

21. In December 2018, EGR applied to the Tax Court for a *mandamus* order to compel CRA to process all August 2018 and later ITCs with due dispatch, which was heard before Justice Pentney on July 3, 2019.²²
22. On July 9, 2019, a mere 4 days after the hearing, CRA announced that the Audit would be expanded to also cover the period from November 1, 2018 to May 31, 2019 (an additional 7 months).²³
23. On July 22, 2019, CRA issued GST/HST notices of reassessment to EGR with no warning whatsoever (the “**2019 Reassessments**”), which were effectively provisional reassessments, pending the outcome of the complete Audit. 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.²⁴
24. On August 20, 2019, EGR filed notices of objection to challenge the 2019 Reassessments. CRA raised a number of alternative inflammatory (and contradictory) allegations in raising these assessments, including that ITC claims were based on “invoices of convenience”; that unrefined gold was not in fact supplied to EGR; and that the suppliers on the invoices were not the true suppliers of the unrefined gold. On March 16, 2020, EGR filed a Notice of Appeal in Tax Court in order to dispute the 2019 Reassessments.²⁵
25. On May 12, 2020, the Honourable Justice Pentney dismissed EGR’s application for an order of *mandamus*, holding that, based on the evidence before him, the application for *mandamus* was premature. He held that CRA’s duty to pay net tax refunds with due dispatch does not

²¹ Salama Affidavit, Tab 2 of the AR, paras. 74-77.

²² Salama Affidavit, Tab 2 of the AR, paras. 78, 81.

²³ Salama Affidavit, Tab 2 of the AR, para. 82.

²⁴ Salama Affidavit, Tab 2 of the AR, paras. 83-89.

²⁵ Salama Affidavit, Tab 2 of the AR, paras. 83-89, 92.

displace the Minister's authority to verify a claim before paying a refund so long as the audit is conducted with due dispatch.²⁶

d. The May 27, 2020 Proposal and the \$190,000,000 Reassessments

26. On May 27, 2020, CRA issued a proposal²⁷ (the “**May 27, 2020 Proposal**”) stating its intention to reassess EGR for the period from June 1, 2016 to October 31, 2018 with the effect of (i) denying over \$133,000,000 in ITCs, (ii) imposing gross negligence penalties in excess of \$34,000,000, and (iii) the whole with interest, for a total of roughly \$190,000,000.²⁸
27. CRA revealed in the May 27, 2020 Proposal that it believes EGR knowingly participated in a type of tax refund fraud called a “carousel scheme”. It states that CRA had completed a survey of the unrefined gold market in the greater Toronto area that determined average volumes and purities of unrefined gold and, effectively, that EGR's transactions with customers that fell outside these average ranges must have been transactions made as part of a “part of a carousel scheme” for which EGR was “a willing participant”. CRA says such transactions were therefore not in respect of “commercial activities” and did not give rise to ITCs.²⁹
28. Unfortunately, the May 20, 2020 Proposal is grossly imprecise and unsubstantiated, factually and legally. EGR, through Tax Counsel, responded in a letter dated July 10, 2020, vigorously denying those allegations, and explaining their imprecision and lack of factual and legal support.³⁰
29. In a letter dated July 28, 2020, CRA stated that it had completed the Audit, disagreed with Tax Counsel, and confirmed it would issue the reassessments proposed. Unfortunately, this July 10, 2020 response is also grossly inadequate. For example, CRA states on numerous occasions that information is deliberately *not* provided due to alleged “confidentiality”

²⁶ See *Express Gold Refining Ltd. v The Minister of National Revenue*, [2020 FC 614](#); Salama Affidavit, Tab 2 of the AR, paras. 93, 94.

²⁷ A “proposal” is a CRA letter notifying a taxpayer of the fact and reasons for an intended reassessment, and affording the taxpayer a reasonable opportunity to respond and/or normalize the situation before the reassessment is issued and becomes enforceable notwithstanding contestation.

²⁸ Salama Affidavit, Tab 2 of the AR, paras. 95.

²⁹ Salama Affidavit, Tab 2 of the AR, paras. 12, 95-98.

³⁰ Salama Affidavit, Tab 2 of the AR, para. 100.

concerns.³¹ CRA also admitted to Tax Counsel that its assessment position had never before been tested in the courts.³²

30. In that July 28, 2020 letter, CRA weaponized EGR's previous submissions to CRA and Department of Finance that the ETA and CRA's position in the 2013 Ruling would lead to tax leakage as a basis to allege that it participated in a carousel scheme. Specifically, CRA stated that the fact that Mr. Salama "repeatedly indicated that he is aware of the weaknesses and vulnerabilities of the GST/HST legislation as it pertains to the scrap gold recycling industry was instrumental in involving EGR in the carousel scheme", and further stated that the "explicit warning by Salama to CRA and Department of Finance only solidify [CRA's] position that Salama knew the vulnerabilities of the GST/HST system, and took advantage of those vulnerabilities" (emphasis added).³³
31. There are many other issues with the July 28, 2020 letter, and justification of the reassessment generally, which together with CRA's persistent refusal to respond to Tax Counsel's reasonable requests for information,³⁴ suggest that CRA are not treating the issue with the good faith expected in CCAA proceedings.³⁵
32. The reassessments contemplated in the May 27, 2020 Proposal were issued on or about July 28, 2020 (the "**2020 Reassessments**"). The 2020 Reassessments are in respect of the reporting periods from June 1, 2016 to October 31, 2018.³⁶ The 2020 Reassessments are enforceable notwithstanding contestation.³⁷ EGR's revenues and assets are insufficient to pay them.³⁸ The 2020 Reassessments are being contested by Tax Counsel in Tax Court File No. 2020-1214(GST)G.³⁹

³¹ Salama Affidavit, Tab 2 of the AR, para. 101.

³² Salama Affidavit, Tab 2 of the AR, paras. 80, 81, 111.

³³ Salama Affidavit, Tab 2 of the AR, para. 101.

³⁴ Salama Affidavit, Tab 2 of the AR, paras. 11, 12, 99-101, 106.

³⁵ See the [CCAA](#), s. 18.6.

³⁶ Salama Affidavit, Tab 2 of the AR, para. 102.

³⁷ See the [ETA](#), s. 315.

³⁸ Salama Affidavit, Tab 2 of the AR, paras. 122-130, 149.

³⁹ Salama Affidavit, Tab 2 of the AR, paras. 105, 107-112.

33. In a letter dated August 12, 2020, CRA advised EGR that it was commencing a new audit for EGR's reporting periods from November 1, 2018 to June 30, 2020 (19 months) (i.e., virtually all reporting periods directly following those targeted by the 2020 Reassessments).⁴⁰

e. CRA continues to withhold August 2018 and later ITCs

34. The amounts assessed in the 2020 Reassessments are enforceable notwithstanding contestation.⁴¹ CRA continues to withhold payment of any ITCs due to EGR in respect of August 2018 and later periods, even to the extent that the 2020 Reassessments have allowed certain ITCs, by setting off those allowed ITCs against the debt raised in the 2020 Reassessments, whether pursuant to section 318 of the ETA or otherwise.⁴²

35. In light of this set-off, it appears that CRA will not pay any of EGR's ITCs (even those that it has or will allow subsequent to an audit) and will continue to set them off against the astronomical debt it has raised through the 2020 Reassessments. If this is not normalized, as sought in the initial order, it is likely to prevent, in itself, the continuation of EGR's business and EGR obtaining determination on its case in Tax Court.⁴³

36. As an early example of the effect of ITCs not being paid, EGR was forced to advise its customers that it presently cannot pay GST/HST on unrefined gold purchases until the situation with CRA is normalized. This presumably places a large cash-flow burden on those customers (since they are required to remit GST/HST collectible with their GST/HST returns, but would not actually be paid the GST/HST by EGR) and thus caused a number of those customers to stop doing business with EGR.⁴⁴

37. Another example of the negative effect of CRA's position is that EGR is incurring GST/HST expenses on its other commercial inputs (e.g., professional services, commercial, standard business supplies, etc.) and claims ITCs for same, for which CRA has (and presumably will continue to) offset (without intervention through these proceedings).⁴⁵

⁴⁰ Salama Affidavit, Tab 2 of the AR, para. 104.

⁴¹ See the [ETA](#), s. 315.

⁴² Salama Affidavit, Tab 2 of the AR, para. 138 and Schedule 1.

⁴³ Salama Affidavit, Tab 2 of the AR, paras. 7, 10, 14, 15, 29, 40, 108, 113, 122-130, 136-139, 147-150.

⁴⁴ Salama Affidavit, Tab 2 of the AR, para. 119.

⁴⁵ Salama Affidavit, Tab 2 of the AR, paras. 15, 138, and Schedule 1.

f. Reasons for Insolvency

38. But for the 2020 Reassessments and CRA’s non-payment of ITCs, EGR would not be insolvent. Due solely to the 2020 Reassessments and CRA’s non-payment of ITCs, EGR is insolvent.⁴⁶

g. Need for CCAA Relief

39. EGR is seeking CCAA protection in order to effect the following principal relief:⁴⁷
- a. a stay of the 2020 Reassessments, including a stay of any CRA right of set-off between the amounts allegedly due under the 2020 Reassessments and any ITCs in respect of post-filing reporting periods, and
 - b. orders allowing the normalization of certain tax matters, including (i) orders that EGR, the Monitor and CRA make all reasonable efforts to agree on a protocol for the vetting and payment of post-filing ITCs (the “**Protocol Orders**”), (ii) orders that ITCs allowed in connection with the 2019 Reassessments, the 2020 Reassessments, or otherwise (“**Allowed ITCs**”) be paid to EGR, and (iii) orders that ITCs claimed in respect of pre-filing reporting periods and that are assessed as Allowed ITCs after the initial order is made be paid without any set-off,

along with other relief which will be further discussed below.

h. Creditors and 13-week Cashflow Forecast

40. EGR is current in its ordinary course obligations except in respect of the 2019 and 2020 Reassessments. This is despite an approximately 95% decline in its refining business due to the COVID-19 pandemic.⁴⁸
41. EGR has only one secured creditor in respect of a car lease. It does, however, hold deposits, gold bullion and forward contracts on behalf of some of its customers as part of its normal business operations. This, without admission, could be seen as some form of trust.⁴⁹

⁴⁶ Salama Affidavit, Tab 2 of the AR, paras. 14, 130, and pages 24-25 (table).

⁴⁷ Salama Affidavit, Tab 2 of the AR, paras. 14-16, 113, 114, 136-139, 149, 150.

⁴⁸ Salama Affidavit, Tab 2 of the AR, paras. 14-124, pages 24-25 (table).

⁴⁹ Salama Affidavit, Tab 2 of the AR, paras. 27, 28, 30, 115, 125, 141-146.

42. Provided the tax situation can be normalized as sought in the draft initial order, EGR intends to operate normally and pay its pre- and post-filing creditors (excluding CRA as to the 2020 Reassessments) in the normal course during the CCAA proceeding. Based on its 13-week cash flow, it may require some cash infusions to do so, which will be addressed if and when necessary.⁵⁰

III. ISSUES AND THE LAW

a. Whether EGR Is an Eligible Debtor Company under the CCAA and Appointment of Deloitte as Monitor

43. EGR is an Ontario corporation with total claims against worth more than \$5,000,000. It is insolvent as set out above. Therefore, this court has jurisdiction to make orders under the CCAA in respect of EGR.⁵¹ Deloitte is established and qualified, and has consented to act as monitor.⁵²

b. Stay of Proceedings Generally and Stay of D&O Claims

44. Without a stay of proceeding, the enforcement of the 2020 Reassessments may make EGR unable to exercise its right to contest them.⁵³ The stay sought⁵⁴ is intended to maintain the *statu quo* so that EGR may obtain, as a first milestone of its restructuring, a decision on the merits of its case in Tax Court. This poses no prejudice to EGR's trade creditors, as the order sought also provides for EGR's ability to pay the pre- and post-initial order expenses it deems appropriate for its normal business operations.⁵⁵ Further, a stay of claims against directors and officers is relief typically granted in CCAA filings involving potential HST/GST claims in order for existing directors and officers to remain involved with the company during the attempted restructuring.⁵⁶ As this is the initial application, the above stays are presently sought for 10 days.⁵⁷

⁵⁰ Salama Affidavit, Tab 2 of the AR, paras. 126-130.

⁵¹ [CCAA](#), s. 3, and relevant definitions in s. 2.

⁵² Consent of Deloitte Restructuring Inc. to act as monitor, Tab 3 of the AR.

⁵³ Salama Affidavit, Tab 2 of the AR, paras. 7, 10, 14, 15, 29, 40, 108, 113, 122-130, 136-139, 147-150.

⁵⁴ Draft initial order, Tab 4 of the AR, paras. 13-15.

⁵⁵ Draft initial order, Tab 4 of the AR, paras. 5, 7, 8, 11.

⁵⁶ *Canwest Publishing Inc.*, [2010 ONSC 222](#) ("*Canwest*"), Tab 1 of the Applicant's Book of Authorities ("**ABOA**"), paras. 56-57, and *Target Canada Co. (Re)*, [2015 ONSC 303](#) ("*Target*"), Tab 2 of the ABOA, paras. 73-79.

⁵⁷ CCAA, s. 11.02, 11.03 and 11.001; Draft initial order, Tab 4 of the AR, para. 2.

c. Stay of CRA Set-off Rights between the Reassessments and Post-Filing ITCs

45. The 2020 Reassessments are enforceable notwithstanding contestation⁵⁸ and CRA is offsetting August 2018 and later ITCs as a form of enforcement.⁵⁹ This creates critical cashflow issues for EGR, as explained above.
46. The initial order sought therefore includes a temporary stay of any CRA right of set-off between any CRA claims provable (or “pre-filing claims”), including any claim based on the 2020 Reassessments, and any post-filing debt of CRA toward EGR, including ITCs.⁶⁰ For clarity, this does not in itself cancel debts or prevent any right of set-off that may exist should the court later lift the stay or should the *Bankruptcy and Insolvency Act* become applicable, for example.
47. The CCAA court has ordered the stay of “pre- & post-” set-off rights in appropriate cases.⁶¹
48. In the “attempted restructuring” phase of a CCAA proceeding,⁶² the court “must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [...] preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it”.⁶³ CCAA jurisdiction may be used to “discourage parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage.”⁶⁴
49. In *North American Tungsten Corporation Ltd.*,⁶⁵ Butler J. for the British Columbia Supreme Court relied on the Ontario Superior Court cases of *Air Canada*⁶⁶ and *Tucker*⁶⁷ in ruling that “a temporal stay of rights can be granted to further the purpose of the initial order and the

⁵⁸ See the [ETA](#), s. 315.

⁵⁹ Salama Affidavit, Tab 2 of the AR, paras. 15, 138, and Schedule 1.

⁶⁰ Draft initial order, Tab 4 of the AR, para. 15.

⁶¹ See *Air Canada (Re)*, [2003 CanLII 64234 \(ON SC\)](#) (“*Air Canada*”), Tab 3 of the ABOA, paras. 7, 25; *Tucker v Aero Inventory (Uk) Limited*, [2009 CanLII 63138 \(ON SC\)](#) (“*Tucker*”), Tab 4 of the ABOA, paras. 26, 27, 31; *North American Tungsten Corporation Ltd. (Re)*, [2015 BCSC 1382](#) (“*Tungsten*”), Tab 5 of the ABOA, paras. 22, 23, 25, 28, 32; *Arrangement relatif à Métaux Kitco inc.*, [2017 QCCA 268](#) (Quebec Court of Appeal’s unofficial translation) (“*Kitco*”), Tab 6 of the ABOA, paras. 20, 43, 47-50, 62, 71, 92, 97.

⁶² *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#) (“*Callidus*”), Tab 7 of the ABOA, para. 41.

⁶³ *Century Services Inc. v Canada (A.G.)*, [2010 SCC 60](#) (“*Century Services*”), Tab 8 of the ABOA, para. 60 (emphasis added).

⁶⁴ *Callidus*, Tab 7 of the ABOA, para. 51 (emphasis added).

⁶⁵ *Tungsten*, Tab 5 of the ABOA.

⁶⁶ *Air Canada*, Tab 3 of the ABOA.

⁶⁷ *Tucker*, Tab 4 of the ABOA.

purposes of the *Act*. Such a stay can apply to enforcement of set-off rights even where it is acknowledged those rights exist.”⁶⁸

50. In *Tungsten*, the Court found it appropriate to effect such a stay so as to “preserve the *status quo* to effect a restructuring”. Otherwise, cashflow would be severely hampered, and “great prejudice to other stakeholders would flow” as the restructuring would “effectively be at an end”.⁶⁹
51. *Arrangement relatif à Métaux Kitco inc.*⁷⁰ is a remarkably similar case to EGR’s. Kitco Metals Inc. (“**Kitco**”) was also in the gold refining business, was also in a constant GST/QST reimbursement position, and was also made insolvent by substantial tax reassessments, enforceable notwithstanding Kitco’s contestation, based on allegations of tax fraud. Kitco obtained a stay of proceedings under the CCAA, but the Quebec Revenue Agency (“**QRA**”) continued to apply all post-filing tax reimbursements it owed to Kitco on account of the reassessments. Kitco challenged such set-off and requested an order that QRA pay all post-filing tax refunds in the normal course. QRA argued, like it had been argued in every other case highlighted above, that CCAA s. 21 (previously s. 18.1) prevented the court from staying the impugned set-off. The Quebec Court of Appeal upheld the Superior Court’s granting the orders sought and rejecting QRA’s position.
52. The Court of Appeal wrote that QRA’s interpretation of s. 21 would create “an obstacle to the restructuring of large companies in difficulty, which is the primary objective of the CCAA”⁷¹ because it “undermines the *status quo* period intended by the statute during which the company can develop a plan of arrangement to be presented to creditors”.⁷² The Court of Appeal rhetorically queried, “How can Kitco keep its business going if, like its competitors, it pays 15% in taxes on its inputs, but, unlike them, it does not receive a refund? This is an untenable situation.”⁷³ Further, the Court found irrelevant the QRA’s allegation that the CCAA proceedings were instituted for “the only purpose of [preventing] the remedies of the

⁶⁸ *Tungsten*, Tab 5 of the ABOA, para. 25; see also para. 28.

⁶⁹ *Tungsten*, Tab 5 of the ABOA, para. 32.

⁷⁰ *Kitco*, Tab 6 of the ABOA. While this case involved in part the settling of matters of civil law with respect to “compensation” (the Quebec law parallel to set-off), this factum only discusses the *ratio* of the case as to whether the court may order a stay of set-off (or compensation) rights.

⁷¹ *Kitco*, Tab 6 of the ABOA, para. 20.

⁷² *Kitco*, Tab 6 of the ABOA, para. 43.

⁷³ *Kitco*, Tab 6 of the ABOA, para. 48.

tax authorities”, holding that this would not change the Court’s view as to “the rules of [set-off] that are applicable now, during the status quo”.⁷⁴

53. Allowing CRA to offset post-filing ITCs during the restructuring period would hamper EGR’s ability to fund its operations, let alone an arrangement, and prevent EGR from exercising its rights against the 2020 Reassessments.⁷⁵ As *Kitco* suggests, CRA, like any other stakeholder, should not be allowed to single-handedly supersede the interests of all the other stakeholders.
54. Therefore, it is appropriate for this court to order, as part of a stay of proceedings, a stay of any CRA right of set-off between the amounts allegedly due under the 2020 Reassessments and any amount becoming payable by CRA to EGR in respect of post-filing reporting periods. The wording in the suggested draft order is broader, referring to Tax Enforcement Entities, Pre-Filing Tax Liabilities and Post-Filing Tax Assets (as those terms are defined in the draft order), but only to prevent any technical arguments to circumvent the stay.
55. Because of the immediate materiality of this set-off issue, this relief is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial 10-day stay period.⁷⁶

d. Normalization of Certain Tax Matters

(i) *Protocol Orders*⁷⁷

56. The initial order sought includes orders that EGR, the Monitor and CRA make all reasonable efforts to agree on a protocol for the vetting and payment of ITCs claimed in respect of post-filing transactions.⁷⁸
57. CRA’s allegations in denying ITCs in the Reassessments are effectively that transactions with certain customers fall outside some standard market range of purities and volumes; however, CRA, to date, has not indicated what particular protocols or parameters it ought to have invoked in order to determine whether a particular transaction will give rise to a *bona fide* ITC allowed by CRA.⁷⁹ As far as EGR is concerned, it fulfilled its statutory obligations with

⁷⁴ *Kitco*, Tab 6 of the ABOA, paras. 93, 97.

⁷⁵ Salama Affidavit, Tab 2 of the AR, paras. 7, 10, 14, 15, 29, 40, 108, 113, 122-130, 136-139, 147-150.

⁷⁶ [CCAA](#), s. 11.001.

⁷⁷ Draft initial order, Tab 4 of the AR, para. 16.

⁷⁸ Draft initial order, Tab 4 of the AR, para. 16.

⁷⁹ See the Salama Affidavit, Tab 2 of the AR, para. 98.

respect to the ITCs denied by CRA by following strict customer identification protocols and GST/HST-registration number confirmation.⁸⁰ In light of the allegations raised in the Reassessments, EGR understands that CRA may require that some additional steps (unknown to EGR) be taken by EGR to confirm that transactions are *bona fide*. Such steps would be extra-statutory and are not otherwise published in any administrative policy of CRA (nor the 2013 Ruling). Yet, as seen above, as a precious metal refiner, EGR is particularly dependent on CRA approving and paying ITCs with diligence and good faith.

58. The orders sought seek to remedy the impasse and direct all of EGR, the monitor and CRA to cooperate, in good faith, in setting out an acceptable process through which CRA can reasonably satisfy itself that EGR's post-filing ITC claims are *bona fide*, including with the assistance of the monitor, so as to ensure their efficient processing and payment and allow EGR to remain a going concern pending determination of its case in Tax Court as a first milestone of the restructuring.⁸¹
59. The orders sought provide that unless and until the parties come to such an agreement, the otherwise applicable law and statutes, save to the extent incompatible with the initial order, will govern, including the stay (and that of CRA set-off rights).⁸² As unsatisfactory as this would be, it is the necessary default in the circumstances.

(ii) *Orders that any Allowed ITCs Be Paid to EGR forthwith*⁸³ (the "**Allowed ITCs Orders**")

60. As described above, the 2020 Reassessments involve allegations of some "carousel" scheme among colluding persons in the precious metal refining industry, including EGR. On the basis of those allegations, the 2020 Reassessments deny over \$133,000,000 in ITCs⁸⁴ that EGR claimed in the period targeted by the Reassessments, i.e. from June 1, 2016 to October 31, 2018. Those ITCs were denied because CRA says they were in respect of transactions which CRA alleges were part of the carousel scheme.⁸⁵

⁸⁰ Salama Affidavit, Tab 2 of the AR, paras. 34, 35, 88, 89.

⁸¹ Draft initial order, Tab 4 of the AR, para. 16.

⁸² Draft initial order, Tab 4 of the AR, para. 16 *in fine*.

⁸³ Draft initial order, Tab 4 of the AR, paras. 17, 18.

⁸⁴ The balance of the Reassessments are gross negligence penalties and interest.

⁸⁵ Salama Affidavit, Tab 2 of the AR, paras. 95, 103, and Schedule 1.

61. All this, among other things, is being challenged in Tax Court. Suffice it to say that the “evidence” used by CRA to attach certain transactions to a fraudulent scheme remains both largely undisclosed (to the extent any evidence exists at all) and, indeed, untested.
62. Although the 2020 Reassessments retroactively deny the majority of ITCs claimed by EGR for the reporting periods, the 2020 Reassessments provides for Allowed ITCs. For the August to October 2018 periods, Allowed ITCs total \$345,222.08, \$542,995.40, and \$420,078.84, respectively. Yet those Allowed ITCs were not paid because CRA offset them from the amount of the Reassessments, as though it was a secured creditor, and the Allowed ITCs were its “collateral”.⁸⁶
63. Allowing CRA to not disgorge such Allowed ITCs would hamper EGR’s ability to fund its operations, let alone an arrangement, and could prevent EGR from exercising its rights against the 2020 Reassessments.⁸⁷
64. Furthermore, EGR has claimed ITCs in respect of transactions during later reporting periods, i.e. from November 2018 to August 2020, and continues to claim ITCs as part of its normal business operations. CRA has yet to assess those periods, although it is currently auditing the reporting periods from November 1, 2018 to June 30, 2020 (19 months).⁸⁸ Once this audit is concluded, which will be after the initial order assuming one is granted, it is reasonable to expect that CRA will seek to offset any further Allowed ITCs against the Reassessments. This would also cripple EGR over time and prevent it from restructuring and obtaining, as a first milestone, a determination of its case in Tax Court.

(iii) *The Protocol Orders and the Allowed ITCs Orders are within this Court’s Jurisdiction and Appropriate in the Circumstances*

65. No direct precedent of those two remedies could be located. However, CCAA courts are often “called upon to innovate accordingly in exercising their jurisdiction”.⁸⁹ The primary purposes of the CCAA is “to permit the debtor to carry on business, and, where possible, avoid the social and economic costs of liquidating its assets.”⁹⁰ The CCAA’s “distinguishing feature”

⁸⁶ Salama Affidavit, Tab 2 of the AR, paras. 15, 138 and Schedule 1.

⁸⁷ Salama Affidavit, Tab 2 of the AR, paras. 7, 10, 14, 15, 29, 40, 108, 113, 122-130, 136-139, 147-150.

⁸⁸ Salama Affidavit, Tab 2 of the AR, para. 104 and Schedule 1.

⁸⁹ *Century Services*, Tab 8 of the ABOA, para. 61; *Callidus*, Tab 7 of the ABOA, para. 49.

⁹⁰ *Century Services*, Tab 8 of the ABOA, para. 15 (emphasis added); see also *Callidus*, Tab 7 of the ABOA, para. 41.

is its s. 11, “a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA’s objectives.”⁹¹ The CCAA courts are called upon to be “supervising the process and advancing it”.⁹²

66. The “baseline considerations” in exercising CCAA jurisdiction are “appropriateness, good faith and due diligence”.⁹³ As to the requirement of appropriateness, the assessment is “whether the order sought advances the policy objectives underlying the CCAA” and “whether the order will usefully further efforts to achieve the remedial purpose of the CCAA”.⁹⁴ “When an order is sought that does realistically advance the CCAA’s purpose, the ability to make it is within the discretion of a CCAA court.”⁹⁵
67. The requirement of due diligence is intended to “discourage parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. [...] This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing”.⁹⁶ Where a creditor is seeking to exercise its rights “in a manner that frustrates, undermines or runs counter to those objectives – that is, acting for an improper purpose”, the CCAA court has jurisdiction to make appropriate orders so as to steer the CCAA proceeding back towards its remedial, restructuring objective.⁹⁷ “Fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute... All involved parties face real economic risks. Unfairness resides where only some face these risks.”⁹⁸ As *Kitco* suggests, CRA, like any other stakeholder, should not be allowed to single-handedly supersede the interests of all the other stakeholders.

⁹¹ *Century Services*, Tab 8 of the ABOA, para. 19 (emphasis added); see also *Callidus*, Tab 7 of the ABOA, para. 48.

⁹² *Century Services*, Tab 8 of the ABOA, para. 60 (emphasis added).

⁹³ *Century Services*, Tab 8 of the ABOA, para. 70; *Callidus*, Tab 7 of the ABOA, para. 70.

⁹⁴ *Century Services*, Tab 8 of the ABOA, para. 70.

⁹⁵ *Century Services*, Tab 8 of the ABOA, para. 71, see also para. 75; *Callidus*, Tab 7 of the ABOA, para. 50.

⁹⁶ *Callidus*, Tab 7 of the ABOA, para. 51 (emphasis added).

⁹⁷ *Callidus*, Tab 7 of the ABOA, para. 70.

⁹⁸ *Callidus*, Tab 7 of the ABOA, para. 75 (emphasis added).

68. For those reasons, the Protocol Orders⁹⁹ and the Allowed ITCs Orders¹⁰⁰ are within this court's jurisdiction to make in appropriate cases, and as seen above, those remedies are necessary and appropriate in the present circumstances.
69. The wording in the suggested draft order is broad, referring again to Tax Enforcement Entities and Pre-Filing Tax Liabilities, but avoids overbreadth through limitations of time ("on or after the day of the Reassessments") and scope (referring only to Allowed ITCs, i.e. those allowed by CRA as properly payable under applicable tax law).
70. Because of the immediate materiality of those issues, and the time possibly required to come to an agreement, there should be no reason not to effect such orders at the earliest opportunity. It is therefore appropriate to make the orders sought during the initial 10-day stay period.¹⁰¹

e. Possession of Property and Operations, and Restructuring

71. EGR seeks to remain in possession and continue its business as a going concern during its attempted restructuring.¹⁰² That it be allowed to pay the pre- and post-initial order expenses it deems appropriate is a necessary condition to its normal business operations as well as its retaining of, among others, suppliers, assistants, counsel and employees.¹⁰³
72. Further, EGR seeks orders allowing it to formalize and perform trust agreements on terms existing but unwritten as of the date of the initial order, or agreed to thereafter.¹⁰⁴ Holding deposits and forward contracts on its customers' behalf is part of EGR's normal business operations. EGR's formalizing those agreements and being expressly allowed to perform them with the oversight of the monitor is intended to instil confidence in customers while providing transparency to creditors.¹⁰⁵

⁹⁹ Draft initial order, Tab 4 of the AR, para. 16.

¹⁰⁰ Draft initial order, Tab 4 of the AR, paras. 17, 18.

¹⁰¹ [CCAA](#), s. 11.001.

¹⁰² Draft initial order, Tab 4 of the AR, paras. 5, 7, 8, 11.

¹⁰³ Salama Affidavit, Tab 2 of the AR, para. 140; see *JTI-Macdonald Corp., Re*, [2019 ONSC 1625](#), Tab 9 of the ABOA, paras. 24, 25.

¹⁰⁴ Draft initial order, Tab 4 of the AR, para. 6.

¹⁰⁵ Salama Affidavit, Tab 2 of the AR, paras. 27, 28, 30, 115, 125, 141-146.

f. Administration and D&O Charges

73. EGR seeks a directors' and officers' indemnification and charge.¹⁰⁶ A D&O charge is an appropriate and typical CCAA relief in cases involving potential GST/HST claims. It is key for Mr. Salama, EGR's Vice President and the person most knowledgeable of EGR's affairs, to remain involved with EGR during the restructuring. The \$100,000 amount is based on one pay period exposure and income tax monthly installments and is reasonable in the circumstances,¹⁰⁷ including as part of the initial 10-day initial order.¹⁰⁸
74. EGR seeks an administration charge to secure payment of the standard professional fees and disbursements of the monitor, its counsel, and all of EGR's counsel, including for example its restructuring and tax counsel, incurred both before and after the initial order and in respect of these proceedings and proceedings in respect of the 2020 Reassessments or similar proceedings.¹⁰⁹ EGR's restructuring and tax cases are complex and eminently dependent on professional assistance. The CCAA proceeding and the tax proceedings are closely intertwined and both integral to EGR's continuation. Counsel in both domains interact and work in furtherance of the same global case. Their roles are not duplicative. The suggested quantum of the administration charge, \$300,000, is *prima facie* fair and reasonable. The only secured creditor is in respect of a car lease. The monitor supports the administration charge. For those reasons the administration charge sought is appropriate in the circumstances,¹¹⁰ including as part of the initial 10-day initial order.¹¹¹

IV. NATURE OF THE ORDER SOUGHT

75. For the reasons above, EGR respectfully requests an order substantially in the form of the draft included in the application record.

¹⁰⁶ Draft initial order, Tab 4 of the AR, paras. 23-25, 34-39.

¹⁰⁷ [CCAA](#), s. 11.51; see *Canwest*, Tab 1 of the ABOA, paras. 56-57, and *Target*, Tab 2 of the ABOA, paras. 73-79.

¹⁰⁸ [CCAA](#), s. 11.001.

¹⁰⁹ Draft initial order, Tab 4 of the AR, paras. 33-39.

¹¹⁰ [CCAA](#), s. 11.52; See *Canwest*, Tab 1 of the ABOA, paras. 52-55, and *Target*, Tab 2 of the ABOA, paras. 73-79.

¹¹¹ [CCAA](#), s. 11.001.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of October, 2020.

Goldman Sloane Nash & Haber LLP

SCHEDULE A – LIST OF AUTHORITIES

**B.o.A.
Tab No.** **Reference**

1. *Canwest Publishing Inc.*, [2010 ONSC 222](#)
2. *Target Canada Co. (Re)*, [2015 ONSC 303](#)
3. *Air Canada (Re)*, [2003 CanLII 64234 \(ON SC\)](#)
4. *Tucker v Aero Inventory (Uk) Limited*, [2009 CanLII 63138 \(ON SC\)](#)
5. *North American Tungsten Corporation Ltd. (Re)*, [2015 BCSC 1382](#)
6. *Arrangement relatif à Métaux Kitco inc.*, [2017 QCCA 268](#) (Quebec Court of Appeal's unofficial translation)
7. *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#)
8. *Century Services Inc. v Canada (A.G.)*, [2010 SCC 60](#)
9. *JTI-Macdonald Corp., Re*, [2019 ONSC 1625](#)

SCHEDULE B – RELEVANT STATUTES

➤ *Companies Creditors' Arrangement Act*, [R.S.C. 1985, c. C-36](#)

Definitions

2 (1) In this Act,

[...]

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

[...]

debtor company means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
- (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

[...]

initial application means the first application made under this Act in respect of a company; (*demande initiale*)

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the

application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Stays, etc. – initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Security or charge relating to director’s indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of

the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

➤ *Excise Tax Act*, [R.S.C. 1985, c. E-15](#)

Definitions

123(1) In section 121, this Part and Schedules V to X,

[...]

business includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

commercial activity of a person means

- (a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,
- (b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
- (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply; (*activité commerciale*)

[...]

exempt supply means a supply included in Schedule V; (*fourniture exonérée*)

[...]

financial instrument means

[...]

- (e) a precious metal,

[...]

financial service means

[...]

- (d) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,

[...]

precious metal means a bar, ingot, coin or wafer that is composed of gold, silver or platinum and that is refined to a purity level of at least

- (a) 99.5% in the case of gold and platinum, and
 (b) 99.9% in the case of silver; (*métal précieux*)

[...]

taxable supply means a supply that is made in the course of a commercial activity;
 (*fourniture taxable*)

[...]

zero-rated supply means a supply included in Schedule VI. (*fourniture détaxée*)

Schedule VI, Part IX, section 3

A supply of a financial service that is the supply of precious metals where the supply is made by the refiner thereof or by the person on whose behalf the precious metals were refined.

Imposition of goods and services tax

165 (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

(2) Subject to this Part, every recipient of a taxable supply made in a participating province shall pay to Her Majesty in right of Canada, in addition to the tax imposed by subsection (1), tax in respect of the supply calculated at the tax rate for that province on the value of the consideration for the supply.

(3) The tax rate in respect of a taxable supply that is a zero-rated supply is 0%.

General rule for credits

169 (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the

following formula is an input tax credit of the person in respect of the property or service for the period:

$$A \times B$$

where

A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is [...]

- (c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

Payment of net tax refund

229 (1) Where a net tax refund payable to a person is claimed in a return filed under this Division by the person, the Minister shall pay the refund to the person with all due dispatch after the return is filed.

Assessment before collection

315 (1) The Minister may not take any collection action under sections 316 to 321 in respect of any amount payable or remittable by a person that may be assessed under this Part, other than interest, unless the amount has been assessed.

(2) If the Minister sends a notice of assessment to a person, any amount assessed then remaining unpaid is payable forthwith by the person to the Receiver General.

(3) The Minister may, subject to such terms and conditions as the Minister may stipulate, postpone collection action against a person in respect of all or any part of any amount assessed that is the subject of a dispute between the Minister and the person.

Recovery by deduction or set-off

318 Where a person is indebted to Her Majesty in right of Canada under this Part, the Minister may require the retention by way of deduction or set-off of such amount as the Minister may specify out of any amount that may be or become payable to that person by Her Majesty in right of Canada.

➤ *Rules of Civil Procedure, [R.R.O. 1990, Reg. 194](#)*

Order on terms

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

Court may dispense with compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

Extension or abridgment, general powers of court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

Notice of Application

14.05(1) The originating process for the commencement of an application is a notice of application (Form 14E, 14E.1, 68A or 73A) or an application for a certificate of appointment of an estate trustee (Form 74.4, 74.5, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30).

(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes.

Court File No.

**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.**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced in TORONTO

FACTUM OF THE APPLICANT
(CCAA Initial Order)

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