SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-20-00649558-00CL **DATE:** **22 December 2023 (Heard)**

NO. ON LIST: **4**

TITLE OF PROCEEDING: EXPRESS GOLD REFINING LTD. v. THE ATTORNEY GENERAL OF CANADA on behalf of Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue

BEFORE JUSTICE: MR JUSTICE CAVANAGH

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE CAVANAGH:

Introduction

[1] Deloitte Restructuring Inc. ("Deloitte") in its capacity as the court-appointed monitor ("Monitor") of Express Gold Refining Ltd. ("EGR") brings this motion for an order appointing a mediator as an officer of the Court to act as a neutral third party to assist in the mandatory mediation of certain tax disputes and litigation pending in the Tax Court of Canada ("TCC") between EGR and the Canada Revenue Agency ("CRA").

[2] For the following reasons, the Monitor's motion is dismissed.

Background Facts

[3] EGR's business relates to gold refining, which consists of EGR purchasing unrefined bars and scrap gold for refining at a specialized facility Toronto and arranging for the final stages of refining to be conducted by third-party refiners offsite. EGR also engages in the trading of gold bullion (and other precious metals) and forward contracts, and takes trading positions on its own behalf and for its clients based on short and long-term fluctuations in the price of gold and other precious metals, either for hedging purposes or for investment purposes.

[4] As a GST/HST registrant under Part IX of the *Excise Tax Act*, EGR pays GST/HST on unrefined gold purchased from its suppliers, but does not collect GST/HST on the refined gold sold to its customers. GST/HST paid to suppliers in a business transaction gives rise to input tax credits that EGR may claim. When a registrant's input tax credits exceed the GST/HST collected, it is entitled to a net tax refund from the CRA.

[5] On July 29, 2020, CRA issued Notices of Reassessment related to EGR's June 1, 2016 to October 31, 2018 reporting periods, imposing tax, penalties and interest in excess of $189.5 million. CRA further advised EGR that it intended to take enforcement actions notwithstanding EGR's contestation.

[6] On October 15, 2020, EGR sought and obtained creditor protection under the *CCAA* to provide for the continued operation of the business, stay the enforcement actions commenced by CRA, and to create breathing room while EGR pursued its appeal from the reassessments in the TCC. Deloitte was appointed as Monitor in the proceedings.

[7] The litigation in the TCC has proceeded. The parties have completed examinations for discoveries. The trial has been scheduled to commence in February 2025.

[8] On March 31, 2023, CRA and EGR jointly wrote to the TCC requesting that a settlement conference be scheduled. In the joint letter, the parties wrote that they believe that a settlement conference would be beneficial. A further letter dated April 17, 2023 was sent requesting a settlement conference.

[9] By letter dated May 29, 2023, the Hearings Coordinator for the TCC advised the parties that the request for a settlement conference is denied. In this letter, the Hearings Coordinator wrote that "[p]arties must have exchanged written offers of settlement before the Court will consider scheduling a Settlement Conference."

[10] CRA's position is that it is no longer willing to discuss settlement of the tax litigation with EGR. It opposes the requested order for mandatory mediation.

[11] At the hearing of this motion, I was advised that a case management conference was scheduled to be held in the TCC on December 18, 2023. I asked counsel for the Monitor to report on that conference to the extent that it may affect the issues on the motion before me. By email dated December 19, 2023, counsel for the Monitor reported that although EGR raised the prospect of a settlement conference in correspondence to the TCC before the case management conference, the topic was not pursued further at the case management conference.

Analysis

[12] Section 11 of the CCAA provides:

> 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.

[13] I am satisfied that this Court has the jurisdiction to grant the requested order under its broad statutory jurisdiction under the *CCAA*.

[14] The TCC is a superior court of record and has exclusive original jurisdiction to hear and determine tax appeals arising from the *Excise Tax Act*.

[15] The Monitor submits that this Court should impose a procedure in the *CCAA* proceedings requiring EGR and CRA to engage in settlement negotiations with the assistance of a neutral mediator. The Monitor submits that the imposition of mandatory mediation would further the remedial purpose of the *CCAA*, as described by the Court of Appeal for Ontario in *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662, at para. 47:

> There is no dispute about the purpose of the *CCAA*. It describes itself as "an Act to facilitate compromises and arrangements between companies and their creditors". Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies.

[16] The Monitor must satisfy the Court that the requested order is in furtherance of the remedial objectives of the *CCAA* and that the three following baseline considerations are met: (i) that the order sought is appropriate in the circumstances, and (ii) that the applicant has been acting in good faith, and (iii) with due diligence.

[17] "Appropriateness" is assessed by enquiring whether the order sought advances the policy objective underlying the *CCAA*. See *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 70. A determination of whether a mandatory mediation order is appropriate will depend on the unique factual landscape in the restructuring: *1057863 B.C. Ltd. (Re)*, 2022 BCSC 759, at para. 49.

[18] Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process: *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, at para. 231.

[19] CRA submits that an order for mandatory mediation would usurp the right of the TCC to control its own process and amount to a collateral attack on the decision of the TCC to decline the request for a settlement conference.

[20] The request to the TCC for a direction convening a settlement conference was made by EGR, jointly with the CRA. The Monitor is not bound by this procedural direction and its motion to this Court is not a collateral attack on the TCC's procedural direction declining the request for a settlement conference.

[21] The Monitor submits that the broad jurisdiction granted under section 11 of the *CCAA* has been used to approve mediation orders in various cases in Ontario and elsewhere in Canada. The Monitor places particular reliance on the decision of the Supreme Court of British Columbia in *1057863 B.C. Ltd. (Re)*, 2022 BCSC 759 ["105"].

[22] In *105*, the Petitioners were the owners of a pulp mill in Nova Scotia. The Province of Nova Scotia was a significant creditor. Nova Scotia passed a statute that required the Petitioners to cease using an effluent treatment facility that it had been leasing from Nova Scotia and using as part of its operations at the mill. As a result, the mill operations ceased. The Petitioners asserted compensation claims against Nova Scotia arising from the closure of the mill. The consequences of the mill closure were the genesis of the Petitioners' application for protection under the *CCAA*.

[23] The Petitioners sought a settlement of their claim for compensation from Nova Scotia. The Petitioners suggested mediation but Nova Scotia opposed. The Court approved the expenditure needed to fund litigation expenses and allow the Petitioners to file a claim against Nova Scotia to preserve the viability of their "litigation asset". The Petitioners did so. The Petitioners brought an application for approval by the *CCAA* Court of a mandatory mediation process and appointing a respected, retired, former Justice of the Supreme Court of Canada as an officer of the *CCAA* Court to act as a neutral third-party mediator. At the time of the application, Nova Scotia had not yet filed a statement of defence to the action. Nova Scotia opposed the application for a mandatory mediation order.

[24] The application judge accepted that the circumstances of the proposed mediation were unique in that the dispute involved claims by the Petitioners rather than claims against them. The application judge concluded that the time had come to determine whether any settlement is achievable because a settlement, if achieved, would be for the benefit of all stakeholders. The application judge considered that the benefits of a mediation were manifest and, even if no settlement was achieved, there may be benefits in the form of a narrowing of the issues in the action. The application judge concluded that the requested mediation order is consistent with the remedial purposes of the CCAA and that the granting of the requested order was appropriate. The requested mediation order was made.

[25] The circumstances in which a mandatory mediation was ordered in *105* differ materially from the circumstances on the motion before me. In *105*, the order was sought just after the litigation had

commenced, and before Nova Scotia had even filed a statement of defence. The application judge considered that there would be no downside to the mediation because there might be benefits through narrowing the issues even if no settlement was achieved. The action by the Petitioners against Nova Scotia was not being case managed, and there is no suggestion in the reasons of the application judge that the action was subject to any judicial oversight. In contrast, on this motion, the evidence is that the tax appeals are being case managed in the TCC. I am asked to make an order directing the parties to the tax litigation in the TCC, a court with specialized expertise and exclusive jurisdiction over this litigation, to attend a mandatory mediation, in circumstances where the TCC, exercising its case management authority, has already declined to direct a settlement conference.

[26] In my view, in these circumstances, for me to direct the parties to attend a mandatory mediation of a tax appeal pending in the TCC would inappropriately intrude on the right of the TCC to control its own process. The tax litigation in the TCC is being case managed, and the case management judge or judges of that Court are fully informed of the subject matter of the litigation and the procedural status of the litigation. The Monitor does not suggest that EGR is not able to renew its request for a settlement conference to the case management judge who is well positioned to consider such a request and give appropriate procedural directions to the parties.

[27] I conclude that the requested order is not appropriate in the circumstances.

Disposition

[28] For these reasons, the Monitor's motion is dismissed.

[29] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable (and with page limits) to be agreed upon by counsel and approved by me.

December 22, 2023