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.

REPLY FACTUM OF THE MONITOR
(returnable December 4, 2023)

November 29, 2023

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1. CRA is recycling the same argument presented to this Court in June 2021. Then, as now, CRA opposed the Monitor's motion for *procedural* relief impacting the tax litigation[1] on the stated basis that this Courts lacks the requisite jurisdiction.[2]

2. Justice McEwen, then presiding over this matter, rejected CRA's position on the grounds that: first, section 11 of the CCAA confers broad jurisdiction on this Court to "make any order that it considers appropriate in the circumstances"; and, second, that there was "no tension between this Court and the TCC in this regard".[3] Justice McEwen was applying his earlier analysis in the *JTI-Macdonald Corp.* CCAA proceeding in which he had articulated this Court's jurisdiction *vis-a-vis* other courts with parallel overlapping jurisdiction (in that case, proceedings in the Supreme Court of Canada and the Quebec Court of Appeal) in these terms:

> [19] The [CCAA] … provides this court with jurisdiction to deal with proceedings other than those that simply arise before the Ontario Superior Court of Justice. The CCAA legislation is remedial in nature. In order to allow for the proper restructuring of debtor companies, or in this case settlement of multiple significant lawsuits, it would be undesirable to restrict the discretion of this court to matters at the Superior Court level. It would lead to a chaotic situation where only proceedings before the Superior Court and/or other provincial trial courts were stayed but proceedings that had reached the appeal courts were allowed to proceed. This would significantly hamper the stated purpose of the CCAA, which is to attempt to negotiate a compromised plan of arrangement[4].

3. Justice McEwen's reasoning is consistent with the principles articulated in *Ludmer v. Canada (Attorney General)* in which the Quebec Superior Court dismissed a motion by the

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[1] The Monitor sought production, in the CCAA proceeding, of documents that the CRA had disclosed to EGR in the tax litigation.

[2] CRA argues that the requested mediation order "conflicts with the jurisdiction of the [TCC]"; "usurps its right to control its own processes"; "infringe[s] on the TCC's jurisdiction and processes"; and "comes in direct conflict with the TCC's jurisdiction"; *Factum of The Attorney General of Canada dated November 22, 2023* ("**CRA Factum**"), at paras. 1, 24, 26 and 27.

[3] *Endorsement of McEwen J. dated June 9, 2021* in this proceeding.

[4] *In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.*, 2019 ONSC 2222 (CanLII), at para. 19.

CRA (and the Attorney General of Canada) to stay proceedings before it pending the trial of a related tax appeal before the TCC. The Quebec Court, while recognizing the TCC's exclusive jurisdiction to hear and determine tax appeals, held that, as in *JTI* – and in the case at bar – the issue was not about concurrent jurisdiction over the same dispute but, rather, different courts exercising jurisdiction over different aspects of the dispute.[5]

4. All of these decisions are consistent with the overarching principle of cooperative federalism, which requires that the paramountcy doctrine (upon which the CRA is essentially relying here) must always be applied with restraint. Applying this framework, in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, the Supreme Court of Canada held that "actual conflict" between a federal and provincial law is required before the latter is held to be constitutionally invalid. Actual conflict exists only where compliance with the two competing laws would be impossible and the provincial law is found to frustrate the purpose of the federal one.[6]

5. No actual conflict would be created by the granting of the mediation order. First, it would not only not be "impossible" for the CRA to comply with it, while also preparing for a trial in the TCC, but it would also reflect how litigation in this country is typically managed. Mediation is an accepted procedure designed to allow the parties to resolve their dispute short of the added time, expense and use of scarce judicial resources engaged by a trial. The two processes would thus complement each other. Further, having vacated the settlement conference "field" when given an opportunity to occupy it, the TCC could not complain,

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[5] *Ludmer v. Canada (Attorney General)*, 2015 QCCS 1218, para. 2, 13, 14 and 56.
[6] *(Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, para. 17-21.

fairly or otherwise, if another Court with concurrent jurisdiction in procedural matters (as opposed to substantive issues) chose to act.[7]

7. Second, the mediation order would not frustrate the purpose of the TCC's jurisdiction, which is to "hear and determine … appeals to the Court on matters arising under the … *Excise Tax Act* … ".[8] The words *hear and determine* mean to "decide a case on its merits."[9] That is to say, matters of substance arising under the *Excise Tax Act* would appear to be reserved to the Tax Court. But, the mediation order would not result in a hearing, let alone a *decision* of EGR's tax appeal *on its merits*. In this regard, CRA's argument, set out in paragraphs 27-30 of its factum, that the mediator's tasks "will be the same as that [*sic*]" of the TCC trial judge, is simply incorrect. The mediator will make no determinations whatsoever. The mediator will simply facilitate a negotiation. The mediator will certainly not *hear and determine* the appeal. In this sense, as in *Ludmer*, this Court and the TCC would simply be exercising their respective jurisdictions over different aspects of the dispute between CRA and EGR.

8. The absurdity of CRA's position is readily exposed by the following hypothetical – suppose the parties voluntarily agreed to submit to mediation. According to CRA, the parties would be forbidden to engage in such a process for the same core reason articulated in CRA's factum, namely, that the mediator's tasks would be the same as those of the trial judge and so usurp the TCC's function. That proposition is plainly incorrect as there is nothing in the *Excise Tax Act* precluding the parties attempting to privately resolve their disputes.

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[7] *Strickland v. Canada (Attorney General)*, 2015 SCC 37, at paras. 1, 6, 32 and 33.
[8] *Tax Court of Canada Act* R.S.C., 1985, c. T-2, s. 12.
[9] *314164 Ontario Ltd. v. Sudbury (City), et al.*, 1982 CanLII 2147 (ON SC) at para. 49; see also: *Madden, Re* 1871 CarswellOnt 193, 31 U.C.Q.B. 333, at paras. 2, 5 and 6.

9. Contrary to paragraph 31 of CRA's factum, this motion is not a collateral attack on the TCC's refusal to convene a settlement conference. This is the *Monitor's* motion. The Monitor is an officer of this Court, not the TCC. Even if the doctrine of collateral attack had any place in this analysis (the proposition is at best dubious), neither the Monitor nor this Court is bound by any procedural direction the TCC may have given to EGR and CRA.

10. CRA's argument, in paragraphs 40-42 of its factum, that the circumstances giving rise to the proposed mediation may be unique or even new, is hardly a principled basis for rejecting the Monitor's request. As in the many previous cases where a CCAA court ordered mandatory mediation, there are well documented reasons here for at least giving ADR a try – especially when nothing else has worked thus far and the prospect of a lengthy trial looms on the horizon. Further, the proposed mediation would enure not just to the benefit of CRA and EGR, but all of EGR's other stakeholders.

11. CRA's final argument against mediation is that it is not yet "appropriate", because EGR has $2.1 million "in the bank".[10] CRA's position ignores that EGR lies in the ICU of the CCAA Court. CRA's position further implies that the patient needs to expire before mediation is "appropriate". That sort of thinking is antithetical to the often-cited and well understood remedial purposes of the CCAA.[11]

[10] CRA Factum, at paras. 43-44.
[11] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paras. 18, 24 and 70.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2023.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *In the Matter of A Plan of Compromise or Arrangement of Express Gold Refining Ltd.*, ONSC (Comm. List) File No. CV-20-00649558-00CL, Endorsement of the Hon. McEwen J., dated June 9, 2021

2. *In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.*, 2019 ONSC 2222 (CanLII)

3. *Ludmer v. Canada (Attorney General)*, 2015 QCCS 1218

4. *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (CanLII)

5. *Strickland v. Canada (Attorney General)*, 2015 SCC 37

6. *314164 Ontario Ltd. v. Sudbury (City)*, 1982 CanLII 2147 (ON SC)

7. *Madden, Re* 1871 CarswellOnt 193, 31 U.C.Q.B. 333

8. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

SCHEDULE "B"
RELEVANT STATUTES

***Tax Court of Canada Act* R.S.C., 1985, c. T-2**

Jurisdiction

12 (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part IX of the *Excise Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act*, Part V.1 of the *Customs Act*, the *Income Tax Act*, the *Employment Insurance Act*, the *Air Travellers Security Charge Act*, the *Excise Act, 2001*, the *Softwood Lumber Products Export Charge Act, 2006*, the *Disability Tax Credit Promoters Restrictions Act*, Part 1 of the *Greenhouse Gas Pollution Pricing Act*, the *Underused Housing Tax Act* and the *Select Luxury Items Tax Act* when references or appeals to the Court are provided for in those Acts.

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PROCEEDING COMMENCED AT TORONTO

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