**CANADA**

**PROVINCE OF QUÉBEC**
**DISTRICT OF MONTREAL**

**S U P E R I O R C O U R T**
(Commercial Division)

No.: 500-11-048114-157

*Companies' Creditors Arrangement Act*,
R.S.C. (1985), c. C-36 (as amended)

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**IN THE MATTER OF THE PLAN OF COMPROMISE OF ARRANGEMENT OF:**

**BLOOM LAKE GENERAL PARTNER LIMITED ET ALS.**

*Debtors*

-and-

**AGENCE DU REVENU DU QUEBEC**
**CANADA REVENUE AGENCY**

*Respondents/Mises-en-cause*

-and-

**THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP ET ALS.**

*Mises-en-cause*

-and-

**FTI CONSULTING CANADA INC.**

*Petitioner/Monitor*

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# ARGUMENTATION OUTLINE: AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO SET-OFF AND DAMAGE PAYMENT INPUT TAX CREDITS (THE "MOTION")[1]

[1] Capitalized terms used in this Argumentation Outline not otherwise defined herein shall have the meaning ascribed thereto in the Motion. For ease of reference, a list of defined terms is also attached hereto.

## TABLE OF CONTENTS

**I. INTRODUCTION ..... 3**

A) OVERVIEW ..... 3

B) GST/QST: LEGISLATIVE AND ADMINISTRATIVE FRAMEWORK ..... 5

**II. ISSUES IN DISPUTE ..... 10**

**III. ANALYSIS ..... 10**

A) THE DAMAGE PAYMENT ITCS ARE POST-FILING AMOUNTS ..... 10

B) THE RESTRUCTURING CLAIMS ARE NOT PRE-FILING CLAIMS ..... 20

C) POST-FILING DEBTS CANNOT BE OFFSET AGAINST PRE-FILING CLAIMS ..... 28

1) Kitco stands for the proposition that compensation cannot be effected between pre-filing claims and post-filing debt ..... 28

2) The holding in Kitco in that pre/post compensation can generally not be effected is a principle that is well-accepted by the courts ..... 32

3) There is no valid reason to limit the scope and the rationale in Kitco ..... 37

a) The effects of set-off on the *pari passu* principle ..... 37

b) Liquidating CCAAs are common and should not be subject to a different set of rules ..... 39

**IV. CONCLUSION ..... 43**

**LIST OF AUTHORITIES ..... 45**

Legislation ..... 45

Jurisprudence ..... 45

Secondary sources ..... 47

**LIST OF DEFINED TERMS ..... 48**

# I. INTRODUCTION

## A) OVERVIEW

1. On January 27, 2015, the Honourable Justice Martin Castonguay, J.S.C., originally issued the Bloom Lake Initial Order in respect of the Bloom Lake CCAA Parties, including CQIM (R-1);

    - Paragraph 1 of the Motion

2. On May 20, 2015, the Honourable Justice Stephen W. Hamilton, J.S.C. (as he then was) issued the Wabush Initial Order, extending the scope of these CCAA proceedings to the Wabush CCAA Parties;

    - Paragraph 2 of the Motion

3. Pursuant to the Bloom Lake Initial Order and the Wabush Initial Order, FTI Consulting Canada Inc. was appointed as monitor to the CCAA Parties (the "**Monitor**");

    - Paragraphs 2 and 4 of the Motion

4. On November 5, 2015, Mr. Justice Hamilton issued the Claims Procedure Order, as amended on November 16, 2015 (R-2);

    - Paragraph 5 of the Motion
    - Exhibit R-2

5. On May 18, 2018, Mr. Justice Hamilton issued an order accepting the filing of the Amended and Restated Joint Plan of Comprise and Arrangement dated May 16, 2018 (as further amended, restated or supplemented from time to time, the "**Plan**", R-3);

    - Paragraph 6 of the Motion
    - Exhibit R-3

6. On June 18, 2018, the Plan was approved by the Classes of Affected Unsecured Creditors and on June 29, 2018, Mr. Justice Hamilton issued the Plan Sanction Order (R-4);

    - Paragraph 6 of the Motion
    - Exhibit R-4

7. On July 31, 2018, the Monitor issued the Plan Implementation Date Certificate, confirming the implementation of the Plan on that date;

8. In August 2018, the Monitor commenced the first interim distributions to Affected Third Party Unsecured Creditors from each of the Unsecured Creditor Cash Pools and Pension

Cash Pools, while interim distributions on account of the Salaried Late Employee Claims[2] and the USW Late Employee Claims[3] were made in January 2020, in accordance with the Order for leave to file late claims and authorization to make modifications to the Plan dated December 3, 2019 (together, the "**First Interim Distribution**")[4];

9. On or about October 2, 2020, the Monitor issued a notice to Revenu Quebec ("**RQ**") allowing its claim for an aggregate amount of $13,392,752.86 based on Section 25 of the *Tax Administration Act* and Section 296 (1) of the *Excise Tax Act* ("**ETA**") with respect to unpaid Québec sales tax ("**QST**") in the amount of $5,653,595.34 and unpaid goods and services tax ("**GST**") in the amount of $7,739,157.52, on account of taxable supplies of goods and services received by CQIM prior to the Filing Date, where such tax amounts remained unpaid by CQIM as of the Filing Date (the "**296 Claims**", R-6);

- *Tax Administration Act*, R.S.Q., c. A-6.002 **[TAB 5]**
- *Excise Tax Act*, R.S.C. 1985, c. E-15 **[TAB 2]**
- Exhibit R-6

10. As part of an audit conducted by RQ to determine which portion of the First Interim Distribution to certain creditors related to the payment of Restructuring Claims[5], as some of these creditors had also asserted general claims based on unpaid invoices, it was determined that:

a) The ITCs claimed for QST and GST paid in 2018 as part of the First Interim Distribution to certain creditors on account of their claims for damages arising from the disclaimer or resiliation of contracts pursuant to the CCAA (the "**Damage Payments ITCs"**) amounted to $7,459,257.85;

b) RQ is also indebted to CQIM for an amount of $422,490.35 representing ITCs not in relation to Restructuring Claims, but rather in relation to supplier invoices which were not part of the 296 Claims, including $234,755.16 in relation to the post-filing period[6];

(collectively, the "**Disputed ITCs"**), the quantification of which is admitted by the Parties;

11. RQ seeks to set-off the Disputed ITCs against the 296 Claims;

12. By way of the Motion, the Monitor seeks an order declaring that:

a) the 296 Claims constitute pre-filing claims;

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[2] Also as defined in the December 3, 2019 Order for leave to file late claims and authorization to make modifications to the Plan.
[3] *Ibid*.
[4] On May 17, 2021, the Monitor proceeded with the second interim distribution, which included approximately $1.7 million on account of Secured Claims and $27.4 million on account of Proven Unsecured Claims, the whole as mentioned in the Monitor's Fifty-Sixth Report.
[5] Paragraph 21 of Contestation de l'agence du Revenu du Québec dated May 14, 2021 (the "**Contestation**").
[6] See also RQ's Contestation at paragraphs 22-23, 24(c), 89-92 and 94 III.

b) the Damage Payment ITCs constitute post-filing amounts;

c) RQ (acting on its behalf and on behalf of the Canada Revenue Agency "**CRA**") cannot set-off the 296 Claims against the Damage Payment ITCs owed by RQ (and the CRA) to CQIM;

d) RQ (acting on its behalf and on behalf of the CRA) shall without set-off of any kind pay to the Monitor, on behalf of the CCAA Parties and their creditors, all Damage Payment ITCs validly claimed by any of the CCAA Parties in respect of the First Interim Distribution, including without limitation the Damage Payment ITCs claimed by CQIM in the amount of $7,459,257.85, together with interest at the legal rate and the additional indemnity from and after the date at which each of the Damage Payment ITCs claimed became payable, until paid in full to the Monitor on behalf of the CCAA Parties;

e) RQ (acting on its behalf and on behalf of the CRA) shall without set-off of any kind pay to the Monitor, on behalf of the CCAA Parties and their creditors, all Damage Payment ITCs validly claimed by any of the CCAA Parties with respect to all future distributions under the Plan;

f) RQ (acting on its behalf and on behalf of the CRA) shall without set-off of any kind pay to the Monitor, on behalf of the CCAA Parties and their creditors, additional ITCs in the amount of $234,755.16;

**B) GST/QST: LEGISLATIVE AND ADMINISTRATIVE FRAMEWORK**

13. Acting as an agent for the Quebec Minister of Revenue, RQ is responsible for the administration of the tax legislation in Quebec, including the *Act respecting the Quebec Sales Tax*[7];

14. Under an agreement between the federal and Quebec governments, RQ also administers GST on behalf of the CRA in the province in Quebec;

15. As a result, in this province, RQ is responsible for the collection of QST and GST, as well as the reimbursement of net tax refunds determined based on the amount of tax collected, minus input tax credits ("**ITCs**") for the purpose of the GST and input tax refunds ("**ITRs**") for the purpose of the QST (collectively, the "**ITC Claims**");

16. GST and QST are taxes on consumption, which are ultimately paid by the final consumers of *taxable supplies*;

17. In the context of the QSTA and ETA, *supplies* mean the provision of property or services in any manner, including by sale, exchange or lease. The *recipients* of *supplies* pay consideration to the person who "made" (*i.e.* provided) them, the *supplier*. The *supplier* of

[7] CQLR, c. T.-01 ("**QSTA**"). **[Tab 3]**

a *taxable supply* acts as an agent on RQ's behalf in collecting GST/QST, if applicable, rather than having the *recipient* of the supply pay GST/QST directly to RQ;

- ETA, Section 123(1) (definitions of "*commercial activity*", "*person*", "*recipient*", "*supplies*", "*supplier*", "*taxable supply*") and Section 221 **[TAB 2]**
- QSTA, Section 1 (definitions of "*commercial activity*", "*person*", "*recipient*", "*supplies*", "*supplier*", "*taxable supply*") and Section 422 **[TAB 3]**

18. Three categories of supplies are contemplated by the statutes: *taxable supplies*, *zero-rated supplies* and *exempt supplies*:

a) Taxable supplies: Most supplies fall into this category. They are supplies which are "made" (provided) in the course of a commercial activity, for which 5% in GST and 9.975% in QST is collected by the supplier;

b) Zero-rated supplies: Zero-rated supplies are essentially a subset of taxable supplies, for which GST/QST apply, but at a rate of 0%. Examples of zero-rated supplies are basic groceries, prescription drugs, and exports;

c) Exempt supplies: Exempt supplies are entirely exempt from GST/QST. Examples of exempt supplies are certain dental or medical services performed by licenced dentists or physicians;

19. The main difference between zero-rated supplies and exempt supplies is that ITCs and ITRs can be claimed for the GST/QST paid on the inputs used to make zero-rated supplies, whereas no ITCs or ITRs can be claimed for GST/QST paid on inputs used in the making of an exempt supply;

- See *Reference Re Goods and Services Tax*, [1992] 2 S.C.R. 445 at pp 456-457 **[TAB 12]**

20. For example, a baker who makes and sells bread (a zero-rated supply) can claim ITCs and ITRs on the GST/QST paid on the supplies and services they used to make that bread, whereas a dentist cannot not claim ITCs or ITRs on the GST/QST paid on supplies used to provide general, non-cosmetic dental services (an exempt supply);

- ETA, Subsection 123(1) ("*zero-rated supply*") and Schedule VI, Part III, Section 1 (*Basic Groceries*) **[TAB 2]**
- QSTA, Section 177 (*Basic Groceries)* **[TAB 3]**
- ETA, Subsection 123(1) ("*exempt supply*") and Schedule V, Part II (*Health Care Services*) **[TAB 2]**
- QSTA, Sections 108 ("*medical practitioner*") and 112 (*Health Care Services*) **[TAB 3]**

21. With respect to taxable supplies, when a purchaser uses a *taxable supply* (be it a good or service) as an "input" to produce or provide ("make") other taxable supplies, it can claim ITCs and ITRs equivalent to the GST/QST paid on those inputs;

- ETA, Section 169 **[TAB 2]**
- QSTA, Section 201 **[TAB 3]**

22. In the *Reference re Quebec Sales Tax*, the Supreme Court of Canada characterized this type of taxation scheme as "a method of tax collection by installments", in that the suppliers who collect and remit tax throughout the supply chain are essentially tax collectors:

> Imposing the tax at each level in the consumption chain is simply a method of tax collection by instalments. The persons who collect the tax along the chain and who are reimbursed are really tax collectors.

- *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715 at 730 **[TAB 35]**

23. The Court also noted that GST and QST are a form of direct taxation, as the final consumer who ultimately pays the tax is the one intended to bear the burden, as opposed to indirect taxes (such as customs tax) whereby it is expected that the person liable to pay tax (for example, an importer of goods) is expected to indemnify themselves by passing on that cost to the purchaser as an element of the price:

> The availability of the input tax refunds is the key to understanding what is truly going on prior to the stage of ultimate consumption. Eligibility for an input tax refund relieves the consumer turned supplier from the burden of the tax which is then charged to the person who purchases the good. The reimbursement of the tax initially "paid" through the mechanism of the input tax refund means that there is no tax to be passed on. The input tax refund thus guarantees that the person who ultimately pays the tax is the one who was intended should bear the burden and that therefore the proposed tax is a form of direct taxation. Though the input tax refund mechanism operates behind the scenes to produce this result and though the GST, for example, can be included in the price and appear only on the final invoice, consumers are fully aware, often to their dismay, that they are paying the tax.

- *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715 at 730 **[TAB 35]**

24. As a result, in allowing for ITCs and ITRs to be claimed by suppliers on taxable supplies which are redirected to production rather than consumption, the ETA and QSTA ensure that sales tax is applied on the value added throughout a supply chain, and that the amounts collected by the tax authorities do not exceed the sum of 5% (GST) and 9.975% (QST) of the consideration paid by the final recipient of the supply;

- ETA, Sections 225, 228, 238 **[TAB 2]**
- QSTA, Sections 428, 437, 468 **[TAB 3]**

25. For example, initial manufacturing suppliers charge GST/QST to the distributors they sell *taxable supplies* to, and remit those amounts to RQ. In turn, those distributors then charge GST/QST to the retailers they resell the same *taxable supplies* to, generally at a higher price than they were bought for. However, prior to those distributors remitting the GST/QST collected from retailers to RQ, the GST/QST paid to the manufacturing suppliers for the *taxable supplies* they resold (which are characterized as *inputs* to their business) can be deducted from the overall amount that they are required to remit;

26. To illustrate, take the following example:

    a) A manufacturer (*supplier*) makes a computer and sells it to a distributor (*recipient*) for $100. The *supplier* collects $14.98 in GST/QST up and above the consideration of $100;

    b) The distributor, now acting as a *supplier*, then sells the computer to a retailer (the *recipient*) for $200, and collects an additional $29.95 in GST/QST from the retailer;

27. In this case, the total GST/QST collected is $44.93 ($14.98 + $29.95) on a computer which was ultimately sold to the final recipient for $200, which amounts to more than 22% in tax being charged. As the computer was purchased by the distributor and used as an input to its commercial activity (*i.e.* the resale of computers), the GST/QST paid to the manufacturer ($14.98) can be recovered by the distributor by way of ITCs and ITRs, which reduces the "net tax" to be remitted to RQ. Therefore, the ultimate amount of GST/QST paid on the computer, which was ultimately sold for $200, does not exceed $29.95, *i.e.* 5% in GST and 9.975% in QST ($44.93 – $14.98);

28. GST/QST in respect of a taxable supply is payable by the recipient as soon as consideration is paid or becomes due (for example, upon issuance of an invoice);

    - ETA, Sections 152, 168 **[TAB 2]**
    - QSTA, Section 82 **[TAB 3]**

29. As discussed above, the supplier acts as an agent for RQ, and is required to collect GST/QST from the recipient, and remits those amounts to RQ. The supplier's duty to remit tax to RQ arises for the "period" in which tax became payable by the recipient of the taxable supply, *i.e.* regardless of if it was actually paid or not;

    - ETA, Sections 221, 225, 228 **[TAB 2]**
    - QSTA, Sections 422, 428, 437 **[TAB 3]**

30. ITCs/ITRs are available to the recipient as soon as the tax becomes payable or has been paid without having become payable on the taxable supply so acquired. The recipient must claim this ITC/ITR within the prescribed time period, which is generally four years;

    - ETA, Sections 169, 225(4) **[TAB 2]**
    - QSTA, Sections 201, 431 **[TAB 3]**

31. The difference between the amount of tax collected and ITCs/ITRs is called "net tax". If, for a particular "reporting period", the net tax is positive, the registrant must remit the positive amount to RQ, whereas if it is negative, the registrant is entitled to a refund of the negative amount;

- ETA, Section 225 **[TAB 2]**
- QSTA, Section 428 **[TAB 3]**

32. A reporting period refers to the time period within a fiscal year (which can be monthly, quarterly or yearly, depending on the registrant's sales volumes) that a registrant must calculate and report their net GST/QST remittances or refunds to RQ;

- ETA, Section 245 **[TAB 2]**
- QSTA, Section 458.6 **[TAB 3]**

33. Furthermore, if a supplier who has made a taxable supply considers that the recipient will not pay all or part of the invoice, and that a portion of the invoice has become "bad debt", the supplier can indirectly obtain a refund or credit for this bad debt;

- ETA, Section 231 **[TAB 2]**
- QSTA, Section 444 **[TAB 3]**

34. The QSTA and ETA also contain deeming provisions, whereby certain types of payments are deemed to be consideration for *taxable supplies*. This is the case when an amount of money is paid from one person to another as compensation or indemnification for damages that result from terminating an agreement for the "making" of a *taxable supply*, otherwise known as damage payments;

- ETA, Section 182 **[TAB 2]**
- QSTA, Section 318 **[TAB 3]**

35. For example, if a retailer pays $100 in damages to their distributor for cancelling an order, the QSTA and ETA deem the $100 to be (i) consideration for a *taxable supply* and (ii) inclusive of GST/QST, if the order would have otherwise been subject to GST/QST. As a result, the retailer will be deemed to have paid, and the distributor to have collected, $4.35 in GST and $8.67 in QST. The distributor will therefore be required to remit those amounts to RQ, whereas the retailer can claim them as ITCs and ITRs if the *taxable supply* was originally destined to be acquired as a *supply* in a *commercial activity*;

36. The effects of these deeming provisions only come into existence from the moment a damage payment is made. Prior to making a damage payment, there is no *taxable supply*, no *consideration*, and therefore no GST/QST deemed to have been paid or collected. Those provisions of the ETA and QSTA provide that consideration and tax are deemed to be paid when a damage payment is made, but not before;

## II. ISSUES IN DISPUTE

37. The facts stated at paragraphs 1 to 9, 15 to 19 and 21 to 24 of the Motion are admitted[8];

38. RQ does not contest the filing of Exhibits R-1 to R-6;

39. The Monitor does not contest the filing of Exhibits ARQ-1 to ARQ-15, but strictly subject to the following reserves:

a) **Exhibit ARQ-10**: the conclusions at paragraphs 25 to 35 of the sworn statement of Guy Rivard are of the nature of a legal opinion and are not admissible. The Court should only consider the factual statements contained in said sworn statement;

b) **Exhibit ARQ-11**: this audit report is not admissible as it was completed (April 15, 2021) and approved (April 30, 2021) well after the completion of the audit by Revenu Quebec and the filing of the present Motion on or about January 18, 2021. It is not relevant inasmuch the quantification of the 296 Claims and of the Damage Payments ITCs are admitted. Moreover, said audit report (ARQ-11) contains inadmissible legal analysis and opinions concerning the availability of set-off under the CCAA, which is ultimately the issue to be decided by this Court;

40. RQ takes the position that:

a) the Damage Payment ITCs are pre-filing debts owed by RQ to CQIM, which can be set-off against RQ's pre-filing claims, including the 296 Claims;

b) Alternately, in the circumstances of this case, RQ could in any event set-off the Disputed ITCs against its pre-filing 296 Claims, even if the Disputed ITCs are post-filing debts, on the basis that the reasoning in *Kitco*[9] is of limited import and that it is not applicable in the context of a liquidating CCAA;

41. The Monitor submits that:

a) the Damage Payment ITCs are post-filing amounts and cannot be offset against pre-filing claims, including the 296 Claims;

b) the Restructuring Claims are not pre-filing claims;

c) post-filing debts cannot be offset against pre-filing claims;

## III. ANALYSIS

### A) THE DAMAGE PAYMENT ITCS ARE POST-FILING AMOUNTS

[8] See also the list of admissions dated August 12, 2021 (*Liste des admissions communes*).
[9] *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268, confirming 2016 QCCS 444 ("***Kitco***"). **[Tab 6]**

42. Pursuant to the general rules provided by Section 165 ETA (and Section 16 QSTA), acquirers of taxable supplies are subject to GST/QST, which according to Section 168 ETA (and Section 82 QSTA) becomes payable at time the invoice is issued by the supplier;

- ETA, Sections 165 and 168 **[TAB 2]**
- QSTA, Sections 16 and 82 **[TAB 3]**

43. Although the payment of damages as a consequence of the termination of a contract is not a taxable supply, Section 182 ETA (and Section 318 QSTA) deem such payment to be consideration for a taxable supply. The Restructuring Claims themselves, before payment, are not deemed to be consideration payable for taxable supply;

44. Sections 182(1) ETA and 318 QSTA also deem such payments to include GST and QST:

| **182 ETA** | **318 QSTA** |
|---|---|
| ***182 (1)*** *For the purposes of this Part,* ***where at any time****, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant to a person,* ***an amount is paid or forfeited to the registrant otherwise than as consideration for the supply****, or a debt or other obligation of the registrant is reduced or extinguished without payment on account of the debt or obligation,* | ***318.*** ***Where at any time****, as a consequence of the breach, modification or termination, after 30 June 1992, of an agreement for the making of a taxable supply, other than a zero-rated supply, of property or a service in Québec by a registrant to a person,* ***an amount is paid or forfeited to the registrant otherwise than as consideration for the supply****, or a debt or other obligation of the registrant is reduced or extinguished without payment being made in respect of the debt or obligation,* |
| *(a) the* ***person is deemed to have paid, at that time, an amount of consideration for the supply*** *equal to the amount determined by the formula* | *(1)* ***the person is deemed to have paid, at that time, an amount of consideration for the supply*** *equal to the amount determined by multiplying the amount paid or forfeited, or by which the debt or obligation was reduced or extinguished, as the case may be, by 100/109.975; and* |
| *[…]* | |
| *(b) the registrant is deemed to have collected, and the* ***person is deemed to have paid, at that time, all tax in respect of the supply*** *that is calculated on that consideration, which is deemed to be equal to (…)* | *(2) the registrant is deemed to have collected, and* ***the person is deemed to have paid, at that time, all tax in respect of the supply*** *that is calculated on that consideration, which is deemed to be equal to tax under section 16 calculated on that consideration.* |
| (our underlining) | (our underlining) |

| | |
|---|---|

45. In the absence of those deeming rules, the payments made on account of the Restructuring Claims would not have been consideration for a taxable supply and would not have given rise to any obligation to pay and to remit any GST/QST, and no portion of the First Interim Distribution on account of the Restructuring Claims would have been considered to be GST/QST paid by CQIM;

46. Indeed, the payments made on account of the Restructuring Claims were not consideration for the taxable supplies which were initially to be provided under the disclaimed contracts, but rather sums which were paid to partially indemnify the parties who suffered losses as a result of those disclaimers. Those payments were only deemed to be consideration for taxable supplies and inclusive of GST/QST due to the deeming rules at Sections 182 ETA and 318 QSTA;

47. Furthermore, the unambiguous wording of Sections 182(1) ETA and 318 QSTA makes it clear that these deeming rules only apply at the time of payment, which in this case is in the post-filing period. These provisions do not deem GST/QST to have been paid or payable any time before the actual payment is made. It follows that GST/QST was not paid or deemed to be paid in the pre-filing period, nor at any time prior to the Bloom Lake Initial Order;

48. The fact that these deeming rules only apply at the time of payment is made clear by the wording of Sections 182(1) ETA and 318 QSTA, and is further reinforced by the current version of Section 182 ETA, which replaced the previous version, which read as follows[10]:

> **182.** For the purposes of this Part, where at any time, as a consequence of the breach, modification or termination of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by or to a registrant,
>
> > (*a*) an amount is paid or forfeited, or becomes payable, by a person to the registrant otherwise than as consideration for the supply, or
> >
> > (*b*) a debt or other obligation (other than consideration for the supply) of the registrant to a person is reduced or extinguished without payment on account of the debt or obligation,
>
> the registrant shall be deemed to have made a taxable supply of the property or service in Canada to the person and to have collected tax from the person at that time, equal to the tax fraction of the amount so paid, forfeited, payable or extinguished, or the amount by which the debt or other obligation was so reduced, as the case may be, and the person shall be deemed to have received that supply and to have paid, at that time, that tax.

[10] S.C. 1990, c. 45, Section 182, as replaced by S.C. 1993, c. 27, Section 46. **[Tab 4]**

(our underlining)

49. The Damage Payment ITCs were requested by CQIM in its sales tax returns for the period ending November 30, 2018, on the basis that GST/QST only arose and became payable upon payment of the First Interim Distribution. Indeed, CQIM's right to the Damage Payment ITCs only arose as a result of Sections 182(1) ETA and 318 QSTA deeming there to be, at the time of payment on account of the Restructuring Claims, GST/QST included in such partial payments. Those payments were all made in the post-filing period;

50. Pursuant to Sections 182(1) ETA and 318 QSTA, the tax obligation giving rise to the Damage Payment ITCs did not exist (i) at the time of the Bloom Lake Initial Order, (ii) at the time the contracts giving rise to the Restructuring Claims were disclaimed or resiliated, (iii) at the time the Restructuring Claims were filed by the relevant creditors, nor (iv) at the time the Restructuring Claims became Proven Claims under the Claims Procedure Order (R-2). Instead, pursuant to Sections 182(1) ETA and 318 QSTA, the tax obligation only arose when the First Interim Distribution was made in 2018 on account of Restructuring Claims;

51. RQ submits at paragraph 79 of its Contestation that this Court should favor a contextual interpretation of Section 182 ETA and 318 QSTA such that they may be read harmoniously (at least according to RQ) with Sections 19, 21 and 32 CCAA, after criticizing as follows the interpretation favored by the Monitor at paragraph 78-79 of its Contestation:

> 78. La théorie d'interprétation du Contrôleur pour l'application de articles 182 LTA et 318 LTVQ est restrictive et littérale, se résumant à retenir que l'obligation taxable serait présumée « naître », sans aucun rapport avec les contrats antérieurs, qu'au « moment donné» du paiement des dommages suite aux résiliations des contrats des fournisseurs;
>
> 79. Une interprétation contextuelle doit être retenue pour que les articles 182 LTA et 318 LTVQ soient plutôt interprétés en harmonie avec les articles 19, 21 et 32 LACC, le tout pour déterminer à quel moment l'obligation taxable a pris naissance;

52. While it is trite law to state that they should favour a contextual and purposive approach to statutory interpretation, Courts must first rely on the plain wording used by the legislator:

> It has been long established as a matter of statutory interpretation that "*the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*": see 65302 British Columbia Ltd. v. Canada, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary

> meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Our underlining.]

- *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 at para 10 ("**Canada Trustco**") **[TAB 8]**

53. In our view, the clear wording of the relevant provisions of the ETA and QSTA are dispositive of the issue. The mere existence of the Restructuring Claims, or indeed any of the relevant pre-filing contracts for the supply of goods or services, does not give rise to GST and QST being paid or becoming payable and therefore cannot form the basis of the Damage Payment ITCs, which are dependent upon GST and QST being payable or having been paid. The right to the Damage Payment ITCs arises from and at the time of the payment of distributions on account of the Restructuring Claims, which clearly occurred post-filing;

54. As stated by the Supreme Court of Canada in *Bell ExpressVu*:

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
>
> > *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "*is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects*".
>
> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".

(our underlining)

- *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 at paragraphs 26-27 ("**Bell ExpressVu**"). **[TAB 9]**

55. In *Placer Dome*, the Supreme Court of Canada reminds us of the importance of the wording used by tax statutes in the context of a unified textual, contextual and purposive approach to statutory interpretation as follows:

> [21] In Stubart Investments Ltd. v. The Queen, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.
>
> [22] On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the Act may be necessary: *Canada Trustco*, at para. 10. Moreover, as McLachlin C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities." The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".
>
> [23] The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.

(our underlining)

- *Placer Dome Canada Ltd v. Ontario (Minister of finance)*, [2006] S.C.R. 715 at paragraphs 21 to 23 **[TAB 10]**
- See also: *Centre de traitement de la biomasse de la Montérégie Inc. c. Agence du revenu du Québec*, 2021, QCCA 1068 at paragraphs 30-32. **[TAB 11]**

56. Furthermore, the deeming provisions set out by the Sections 182(1) ETA and 318 QSTA and the right to claim input tax credits in respect of taxable supplies must be construed in the light of the ETA as a whole:

> On the question of integration, I am of the opinion that Canada is correct to say that to sever the revenue raising portions of the GST Act from those portions which do not raise revenue would be to change the character of the tax fundamentally, from a value-added tax to a federal retail sales tax. The objective of the Act is to raise revenue for the federal government, and the means chosen is a tax on value added throughout the chain of production, with input tax credits granted in respect of taxable supplies that are redirected to production instead of consumed. The means chosen are highly integrated into the scheme of the GST Act as a whole, and, indeed, to sever the system of input tax credits from the rest of the Act would be to carve out an exception to the text of s. 91(3) of the Constitution Act, 1867 which the words "any Mode or System of Taxation" cannot reasonably bear.
>
> (our underlining)

- *Reference Re G.S.T.*, [1992] 2 S.C.R. 445 at page 471. **[TAB 12]**

57. The objects and purposes of the ETA, on the one hand, and of the BIA and CCAA, on the hand, are completely different and certainly cannot be considered as statutes *in pari materia* or dealing with the same subject matter;

58. When one takes a closer look at different provisions in the ETA, it is apparent that Parliament clearly expressed when certain provisions needed to be read in conjunction with provisions of the BIA or CCAA by making express references to same:

a) For example, the deemed trust provisions of Subsection 222(1.1) ETA exclude certain operations of law "*at or the time a person becomes a bankrupt (within in the meaning of the Bankruptcy and Insolvency Act), to any amounts that, before that time, were collected or became collectible*";

b) Section 265 ETA expressly deals with the effects of bankruptcy on sales tax remittances;

c) Last, the ETA also states that limitation periods with respect to collection are extended by the number of days that a CCAA stay order is effective:

> **82 (2.6)** In computing the day on which a limitation period ends, there shall be added the number of days on which one or more of the following is the case: […]
>
> **(d)** an action that the Minister may otherwise take in respect of the tax debt is restricted or not permitted under any provision of the *Bankruptcy and Insolvency Act*, of the *Companies' Creditors Arrangement Act* or of the *Farm Debt Mediation Act*.
>
> [Emphasis added.]

59. As the CCAA and ETA are not *in pari materia*, the "contextual" analysis of the ETA requires a reading of its provisions in light of the statute as a whole. Such a reading of the relevant provisions of the ETA dealing with ITCs does not in any way support any argument to the effect that regard must be had to the underlying contracts to determine when a tax obligation arises;

60. The general provision dealing with ITCs is Section 169 ETA. It states that when a registrant acquires *property* or *services* during a *reporting period*, and the tax in respect of the *supply becomes payable* or *is paid, the registrant may claim an input tax credit* in that reporting period:

> **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 […]:

61. Section 182 ETA deals with damage payments, and provides that when same are paid pursuant to the breach or termination of an agreement for the making of a taxable supply or a service, a person is deemed to have paid, *at the time the payment is made*, an amount of *consideration* for a supply:

> **182 (1)** For the purposes of this Part, where at any time, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant to a person, an amount is paid or forfeited to the registrant otherwise than as consideration for the supply, or a debt or other obligation of the registrant is reduced or extinguished without payment on account of the debt or obligation,
>
> > ***a)*** The person is deemed to have paid, at that time, an amount of consideration for the supply equal to the amount determined by the formula

62. Furthermore, Section 225(1) ETA deals with remittance of tax and provides the formula to determine whether the net tax will result in a refund or an amount to be remitted:

> **225 (1)** Subject to this Subdivision, the net tax for a particular reporting period of a person is the positive or negative amount determined by the formula
>
> A - B
>
> Where
>
> A is the total of
>
> > **a)** all amounts that became collectible and all other amounts collected by the person in the particular reporting period as or on account of tax under Division II, and
> >
> > **b)** all amounts that are required under this Part to be added in determining the net tax of the person for the particular reporting period; and
>
> B is the total of
>
> > **a)** all amounts each of which is an input tax credit for the particular reporting period or a preceding reporting period of the person claimed by the person in the return under this Division filed by the person for the particular reporting period, and
> >
> > **b)** all amounts each of which is an amount that may be deducted by the person under this Part in determining the net tax of the person for the particular reporting period and that is claimed by the person in the return under this Division filed by the person for the particular reporting period.

63. The "A – B" formula makes reference to "reporting periods", which is a public law concept specific to tax law and that is completely foreign to private law. Reporting periods are defined in section 245 ETA, and the act allows for a registrant to elect the length of the reporting period in certain circumstances (fiscal month, fiscal quarter or fiscal year – concepts which also do not exist in private law). Other provisions of the act also make reference to temporal notions which are foreign to private law, and deem payments to be made at different times than they were in reality – hence furthering the proposition that the ETA is comprehensive as relating to the times when tax obligations arise[11];

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[11] See for example:
- Subsection 136.1(1) which deems lease payments to be making of supplies. The concept of a "lease interval" is introduced.
- Subsection 136.1(2) introduces the concept of "billing periods" relating to services that are performed over several reporting periods – the provision provides a framework to determine the time which the supply is deemed to have been made and the consideration paid.
- Subsection 168(1) deems when tax is payable by the recipient of a taxable supply.

- Canada Revenue Agency, *Authorized Fiscal Periods and Reporting Periods*, GST memoranda 500-2-1, June 22, 2017 at paras 1-3 and 17 **[TAB 39]**

64. RQ seems to go even further at paragraphs 71 and 72 of its Contestation, first by characterizing tax law as an accessory of civil law, only to conclude that the timing of a tax liability on account of damage claims should be determined by reference to the date of execution of the underlying contracts, despite the clear wording of Sections 182 ETA and 318 QSTA;

65. On the relationship between federal enactments and private law, Professors Brisson and Morel in "*Droit federal et droit civil: complémentarité, dissociation*" state:

> Whenever a federal statutory provision uses a private law concept without defining it or otherwise assigning some specific meaning to it, and whenever a statute falls short of comprehensively governing a question of private law or lacks a formal incorporating provision, the omission must be remedied by referring to one of the two legal systems in force.

- Jean-Maurice Brisson and André Morel, "*Droit fédéral et droit civil : complémentarité, dissociation*", 1996 CanLIIDocs 93 at 309. **[TAB 40]**

66. Canada's Department of Justice suggests that when interpreting federal enactments, especially tax statutes, one must first determine whether Parliament is relying on a private law rule or a public law rule before interpreting a provision with regard to private law rules. As the timing of collection and remittance of tax is a matter that concerns the relationship between the taxpayer and the state, section 225 appears to be a public law rule. One should not need to look to private law to determine the time a tax obligation arises:

> The first stage is to determine whether Parliament is relying on a private law rule or whether it seeks instead to apply public law rules. As noted earlier, it is not enough to say that a federal tax law as a whole is a public law or a private law enactment. Although the I.T.A., for example, has been described as a public law statute if there ever was one, one must go a bit further and ask, for each provision in which a private law concept is used, whether the civil rights of the litigants are at issue.
>
> But what distinguishes a public law concept from a private law concept? Public law concerns relations between the state and individuals, and private law is concerned with respects among individuals. In other words, the distinguish feature of a private law rule is the regulation of the exercise of civil rights whereas the object of a public law rule is the regulation of relationships between the state and its citizens.

- Canada, Department of Justice, *The Place of Private Law in Federal legislation: The St-Hilaire case and Bijural Terminology Records*, 2015. **[TAB 41]**

67. Therefore, a "contextual" analysis of the relevant provisions in the ETA relating to ITCs in the context of this file yields the following result:

a) when an agreement for the making of a taxable supply is disclaimed by the debtor and a Damage Payment is made pursuant to a compromise or arrangement, the person is deemed to have paid, at the time the payment is made, an amount of consideration for a taxable supply, based on the formula at paragraph 182(1)(a) ETA;

b) an ITC can be claimed in the reporting period during which the Damage Payment was made, pursuant to subsection 169(1) ETA;

c) A "reporting period" is a public law concept that is specific to the ETA, which does not call any private law concepts into play, as the ETA is comprehensive regarding the timing of liabilities;

68. The conclusion that the Damage Payment ITCs are post-filing amounts is not only dictated by the clear and unambiguous wording of Sections 182(1) and 318 QSTA, but it is also fully supported by a contextual and purposive interpretation of said provisions within the broader context of the ETA and QSTA;

69. The suggestion by the RQ that the temporal deeming provisions of Sections 182(1) ETA and 318 QSTA should be informed by different rules of a different and completely unrelated statute is not supported in law;

70. In any event, the Monitor disputes the suggestion that a proper reading of Sections 19, 21 and 32 CCAA supports the position of RQ, the whole as explained more fully below under section III.C) of this Argumentation Outline;

71. As a result, RQ is wrong in arguing that it can set-off the Damage Payment ITCs against its 296 Claims as a form of "pre vs. pre" set-off permitted by the CCAA and *Kitco*;

**B) <u>THE RESTRUCTURING CLAIMS ARE NOT PRE-FILING CLAIMS</u>**

72. RQ appears to suggest that the characterization of the Restructuring Claims as pre or post-filing is relevant to the characterization of the Damage Payment ITCs as pre or post-filing;

73. While we disagree with RQ's reasoning to the effect that the characterization of the Restructuring Claims as pre or post-filing is relevant to the characterization of the Damage Payment ITCs as pre or post-filing, based as explained above on the clear wording of Sections 182(1) ETA and 318 QSTA, we consider that the Restructuring Claims are clearly post-filing claims, the whole as further explained below;

74. We submit that RQ mistakenly characterizes Restructuring Claims as pre-filing claims by conflating the notions of "claims" that may be dealt with under a plan or arrangement pursuant to Section 19 CCAA and the claims for damages that can be asserted as a result of the disclaimer or resiliation of a contract pursuant to Subsection 32(7) CCAA, and

mistakenly takes the position that the only claims that may be compromised pursuant to a plan of arrangement under the CCAA are claims that existed prior to the commencement of the CCAA proceedings;

75. The determination of which claims can be compromised by way of a plan under the CCAA derives from Subsection 19(1) CCAA, which reads as follows:

> **19 (1)** Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
>
> (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).
>
> (our underlining)

76. The fact that the Restructuring Claims can be compromised pursuant to the CCAA does not result from their characterization as pre-filing claims, which clearly they are not, but rather from the regime set out in Section 32 CCAA governing the termination of contracts;

77. Section 32 CCAA provides that contracts to which a debtor company is party as of the date of the initial order can be terminated by way of notice, which can be contested within 15 days, and only takes effect 30 days later if not duly contested, or, when such contestation has been resolved. Subsection 32(7) of the CCAA provides that "*if an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim*". Consequently, the Restructuring Claims are provable claims because they are deemed to be provable claims by the CCAA and not because they are pre-filing claims;

78. A claim in damages resulting from a breach or non-performance of a contract occurring prior to the applicable initial order would clearly amount to a pre-filing claim. A Restructuring Claim, which can only arise as a result of a disclaimer or resiliation after the issuance of an initial order under the CCAA in relation to a contract entered before that date[12], cannot be considered a pre-filing claim. Rather it can only be considered a post-

[12] Section 32(1) CCAA specifically provides that it can only apply to an "agreement to which the company is a party on the day on which proceedings commence under this Act."

filing claim, which is deemed by Subsection 32(7) CCAA to be a provable claim subject to compromise under a CCAA plan;

79. Paragraphs (a) and (b) of the definition of "Claim" of the Claims Procedure Order (R-2) provide as follows:

> 4.11 *"**Claims**" means:*
>
> *(a) Any right or claim of any Person that may be asserted or made in whole or in part against the CCAA Parties (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an event, fact, act or omission which occurred in whole or in part prior to the applicable Determination Date[13], at law or in equity, by reason of the commission of a tort (intentional or unintentional), any breach of contract, lease or other agreement (oral or written), any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty), any breach of extra-contractual obligation, any right of ownership of or title to property, employment, contract or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any of the CCAA Parties or any of their property or assets, and whether or not any such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured (by guarantee, surety or otherwise), unsecured, present, future, known or unknown, and whether or not any such right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable under the BIA had the CCAA Parties (or any one of them) become bankrupt on the applicable Determination Date, including, for greater certainty, any Tax Claim and any monetary claim in connection with any indebtedness, liability or obligation by reason of a breach of a collective bargaining agreement, including grievances in relation thereto, or by reason of a breach of a legal or statutory duty under any employment legislation or pay equity legislation; or*
>
> *(b) any Restructuring Claim;*
>
> (…)
>
> (our underlining)

80. Paragraph (b) would be superfluous if the Restructuring Claims were pre-filing claims as they would already be covered by paragraph (a) of the definition.

[13] With respect to the Bloom Lake CCAA Parties, including CQIM, the Determination Date is January 27, 2015, as provided by Section 4.23 of the Claims Procedure Order (R-2).

81. The definition of "Restructuring Claim" under the Claims Procedure Order (R-2) is also restricted to claims that arise after the filing date:

> 4.60 ***"Restructuring Claim"*** *means any right or claim of any Person against the CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the CCAA Parties (or any one of them) to such Person, arising out of the restructuring, disclaimer, resiliation, termination or breach or suspension, on or after the Determination Date, of any contract, employment agreement, lease or other agreement or arrangement, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of this Claims Procedure Order, and, for greater certainty, includes any right or claim of an Employee of any of the CCAA Parties arising from a termination of its employment after the Determination Date, provided, however, that "Restructuring Claim" shall not include an Excluded Claim;*
>
> (our underlining)

82. At paragraphs 81 and 82 of its Contestation, RQ argues that Section 4.60 of the Plan cannot serve to determine what claims are to be considered as post-filing obligations. As a matter of fact, RQ's position is in clear contradiction with the clear wording of Sections 4.11 of the Claims Procedure Order (see also definition of Claims in Schedule A of the Plan) and 4.60 of the Plan. As a matter of law, the Plan has been approved by the requisite majorities of creditors and sanctioned by the Court (R-4), such that its terms are binding on all creditors, including RQ;

83. At paragraphs 67 to 72 of its Contestation, RQ further submits that the Damage Payment ITCs are merely accessories of the damages flowing from contracts entered into before the issuance of the Bloom Lake Initial Order;

84. The Damage Payment ITCs cannot be dissociated from the GST/QST payable and deemed paid on account of the Restructuring Claims and as of the date of payment of the Restructuring Claims, which occurred in 2018;

85. The contracts of Canadian Iron Ore Railcar Leasing LP (ARQ-2), Quebec North Shore and Labrador Railway Company Inc. (ARQ-4), the CSL Group Inc. (ARQ-6) and Western Labrador Rail Services Inc. (ARQ-5, collectively with ARQ-2, ARQ-4 and ARQ-6 the "**Terminated Contracts**") were all executed pre-filing and provided for successive services to be provided over time in consideration of monthly payments;

86. Certainly, RQ would agree that CQIM's right to seek ITCs with respect to services rendered pursuant to the Terminated Contracts after the Bloom Lake Initial Order, would represent post-filing amounts owing to it: there exists no rational argument to justify why the Damage Payment ITCs should be treated otherwise or differently as the Restructuring Claims merely represent the present value of the services which were intended to be provided post-filing over time by these different suppliers to CQIM pursuant to the Terminated Contracts;

87. Considering the Damage Payment ITCs to be pre-filing amounts on the basis that they originate from pre-filing contracts also runs contrary to the specific rule set out at Section 11.01 CCAA, which does not focus on the pre-filing nature of the contracts at issue, but rather on the timing of the consideration provided thereunder:

> **11.01** No order made under section 11 or 11.02 has the effect of
>
> **(a)** prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> **(b)** requiring the further advance of money or credit.

88. Echoing Subsection 32(7) of the CCAA, Subparagraph 33(e) of the Bloom Lake Initial Order (R-1) provides that that the Bloom Lake CCAA Parties can terminate contracts "*and make provisions for the consequences thereof in the Plan*". The Plan compromises "Affected Claims", not "pre-filing claims". The definition of Affected Claims is a "Claim other than an Unaffected Claim". A "Claim" includes both (i) claims "*…in existence on, or which is based on, an event, fact, act or omission which occurred in whole or in part prior to the applicable Filing Date…*" (i.e. a "pre-filing claim") and (ii) "*Restructuring Claims*". Thus, both the CCAA and the Plan clearly provide for the authority to compromise Restructuring Claims even though they are not pre-filing claims;

89. Before and leading up to the enactment of Section 32 CCAA, caselaw recognized the authority of the courts to allow an insolvent debtor to repudiate certain contracts and permit the co-contracting party to file a claim in damages;

- *Re PCI Chemicals Canada Inc*., 2002 CarswellQue 831 at paras 64-66 **[TAB 13]**
- *Re AbitibiBowater*, 2009 QCCS 2188 at paras 64-68 **[TAB 14]**

90. The rationale for the right to repudiate certain contracts during the pendency of CCAA proceedings and to compromise any resulting claim in damages instead of considering same as post filing obligations to be paid in full was explained as follows by Justice Tysoe in the *Doman* matter:

> 27 If a debtor company repudiated a contract prior to commencing CCAA proceedings, the court would not have any direct involvement in the termination of the contract unless, possibly, the other party to the contract sought specific performance of the contract (which, as Brenner C.J.S.C. pointed out in Skeena Cellulose**,** is particularly inappropriate in an insolvency). The other party to the contract would have a claim for damages in respect of the repudiation and would be treated like any other unsecured creditor for the purposes of the plan of arrangement.
>
> 28 Once an insolvent company seeks the assistance of the court by commencing CCAA proceedings, the company comes under the supervision of the court. The supervision also involves a consideration of

the interests of the broad constituency served by the CCAA mentioned in Skeena Cellulose by Newbury J.A. These interests, when coupled with the exercise by the court of its equitable jurisdiction, bring into play the requirements for fairness and reasonableness in weighing the interests of affected parties.

29 Generally speaking, the indebtedness compromised in CCAA proceedings is the debt which is in existence at the time of the CCAA filing, and the debtor company is expected to honour all of its obligations which become owing after the CCAA filing. It is common for the initial stay order or the come-back order to provide that the debtor company is to continue carrying on its business and to honour its ongoing obligations unless the court authorizes exceptions.

30 In many reorganizations under the CCAA**,** it is necessary for the insolvent company to restructure its business affairs as well as its financial affairs. Even if the financial affairs are restructured, the company may not be able to survive because portions of the business will continue to incur ongoing losses. In such cases, it is appropriate for the court to authorize the company to restructure its business operations, either during the currency of the CCAA proceedings or as part of a plan of arrangement. The process is commonly referred to as a downsizing if it involves certain aspects of the business coming to an end. The liabilities which are incurred as a result of the restructuring of the business operations, for such things as termination of leases and other contracts, are included in the obligations compromised by the plan of arrangement even though the debtor company will have been honouring its ongoing commitments under the leases and other contracts after the commencement of the CCAA proceedings. The inclusion of these liabilities in the plan of arrangement is an exception to the general practice of debtor companies paying the full extent of post-filing liabilities and compromising only the pre-filing liabilities.

31 It is within this context that the court is called upon to authorize the termination of contracts which the debtor company could have repudiated without any authorization prior to the commencement of CCAA proceedings. The liabilities to be compromised have, in general terms, been crystallized by the filing of the CCAA petition, and the affairs of the debtor company are under the supervision of the court, which is required to exercise its equitable jurisdiction fairly and reasonably.

32 I do not approach the matter in the same fashion as Lo Vecchio J. did in Blue Range. I do not see the resistance of a party to the termination of a contract with the debtor company to be an attempt to elevate their claim for damages above the claims of all the other unsecured creditors. Apart from any monies which may have been outstanding under the contract at the time of the CCAA filing, the party to the contract was not an unsecured creditor who was going to be subjected to a compromise under a plan of arrangement. The party only becomes a creditor in respect of its damage claim if the contract is terminated. Although Lo Vecchio J. could be interpreted as suggesting in the quoted paragraphs 36 to 38 that a

> debtor company may terminate contractual relations as long as the resulting damage claim is included in its plan of arrangement, I do note that he subsequently commented that the termination of the contracts in that case was necessary to the company's survival program.
>
> (our underlining)

- *Re Doman Industries*, 2004 BCSC 733 at paras 27-32 **[TAB 15]**
- See also *Blue Range Resource Corp (Re)*, 1999 ABQB 1038 at paras 36-38 **[TAB 38]**:

> [36] The purpose of the CCAA proceedings generally and the stay in particular is to permit a company time to reorganize its affairs. This reorganization may take many forms and they need not be listed in this decision. A common denominator in all of them is frequently the variation of existing contractual relationships. Blue Range might, as any person might, breach a contract to which they are a party. They must however bear the consequences. This is essentially what has happened here.
>
> [37] A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16 .e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.
>
> [38] The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathise with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route.

91. Prior to the 2009 enactment of Section 32 CCAA, Courts permitted claims in damages resulting from the post-filing repudiation of contracts to be compromised within plans of arrangement not on the basis that they constituted "provable claims" or "claims" within the meaning of the CCAA, but rather based on their inherent supervisory jurisdiction over CCAA restructurings, as evidenced by the clause-by-clause analysis of Bill C-12 published in 2005:

> *Prior to Chapter 47, the CCAA was silent on the ability of a debtor to disclaim an agreement. A judicial practice developed, however, based on inherent jurisdiction that allowed the disclaimer of most kinds of agreements.*

> *The rationale for allowing disclaimers is to facilitate restructurings by granting debtors the ability to repudiate agreements that would threaten its viability if they continued to be bound by them. At the same time, codification of the current practice makes the process more transparent by providing both parties with a better understanding of the rules that apply when considering a disclaimer. The amendments are designed to ensure that the process occurs in an open, fair and expeditious manner.*

- Government of Canada, Corporate and Insolvency Law Policy Directorate of Industry Canada, *Bill C-12: Clause by clause analysis*, Ottawa, 2005 **[TAB 42]**

92. This espouses the views expressed in a 2003 Senate report which led up to the enactment of Section 32 CCAA:

> *The Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act be amended to permit disclaimer of executory contracts in existence on the date of commencement of proceedings under the Acts. This disclaimer should apply to all executory contracts, provided a number of conditions are met. In particular: the debtor should be obliged to establish inability or serious hardship in restructuring the enterprise without the disclaimer; the co-contracting party should be permitted to file a claim in damages in the restructuring; and, where a collective agreement is being disclaimed, the debtor should also have the burden of establishing that post-filing negotiations have been carried on, in good faith, for relief of too onerous aspects of the collective agreement and should establish in Court that the disclaimer is necessary in order to allow for a viable restructuring.*
>
> (our underlining)

- Senate Report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce, (November 2003) at page 138 **[TAB 43]**

93. Section 65.11 BIA was also enacted at the same time as Section 32 CCAA, and provides for the same mechanisms in the context of BIA proposals. With the trustee's approval, the debtor may disclaim agreements that they were a party to on the day that the notice of intention or proposal was filed. Subsection 65.11 (8) BIA also deems damages that a party to a disclaimed contract that suffers as loss as a result to have a provable claim;

94. The definition of "provable claim" at Section 121 BIA remained the same pursuant to the enactment of Section 65.11 BIA:

> **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

> **(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

which further evidences that Restructuring Claims would not constitute a "provable claim" without the deeming provisions set out in Sections 32(7) CCAA and 65.11 (8) BIA;

95. In the light of the foregoing, the Restructuring Claims are not pre-filing claims for the purpose of establishing what pre-filing claims can be set-off against RQ's 296 Claims;

### C) POST-FILING DEBTS CANNOT BE OFFSET AGAINST PRE-FILING CLAIMS

96. At paragraphs 84 and 94.II and 94.III of its Contestation, should this Court conclude that the Disputed ITCs are indeed post-filing debts owed by CQIM, RQ seeks to set-off same against its pre-filing 296 Claims by limiting the scope of the *Kitco* decision to debtors in operation and excluding its application to matters where debtors have ceased operating and are in liquidation;

- *Arrangement relatif à Métaux Kitco inc.,* 2016 QCCS 444 ("**Kitco QCCS**") **[TAB 7]**
- Arrangement relatif à Métaux Kitco inc., 2017 QCCA 268 ("**Kitco QCCA**") **[TAB 6]**

#### 1) Kitco stands for the proposition that compensation cannot be effected between pre-filing claims and post-filing debt

97. The facts of *Kitco* can be summarized as follows:

a) Métaux Kitco inc. ("**Kitco**") was in the business of purchasing and extracting scrap gold in order to produce and sell pure gold. Kitco paid GST/QST on the scrap gold but did not collect it on the pure gold it sold, as the sale of pure gold is not taxable. Therefore, Kitco's ITC claims generally resulted in a net tax refund for each reporting period;

b) RQ and the CRA (the "**Agencies**") conducted audits and disallowed several ITCs it had paid to Kitco. It was alleged that Kitco participated in a fraudulent tax scheme, as it had claimed ITCs for sales tax that was never paid to its suppliers. In order to avoid enforcement measures by the Agencies, Kitco filed a notice of intent ("**NOI**") under the *BIA*. The proceedings were then continued under the *CCAA* and an initial order was granted;

c) Kitco continued to operate as a going concern after the issuance of the Initial Order, and filed its ITC claims as usual. The Agencies took the position that they were entitled to offset Kitco's pre-filing ITC-related debt with their post-filing ITC claims, and as a result withheld payment of approximately $1.8M in ITCs. Kitco then filed a motion for declaratory judgment in order to confirm that the Agencies could not effect compensation between the pre-filing ITC-related debt and their post-filing ITC claims;

98. Following the Supreme Court of Canada's ruling in *Century Services*, the Superior Court held that the conditions to effect compensation in the context of insolvency proceedings under the BIA also applied to CCAA proceedings, as both statutes form part of an "*integrated body of insolvency law*":

> [105] Vu la très grande similarité des articles 97(3) LFI et 21 LACC et le fait que ces deux lois font partie d'un ensemble intégré de règles du droit de l'insolvabilité, cette conclusion s'applique tout autant à la compensation à opérer dans le cadre d'une restructuration. Il n'y a pas lieu de distinguer entre le mécanisme de la compensation dans le contexte d'une faillite ou d'une proposition et dans le contexte d'un arrangement.
>
> (our underlining)

- *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 at paras 15, 22-24, 78 ("**Century Services**") **[TAB 19]**
- *Kitco QCCS* at para 105 **[TAB 7]**

99. As a result, relying mainly on the Supreme Court of Canada's rulings in *D.I.M.S.* and *Husky Oil* which dealt with set-off in BIA proceedings, the Superior Court held that:

a) The rules relating to compensation in an insolvency context are to be applied in light of the civil law rules relating to compensation (article 1673 *CcQ*), in that legal compensation can be effected between debts that are mutual, liquid, certain and exigible, and for judicial compensation to be effected, debts must also be connected;

- *Kitco QCCS* at paras 77-87 **[TAB 7]**
- *D.I.M.S.* at paras 34-36 and 64 **[TAB 16]**

b) Section 21 CCAA, which allows recourse to the compensation mechanism in CCAA proceedings, must be interpreted restrictively;

- *Kitco QCCS* at para 99 **[TAB 7]**

c) Such a restrictive interpretation of Section 21 CCAA is justified as the compensation mechanism in an insolvency context is an exception to the principle of equality of creditors, as it unavoidably has the effect of securing the claim of the party invoking compensation;

- *Kitco QCCS* at para 100 **[TAB 7]**
- *Husky Oil* at paras 57-58 **[TAB 28]**

d) Compensation can only be effected between mutual debts that came into existence before the date of commencement of proceedings under the CCAA;

- *Kitco QCCS* at para 102 **[TAB 7]**
- *D.I.M.S.* at para 55 **[TAB 16]**

100. In applying these principles to the facts of the case, the Superior Court found that none of the criteria for compensation to apply were met, as:

a) The debts were not connected, except for the identity of the parties and for the laws involved. The ITCs forming part of both debts related to distinct periods, transactions and suppliers;

- *Kitco QCCS* at paras 116-117 **[TAB 7]**

b) The ITCs claimed after Kitco's CCAA proceedings commenced were post-filing amounts, and as a result, could not be set-off by the Agencies against the pre-filing debt that they were owed by Kitco for the disallowed ITCs;

- *Kitco QCCS* at para 118 **[TAB 7]**

101. The Court of Appeal found that, *inter alia*:

a) RQ's argument to the effect that Section 21 CCAA should be interpreted as to permit pre/post set-off ran contrary to the objectives of the CCAA and principle of equality of creditors;

- *Kitco QCCA* at paras 20-21 **[TAB 6]**

b) The post-filing ITCs owed by RQ to Kitco were indeed post-filing amounts, as Kitco had no right to the post-filing ITCs on the day it commenced its insolvency proceedings. Kitco's right to the post-filing ITCs arose from the payment of taxes to its suppliers;

- *Kitco QCCA* at para 40 **[TAB 6]**

c) The case law cited by RQ (*Air Canada*) to support the proposition that pre/post compensation can be effected ran contrary to the correct interpretation of Section 21 CCAA;

- *Kitco QCCA* at paras 45-50 and 72 **[TAB 6]**

d) The Superior Court was correct in transposing the principles set out in *D.I.M.S.* under BIA proceedings to CCAA proceedings;

- *Kitco QCCA* at paras 51-52 **[TAB 6]**

e) RQ was essentially attempting to claim a security interest on Kitco's property in setting-off the post-filing ITCs owed to Kitco with pre-filing debt, which was not permitted;

- *Kitco QCCA* at para 71 **[TAB 6]**

102. Despite RQ's arguments to the contrary, *Kitco* does not in any way allow pre/post compensation or set-off. Also, the discussion in first instance concerning the nature of the

disputed ITCs that were claimed back by RQ against Kitco and whether same could be considered as certain, liquid and exigible was only *obiter* inasmuch as the ITCs in relation to post-filing commercial activities were undoubtedly a post-filing claim owing to the debtor:

> [28] For compensation to be effected between debts, the Civil Code requires that the debts be "certain" (art. 1673). Does the fact that the assessments are contested make them uncertain, or does the fact that they are immediately exigible make them certain within the meaning of that provision?
>
> [29] That question need not be answered, because, even if we adopt the hypothesis favourable to the ARQ whereby the assessments are certain, the question remains whether compensation can be effected between the two debts where one is incurred before the insolvency proceedings and the other is incurred after. The answer to that question will be sufficient to decide the dispute.
>
> (…)
>
> [80] In *Daltech* as well, the Court reiterated that the mutual obligations at the source of the debts to be compensated must exist on the day of Determination. In that judgment, we read:
>
> [Translation]
>
> > [58] In *D.I.M.S. Construction inc. (Trustee of) v. Québec (Attorney General)*, Deschamps, J. interpreted section 97(3) *BIA*. "… as implicitly requiring that the mutual debts come into existence before the bankruptcy". In this case, I share the opinion of the trial judge that compensation applies because, prior to the bankruptcy, the bankrupt had a claim against the respondent, as evidenced by the right of retention set out provided in the Contract. At the time of the bankruptcy, both parties were mutually creditor and debtor.
>
> […]
>
> [82] In my opinion, sections 21 CCAA and 97(3) BIA, which provide that the "law of set-off or compensation applies to all claims…", thereby identify the point in time when compensation is effected, or in other words, the moment at which the claims must be established: it is on the date of Determination that temporal reciprocity is established.

- *Kitco QCCA* at paras 28, 29, 80 and 82 **[TAB 6]**

103. As demonstrated above in subsection A), per Sections 182 (1) ETA and 318 QSTA, CQIM's tax liability only arose and the Damage Payment ITCs only became payable upon payment of the First Interim Distribution;

- Paragraph 8 of the Motion

104. Therefore, much like in *Kitco*, it is plainly obvious that CQIM had no right to the Disputed ITCs when the Bloom Lake and Wabush Initial Orders were issued. Accordingly, they are post-filing amounts owed to CQIM which cannot be set-off against the 296 Claims:

> [40] It is a fact that, as at the day of Determination, Kitco had no right to the claimed refund. That right arose from the continuation of its business and the taxes it has paid to its suppliers on the input for its operations since Determination. The refund is indeed a post-debt.

- *Kitco QCCA* at para 40 **[TAB 6]**

**2) <u>The holding in Kitco in that pre/post compensation can generally not be effected is a principle that is well-accepted by the courts</u>**

105. The holding in *Kitco* in that pre/post compensation cannot be effected in CCAA proceedings has been repeatedly cited and affirmed since;

106. The *Beyond the Rack* decision, which was rendered after *Kitco* was decided in first instance, but prior to the Court of Appeal's ruling, the facts can be summarized as follows:

a) The payment processors to an online retailer ("**BTR**") were designated as critical suppliers in BTR's CCAA proceedings;

b) At the time the initial order was granted, there were several unfulfilled client orders (the "**Pre-filing Orders**"). Although BTR continued to operate as a going concern, many clients requested refunds for Pre-filing Orders. BTR accordingly instructed its payment processors to issue refunds, which totaled approximately $1.9M. These refunds were deducted from the remittances the payment processors owed to BTR for new sales, as per the terms of the payment processing contracts;

c) The Monitor and BTR submitted an application for directions to the Court, whereby they sought to prohibit the payment processors from reducing their remittances to BTR by the amounts refunded for Pre-filing Orders, arguing that the payment processors held pre-filing claims for the Pre-filing Order refunds for which compensation could not be effected with post-filing revenue;

- *7098961 Canada inc. (Beyond The Rack Enterprises Inc.) (Arrangement relatif à)*, 2016 QCCS 2115 ("**Beyond the Rack**") **[TAB 22]**

107. As the cancellation of the Pre-filing Orders and the operations performed by the payment processors pursuant to BTR's instructions to refund occurred in the post-filing period, the Court found that the refunds constituted post-filing claims which resulted from post-filing services rendered. Accordingly, the compensation being effected by the payment processors was "post/post";

- *Beyond the Rack* at para 208 **[TAB 22]**

108. Although this was dispositive of the issue, the Court addressed the Monitor's argument to the effect that the law was settled regarding pre/post compensation, stating that although it would go against the rules regarding pre/post compensation, nothing would prevent the Court from crafting an initial order which would permit a critical supplier to effect pre/post compensation if necessary:

> [183] Moreover, under CCAA proceedings where the ultimate goal is to give the opportunity to a company to restructure its operations and business with the critical assistance of certain key suppliers, nothing would prevent the Court to allow a critical supplier to make such a type of compensation, if necessary, <u>even if the process could go against the rules between pre-filing claims and post-filing ones</u>.
>
> (our underlining)

- *Beyond the Rack* at para 183 **[TAB 22]**

109. The Court also cited the Superior Court's ruling in *Kitco* to confirm that civil law compensation is applicable in the context of CCAA proceedings;

- *Beyond the Rack* at paras 218-225 **[TAB 22]**

110. In *Ferti-Val*, the Superior Court also reaffirmed the general principle set out by the Court of Appeal in *Kitco*, insofar as pre/post compensation cannot be effected:

> [32] L'arrêt *Arrangement relatif à Métaux Kitco inc*., rendu après l'audience en la présente affaire, confirme le jugement de la première juge qui statue que la compensation prévue à l'article 21 *L.a.c.c.* n'est pas permise entre la dette fiscale litigieuse de la débitrice née avant les procédures en insolvabilité et sa créance non contestée pour des crédits TPS et TVQ née après ces procédures.

- *Syndic de Ferti-val inc*., 2017 QCCS 2057 ("**Ferti-Val**") at para 32 **[TAB 21]**

111. The facts in *Ferti-Val* can be summarized as follows:

a) The debtor filed for bankruptcy in 2007;

b) The CRA had an unsecured claim in Ferti-Val's bankruptcy for $307,929.58;

c) The trustee applied for tax credits which the debtor was entitled to between 2004 and 2006 (the "**RS&DE Credits**"), which were denied by the CRA;

d) The CRA upheld this denial following a notice of objection, and the matter was scheduled to be heard by the Tax Court of Canada;

112. The trustee petitioned the Superior Court for a declaratory judgment to the effect that the RS&DE Credits were post-filing amounts owed to Ferti-Val, as they would only be recognized after the filing date following a judgment by the Tax Court of Canada;

113. The Court found that the RS&DE Credits claimed for taxation years 2004, 2005 and 2006 were pre-filing debt, as the debtor was entitled to them in pre-filing period, but did not claim them. Accordingly, it held that should the Tax Court of Canada rule in Ferti-Val's favour, the CRA would be entitled to effect compensation between its pre-filing claim and the RS&DE Credits (pre/pre compensation):

> [35] Ouvrons une parenthèse pour dire qu'en la présente affaire le syndic soutient que les crédits d'impôt RS&DE pour les années antérieures à la faillite sont des dettes post-faillite du fait qu'elles ne seront reconnues que postérieurement à la faillite par un jugement final. Il fait aussi valoir que suivant l'arrêt de la Cour suprême dans *D.I.M.S.* l'article 97(3) L.f.i. rend applicable au Québec les règles de la compensation du Code civil du Québec, lesquelles requièrent que les dettes soient l'une et l'autre certaines liquides et exigibles pour que la compensation de plein droit opère (art. 1673). Il fait valoir que les crédits d'impôt contestés n'étaient ni liquides ni exigibles à la date de la faillite, en conséquence de quoi la compensation ne saurait avoir lieu.
>
> […]
>
> [37] En l'espèce DEC a avancé des sommes à la débitrice avant la faillite et la créance que tente de faire valoir le syndic est pour des crédits d'impôt à la recherche scientifique et au développement expérimental résultant des investissements qu'elle a faits en RS&DE au cours de ses opérations avant la faillite. Ce sont deux dettes pré-faillite.

- *Ferti-Val* at paras 35, 37 **[TAB 21]**

114. The Court's reasoning in *Ferti-Val* can easily be transposed to the present circumstances. Had CQIM claimed ITCs after the Bloom Lake Initial Order was issued for GST/QST paid on inputs prior to the same, those ITCs would clearly be pre-filing debt that RQ could validly offset against the 296 Claims;

115. Here, the Damage Payment ITCs became due and owing, and came into existence only as a result of the specific deeming provisions of Sections 182 (1) ETA and 318 QSTA: *Ferti-Val* is of no assistance to RQ;

116. The Superior Court and Court of Appeal also affirmed the pre/post compensation rules in *Consultants SM*. As RQ mentions in its Contestation at paragraph 40, the Supreme Court of Canada heard an appeal in that matter which is currently still under advisement;

- *Arrangement relatif à Consultants SM inc.*, 2019 QCCS 2316 ("**Consultants SM QCCS**") **[TAB 17]**
- *Arrangement relatif à Consultants SM inc.*, 2020 QCCA 438 ("**Consultants SM QCCA**") **[TAB 18]**

117. The relevant facts in *Consultants SM* can be summarized as follows:

a) An initial order was issued under the CCAA in August 2018;

b) The debtor ("**SM**") performed post-filing work for the City of Montreal (the "**City**") between August and November of 2018 for which it had invoiced $825,892.20 but was not paid (the "**outstanding invoices**");

c) Following the approval of a sale of SM's assets (the "**APA**") which would essentially leave most unsecured claims unsatisfied, the City took the position that it was permitted to effect compensation between the outstanding invoices and two claims it had against SM:

i) The City's first pre-filing claim was for a voluntary undertaking made by SM under Bill 26[14] to reimburse amounts improperly paid to it because of its alleged fraudulent tactics in the award process for several public contracts between 1996 and 2016 (the "**First Claim**");

ii) The City's second pre-filing claim was based on legal proceedings it obtained leave from the CCAA judge to commence against SM in 2018 for collusion in a public call for tenders (the "**Second Claim**");

(collectively, the "**City's Claims**")

118. The Monitor petitioned the Superior Court for a declaratory judgment to the effect that the City's post-filing debt to SM was not extinguished by way of compensation with the City's Claims, and ordering the City to pay the outstanding invoices, which was granted. The Superior Court found that:

a) The First Claim was pre-filing debt arising out of fraudulent misrepresentation within the meaning of Paragraph 19(2)(*d*) CCAA, following which it would survive the CCAA proceedings, unless the City consented for it to be compromised in a plan of arrangement;

- *Consultants SM QCCS* at paras 43 and 47 **[TAB 17]**

b) Although the First Claim would survive the CCAA proceedings, it was still pre-filing debt that could not be offset against the post-filing outstanding invoices;

- *Consultants SM QCCS* at paras 69-73 **[TAB 17]**

c) Although the Second Claim was post-filing, post/post compensation could not be effected, as the conditions for compensation by operation of law (article 1673 *CcQ*)

[14] *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR c R-2.2.0.0.3 **[*Bill 26*]**.

were not met: the court proceedings were still at a preliminary phase, and therefore the debt was not certain, liquid, nor exigible;

- *Consultants SM QCCS* at para 42 **[TAB 17]**

119. The majority of the Court of Appeal concurred with the Superior Court in the result (save for the order forcing the City to pay the outstanding invoices to SM, which was technically *ultra petita*), but disagreed with the characterization of the First Claim as arising out of fraudulent representation. It found that the Superior Court had reached this conclusion based on an incorrect reading of certain provisions in Bill 26;

120. However, as the First Claim was a pre-filing claim, the majority of the Court of Appeal held that its fraudulent nature was irrelevant for the purpose of determining whether compensation could be effected with the post-filing outstanding invoices, as *Kitco* precludes pre/post compensation:

> [50] La créance PRV ne peut donc être qualifiée de frauduleuse. Elle constitue une créance ordinaire et est donc compromise selon le paragraphe 19(1) LACC. L'argumentaire échafaudé par la Ville ne résiste pas à l'analyse. Bien que cette détermination suffise pour rejeter ce moyen de l'appelante, j'ajouterai ceci au sujet de la prétention de compensation en matière de fraude.
>
> [51] La juge de première instance a décidé, à bon droit, que même en présence d'une dette qui résulterait d'une fraude, les principes énoncés dans l'arrêt Kitco reçoivent application. La compensation ne peut donc s'opérer entre une dette de cette nature née avant des procédures en insolvabilité et une dette née après celles-ci.
>
> (our underlining)

- *Consultants SM QCCA* at paras 50-51 **[TAB 18]**

121. On appeal, the City also argued that it would have no chance of recovering its debt under the First Claim as SM would essentially be an "empty shell" once the APA was concluded, which would yield an unfair result given the circumstances. The majority of the Court of Appeal found that there were no overriding public policy considerations which would justify giving debt arising out of fraud a preference which is not expressly provided for by statute, and that deference should be given to the supervising judge's decision to approve the APA:

> [53] Par ailleurs, il arrive que certains aspects de la réorganisation des entreprises de grande envergure concernent l'intérêt public. S'il est vrai que personne ne souhaite que la fraude demeure sans conséquence, cela ne justifie pas de mettre de côté les règles mises en place par la LACC. Ces règles imposent notamment de traiter les créanciers sur un pied d'égalité, sous réserve des priorités édictées par la loi. Or, la dette frauduleuse ne constitue pas une créance prioritaire, ce que le législateur aurait pu édicter s'il l'avait voulu. Adopter une interprétation étendue de la compensation

> en matière de créance frauduleuse aurait pour effet de conférer, en pratique, une priorité accrue et de brouiller les cartes considérablement.
>
> […]
>
> [55] La Ville reconnaît que, règle générale, une fois la restructuration complétée, une réclamation frauduleuse n'est pas purgée, de sorte que le créancier peut encore tenter de récupérer sa créance auprès de l'entreprise restructurée. En l'espèce toutefois, comme il y a une vente d'actifs en vertu de l'article 36 LACC et que Groupe SM deviendra une « coquille vide », son recours est illusoire.
>
> [56] Il est vrai que les créanciers ordinaires ne toucheront pas un sou au terme de l'opération de « réorganisation », mais le Tribunal, après étude et examen des considérations pertinentes, a conclu que la vente proposée devait être approuvée, ce que la Ville n'a contesté ni avant ni après la décision rendue le 12 novembre 2018.

- *Consultants SM QCCA* at paras 53-56 **[TAB 18]**

122. The Monitor respectfully submits that this Court should not depart from this line of jurisprudence, nor distinguish or read it down as suggested by RQ. Clearly, the 296 Claims and the Disputed ITCs are not in any way connected, they arise from different tax obligations and transactions, and the Disputed ITCs obviously did not exist as of the date of the Bloom Lake Initial Order. Therefore, compensation (including legal or judicial compensation) cannot operate. Moreover, there is no valid reason in fact or at law to allow for pre/post set-off in this case. None is alleged by RQ and the conclusions sought by it would defeat fundamental objectives of insolvency law;

### 3) <u>There is no valid reason to limit the scope and the rationale in Kitco</u>

#### a) <u>The effects of set-off on the *pari passu* principle</u>

123. Sections 97(3) BIA and 21 CCAA specifically preserve the application of the law of set-off both in bankruptcy and restructuring matters governed by the CCAA.[15] In *Husky Oil*, the Supreme Court of Canada in reaffirming the application of the law of set-off in bankruptcy, as mandated by Section 97(3) BIA, recognized that set-off has the impact of reordering the priority of a creditor also indebted to the estate:

> 57 In the bankruptcy context, a right to set-off necessarily has the effect of securing the claim of the party claiming set-off against assets of the bankrupt's estate. This was recently recognized in unambiguous terms by Lord Hoffman in his speech for the unanimous House of Lords in *Stein v. Blake*, [1995] 2 All E.R. 961. His Lordship stated at p. 964:

[15] Although CCAA Courts maintain their authority under section 11 CCAA to stay the right of set-off. See: *North American Tungsten Corporation Ltd. (re),* 2015 BCSC 1382, leave to appeal denied by *North American Tungsten Corp. v. Global Tungsten and Powders Corp*., 2015 BCCA 390 and 2015 BCCA 426 **[TAB 24 and 25]**; *Tucker v. Aero Inventory (UK) Ltd.,* 2009 CarswellOnt 7007 **[TAB 26]**; *Re: Just Energy Corp*., 2021 ONSC 1793 **[TAB 27]**

> *Bankruptcy set-off … affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance.*

- *Husky Oil Operation Ltd. v. Minister of National Revenue,* [1995] 3 S.C.R. 453 at para 57 ("**Husky Oil**") **[TAB 28]**

124. More recently in *D.I.M.S. Construction*, the Supreme Court of Canada noted the impact of set-off on the rule of equality between creditors:

> [55] […] Since s. 97(3) BIA is an exception to the rule of equality between creditors, it must be interpreted narrowly.

- *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General),* 2005 SCC 52 at para 55 ("**D.I.M.S.**") **[TAB 16]**

125. Limiting compensation between claims which do not exist as of the date of the initial order is tied to the fundamental objectives of maximizing creditor recovery and treating creditors equally, which remain applicable even under bankruptcy and liquidation;

126. In *Nortel Networks*, the Ontario Court of Appeal affirmed that the need to treat all creditors fairly and to ensure an orderly distribution of assets is the foremost governing principle in insolvency proceedings:

> [23] It is well settled that the pari passu principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486, at para. 20 (S.C.), per Blair J. In fact, the pari passu principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: *The Pari Passu Myth*" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the pari passu] principle entrenched in jurisdictions far removed … in geography and time": Mokal, at pp. 581-582.
>
> [24] The pari passu principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.
>
> (our underlining)

- *Nortel Networks Corporation (Re)*, 2015 ONCA 681 at paras 23-34 **[TAB 34]**

127. Allowing RQ to effect pre/post compensation would run contrary to the *pari passu* principle. Indeed, as Sections 21 CCAA and 97 (3) BIA have the effect of securing an unsecured creditor's claim, they are exceptions to the principle of equality of creditors and must be interpreted narrowly;

- *Kitco QCCS* at para 54 **[TAB 7]**

b) Liquidating CCAAs are common and should not be subject to a different set of rules

128. At paragraph 37 of its Contestation, RQ further submits that the scope of the rule in *Kitco* should be limited to cases where the debtor continues their business operations as a going concern;

129. RQ's argument appears to be based on the following statement in *Kitco* by the Court of Appeal:

> [20] À mon avis, l'interprétation littérale de l'Agence n'est pas la bonne car elle fait échec à la restructuration des grandes entreprises en difficulté, l'objectif primordial de la L.a.c.c., […]
>
> (our underlining)

- *Kitco QCCA* at para 20 **[TAB 6]**

130. First, the rest of that statement bears reading, as the Court of Appeal also points out that allowing for pre/post compensation would go against the *pari passu* principle:

> [20] In my opinion, the ARQ's literal interpretation is not correct because it creates an obstacle to the restructuring of large companies in difficulty, which is the primary objective of the *CCAA*, and also goes against the well-established principle in insolvency law of treating unsecured creditors equally. The ARQ also submits a ground based on the hypothesis that Kitco will fail to submit a plan of arrangement.

- *Kitco QCCA* at para 20 **[TAB 6]**

131. Second, and as explained above at paragraphs 96 to 103, *Kitco* firmly establishes that pre/post compensation is not available. The Court of Appeal widened the mutual claims that can be set-off by expanding the strict concepts applicable under the *CcQ* by reference to the broader concept of provable claims. However, this discussion is of no use to RQ in the present case since the 296 Claims are clearly pre-filing claims and that the Disputed ITCs are clearly post-filing debts which did not exist as of the date of the Bloom Lake Initial Order;

132. Third, nothing in the CCAA or the case law suggests that CCAA proceedings which involve sales of assets rather than restructuring ("**Liquidating CCAAs**") should be subject to a different set of rules;

- *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 at para 46 ("**Callidus**") **[TAB 29]**

133. Section 36 CCAA empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. Its adoption was recommended by the Standing Senate Committee on Banking, Trade and Commerce in its November 2003 report;

- Senate Report, Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, Report of the Standing Senate Committee on Banking, Trade and Commerce, (November 2003) at page 147 **[TAB 43]**

134. In *Callidus,* the Supreme Court of Canada relied on that report when it stated that liquidation was not inconsistent with the remedial objectives of the CCAA, as it may be a means to eliminate further loss for creditors. Indeed, the Court noted that CCAA proceedings have evolved to permit outcomes that result in liquidation:

> [42] That said, the CCAA is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally". In pursuit of those objectives, CCAA proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself. Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the CCAA landscape.
>
> […]
>
> [45] However, since s. 36 of the CCAA came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the CCAA, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership. Indeed, in *Indalex*, the company sold its assets under the CCAA in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).
>
> [References omitted. Our underlining.]

- *Callidus* at paras 42 and 45 **[TAB 29]**

135. In reaching this conclusion, the Court drew a parallel to its ruling in *Orphan Well* which concerned BIA proceedings, where it explained that as a general matter, the BIA serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors, but in circumstances where a debtor corporation will never emerge form bankruptcy, only the latter purpose is relevant:

> [67] The case law has established that the BIA as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing *Husky Oil*, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. […]
>
> (our underlining)

- *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5 at para 67 **[TAB 30]**
- See also *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at paras 32 to 35 **[TAB 36]:**

> [32] Parliament enacted the BIA pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act*, 1867. The BIA, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, at para. 7).
>
> [33] The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the BIA ; *Husky Oil*, at para. 9. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:
>
> > The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise.
> >
> > Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

> [34] For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the BIA thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:
>
> > **69.3 (1)** Subject to subsections (1.1) and (2) and sections 69.4 and 69.5 , on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.
> >
> > (See *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, a pp. 1015-16.)
>
> [35] Yet there are exceptions to the principle of equitable distribution. Section 136 of the BIA provides that some creditors will be paid in priority. These creditors are referred to as "preferred creditors". There are also creditors that are paid only after all ordinary creditors have been satisfied: ss. 137(1) , 139 and 140.1 of the BIA . Furthermore, the automatic stay of proceedings does not prevent secured creditors from realizing their security interest: s. 69.3(2) of the BIA ; *Husky Oil*, at para. 9. A court may also grant leave permitting a creditor to begin separate proceedings and enforce a claim: s. 69.4 of the BIA . These exceptions reflect the policy choices made by Parliament in furthering this purpose of bankruptcy.

136. The Court also referred to *Dianor*, where the Ontario Court of Appeal held that Liquidating CCAAs are now commonplace:

> [70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. <u>The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace</u>. […]
>
> (our underlining)

- *Third Eye Capital Corporation v. Dianor Resources Inc*., 2019 ONCA 508 at para 70 **[TAB 33]**

137. Since the Supreme Court of Canada's ruling in *Callidus*, the legitimacy of Liquidating CCAAs has been restated by our courts several times. For example, in *Aquadis*, the Quebec Court of Appeal pointed out that Liquidating CCAAs were widely accepted both in practice and the case law:

> [68] What is inescapable and particularly applicable here <u>is the acceptance, in the practice and case law, of the liquidating CCAA</u> and the expanded view of the role of the monitor, indeed the baptism of the "super monitor". […]
>
> (our underlining)

- *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 at para 68 **[TAB 31]**
- See also *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 at para 51 (leave to appeal to QCCA and SCC refused, 2020 QCCA 1488, SCC docket n$^{os}$ 39464, 39526) **[TAB 37]**
- See also *Re Bellatrix*, 2021 ABCA 85 at para 51 **[TAB 32]**

138. Finally, the Monitor further submits that the *Kitco* ruling is coherent with the applicable rule pursuant to the *Winding-Up and Restructuring Act,* R.S.C. 1985, c. W-11 ("**WURA**") as provided by Section 73 WURA:

> **73 (1)** The law of set-off, as administered by the courts, whether of law or equity, applies to all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company, in the same manner and to the same extent as if the business of the company was not being wound up under this Act.

and that there appears to exist no policy reason or valid justification to depart from that rule and the *pari passu* rule in the present case. Certainly, none is alleged by RQ;

## IV. CONCLUSION

139. The Monitor submits that the Damage Payment ITCs are post-filing amounts based not only on the clear and unambiguous wording of Sections 182(1) ETA and 318 QSTA, but also based on a contextual and purposive interpretation of the ETA and QSTA;

140. The Monitor submits that RQ's attempts to read-in Sections 182(1) ETA and 318 QSTA foreign concepts from unrelated federal legislation dealing with completely unrelated matters or concepts of private law is totally unwarranted;

141. Even if Sections 182(1) ETA and 318 QSTA are dispositive concerning the post-filing nature of the Damage Payment ITCs and that pre or post qualification of the Restructuring is not relevant for that purpose, Restructuring Claims do not amount to pre-filing claims, and again, RQ's arguments are contrary to the CCAA, the Claims Procedure Order and the Plan;

142. Therefore, in the present case, the pre-filing nature of the 296 Claims on the one hand, and the post-filing nature of the Disputed ITCs on the other hand are undeniable;

143. *Kitco* does not in any way allow or permit pre/post compensation, which would clearly undermine a fundamental and governing principle of insolvency law, which is applicable even in bankruptcy or in liquidation;

144. As of the date of the Bloom Lake Initial Order, the Disputed ITCs clearly did not exist and therefore cannot subsequently serve to secure the partial repayment of a pre-filing debt by way of compensation. Whether or not the disputed ITCs in *Kitco* were considered as mutually liquid, certain or exigible within the meaning of 1673 *CcQ* or a provable claim

within the meaning of Section 19 CCAA and 2 BIA, is not in any way relevant in the present case, since the pre-filing nature of the 296 Claims is not in dispute (claims of RQ against CQIM), whereas as the post-filing nature of the Disputed ITCs (debts of RQ owing to CQIM) is undeniable;

145. Finally, there is no valid reason in fact or at law to allow for pre/post compensation in this case. None is alleged by RQ and the conclusions sought by it would defeat a fundamental objective of insolvency law and would prejudice all the other creditors of CQIM;

146. In Liquidating CCAAs, debtor companies should focus their restructuring efforts on maximizing creditor recovery, while the Monitor should ensure that the continuance of CCAA proceedings remains justified and that creditors are not prejudiced. Likewise, supervising judges in the exercise of their discretion should also pay greater attention to maximizing creditor recovery as the driving consideration of the process. In the present case, the Monitor views that RQ's efforts to set-off the Disputed ITCs, which did not exist as of the date of the Bloom Lake Initial Order, against its pre-filing 296 Claims, would run afoul the *pari passu* rule, would amount to the creation of a form of security which did not exist as of the filing date, and would prejudice the general body of creditors by reducing their recovery.

**THE WHOLE RESPECTFULLY SUBMITTED**

**MONTREAL**, August 13, 2021

Woods s.e.n.c.r.l./LLP

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# LIST OF AUTHORITIES

## LEGISLATION

1. *Act respecting fiscal administration*, C.Q.L.R., c. A-6.002.

2. *Excise Tax Act*, R.S.C. 1985, c. E-15.

3. *Act respecting the Quebec Sales Tax*, C.Q.L.R., c. T.-01

4. *An Act to amend the Excise Tax Act, the Criminal Code, the Customs Act, the Customs Tariff, the Excise Act, the Income Tax Act, the Statistics Act and the Tax Court of Canada Act*, S.C. 1990, c. 45

5. *Tax Administration Act,* R.S.Q., c. A-6.002

## JURISPRUDENCE

6. *Arrangement relatif à Métaux Kitco inc*., 2017 QCCA 268

    a) *Arrangement relatif à Métaux Kitco inc*., 2017 QCCA 268 (Unofficial English Translation)

7. *Arrangement relatif à Métaux Kitco inc*., 2016 QCCS 444

8. *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601

9. *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559

10. *Placer Dome Canada Ltd v. Ontario (Minister of finance)*, [2006] S.C.R. 715

11. *Centre de traitement de la biomasse de la Montérégie Inc. c. Agence du revenu du Québec*, 2021 QCCA 1068

12. *Reference Re Goods and Services Tax*, [1992] 2 S.C.R. 445

13. *Re PCI Chemicals Canada Inc*., 2002 CarswellQue 831

14. *Re AbitibiBowater*, 2009 QCCS 2188

    a) *Re AbitibiBowater*, 2009 QCCS 2188 (Unofficial English Translation)

15. *Re Doman Industries*, 2004 BCSC 733

16. *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52

17. *Arrangement relatif à Consultants SM inc*., 2019 QCCS 2316

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

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21. *Syndic de Ferti-val inc*., 2017 QCCS 2057

22. *7098961 Canada inc. (Beyond The Rack Enterprises Inc.) (Arrangement relatif à)*, 2016 QCCS 2115

23. *North American Tungsten Corporation Ltd. (re)*, 2015 BCSC 1382

24. *North American Tungsten Corp. v. Global Tungsten and Powders Corp*., 2015 BCCA 390

25. *North American Tungsten Corp. v. Global Tungsten and Powders Corp*., 2015 BCCA 426

26. *Tucker v. Aero Inventory (UK) Ltd*., 2009 CarswellOnt 7007

27. *Re Just Energy Corp*., 2021 ONSC 1793

28. *Husky Oil Operation Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453

29. *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10

30. *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5

31. *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659

32. *Re Bellatrix*, 2021 ABCA 85

33. *Third Eye Capital Corporation v. Dianor Resources Inc*., 2019 ONCA 508

34. *Nortel Networks Corporation (Re)*, 2015 ONCA 681

35. *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715

36. *Alberta (Attorney General) v. Moloney*, 2015 SCC 51

37. *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218

    a) *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488

    b) *Victor Cantore v. Nemaska Lithium Inc. et al*., SCC Docket nº 39464; *Brian Shenker v. Nemaska Lithium Inc. et al*., SCC Docket nº 39526

38. *Blue Range Resource Corp (Re)*, 1999 ABQB 1038

**SECONDARY SOURCES**

39. Canada Revenue Agency, Authorized Fiscal Periods and Reporting Periods, GST memoranda 500-2-1, June 22, 2017 <Online: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/g500-2-1/authorized-fiscal-periods-reporting-periods-gst-500-2-1.html>

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41. Canada, Department of Justice, *The Place of Private Law in Federal legislation: The St-Hilaire case and Bijural Terminology Records*, 2015. <Online: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/ouell/legris2.html>

42. Government of Canada, Corporate and Insolvency Law Policy Directorate of Industry Canada, *Bill C-12: Clause by clause analysis*, Ottawa, 2005 <Online: https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01986.html#a84>

43. Senate Report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce, (November 2003)

44. Alexandre Bayus, Patrice Benoit & Sylvain Vauclair, "*Kitco*: Is It About More Than Pre-post Set-off?" in Janis P. Sarra, ed., Annual Review of Insolvency Law. Toronto: Carswell, 2017

## LIST OF DEFINED TERMS

- **296 Claims** means the notice issued to RQ on or about October 2, 2020 allowing its claim for an aggregate amount of $13,392,752.86 based on Section 25 of the *Act respecting fiscal administration* and Section 296(1) of the *Excise Tax Act* with respect to unpaid QST in the amount of $5,653,595.34 and unpaid GST in the amount of $7,739,157.52 on account of taxable supply of goods and services received by CQIM prior to the Filing Date where such tax amounts remained unpaid by CQIM as at the Filing Date.

- **Affected Claims** means a claim other than an unaffected claim.

- **Affected Third Party Unsecured Creditor** means an Affected Third Party General Unsecured Creditor or the Pension Plan Administrator in respect of the Pension Claims.

- **Affected Unsecured Creditor** means the Pension Plan Administrator in respect of the Pension Claims or an Affected General Unsecured Creditor.

- **BIA** means the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.

- **Bloom Lake CCAA Parties** means Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, and Cliffs Québec Iron Mining ULC, as well as Mises-en-cause The Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake Railway Company Limited.

- **Bloom Lake Initial Order** means the Order issued on January 27, 2015, by the Honourable Justice Martin Castonguay, J.S.C., (as subsequently amended, rectified and/or restated) pursuant to the *Companies' Creditors Arrangement Act* in respect of the Petitioners Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, and Cliffs Québec Iron Mining ULC, as well as Mises-en-cause The Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake Railway Company Limited.

- **CCAA** means the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36.

- **CCAA Parties** means the Wabush CCAA Parties, together with the Bloom Lake CCAA Parties.

- **Claims** means:
    - Any right or claim of any Person that may be asserted or made in whole or in part against the CCAA Parties (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an event, fact, act or omission which occurred in whole or in part prior to the applicable Determination Date , at law or in equity, by reason of the commission of a tort (intentional or unintentional), any breach of contract, lease or other agreement (oral or written), any breach of duty (including, without limitation, any

legal, statutory, equitable or fiduciary duty), any breach of extra-contractual obligation, any right of ownership of or title to property, employment, contract or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any of the CCAA Parties or any of their property or assets, and whether or not any such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured (by guarantee, surety or otherwise), unsecured, present, future, known or unknown, and whether or not any such right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable under the BIA had the CCAA Parties (or any one of them) become bankrupt on the applicable Determination Date, including, for greater certainty, any Tax Claim and any monetary claim in connection with any indebtedness, liability or obligation by reason of a breach of a collective bargaining agreement, including grievances in relation thereto, or by reason of a breach of a legal or statutory duty under any employment legislation or pay equity legislation; or

- any Restructuring Claim;

provided, however, that "Claim" shall not include any Excluded Claim. For greater certainty, no "Claim" shall exist for interest or other amounts akin to interest accrued after the applicable Determination Date unless validly secured by a lien.

- **CcQ** means *Civil Code of Quebec,* RLRQ c CCQ-1991.

- **Claims Procedure Order** means Order issued on November 5, 2015, by the Honourable Justice Stephen W. Hamilton, J.S.C. (as amended on November16, 2015,) which approved and established a procedure for the filing of creditors' claims against the CCAA Parties and their directors and officers.

- **CQIM** means Cliffs Québec Iron Mining ULC.

- **CRA** means Canada Revenue Agency.

- **Damage Payments ITCs** means the ITCs claims for QST and GST paid in 2018 as part of the First Interim Distribution to certain creditors on account of their claims for damages arising from the disclaimer or resiliation of contracts pursuant to the CCAA.

- **Disputed ITCs** means the ITCs claims for QST and GST paid in 2018 as part of the First Interim Distribution to certain creditors on account of their claims for damages arising from the disclaimer or resiliation of contracts pursuant to the CCAA amounted to $7,459,257.85; as well as Revenu Quebec's debt to CQIM for an amount of $422,490.35 representing ITCs not in relation to Restructuring Claims, but rather in relation to supplier invoices which were not

subject of the 296 Claims and all of which were issued after the Bloom Lake Initial Order including $234,755.16 in relation to the post-filing.

- **ETA** means the *Excise Tax Act,* R.S.C., 1985, c. E-15.

- **FAA** means the *Act respecting fiscal administration,* R.S.C., 1985, c. F-11.

- **Filing Date** means the January 27, 2015, date of the Bloom Lake Initial Order and May 20, 2015, date of the Wabush Initial Order.

- **First Interim Distribution** means the Distribution starting in August, 2018, by the Monitor to Affected Third Party Unsecured Creditors from each of the Unsecured Creditor Cash Pools and Pension Cash Pools, and the interim distributions made in January 2020, on account of the Salaried Late Employee Claims and the USW Late Employee Claims in accordance with the Order for leave to file late claims and authorization to make modifications to the Plan dated December 3, 2019**.**

- **GST** means the Goods and services tax.

- **ITC Claims** means the amount Revenu Quebec is responsible for the collecting of QST and GST, as well as the reimbursement of net tax refunds determined based on the amount of tax collected, minus input tax credits for the purpose of the GST and input tax refunds for the purpose of the QST.

- **ITCs** means input tax credits.

- **ITRs** means input tax refunds.

- **Monitor** means FTI Consulting Canada Inc. in its capacity as Court-appointed Monitor to the CCAA Parties pursuant to the Bloom Lake Initial Order and the Wabush Initial Order.

- **Motion** means the Motion by the Monitor for Directions with Respect to Set-off and Damage Payment Input Tax Credits, dated January 18, 2021.

- **Pension Cash Pools** means, collectively, the Arnaud Pension Cash Pool and the Wabush Pension Cash Pool, and a "**Pension Cash Pool**" means either the Arnaud Pension Cash Pool or the Wabush Pension Cash Pool.

- **Plan Implementation Date Certificate** means the certificate substantially in the form to be attached to the Sanction Order to be filed by the Monitor with the Court, declaring that all of the conditions precedent to implementation of the Plan have been satisfied or waived.

- **Plan** means the Order issued on May 18, 2018, by the Honourable Justice Stephen W. Hamilton which accepted the filing of the Amended and Restated Joint Plan of Comprise and Arrangement dated May 16, 2018 (as further amended, restated or supplemented from time to time).

- **Proven Claims** means (a) a Claim of a Creditor, Finally Determined as an Allowed Claim for voting, distribution and payment purposes under the Plan, (b) in the case of the Participating CCAA Parties in respect of their CCAA Party Pre-Filing Interco Claims, and in the case of the Non-Filed Affiliates in respect of their Non-Filed Affiliate Unsecured Interco Claims and Non-Filed Affiliate Secured Interco Claims, as such Claims are declared, solely for the purposes of the Plan, to be Proven Claims pursuant to and in the amounts set out in the Amended and Restated Meetings Order, and (c) in the case of Employee Priority Claims and Government Priority Claims, as Finally Determined to be a valid post-Filing Date claim against a Participating CCAA Party.

- **QST** means the Quebec sales taxes.

- **QSTA** means the *Act respecting the Québec sales tax*, RLRQ c T-0.1.

- **Restructuring Claim** means any right or claim of any Person against the CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the CCAA Parties (or any one of them) to such Person, arising out of the restructuring, disclaimer, resiliation, termination or breach or suspension, on or after the Determination Date, of any contract, employment agreement, lease or other agreement or arrangement, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of this Claims Procedure Order, and, for greater certainty, includes any right or claim of an Employee of any of the CCAA Parties arising from a termination of its employment after the Determination Date, provided, however, that "Restructuring Claim" shall not include an Excluded Claim.

- **Restructuring Claims** means the claims against CQIM resulting from the disclaimer of certain of its contracts with Canadian Iron Ore Railcar Leasing LP, Quebec North Shore and Labrador Railway Company, Inc., The CSL Group Inc. and Western Labrador Rail Services.

- **RQ** means Revenu Quebec.

- **Salaried Late Employee Claims** means Affected Third Party General Unsecured Claims against the Wabush Mines Parties in the amounts set out in Schedule "A" of the November 27, 2018 Order issued by the Honourable Michel A. Pinsonnault J.S.C. regarding the *Motion of the Monitor for Late Claims (Represented Employees)*, each as an Affected Third Party Unsecured Creditor of the Wabush Mines Parties, which Affected Third Party General Unsecured Claims would be entitled solely to distributions from the Wabush Mines Parties Unsecured Creditor Cash Pool pursuant to the Plan (as defined in said November 27, 2018 Order).

- **TCC** means Tax Court of Canada.

- **Terminated Contracts** means the contracts of Canadian Iron Ore Railcar Leasing LP, Quebec North Shore and Labrador Railway Company Inc., the CSL Group Inc., and Western Labrador Rail Services Inc.

- **Unsecured Creditor Cash Pool** means in respect of a Participating CCAA Party, the Available Cash of such Participating CCAA Party available for distribution to the Affected Unsecured Creditors of such Participating CCAA Party with Proven Affected General Unsecured Claims under the Plan, calculated on the Distribution Date immediately prior to the distribution of the Non-Filed Affiliates Plan Distributions pursuant to Section 7.1(b), prior to any Unsecured Creditor Cash Pool Adjustment, and for greater certainty does not include either of the Pension Cash Pools, and "**Unsecured Creditor Cash Pool**" means more than one Unsecured Creditor Cash Pools;

- **USW Late Employee Claims** means Affected Third Party General Unsecured Claims against the Wabush Mines Parties and Arnaud, as the case may be, in the amounts set out in Schedule "A" of the November 27, 2018 Order issued by the Honourable Michel A. Pinsonnault J.S.C. regarding *USW's amended motion seeking a declaratory relief for leave to file a late claim*, each as an Affected Third Party Unsecured Creditor of the Wabush Mines Parties and Arnaud, as the case may be and as set out in Schedule "A" of said Order, of the which Affected Third Party General Unsecured Claims would be entitled solely to distributions from the Wabush Mines Parties Unsecured Creditor Cash Pool and the Arnaud Unsecured Creditor Cash Pool, as the case may be and as set out in Schedule "A" of said Order, pursuant to the Plan (as defined in said November 27, 2018 Order).

- **Wabush CCAA Parties** means Wabush Iron Co. Limited, Wabush Resources Inc., as well as Mises-en-cause Wabush Mines, Arnaud Railway Company, and Wabush Lake Railway Company Limited.

- **Wabush Initial Order** means the Order issued on May 20, 2015, by the Honourable Justice Stephen W. Hamilton, J.S.C. (as subsequently amended, rectified and/or restated) extending the scope of the Bloom Lake CCAA proceedings to the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc., as well as Mises-en-cause Wabush Mines, an unincorporated contractual joint venture, Arnaud Railway Company, and Wabush Lake Railway Company Limited.

No : 500-11-048114-157

**SUPERIOR COURT**
(Commercial Division)
DISTRICT OF MONTRÉAL
PROVINCE OF QUÉBEC

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

**BLOOM LAKE GENERAL PARTNER LIMITED, ET AL.**

*Debtors*

-and-

**THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, ET AL.**

*Mises-en-cause*

-and-

**FTI CONSULTING CANADA INC.**

*Petitionner/Monitor*

**ARGUMENTATION OUTLINE AMENDED MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO SET-OFF AND DAMAGE PAYMENT INPUT TAX CREDITS (THE "MOTION")**

**ORIGINAL**

***Mtre. Sylvain Rigaud***
***Mtre. Bogdan-Alexandru Dobrota***
***Mtre. Joshua Bouzaglou***
**File no.: 5956-4**
**Woods s.e.n.c.r.l./LLP**
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**Code BW 0208**