COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029797-214
(500-11-048114-157)

DATE: December 22, 2022

CORAM: THE HONOURABLE **ROBERT M. MAINVILLE, J.A.**
SOPHIE LAVALLÉE, J.A.
PETER KALICHMAN, J.A.

IN THE MATTER OF THE PLAN OF ARRANGEMENT WITH THEIR CREDITORS OF: BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CQIM QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY AND WABUSH LAKE RAILWAY COMPANY LIMITED

AGENCE DU REVENU DU QUÉBEC
AGENCE DU REVENU DU CANADA
APPELLANTS – Impleaded parties
v.
FTI CONSULTING CANADA INC.
Respondent – Monitor

and
BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
CQIM QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
IMPLEADED PARTIES – Petitioners
and
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
IMPLEADED PARTIES – Impleaded parties
and
QUEBEC NORTH SHORE AND LABRADOR RAILWAY COMPANY INC.
IRON ORE COMPANY OF CANADA
8568391 CANADA LIMITED
EMPLOYÉS SALARIÉS, NON SYNDIQUÉS
IMPLEADED PARTIES

JUDGMENT

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[1] The appellants are appealing a judgment rendered on November 8, 2021, by the Superior Court (the Honourable Michel A. Pinsonnault), granting a motion for directions and declaring that they cannot set off a debt they owe to the debtor company against a debt the debtor owes them. The appeal deals primarily with the right to effect compensation in the context of proceedings brought under the *Companies' Creditors Arrangement Act*.

[2] For the reasons of Kalichman, J.A., with which Mainville and Lavallée, JJ.A. concur, **THE COURT**:

[3] **DISMISSES** the appeal, with legal costs.

ROBERT M. MAINVILLE, J.A.

Robert Mainville par la juge Sophie Lavallée selon une procuration

SOPHIE LAVALLÉE, J.A.

PETER KALICHMAN, J.A.

Mtre Jean-Claude Gaudette
Mtre Daniel Cantin
LARIVIÈRE MEUNIER (REVENU QUÉBEC)
For the Appellants

Mtre Sylvain Rigaud
Mtre Bogdan-Alexandru Dobrota
WOODS
For the Respondent

Mtre Gerald N. Apostolatos
LANGLOIS AVOCATS
For Quebec North Shore and Labrador Railway Company Inc.
and Iron Ore Company of Canada

Mtre Bernard Boucher
Mtre Youssef Kabbaj
BLAKE, CASSELS & GRAYDON
For Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, CQIM Québec Iron Mining ULC, Wabush Iron Co. Limited, Wabush Resources Inc., The Bloom Lake Iron Ore Mine Limited Partnership, Bloom Lake Railway Company Limited, Wabush Mines, Arnaud Railway Company, Wabush Lake Railway Company Limited

Mtre Andrew J. Hatnay
KOSKIE MINSKY
Mtre Tina Silverstein for Me Nicolas Brochu
FISHMAN FLANZ MELAND PAQUIN
For Employés salaries, non syndiqués

Date of hearing: September 12, 2022

REASONS OF KALICHMAN, J.A.

[4] This is an appeal from a judgment rendered on November 8, 2021, by the Superior Court (the Honourable Michel A. Pinsonnault), granting a motion for directions and declaring that the appellants cannot set off a debt they owe to the debtor company against a debt the debtor owes them.[1] The appeal deals primarily with the right to effect compensation in the context of proceedings brought under the *Companies' Creditors Arrangement Act* (the ***CCAA***).[2]

I. Background

[5] The essential facts at issue in this appeal, which are summarized in the following paragraphs, are not in dispute.[3]

[6] On January 27, 2015, an initial order was rendered by the Superior Court (the Honourable Martin Castonguay) placing Cliffs Québec Iron Mining ULC (**CQIM**) under the protection of the *CCAA* and appointing FTI Consulting Canada Inc. as monitor (the **Monitor**).[4]

[7] At the time of the initial order, the Appellants, the Agence du revenu du Québec and the Agence du revenu du Canada (collectively the **ARQ**)[5] were owed $13,391,896.40 by CQIM (the **ARQ Claim**).

[8] Between January 2015 and February 2016, CQIM, invoking s. 32(1) of the *CCAA,* cancelled agreements with four of its suppliers, Canadian Iron Ore, Quebec North Shore and Labrador Railways Company Inc., Western Labrador Rail Services and the CSL Group (the **Suppliers**), each of which subsequently brought a damage claim against CQIM as a result of the cancelled contracts (the **Damage Claims**).

[9] On June 29, 2018, a plan of arrangement was sanctioned by the Superior Court (the Honourable Stephen W. Hamilton, as he then was).

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1 *Arrangement relatif à Bloom Lake*, 2021 QCCS 4642 [judgment under appeal].
2 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
3 The parties filed a joint list of admissions (A.M., vol. 1 at pp. 168-172).
4 *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 169.
5 The ARQ is acting on its own regarding unpaid Quebec sales tax (**QST**) but also on behalf of the Agence du revenu du Canada regarding unpaid goods and services tax (**GST**).

[10] In August of 2018, the Monitor began making interim distribution payments to unsecured creditors of CQIM, totalling close to $60 million. As part of this interim distribution, the Suppliers received partial payment of the Damage Claims.

[11] Payments made to the Suppliers as part of the interim distribution entitled CQIM to claim income tax refunds and input tax credits from the ARQ, totalling $7,459,257.85 (the **Damage payment ITCs**). In addition, CQIM claimed tax refunds and input tax credits in connection with payments made to the Suppliers which totalled $422,940.35, $234,755.16 of which were related to services rendered after the initial order (the **Other ITCs**).

[12] The ARQ did not dispute the quantum of the Damage payment ITCs but maintained that it was entitled to operate compensation between that claim and its own. This would, in effect, allow the ARQ to recoup $7,459,257.85 of its claim, thus reducing it from $13,391,896.40 to $5,932,638.55. The ARQ did not assert that the Other ITCs were pre-filing claims.[6]

[13] The Monitor disagreed with the ARQ's position and brought a motion for instructions seeking, among other things, a declaration that the Damage payment ITCs could not be set off against the ARQ Claim.

[14] The Monitor's motion was heard over two days in August of 2021 and the judgment was rendered on November 8, 2021. The ARQ sought leave to appeal which was granted on December 17, 2021.[7]

II. The judgment

[15] At the outset, the judge noted that in the context of CCAA proceedings, compensation can only be applied between two pre-filing claims or two post-filling claims but not between a pre-filing claim and a post-filing claim. There was no dispute before the judge that the ARQ Claim existed when the initial order was rendered and was thus a pre-filing claim. The principal issue to be decided was whether the Damage payment ITCs also constituted a pre-filing claim as the ARQ argued, in which case, compensation was clearly possible. The ARQ submitted that even if the judge were to decide that the Damage payment ITCs came into existence after the initial order and thus constituted a post-filing claim, he had the discretion under s. 11 of the *CCAA* to allow such compensation and should exercise it.

[16] The judge concluded that the Damage payment ITCs constituted a post-filing claim and could not be set off against the ARQ Claim. In his view, a plain reading of s. 182 of

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6 However, it does argue that the judge should have exercised his discretion pursuant to s. 11 CCAA regarding both the Damage payment ITCs and the Other ITCs. This question will be analysed later on in this judgment.

7 *Agence du revenu du Québec v. FTI Consulting Canada inc.*, 2021 QCCA 1925 (judge alone).

the *Excise Tax Act* (the ***ETA***)[8] and of s. 318 of the *Quebec Sales Tax Act* (the ***QSTA***)[9] (collectively the **Tax provisions**) leads to the conclusion that the Damage Payment ITCs could only have been claimed by CQIM when the Suppliers received partial payment on the Damage Claims. Since this occurred when the interim distribution was made in August of 2018, long after the initial order, the Damage payment ITCs were necessarily post-filing claims.

[17] The judge also disagree with the ARQ's submission that the Tax provisions, when read in the context of the *CCAA*, produce a different result. In his view, the object of the *ETA* is different from that of the *CCAA* such that they cannot be considered to be dealing with the same subject matter, *i.e.* are not *pari materia*. Furthermore, the judge did not agree with the ARQ that since the Damage Claims are considered to be provable claims in virtue of s. 32(7) of the *CCAA*, they are necessarily pre-filing claims. He thus rejected the submission that the Damage payment ITCs, as accessories of the Damage Claims, must also be pre-filing claims.

[18] The judge also rejected the view that the Tax provisions were accessory to the civil law and that the timing of the tax liability which gave rise to the Damage payment ITCs should thus be determined in reference to the date the contracts between CQIM and the Suppliers were entered into.

[19] Finally, the judge rejected the ARQ's reading of the Court's decision in *Arrangement relatif à Métaux Kitco inc.*[10] as implying that in a liquidation context – as opposed to a restructuring context – compensation between pre-filing claims and post-filing claims was possible.

III. The issues in appeal

[20] The ARQ argues that the judge erred in failing to conclude that the Damage payment ITCs constituted a pre-filing claim that can be set off against the ARQ Claim. Even if that conclusion stands, it maintains that the judge erred in failing to exercise his discretion under s. 11 of the *CCAA* to allow for compensation between pre-filing and post-filing claims.

[21] The Monitor and the impleaded parties submit that the judge was correct in determining that the Damage payment ITCs constitute a post-filing claim and could thus not be set off against the ARQ Claim. Furthermore, they disagree that the judge failed to exercise his discretion under s. 11 of the *CCAA* but add that, at any rate, the criteria for the exercise of such discretion are clearly not met.

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8 *Excise Tax Act*, R.S.C. 1985, c. E-15.
9 *Act respecting the Québec sales tax*, CQLR, c. T-0.1.
10 2017 QCCA 268.

[22] The first issue to be determined is whether the judge erred in concluding that the Damage payment ITCs are a post-filing claim. If the judge was correct in that determination, the issue then becomes whether he erred in the exercise of his discretion under s. 11 of the *CCAA* in refusing to allow set off with the ARQ Claim.

IV. Analysis

(i) Did the judge err in concluding that the Damage payment ITCs constitute a post-filing claim?

[23] According to the ARQ, the judge adopted an overly literal interpretation of the Tax provisions and failed to read them in harmony with the *CCAA.* In its view, the relevant provisions of the *ETA*, the *QSTA* and the *CCAA* address the same subject, namely, the juridical effects of supplier contracts in the context of insolvency and must be considered in *pari materia.* The judge should thus have read the various dispositions as being in harmony with each other and not in conflict. According to the ARQ, had the judge adopted such an interpretation, he would necessarily have concluded that the Damage payment ITCs are pre-filing claims and can thus be set off against the ARQ Claim.

[24] The ARQ places particular emphasis on s. 32(7) of the *CCAA*, which provides that parties, like the Suppliers, who suffer a loss in relation to disclaimed contracts, are considered to have provable claims. Since, according to s. 19(1)(b) of the *CCAA*, a provable claim is one that relates to debts or liabilities incurred before the initial order (i.e., pre-filing claims) and since CQIM's contracts with the Suppliers were all entered into before the initial order, the judge erred in concluding that the Damage Claims were post-filing claims.

[25] Finally, the ARQ argues that even if a debt was not liquid and exigible at the time of the initial CCAA order, if its subject matter is sufficiently connected to that of a pre-filing debt, they can still be offset. Accordingly, despite concluding that the Damage payment ITCs were post-filing claims, the judge should nonetheless have allowed compensation with the ARQ Claim since the claims are between the same parties and are based on the same tax laws.

[26] For the following reasons, I do not agree with the ARQ.

[27] The right of CQIM to claim the Damage payment ITCs arises from the Tax provisions, the meaning of which could hardly be clearer. The relevant extracts are reproduced below:

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	**182** (1) Pour l'application de la présente partie, dans le cas où, à un moment donné, par suite de l'inexécution, de la modification ou de la résiliation, après 1990, d'une

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,

convention portant sur la réalisation d'une fourniture taxable au Canada, sauf une fourniture détaxée, par un inscrit au profit d'une personne, un montant est payé à l'inscrit, ou fait l'objet d'une renonciation en sa faveur, autrement qu'à titre de contrepartie de la fourniture, ou encore une dette ou autre obligation de l'inscrit est réduite ou remise sans paiement au titre de la dette ou de l'obligation, les présomptions suivantes s'appliquent :

(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 (...)

a) la personne est réputée avoir payé, au moment donné, un montant de contrepartie pour la fourniture égal au résultat du calcul suivant (...)

(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 (...)

b) la personne est réputée avoir payé, et l'inscrit avoir perçu, au moment donné, la totalité de la taxe relative à la fourniture qui est calculée sur cette contrepartie, laquelle taxe est réputée égale au montant suivant (...)

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,

318. Dans le cas où, à un moment quelconque, par suite de l'inexécution, de la modification ou de l'expiration, après le 30 juin 1992, d'une convention relative à une fourniture taxable, autre qu'une fourniture détaxée, d'un bien ou d'un service au Québec qui doit être effectuée par un inscrit à une personne, un montant est payé à l'inscrit ou fait l'objet d'une renonciation en faveur de celui-ci autrement qu'à titre de contrepartie de la fourniture, ou une dette ou autre obligation de l'inscrit est éteinte ou réduite sans qu'un paiement ne soit effectué à l'égard de la dette ou de

	l'obligation, les règles suivantes s'appliquent:
(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	1° la personne est réputée avoir payée, à ce moment, un montant de contrepartie pour la fourniture égal au résultat obtenu en multipliant le montant payé, ayant fait l'objet d'une renonciation ou par lequel la dette ou l'obligation a été éteinte ou réduite, selon le cas, par 100/109,975;
(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.	2° l'inscrit est réputé avoir perçu et la personne est réputée avoir payé, à ce moment, la totalité de la taxe relative à la fourniture qui est calculée sur cette contrepartie, laquelle taxe est réputée égale à la taxe prévue à l'article 16 calculée sur cette contrepartie.
	(Underlined by the Court)

[28] Both provisions stipulate that when an amount is paid because of the termination of an agreement for the making of a taxable supply, the person is deemed to have paid for the supply and the registrant is deemed to have collected the tax, on the day that the damages were paid. I share the judge's view that the meaning of these provisions is unambiguous.

> [79] The Monitor and CQIM were right to rely on the unambiguous wording of Sections 182 (1) ETA and 318 QSTA that makes it clear that these deeming rules only apply at the time of payment, which in this case, was made during the post-filing period. These provisions do not deem that the GST and the QST have been paid or were payable any time before the actual damage payment was made. It follows that the GST and the QST were not paid or deemed to be paid during the pre-filing period, nor at any time prior to the Bloom Lake Initial Order.

[29] Accordingly, it was only when the interim distribution was made three years after the initial CCAA filing, that payment for the supply of a taxable service was deemed to have been made and the taxes due in respect of that payment were deemed to have been collected. As the judge wrote, the plain and simple language of the Tax provisions "leaves no doubt" as to when the Damage payment ITCs came into existence and that they are, therefore, post-filing claims.[11] Furthermore, as the Supreme Court held in *Placer Dome Canada v. Ontario (Min. of Finance)*, since taxpayers are entitled to rely on the clear meaning of taxation provisions, where the words of a statute are "precise and

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[11] Judgment under appeal, para. 89.

unequivocal, those words will play a dominant role in the interpretive process."[12] Not only did the ARQ fail to demonstrate that the judge erred in his interpretation of the Tax provisions, but no such error was even alleged.

[30] It should be noted as well that the interpretation proposed by the ARQ does not even appear to be consistent with the logic of the Tax provisions themselves. The taxable supply that triggers payment (and the duty to pay tax) was never provided because the agreement that contemplated it was disclaimed. The Tax provisions create a fiction for the purpose of collecting the tax that would have been paid at some point in the future had the agreement not been disclaimed and the services continued to be provided. While the Tax provisions are based on a fiction, their logic is sound. If payment must be deemed to have been made and taxes collected, it stands to reason that the triggering event be the payment of the damages that replace what would otherwise have been paid. This fiction thus closely mirrors what occurred as the judge recognized.[13] Conversely, what the ARQ proposes – that the payment be deemed to have been paid years before - would create a fiction that is entirely arbitrary.

[31] While the terms of the Tax provisions are sufficiently clear to dismiss the first ground of appeal, I will nonetheless continue the analysis of the arguments raised by the ARQ.

[32] The ARQ maintains that the proper interpretation of the Tax provisions requires that they be read in harmony with and not in opposition to, the provisions of the *CCAA*. Had the judge adopted such an approach, he would have concluded that the supply of the services from the disclaimed contracts should be deemed to have been paid for and the taxes collected when the agreements were first concluded, which was years before the CCAA filing.

[33] There is nothing harmonious in this interpretation of the statues and none of the principles that the ARQ invokes would justify such a reading.

[34] Contrary to what the ARQ argues, the *CCAA* and the Tax provisions are not in *pari materia*.[14] The purpose of the *CCAA* is to provide companies with the means to avoid "the social and economic consequences of commercial bankruptcies"[15] whereas the purpose of the *ETA* and of the QSTA is to raise revenue for the government.[16] Furthermore, the Tax provisions and the relevant sections of the *CCAA* can be read separately without leading to an absurd or contradictory result. The fact that they overlap in a particular situation does not make them part of a single legislative scheme. Furthermore, as the

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12 2006 SCC 20, para. 21.
13 Judgment under appeal, para. 132.
14 Given the result at which the Court arrives, it is not necessary to consider whether the QSTA, which is provincial legislation, could be *pari materia* with the CCAA, which is federal legislation.
15 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, para. 15.
16 *Reference Re Goods and Services Tax,* [1992] 2 SCR 445, p. 471.

judge noted, when Parliament intended for the provisions of the *ETA* to be read in conjunction with those of the *CCAA*, that was made explicit.[17]

[35] Even if the Tax provisions and the *CCAA* were to be read as part of a single legislative scheme, the judgment does not place them in contradiction. The ARQ's arguments center primarily around s. 32(7) of the *CCAA*, which 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. It reads as follows:

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.	**32 (1)** Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.
(7) 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.	**(7)** En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable

(Underlined by the Court)

[36] According to the ARQ, claims brought under this provision, which are referred to as restructuring claims, are provable claims in accordance with s. 19(1)(b) of the *CCAA* and therefore, must be qualified as pre-filing claims. This section 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	**19 (1)** Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :
(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of	a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

17 Judgment under appeal, para. 96.

(i) the day on which proceedings commenced under this Act, and	(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,
(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	(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la Loi sur la faillite et l'insolvabilité, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la Loi sur la faillite et l'insolvabilité;
(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).	b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

[37] Since the Damage payment ITCs are accessories to restructuring claims, the ARQ contends that they must therefore be pre-filing claims as well and can thus be set off against the ARQ Claims.

[38] I do not share this interpretation. Restructuring claims are post-filing claims that are deemed to be provable claims by virtue of s. 32(7) of the *CCAA*. They do not take on all the characteristics of a provable claim by mere virtue of the fact that they are treated as such for a particular purpose. More specifically, they are not transformed into pre-filing claims. If, as the ARQ suggests, restructuring claims were in all respects, provable claims within the meaning of s. 19 of the *CCAA*, s. 32(7) would be superfluous. It is rather because they would not otherwise be considered as provable claims that s. 32(7) of the *CCAA* has meaning.

[39] The ARQ also argues that according to civil law, the Damage Claims resulted from the application of liquidated damage clauses contained in the disclaimed contracts such that the damages and, by extension, the Damage payment ITCs, crystalized at the time the contracts were concluded. Since fiscal law is an accessory to civil law, the ARQ contends that the judge erred in failing to recognize that the Damage payment ITCs were thus pre-filing debts.

[40] The judge committed no such error. The wording of the Tax provisions is perfectly clear and it is not necessary to look elsewhere to understand what event triggers the duty to pay tax or the moment at which that duty arises.

[41] The Monitor is correct in pointing out that the ARQ, through a variety of arguments, is essentially asking the Court to give effect to "unexpressed legislative intentions under the guise of purposive interpretation", an approach which the Supreme Court strongly cautioned against in *Shell Canada Ltd. v. Canada*.[18] To the extent that the rules of statutory interpretation could ever justify disregarding the clear and unequivocal wording of the Tax provisions, the judge committed no error in refusing to do so in this case.

(ii) Did the judge err in failing to exercise his discretion under s. 11 *CCAA* to allow for pre-post filing compensation?

[42] The ARQ argues that even if the judge were correct in determining that the Damage payment ITCs are a post-filing claim, he erred in failing to exercise his discretion under s. 11 of the *CCAA* to modify the initial order and to allow for compensation between the ARQ Claim, the Damage payment ITCs and the Other ITCs. In its view, the judge clearly felt bound by this Court's decision in *Kitco*[19], which held that the courts do not have the discretion to allow for compensation between pre-filing and post-filing claims. Since the Supreme Court subsequently reversed that position, the ARQ maintains that the Court should exercise this discretion in place of the supervising judge. In its view, the criteria for the exercise of such discretion are clearly met.

[43] I do not share that view.

[44] The Supreme Court's decision in *Montréal (City) v. Deloitte Restructuring Inc.*, which was rendered after the judgment under appeal, confirms that in exceptional circumstances, "a supervising judge has the discretion to authorize pre-post compensation".[20] In reaching this decision, the Supreme Court clearly rejected the prohibition that was proposed in *Kitco*:

> [57] A court's discretion is therefore broad enough to allow it to stay the right of creditors to effect pre-post compensation. In such a case, the prohibition against pre-post compensation flows directly from the stay order. Conversely, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. On this point, we reject the absolute prohibition proposed by the Quebec Court of Appeal in Kitco, because we conclude that a court has the discretion to allow pre-post compensation in appropriate cases.

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18 [1999] 3 SCR 622, para. 43.
19 *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268.
20 *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53, para. 20.

[45] The ARQ submits that the discretion to effect pre-post compensation in this case is based on s. 11 of the *CCAA*, which reads as follows:

> **11** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> **11** Malgré toute disposition de la Loi sur la faillite et l'insolvabilité ou de la Loi sur les liquidations et les restructurations, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

[46] In exercising such discretion, a court must keep three baseline considerations in mind: "(1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part."[21]

[47] In regards to the criterion of appropriateness, the ARQ raises several arguments, including that: (i) since CQIM is in liquidation, the Damage payment ITCs will not be used in the context of a restructuring but will simply be distributed as dividends; (ii) the ARQ's interest is superior to that of CQIM or its creditors, since it seeks to recover taxes on behalf of the public at large; and (iii) allowing compensation would not create an imbalance among creditors and disallowing it will only harm the ARQ.

[48] The ARQ's arguments are unconvincing. Allowing it to set off its claim against the Damage payment ITCs and the Other ITCs would be inconsistent with the remedial objectives of the *CCAA*, regardless of whether the focus is on restructuring the debtor's affairs or on liquidation.[22] These objectives include maximizing creditor recovery and providing for the equitable distribution of assets among creditors.[23] Such compensation would in fact be inequitable since it would prevent the $7,459, 257.85 in Damage payment ITCs from being distributed to the ordinary creditors of CQIM, including the ARQ.

[49] Furthermore, as the Monitor argues, the ARQ conflates its interest with that of the public.[24] If it were appropriate to adopt the ARQ's reasoning in this case, it would be difficult to conceive of a situation in which a tax authority would not be entitled to effect compensation between its pre-filing claim and any post-filing obligation. In this regard, it is important to remember that the ARQ's pre-filing claim is unsecured. Accordingly, the

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21 *Id.*, para. 85.

22 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, paras. 42, 46.

23 *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, para. 67.

24 See as well, *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53, paras. 88,89.

ARQ's position would amount to a court-ordered form of preference or security that Parliament chose not to grant.

[50] Even though the decision in *Deloitte* clears the path for a supervising judge to exercise discretion and allow for compensation between pre-filing and post-filing claims, the Supreme Court was perfectly clear that such discretion is only to be exercised in "exceptional circumstances, given the high disruptive potential of this form of compensation".[25] The judge committed no error much less a reviewable error in refusing to exercise such discretion in this case.

[51] Since the ARQ has failed to establish that the criterion of appropriateness is met, it is not necessary to consider good faith or due diligence.

[52] For these reasons, I propose that the appeal be dismissed with legal costs.

PETER KALICHMAN, J.A.

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25 *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53, para. 20.