C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: **500-11-048114-157**

SUPERIOR COURT
(Commercial Division)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT OF:

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

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

Mises-en-cause

-and-

AGENCE DU REVENU DU QUÉBEC

AGENCE DU REVENU DU CANADA

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

OUTLINE OF ARGUMENTS

(In support of the *Amended Motion by the Monitor for Directions with Respect to Setoff and Damage Payment Input Tax Credits*)

Motion #741

1. INTRODUCTION

1. Through the present Outline of Arguments, **Cliffs Quebec Iron Mining ULC** (hereinafter, "**CQIM**")**, The Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake General Partner Limited** respectfully submit that:

   a) losses sustained as a result of a section 32(7) of the Companies' Creditors Arrangement Act (hereinafter, the "**CCAA**") disclaimer of contract are post-filing debts deemed to be provable claims by the regime of section 32 CCAA and, as such, can be compromised pursuant to section 19(1) CCAA;

   b) an interpretation of section 32(7) CCAA which holds that losses arising out of a disclaimer of contract are pre-filing debts renders meaningless and of no effect the expression "considered to have a provable claim" in such section, which, such result, is in conflict with applicable statutory interpretation principles; and

   c) an interpretation of section 32(7) CCAA which holds the contract disclaimer losses are pre-filing claims also flies in the face of the CCAA's underlying policy objectives and guiding principle.

2. FACTUAL BACKGROUND

2.1 General factual background

2. On July 31, 2008, a Confidential Transportation Agreement was concluded between the Consolidated Thompson Iron Mines Limited, now CQIM, and one of its suppliers for railway transportation services for the transportation of iron ore concentrates in railcars between the Wabush Lake Junction and the Sept-Iles Junction (hereinafter, the "**First Disclaimed Contract**");

3. On February 12, 2010, a Railroad Operation and Maintenance Services Agreement was concluded between Western Labrador Rail Services Inc. (hereinafter, "**WLRS**") and Bloom Lake Railway Company Limited, which was guaranteed by Genessee & Wyoming Inc. and Consolidated Thompson Iron Mines Limited, for the operation and maintenance of an approximate 32 km railroad used to transport iron ore and/or iron ore concentrate from a loading point located in the Province of Newfoundland and Labrador to the interchange point at Wabush Junction in the same province (hereinafter, the "**Second Disclaimed Contract**");

4. Also, on February 12, 2010, a Railcar Leasing Agreement was concluded between Canadian Iron Ore Railcar Leasing LP (hereinafter, "**CIORL**") and Consolidated Thompson Iron Mines Limited for the leasing of railroad rolling stock (hereinafter, the "**Third Disclaimed Contract**");

5. On October 13, 2011, a Time Charter Agreement was entered into between Canada Steamship Lines, a division of the CSL Group Inc., and CQIM for the provision of a Panamax-sized transhipment vessel (hereinafter, the "**Fourth Disclaimed Contract**") (collectively with the First Disclaimed Contract, the Second Disclaimed Contract and the Third Disclaimed Contract, hereinafter, the "**Disclaimed Contracts**");

6. On or around May 2011, Consolidated Thomson Iron Mines Limited, now CQIM, and certain of its affiliates (hereinafter, the "**Bloom Lake CCAA Parties**") were acquired indirectly by Cliffs Natural Resources Inc. Following the acquisition, as part of an internal reorganization, the amalgamated Consolidated Thomson Iron Mines Limited changed its name and was continued as a British Columbia corporation. On December 4, 2014, as part of a larger corporate group reorganization, CQIM was converted into an unlimited liability company under the laws of British Columbia.

7. On January 27, 2015, the Quebec Superior Court issued an Initial Order (as subsequently amended, rectified and/or restated, hereinafter, the "**Bloom Lake Initial Order**") commencing proceedings pursuant to the CCAA in respect of the Bloom Lake CCAA Parties;

8. Pursuant to the Bloom Lake Initial Order, FTI Consulting Canada Inc. was appointed as monitor of the business and affairs of the Bloom Lake CCAA Parties (hereinafter, the "**Monitor**") and an initial 30 day stay period was ordered, which has been further extended from time to time;

9. As of January 2015, $13,392,752.86 was owed by CQIM to Revenu Québec (hereinafter, "**RQ**") for unpaid goods and services tax (hereinafter, the "**GST**") and unpaid Quebec Sales tax (hereinafter, the "**QST**") (hereinafter, the "**RQ Pre-filing Claim**");

10. On January 28, February 2, May 21, 2015, and on February 4, 2016, Bloom Lake Iron Ore Mine Limited Partnership, Wabush Mines JV and CQIM sent notices of disclaimer of contract in connection with each of the Disclaimed Contracts pursuant to section 32 CCAA;

11. On February 27, March 4, June 20, 2015, and on March 4, 2016, the Disclaimed Contracts were officially disclaimed as no parties to the Disclaimed Contracts sought an order from the court preventing the disclaimer within the first fifteen (15) days following the date of the applicable notice of disclaimer of contract;

12. On November 5, 2015, the Quebec Superior Court issued an order (as amended by an order of the Court issued on November 16, 2015, and as further amended

from time to time, hereinafter the "**Amended Claims Procedure Order**" or the "**ACPO**"), *inter alia*:

a) Approving a procedure for the submission, evaluation and adjudication of claims against the Bloom Lake CCAA Parties and their current and former directors and officers; and

b) Ordering the extinguishment of all Claims, D&O Claims and Restructuring Claims (as each such term is defined in the ACPO) not filed in accordance with the applicable deadlines set out in the ACPO.

13. On December 12, 2015, a proof of claim was filed against CQIM, the Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake General Partner Limited in the amount of $29,904,793 for services performed prior to the filing and for $439,309,349 for the losses suffered as a result of the disclaimer of the First Disclaimed Contract (hereinafter, the "**First Restructuring Claim**");

14. On December 14, 2015, CIORL filed a proof of claim against CQIM, the Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake General Partner Limited in the amount of $72,353,170 for the losses suffered as a result of the disclaimer of the Second Disclaimed Contract (hereinafter, the "**Second Restructuring Claim**");

15. On December 17, 2015, WLRS filed a proof of claim against CQIM, the Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake General Partner Limited in the amount of $1,681,110 for services performed prior to the filing and for $2,825,000 for the losses suffered as a result of the disclaimer of the Third Disclaimed Contract (hereinafter, the "**Third Restructuring Claim**");

16. Also on December 17, 2015, the CSL Group Inc. filed a proof of claim against CQIM, the Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake General Partner Limited in the amount of $907,291.33 for services performed prior to the filing and for $23,198,924 for the losses suffered as a result of the disclaimer of the Fourth Disclaimed Contract (hereinafter, the "**Fourth Restructuring Claim**") (collectively with the First Restructuring Claim, the Second Restructuring Claim and the Third Restructuring Claim, hereinafter, the "**Restructuring Claims**");

17. On June 18, 2018, the required majorities of creditors under the CCAA approved the Amended and Restated Joint Plan of Compromise and Arrangement dated May 16, 2018 (as it may be further amended, restated or supplemented from time to time, hereinafter, the "**Plan**");

18. On June 29, 2018, the Plan was sanctioned by the Quebec Superior Court and its formal implementation was confirmed by the issuance by the Monitor of the Plan Implementation Date Certificate (as defined in the Plan) on July 31, 2018;

19. On August 28, 2018, in relation to the Disclaimed Contracts, the Monitor paid a first interim-distribution of $59,258,117.52 in partial payment of the Restructuring Claims pursuant to the Plan (hereinafter, the "**Dividend**");

20. The payments made by the Monitor on behalf of CQIM as partial payment of the losses sustained by CIORL, WLRS, the CSL Group Inc. and other suppliers in respect of their respective Restructuring Claim (hereinafter, the "**Disclaimed Parties**") then created the right for CQIM to claim input tax credits (hereinafter, the "**ITCs**") for the purposes of goods and services tax (hereinafter, the "**GST**") and input tax refunds (hereinafter, the "**ITR**") for the purposes of Quebec Sales tax (hereinafter, the "**QST**") (hereinafter, the "**ITC Claims**").

21. CQIM's right to claim the ITC Claims flows from the application of section 182 of the *Excise Tax Act* and of section 318 of the *Act respecting the Quebec Sales Tax Act*, which respectively provide as follows:

> **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
>
> $$(A/B) \times C$$
>
> where
>
> A is 100%,
>
> B is
>
> (i) if tax under subsection 165(2) was payable in respect of the supply, the total of 100%, the rate set out in subsection 165(1) and the tax rate for the participating province in which the supply was made, and
>
> (ii) in any other case, the total of 100% and the rate set out in subsection 165(1), and
>
> C is the amount paid, forfeited or extinguished, or by which the debt or obligation was reduced, as the case may be; 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
>
> (i) where tax under subsection 165(2) was payable in respect of the supply, the total of the tax under that subsection and under subsection 165(1) calculated on that consideration, and
>
> (ii) in any other case, tax under subsection 165(1) calculated on that consideration.

Transitional

(2) Paragraph (1)(b) does not apply in respect of amounts paid or forfeited, and debts or other obligations reduced or extinguished, as a consequence of a breach, modification or termination of an agreement where

(a) the agreement was entered into in writing before 1991;

(b) the amount is paid or forfeited, or the debt or other obligation is reduced or extinguished, as the case may be, after 1992; and

(c) tax in respect of the amount paid, forfeited or extinguished, or by which the debt or obligation was reduced, as the case may be, was not contemplated in the agreement.

Application of Division IX

(2.1) Division IX does not apply for the purposes of subsection (1).

Exception

(3) Subsection (1) does not apply to that part of any amount paid or forfeited in respect of the breach, modification or termination of an agreement for the making of a supply where that part is

(a) an additional amount that is charged to a person because the consideration for the supply is not paid within a reasonable period and is such an amount referred to in section 161;

(b) an amount paid by one railway corporation to another railway corporation as or on account of a penalty for failure to return rolling stock within a stipulated time; or

(c) an amount paid as or on account of demurrage.

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,

(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

(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 emphasis)

22. In short, the payment of $59,258,117.52 made by the Monitor to the Disclaimed Parties is an amount paid to partially cover the losses the Disclaimed Parties have

sustained as a result of the disclaimer of the Disclaimed Contracts, rather than as a consideration for the supply of services which was initially to be provided;

23. In its GST returns for the period ended November 30, 2018, CQIM claimed the input tax credits for the purposes of GST and input tax refunds for purposes of QST in connection with the sales tax deemed paid on the Dividend (hereinafter, the "**Damage Payment ITCs**");

24. Based on its audit work, RQ assessed the Damage Payment ITCs in the amount of $7,459,257.85;

25. Following this assessment, a dispute arose between the Monitor and RQ, also representing the Canada Revenue Agency, on the issue of set off rights. RQ views the Damage Payment ITCs as arising pre-filing due to the Restructuring Claims being provable claims under the CCAA and the Plan, which, if true, would allow RQ to offset the RQ Pre-filing Claim against the ITC Claims. On the other hand, the Monitor is of the view that the Damage Payment ITCs are post-filing claims and that in any event the Restructuring Claims are not pre-filing claims and, as such, no offset can be effected by RQ (hereinafter, the "**Dispute**");

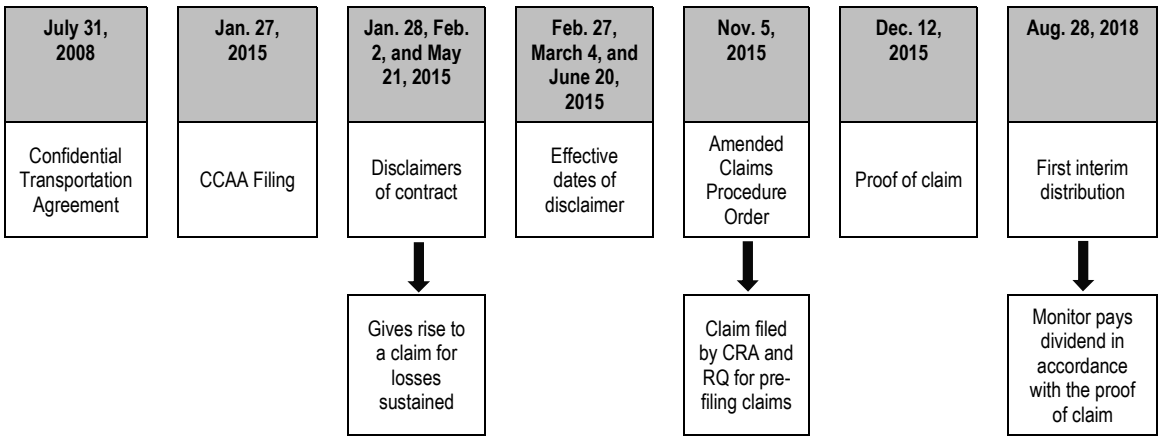
2.2 Timeline of the key relevant events

26. The key facts relevant to the legal determination sought in this matter have occurred at the following moments:

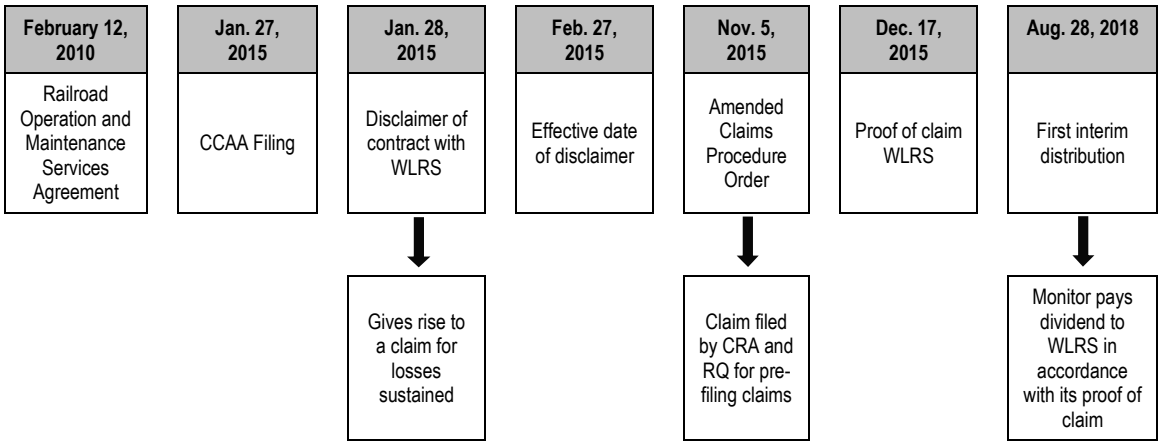
Chronology
Revenue Quebec → Set-off litigation

First Disclaimed Contract

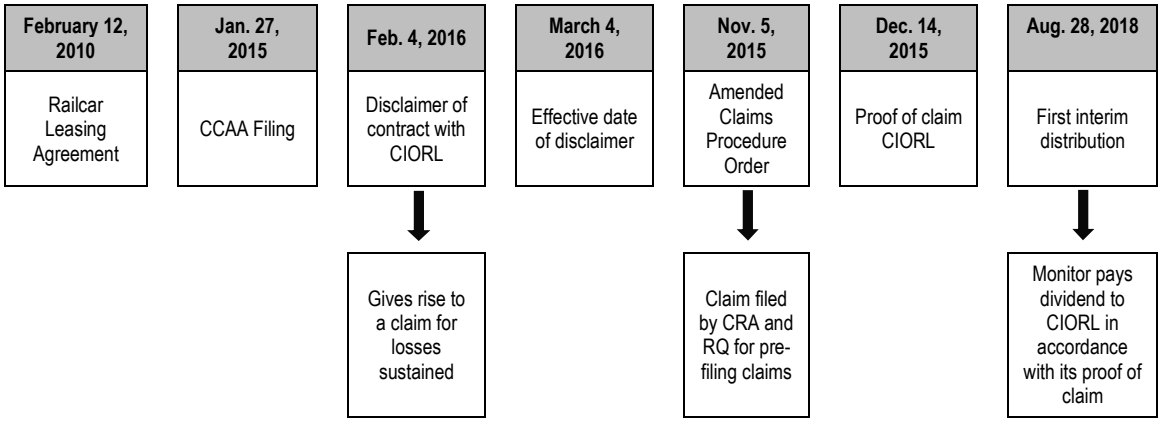
(Disclaimers by CQIM, Bloom Lake Iron Ore Mine Limited Partnership and Wabush Mines JV)



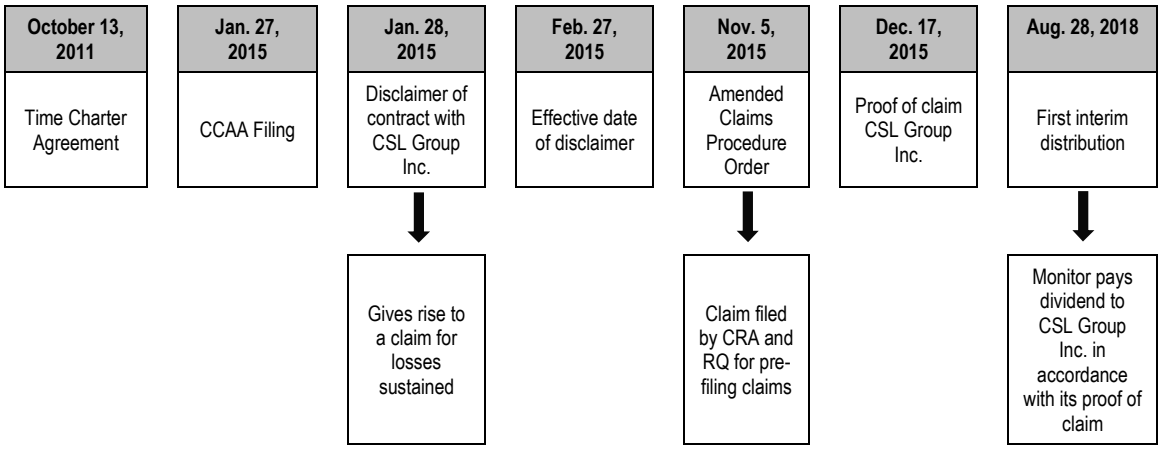
Second Disclaimed Contract (WLRS)



Third Disclaimed Contract (CIORL)



Fourth Disclaimed Contract (CSL Group Inc.)



3. GENERAL RULE CONCERNING THE RIGHT OF SET-OFF IN AN INSOLVENCY CONTEXT: THE CCAA ONLY ALLOWS SET-OFF BETWEEN CLAIMS WHICH ARE BORNE EITHER BOTH PRE OR POST FILING

27. It is important to emphasize that the CCAA and the Bankruptcy and Insolvency Act (hereinafter, the "**BIA**") are part of an integrated body of insolvency law and, as such, case law and doctrine can be applied to both equally.

- *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268, par. 51-52, (hereinafter, "**Kitco**"). **[TAB-1]**

> [51] To begin with, it is useful to focus on the close links between the CCAA and the BIA, which mean that case law and scholarly opinion can be applied to both equally.
>
> [52] These laws form a part of an integrated body of insolvency law, as the Supreme Court has said:
>
> > [78] Tysoe J.A. therefore erred in my view by treating the CCAA and the BIA as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the BIA and the CCAA, reflects the reality that reorganizations of differing complexity require different legal mechanisms . . .

28. Section 21 CCAA allows for compensation in CCAA proceedings and provides as follows:

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

29. Section 97(3) BIA allows for compensation in BIA proceedings and provides as follows:

> **97(3)** The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

30. Ultimately, despite section 21 CCAA and section 97(3) BIA mentioning that the law of set-off or compensation applies to all claims made against a debtor company or the estate of a bankrupt, only debts of the same nature, meaning pre-filing debts with pre-filing debts or post-filing debts with post-filing debts, can be compensated with each other. Without that temporal reciprocity between debts at the time of the filing, no compensation can occur under sections 21 CCAA and 97(3) BIA:

- *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268, par. 80-83. [TAB-1]

> [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
>
> [81] For compensation to be possible, the question is not whether there is a debt, or whether it is liquid or exigible, or related to another debt, but whether it is a provable claim duly proved or "deemed a proved claim".
>
> [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.
>
> [83] Thus, a creditor establishes its claim as at Determination, at which time it subtracts its own debt to the debtor. If the balance is in the creditor's favour, it establishes its provable claim. Otherwise, if the balance is in the debtor's favour, the latter is entitled to claim the balance, but not more.

- *Daltech Architectural Inc. (Syndic de)*, 2008 QCCA 2441, par. 58.**[TAB-2]**

> [58] La juge Deschamps, dans l'arrêt D.I.M.S. Construction inc. (Syndic) c. Québec (Procureur général), est d'avis que l'art. 97(3) L.F.I. « […] requiert implicitement que les créances mutuelles doivent avoir pris naissance avant la faillite ». En l'espèce, à l'instar du juge de première instance, je suis d'opinion que la compensation s'applique puisqu'avant la faillite, la faillie détenait une créance contre l'intimée, illustrée par le droit de rétention prévu au Contrat. Les deux parties étaient, en effet, au moment de la faillite, mutuellement créancière et débitrice.

31. Moreover, it is important to note that the qualification of a debt as being pre- or post-filing is necessarily dependant on the moment at which the obligation creating the debt originates. Should a debt arise after the filing as a result of an obligation incurred prior to filing, then the debt will be qualified as a pre-filing debt. Obviously then, post-filing debts are only those incurred after the filing because of an obligation also incurred after the filing.

32. In the present matter, the ITC Claims flow from the decision that was made by CQIM to disclaim the Disclaimed Contracts and from the payments made

subsequently on August 28, 2018. These disclaimers entitled the Disclaimed Parties to claim for losses sustained as a result of the disclaimers and, as such, further support the position that the amount paid as a Dividend was paid otherwise than as consideration for the supply of services which were initially to be provided. Thus, it is specifically the disclaimers of the Disclaimed Contracts and the payments made subsequently on August 28, 2018, which gave rise to CQIM's right to make the ITC Claims pursuant to the application of section 182 of the *Excise Tax Act* and of section 318 of the *Act respecting the Quebec Sales Tax Act*.

- *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268, par. 77-79. [TAB-1]

> [77] The source of the error lies in the fact that the pre-debts include those incurred after Determination where they result from an obligation that originated before Determination. Post-debts are only those incurred after and also resulting from an obligation originating after Determination, such as the $1.7 million tax refund claimed after Determination and resulting from the company's post-Determination operations.
>
> [78] Certainly, an obligation can be contingent, unliquidated, or not exigible as at the day of Determination, but existing and able to give rise to a claim if a court decision "deems it provable," as provided in sections 121(1) and (2), which refer to 135(1.1) and (4) BIA.
>
> **Section 121 (1)**
>
> Claims provable
>
> **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.
>
> Contingent and unliquidated claims
>
> **(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.
>
> **135** …
>
> Determination of provable claims
>
> **(1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
>
> Determination or disallowance final and conclusive
>
> **(4)** A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the

> person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.
>
> [79] Even though date of the court's ruling is long after Determination, such an obligation is nonetheless a "provable claim" as of that day, to which compensation can apply.

4. DOES CQIM'S ITC CLAIMS CONSTITUTE A PRE OR POST-FILING CLAIM (OR WHAT IS THE SOURCE OF THE ITC CLAIMS)?

33. The parties agree that the RQ Pre-Filing Claim is a pre-filing claim. Thus, the only question is to determine if the ITC Claims are pre or post filing claims.

34. As a starting point, one should keep in mind that both prior and after the filling, CQIM could have elected to keep using the Disclaimed Parties' services. In such a scenario, the Disclaimed Parties would never have been able to make a claim for losses sustained as a result of the disclaimer of the Disclaimed Contracts. Rather, they would have simply continued to be paid in accordance with the terms of the Disclaimed Contracts. In these circumstances, neither 182 ETA nor 318 QSTA would have been triggered since nothing would have been paid otherwise than in consideration of the supply of the services. Any payment that would have been made in such circumstances would simply have been a payment for the supply that was to be provided pursuant to the Disclaimed Contracts.

35. Hence, the source of the ITC Claims cannot simply be the mere existence of the Disclaimed Contracts. To be placed in a situation whereby losses could become payable instead of payment being made for services provided, the Disclaimed Contracts had to be disclaimed, resiliated or otherwise not complied with.

36. In a pre-filing context, the Disclaimed Parties would have been entitled to claim damages pursuant to section 1607 of the *Civil Code of Quebec* (hereinafter, the "**CCQ**") which grants to a party to a contract which is not being substantially performed the right to seek its performance by equivalence. In such a case, the right to claim damages will flow from the fact that one party was made aware by the other party, that the contract concluded between them will no longer be complied with even though the ensuing non-performance of the contract is not legally validated.

37. In our case, the situation is different. CQIM availed itself of its legal right to disclaim the Disclaimed Contracts pursuant to section 32(1) CCAA. This disclaimer right does not generally exist in the CCQ, save some exceptions not relevant in the present matter. Thus, it is the use of this right of disclaimer, itself, which gives rise to the Disclaimed Parties' right to claim for the losses sustained pursuant to section 32(7) CCAA.

38. It is to be noted that, the Canadian Constitution, and more specifically section 91(21) of the *British North America Act*, confers to the federal legislator the right to set out the laws and regulations which shall govern restructuring and insolvency

matters. Hence, the rules set out in the CCQ which deal with the consequences of the compliance or non-compliance with obligations set out in a contract shall only apply on a subsidiary basis and are superseded by the applicable provisions of the BIA and the CCAA when a conflict exists between them and the CCQ's regime.

- *Séquestre de Media5 Corporation*, 2020 QCCA 943, par. 57. **[TAB-3]**

> [57] Bien que la LFI relève de la compétence exclusive fédérale, elle prévoit que ses mécanismes pour le règlement des dettes et la liquidation des actifs doivent s'appliquer en accord avec la législation provinciale portant sur la propriété et les droits civils, dans la mesure où celle-ci n'est pas incompatible avec les dispositions de la loi fédérale. <u>En principe du moins, les dispositions du Code civil du Québec continuent donc de s'appliquer dans le cadre d'une insolvabilité ou d'une faillite dans la mesure où elles sont compatibles avec celles de la LFI</u>:
>
> > 72 (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.
>
> (Our emphasis)

39. Section 32(7) CCAA reads as follows:

> **32.7** 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.

40. The wording of section 32(7) gives rise to the question that if the loss is a provable claim shall it be considered as a pre-filing claim for the purpose of set-off?

5. THE WORDING OF SECTION 32(7) CCAA REPRESENTS A CODIFICATION OF THE EXISTING STATE OF THE CASE LAW PRIOR TO 2005

41. Section 32 came into force in 2009 after the CCAA was substantially updated.

42. The wording of this section of the CCAA was inspired by the state of the existing case law prior to its inception. More specifically, the termination of a contract by a debtor company that had commenced proceedings under the CCAA did not give rise to a preference in favour of the affected creditor. Rather, the latter creditor was treated as an unsecured creditor with a provable claim that could be compromised in the debtor company's plan of arrangement.

- *Blue Range Resource Corp. (Re)*, 1999 ABQB 1038, par. 36-38. **[TAB-4]**

> [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.c 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 setoff 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 its does not affect the creditors' right 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 sympathize 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.

- Enron Capital & Trade Resources Canada Corp. v. Blue Range Resource Corp., 2000 ABCA 239, par. 28. **[TAB-5]**

  [28] The CCAA stay provisions create disparities among market participants. While the non-defaulting party is subject to the stay order and may not terminate its contracts, the debtor company suffers from no similar disability. Subject to the court's supervision, it may terminate and breach contracts with impunity, forcing the non-defaulting party to claim damages as an unsecured creditor in the CCAA proceedings.

- Skeena Cellulose Inc. v. Clear Creek Contracting Ltd., 2003 BCCA 344, par. 22-23. **[TAB-6]**

  [22] The remaining question framed by the Chief Justice was whether Skeena's termination of two of its five replaceable logging contracts constituted an "inappropriate differentiation of treatment between the applicants and other [Skeena] creditors." (para. 42.) He noted that one of the unfortunate results of insolvency restructurings is that some persons suffer hardship. In this case, Skeena had had to terminate the employment of many individuals, its unsecured and secured creditors stood to recoup only a small fraction of their claims, and the Court had already dismissed an application brought by the Pulp, Paper and Research Institute of Canada similar to that brought by the appellants. The Court noted the comments of LoVecchio J. in *Re Blue Range Resource Corp.* [1999] A.J. No. 788 (Alta Q.B.), to the effect that an order authorizing the termination of a contract is appropriate in a restructuring

since, like others dealing with the insolvent corporation, the contracting party will have its claim for damages. But that claim should not be elevated above those of other contracting parties; as LoVecchio J. had stated: […]

[23] Similarly in this case, the Chief Justice concluded that the applicants before him were "seeking to be put in a position superior to [Skeena's] other creditors." (para. 50.) In the result, since Thackray J. had already ruled that replaceable contracts could be terminated as part of a CCAA reorganization, and the appellants had had "full knowledge prior to the creditors' meetings that they would have claims under the Plan if their contracts were to be terminated", the Chief Justice saw no reason why the appellants should "in effect, be placed in a better position than other creditors."

- *Doman Industries et al, Re*, 2004 BCSC 733, par. 29-30. **[TAB-7]**

[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. <u>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</u>.

(Our emphasis)

6. WHAT WAS THE INTENT OF THE LEGISLATOR WHEN IT STATED IN SECTION 32(7) CCAA THAT THE CLAIM RESULTING FROM THE DISCLAIMER OF A CONTRACT IS ‘’CONSIDERED TO [BE] A PROVABLE CLAIM’’?

6.1 Courts must favour interpretations that give meaning to statutes in light of their objectives and the overall context in which they insert themselves. Section 32 CCAA should not be treated differently.

43. Articles 41 and 41.1 of Quebec’s *Loi d’interprétation* and sections 12 of the Canadian *Interpretation Act* respectively provide as follows:

> **41.** Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit.
>
> Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.
>
> **41.1.** The provisions of an Act are construed by one another, ascribing to each provision the meaning which results from the whole Act and which gives effect to the provision.
>
> **12** 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.

44. The author Pierre-André Côté (hereinafter, “**Côté**”), notwithstanding his nuanced position on the matter, teaches us that, in reading a statute, one must assume that every word, every sentence, every paragraph and/or subsection has been deliberately drafted with a view to producing some effect, because the legislator does not speak to say nothing. Côté names this principle, the principle of useful effect.

- Pierre-André Côté et al., *Interprétation des lois*, 4e édition, 2009, par. 1047-1049. **[TAB-8]**

> 1047. En lisant un texte de loi, on doit en outre présumer que chaque terme, chaque phrase, chaque alinéa, chaque paragraphe ont été rédigés délibérément en vue de produire quelque effet. Le législateur est économe de ses paroles : il ne « parle pas pour ne rien dire ».
>
> 1048. Ce principe, appelé principe de l'effet utile, est repris à l'article 41.1 de la Loi d'interprétation du Québec. Dans l'arrêt *Subilomar Properties (Dundas) Ltd. c. Cloverdale Shopping Center Ltd*., il a été ainsi énoncé par le juge Spence :
>
> > « C'est évidemment un truisme qu'aucune législation, loi ou règlement, ne doit être interprétée de manière que certaines parties en soient considérées comme simplement superflues ou dénuées de sens [...]. »

> 1049. Le principe de l'effet utile, qui constitue un argument interprétatif extrêmement courant, ne se présente toutefois pas comme une règle de caractère absolu : il ne faut pas lui demander plus que ce qu'il peut donner. Il ne fait que formuler une présomption.

45. This principle was affirmed by The Canadian Supreme Court (hereinafter the "**SCC**") in its *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Center Ltd.* decision (hereinafter, "**Subilomar**"), in which the honorable Spence J. held that "[i]t is of course trite law that no legislation whether it be by statute or by-law should be interpreted to leave parts thereof mere surplusage or meaningless".

- *Subilomar Properties v. Cloverdale*, [1973] SCR 596, p. 603. **[TAB-9]**

> Therefore, the words of the by-law in para. 11.3.1.2 (2) all business uses permitted in a limited commercial zone on land fronting on the following streets only: Dundas Street ……. would be under the respondent's interpretation, meaningless. It is the respondent's submission that we do not know what lands fronting on Dundas Street might have been zoned I.C2 at some previous time and then the zoning changed by a subsequent amendment prior to the present application. That is true, but I am in accord with the appellant's suggestion that we must interpret the by-law as of the date of the application for the building permit and not as it might have existed at some previous time and certainly as that by-law existed at such date the words, as interpreted as the respondent wishes them to be interpreted, are meaningless. <u>It is of course trite law that no legislation whether it be by statute or by-law should be interpreted to leave parts thereof mere surplusage or meaningless</u>, nor in my view should the by-law be interpreted with the view that in the future some subsequent amendment to the official plan might show I.C2 zoned lands as fronting on Dundas Street.
>
> (Our emphasis)

46. Furthermore, in its *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)* decision (hereinafter, "**Canada 3000**"), the SCC affirmed that the notion that provides for the interpretation of a statute in light of its underlying policy objectives, rather than in a vacuum, goes as far back as the 16th century.

- Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), [2006] 1 SCR 865, par. 36. **[TAB-10]**

> 36 This case is from first to last an exercise in statutory interpretation, and the issues of interpretation are, as always, closely tied to context. The notion that a statute is to be interpreted in light of the problem it was intended to address is as old at least as the 16th century; see Heydon's Case (1584), 3 Co. Rep. 7a, 76 E.R. 637. In a more modern and elaborate formulation, it is said 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" (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87).

47. The more modern and elaborate formulation of this notion recognizes the important role that context must inevitably play when a court construes the written words of a statute. It provides that an Act must be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This approach is the SCC's preferred approach to statutory interpretation in a wide range of interpretive settings.

- *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, par. 26-27 (hereinafter, "**Bell**"). **[TAB-11]**

> 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: see, for example, Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3, at p. 17; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21; R. v. Gladue, [1999] 1 S.C.R. 688, at para. 25; R. v. Araujo, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. 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". (See also Stoddard v. Watson, [1993] 2 S.C.R.

1069, at p. 1079; Pointe-Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

(our emphasis)

48. In line with the foregoing, the Alberta Court of Appeal has recently held that the above-mentioned interpretation principles are applicable to an interpretation of section 32 CCAA.

- *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85, par. 63-64 (hereinafter, "**Bellatrix**"). **[TAB-12]**

> [63] Section 32 of the CCAA should be read in light of the objectives, context, intent and policies of Parliament (which objectives, context, intent and policies are described in Callidus Capital): see Rizzo & Rizzo Shoes Ltd (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21, saying 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 also Canada Trustco Mortgage Co. v Canada, 2005 SCC 54 para 10, [2005] 2 SCR 601, cited in Callidus Capital at para 60 and in Orphan Well Association v Grant Thornton Ltd, 2019 SCC 5 at para 88, [2019] 1 SCR 150.
>
> [64] Section 32 should also be read consistently with the applicable canons of interpretation, including that the provision is part of a larger scheme across several pieces of legislation, and accordingly it should be read in harmony with the scheme and not so as to render any other parts of the scheme ineffective. This canon of interpretation also dates back to Lord Mansfield in R v Loxdale (1758) 1 Burr 445 at p 447 where he said:
>
> > Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and explanatory of each other.
>
> This was lately cited by the UKSC in T W Logistics Ltd v Essex County Council and another, [2021] UKSC 4 at para 75; see likewise Food and Drug Administration et al. v. Brown & Williamson Tobacco Corp. et al., 529 U.S. 120 (2000) where O'Connor J pointed to the need to see a statutory system as "as a symmetrical and coherent regulatory scheme".

6.2 One of the main policy objectives of the CCAA is to preserve and maximize the value of a debtor's assets for the sake of all its creditors

49. As was mentioned in section 3, the CCAA and the BIA are part of an integrated body of insolvency law and, as such, case law and doctrine can be applied to both equally.

- *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268, par. 51-52**.** [TAB-1]

> [51] To begin with, it is useful to focus on the close links between the CCAA and the BIA, which mean that case law and scholarly opinion can be applied to both equally.
>
> [52] These laws form a part of an integrated body of insolvency law, as the Supreme Court has said:
>
> > [78] Tysoe J.A. therefore erred in my view by treating the CCAA and the BIA as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the BIA and the CCAA, reflects the reality that reorganizations of differing complexity require different legal mechanisms . . .

50. As two components of the same body of insolvency law, the CCAA and the BIA share the same general policy objectives, notably:

    a) The financial rehabilitation of the debtor, free of past debts; and

    b) The equitable distribution of the debtor's assets among its creditors according to the established order of priority.

- *Métaux Kitco inc. (Arrangement relatif à)*, 2016 QCCS 444, par. 47-48. **[TAB-13]**

> [47] La LACC se distingue de la LFI par son objectif réparateur. Elle vise à éviter les effets dévastateurs d'une faillite ou l'arrêt des activités d'une entreprise. Elle participe néanmoins de la même philosophie que la LFI. En effet, la LACC et la LFI font partie d'un ensemble intégré de règles du droit de l'insolvabilité.
>
> [48] Deux objectifs se trouvent au cœur de ces deux lois:
>
> > (1) la réhabilitation financière du débiteur, libre de dettes passées;
> >
> > (2) le partage équitable des biens du débiteur entre ses créanciers selon l'ordre de priorité qu'elles établissent.

51. The SCC, in its *9354-9186 Québec inc. v. Callidus Capital Corp*. decision (hereinafter, "**Callidus**"), detailed the array of overarching remedial objectives pursued by Canada's insolvency regime which include, among other things, preserving and maximizing the value of a debtor's assets.

- 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, par. 40. **[TAB-14]**

> [40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the

> claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., Annual Review of Insolvency Law 2016 (2017), 9, at pp. 9-10; J. P. Sarra, Rescue! The Companies' Creditors Arrangement Act 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at pp. 9-10; R. J. Wood, Bankruptcy and Insolvency Law (2nd ed. 2015), at pp. 4-5).
>
> (Our emphasis)

52. In that same decision, the SCC, in its discussion of the evolving nature of the CCAA which now explicitly provides for liquidating CCAAs, highlights the relative weight that the different CCAA policy objectives take on in the context of a liquidation. The SCC held that the objective of equitably distributing the debtor company's assets among its creditors becomes the only relevant one.

- *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10, par. 46 [TAB-14].

> [46] Ultimately, the relative weight that the different objectives of the CCAA take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the BIA context. In Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court 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. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the CCAA, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the CCAA leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

53. Therefore, when liquidation is inevitable, debtor companies should focus on an asset realization and maximization of return to all creditors in order to protect the creditors' interests. Such an equitable result is dictated by the CCAA's guiding principles which emphasize the equitable treatment of all creditors.

- *Target Canada Co. (Re)*, 2015 ONSC 1028, par. 24-25. **[TAB-15]**

> [24] The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in Timminco Ltd., Re, 2012 ONSC 4471 at paragraph 62 as follows:
>
> > [62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.
>
> [25] I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

6.3 Compensation done pursuant to the CCAA and the BIA must respect the principle of equality between creditors and the scheme of distribution subject to the priorities set out in each statute

54. Compensation in the Canadian insolvency regime is an exception to the rule of equality between creditors. As such, sections 21 CCAA and 97(3) BIA must be interpreted narrowly to avoid enabling transactions that would have the effect of granting a security that did not exist prior to an insolvency or bankruptcy.

- *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 SCR 564, par. 55-56. **[TAB-16]**

> 55 Few commentators have shown an interest in the effects of subrogation in bankruptcy matters, and the principles of Canadian bijuralism do not permit the importation of common law rules. The commentaries of authors from outside Quebec are nonetheless of interest for the purpose of reviewing the principles specific to the BIA (R. J. Wood, "Turning Lead into Gold: The Uncertain Alchemy of 'All Obligations' Clauses" (2003), 41 Alta. L. Rev. 801). Section 121 BIA allows the employer to exercise the rights that accrue to him or her by reason of the subrogatory payment. He or she holds no rights in addition to the rights conferred by the civil law. The employer has only those rights which the CSST could exercise. Just as the CSST could not set up compensation, neither can the employer if third persons are affected. Section 97(3) BIA does not provide that a claim may be transferred from one creditor to another so as to permit compensation where it could not otherwise be set up. Since s. 97(3) BIA is an exception to the rule of equality between creditors, it must be interpreted narrowly. It must therefore be read in conjunction with ss. 121, 136(3) and 141 BIA as implicitly requiring that the mutual debts come into existence before the bankruptcy.

> 56 What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt's property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the BIA preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy. To sum up, where subrogation is concerned, the BIA contains no provisions that depart from the civil law and can serve as a basis for extending the scope of application of compensation.
>
> (our emphasis)

- *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268, par. 61-62. [TAB-1]

> [61] This concordance now established, we may consider the Supreme Court's comments on the rule of compensation in insolvency cases. In D.I.M.S. Construction inc. (Trustee of) v. Québec (Attorney General),[14] it writes:
>
> > [55] Since s. 97(3) BIA is an exception to the rule of equality between creditors, it must be interpreted narrowly. …
> >
> > [56] The general principles of the BIA preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy. …
>
> [62] Equal treatment of creditors, subject to the priorities set out in the statute, is a recognized principle of insolvency law.

7. APPLICATION OF THE LEGAL PRINCIPLES TO THE DISPUTE

55. At the heart of the Dispute is the interpretation of section 32(7) CCAA which provides as follows:

> **32 (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.

56. The issue that must be resolved is whether section 32(7) CCAA losses arising out of the disclaimer of contracts are necessarily pre-filing debts which can be set-off or compensated with other pre-filing debts?

57. In light of the applicable legal principles detailed in sections 3 to 6 of this Outline, CQIM respectfully submits that that is not the case for the following reasons:

a) The losses flowing from a disclaimer pursuant to section 32(7) CCAA are only deemed to be provable claims;

b) The interpretation that provides that losses flowing from a disclaimer pursuant to section 32(7) CCAA are necessarily pre-filing debts renders the

inclusion of the expression “considered to have a provable claim” meaningless and of no effect; and

c) Such an interpretation flies in the face of the policy objectives pursued by the CCAA and its guiding principle.

7.1 The losses flowing from a disclaimer pursuant to section 32(7) CCAA are only deemed to be provable claims and, as such, are not pre-filing debts

58. As the QCCA held in *Kitco*, pre-filing debts are debts that were incurred prior to a filing or after a filing but arising out of an obligation incurred prior to a filing.

59. Section 32(7) CCAA losses are not pre-filing debts. They are not incurred prior to a filing because section 32(7) CCAA disclaimers necessarily occur after a filing once CCAA proceedings are commenced.

60. Rather, section 32(7) CCAA losses are post-filing debts arising out of the disclaimer of a contract and, as such, are deemed to be provable claims by the specific wording of the section.

61. Indeed, section 32(7) CCAA losses can be compromised pursuant to section 19(1) CCAA solely because the regime set out in section 32 CCAA governing the termination of contracts provides for such a result, and not because said losses are necessarily pre-filing debts, which, temporally, they are not as they obviously come into existence after the date of filing.

62. If a claim in damages resulted from a breach or non-performance of a contract occurring prior to the date of filing, such damages would necessarily amount to pre-filing debts. However, losses flowing from the disclaimer of a contract in existence prior to a date of filing can only arise as a result of the disclaimer, which disclaimer can only be effected by a CCAA debtor after the date of filing. Thus, such losses can only be qualified as post-filing debts, which are then deemed by section 32(7) CCAA to be a provable claim subject to compromise under a CCAA plan.

7.2 Section 32(7) CCAA must be interpreted in a manner that provides a meaning to the expression “considered to have a provable claim”

63. As Côté teaches us, every word, every sentence, every paragraph and/or subsection of a statute has been deliberately drafted with a view to producing some effect, because the legislator does not speak to say nothing.

64. In the same vein, the SCC, in *Subilomar*, held that a proper statutory interpretation does not leave parts thereof mere surplusage or meaningless.

65. However, an interpretation that provides that section 32(7) CCAA losses are necessarily pre-filing debts does just that by rendering meaningless the expression “considered to have a provable claim”.

66. The inclusion of the expression “considered to have a provable claim” in section 32(7) CCAA ought to be a specification by the legislator that losses flowing from a disclaimed contract should be exceptionally treated as a provable claim notwithstanding the fact that they are post-filing debts. This has the effect of allowing a debtor company to compromise said losses in a plan of arrangement presentable to its creditors.

67. Had this precision not been explicitly made by the legislator, losses flowing from a section 32(7) CCAA disclaimer of contract would not be considered provable claims because they are necessarily post-filing debts and not pre-filing debts.

68. Had section 32(7) CCAA losses obviously been pre-filing debts, then the legislator’s inclusion of the expression “considered to have a provable claim” would produce no effect at all and would effectively be a meaningless redundance and surplusage.

69. Considering Côté and the SCC’s teachings, such cannot be the case.

70. Thus, the only valid interpretation of section 32(7) CCAA is that losses flowing from a disclaimed contract are post-filing debts which are deemed by the legislator, through the expression “considered to have a provable claim”, to be provable claims which can then be compromised pursuant to section 19(1) CCAA.

7.3 Section 32(7) CCAA must be interpreted in line with the CCAA’s underlying policy objectives and guiding principle

71. As is mentioned in section 6.2, the broader Canadian insolvency regime is, among other things, concerned with the preservation and maximization of a debtor company’s assets. This is especially true in the context of a liquidation, such as the context of this Dispute, as it maximizes returns for all the creditors. A correct interpretation of section 32(7) CCAA must be in line with these underlying policy objectives.

72. Moreover, considering the CCAA’s guiding principle of equal treatment of creditors subject to the priorities it sets out, any valid interpretation of section 32(7) CCAA must also be consistent with this guiding principle.

73. Indeed, the SCC affirmed in *Canada 3000* and *Bell*, that a valid statutory interpretation is one that provides for the interpretation of a statute in light of its underlying policy objectives. This means that an Act must be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

74. As the Alberta Court of Appeal affirmed in *Bellatrix*, these canons of interpretation are directly applicable to an interpretation of section 32 CCAA.

75. Therefore, an interpretation that holds that section 32(7) CCAA losses are pre-filing debts flies in the face of the policy objectives pursued by the CCAA and its guiding principle. Indeed, the resulting consequence would necessarily be a reduction of the liquid assets available to be distributed equitably amongst a debtor company's creditors, effectively hindering a debtor company's ability to maximize returns for its creditors through the preservation and maximization of the value of its assets.

76. This is so because a qualification of section 32(7) CCAA losses as pre-filing debts allows a creditor, pursuant to section 21 CCAA, to compensate its pre-filing debts owed to the debtor company with its newly created claim for losses arising from a disclaimed contract.

77. Such a scenario directly affects a debtor company's liquidity pool as it runs the risk of being opposed, by its creditors, the law of set-off provided by section 21 CCAA whenever the debtor seeks to recover pre-filing debts owed to it by creditors with which it has disclaimed contracts pursuant to section 32 CCAA.

78. In other words, qualifying section 32(7) CCAA losses as pre-filing debts effectively enables transactions, through set-off, that would have the effect of granting a security to a creditor that did not have one prior to the insolvency. Such a situation is in direct conflict with the scheme, object and underlying policies of the CCAA, and the broader Canadian insolvency regime, which preclude such a scenario in favour of the equitable treatment of all creditors.

79. Taking into account the existing case law prior to the adoption of section 32(7) CCAA and the various principles which provide guidance on the intent of the legislator, it is clear that the only goal of the legislator when it stated that the claim resulting from the disclaimer of a contract shall be considered as a provable claim was to ensure that such a claim could be compromised by a plan of arrangement.

80. It was surely not to convert what is clearly a post-filing claim into a pre-filing claim and consequently opening the door to a purported right of set-off. To retain this interpretation would defeat the purpose of section 32 CCAA and would hinder a debtor's ability to restructure itself.

8. CONCLUSION

81. In light of the foregoing, it is clear that the appropriate interpretation of section 32(7) CCAA leads us to conclude that the losses arising out of a disclaimed contract are post-filing debts which the legislator has exceptionally deemed to be provable claims subject to compromise under a CCAA plan.

82. As such, RQ cannot avail itself of section 21 CCAA to effect compensation between the pre-filing sums owed to it by the debtor company and the Damage Payment ITCs it owes as a result of the disclaimer of the Disclaimed Contracts.

THE WHOLE, RESPECTFULLY SUBMITTED.

Montreal, August 13, 2021

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SUPERIOR COURT
DISTRICT OF MONTREAL
(Commercial Division)

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

BLOOM LAKE GENERAL PARTNER LIMITED & AL.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP & AL.

Mises-en-cause

-and-

AGENCE DU REVENU DU QUÉBEC
AGENCE DU REVENU DU CANADA

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

OUTLINE OF ARGUMENTS

(In support of the *Amended Motion by the Monitor for Directions with Respect to Setoff and Damage Payment Input Tax Credits* (Motion #741))

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