SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-048114-157

DATE: November 8, 2021

BY THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

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

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
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

FTI CONSULTING CANADA INC.
Monitor

AGENCE DE REVENU DU QUÉBEC (ARQ)
AGENCE DU REVENU DU CANADA (ARC)
ARQ Mises-en-cause

JUDGMENT ON MOTION BY MONITOR FOR DIRECTIONS WITH RESPECT TO SET-OFF AND DAMAGE PAYMENT INPUT TAX CREDIT

(Sections 11, 21 and 23(k) of the *Companies' Creditors Arrangement Act*)

OVERVIEW

[1] In the context of the implementation of a Plan of Arrangement[1] (the "**Plan of Arrangement**") sanctioned by Justice Stephen W. Hamilton[2] pursuant to the *Companies' Creditors Arrangement Act* ("**CCAA**"), FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of the Petitioners and Mises-en-cause (the "**Monitor**") is seeking directions from the Court regarding the treatment of certain tax credits and tax refunds sought from the *Agence du Revenu du Québec*[3] (the "**ARQ**").

[2] The directions sought by the Monitor involve the application of the rules of set-off or compensation to certain claims between Petitioner Cliffs Québec Iron Mining ULC ("**CQIM**") and the ARQ which may be subject or not to set-off or compensation.

[3] This exercise requires the determination as to whether certain claims should be treated as pre-Filing Date ("**pre-filing**") claims and post-Filing Date ("**post-filing**") claims.

[4] The applicable filing date for the purposes hereof, is January 27, 2015 (the "**Filing Date**"), which is the date when Justice Stephen W. Hamilton issued the Bloom Lake Initial Order[4].

[5] More precisely, the present matter relates to the right of the ARQ to set-off its $13,391,896.40[5] pre-filing claims (the "**ARQ $13M Claims**") against one of the Petitioners, CQIM who filed a $7,459,257.85[6] claim (the "**CQIM $7.5M Claim**") with the ARQ in 2018 some 3 years after the Filing Date.

[6] According to CQIM and the Monitor, ARQ is precluded from operating compensation between its ARQ $13M Claims and the CQIM $7.5M Claim on the basis that the former are pre-filing claims that cannot be offset with the latter being a post-filing claim.

[7] The CQIM $7.5M Claim was filed with the ARQ following the First Interim Distribution[7] made in 2018 under the Plan of Arrangement by the Monitor to the creditors of the CCAA Parties[8] including certain of CQIM's creditors who received partial damage

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[1] **R-3**.
[2] **R-1**.
[3] ARQ is acting in the present proceedings on its own behalf based on Section 25 of the *Tax Administration Act* with respect to unpaid Québec sales tax ("**QST**") but also acting on behalf of Canada Revenue Agency ("**CRA**") based on Section 296 (1) of the *Excise Tax Act* with respect to unpaid goods and services tax ("**GST**").
[4] *Ibid*.
[5] Amount admitted by the Monitor.
[6] Amount admitted by the ARQ.
[7] As defined hereafter.
[8] As defined hereafter.

payments following notices of resiliation or of disclaimer of their respective agreements entered into with CQIM prior to the Filing date, the whole in virtue of Section 32 CCAA.

[8] According to the Monitor, the First Interim Distribution damage payments made to those four specific creditors of CQIM (the "**CQIM Creditors**") generated the CQIM $7.5M Claim, the payment of which the Monitor expects to receive from the ARQ without the latter applying the same in compensation of its own ARQ $13M Claims.

[9] Relying, *inter alia*, on Section 21[9] CCAA dealing with set-off and compensation, the Monitor contends that the CQIM $7.5M Claim is a post-filing claim against the ARQ that cannot be compensated with the ARQ $13M Claims which are pre-filing claims. Compensation can only be applied between two pre-filing claims which are liquid, certain and exigible or between two post-filing such claims, but never between pre-filing and post-filing claims.

[10] In summary, the central issue essentially boils down to determining whether the CQIM $7.5M Claim is a pre-filing or a post-filing claim, thus enabling the ARQ to set-off or not the same with its ARQ $13M Claims which are undisputed pre-filing claims.

[11] All in all, if the ARQ's position is correct, it should not have to pay to the Monitor the CQIM $7.5M Claim as the same will have been satisfied by way of compensation with its own ARQ $13M Claims that would be reduced by as much.

[12] Failing which, the Monitor and CQIM contend that the ARQ should have to remit to them an amount equal to the CQIM $7.5M Claim for distribution among all the creditors of CQIM creditors including, ironically, the ARQ itself.

[13] However, the ARQ argues that the *pre* or the *post* filing nature of the CQIM $7.5M Claim is irrelevant as it can, in any event, be compensated with its ARQ $13M Claims given the very close and direct connection between the damage partial payments made to the CQIM Creditors that generated the CQIM $7.5M Claim and those CQIM Creditors disclaimed (pre-filing) contracts.

[14] Even though CQIM issued notices of disclaimer to the CQIM Creditors after the Filing Date[10] (the "**Notices of disclaimer**"), Section 32 (7)[11] CCAA provides that the damage claims resulting therefrom are nevertheless *considered* to be provable claims of the CQIM Creditors against CQIM in the context of the CCAA proceedings.

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[9] **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.

[10] **ARQ-1**.

[11] **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.

[15] Be that as it may, the position adopted by the ARQ begs the following question.

[16] If the CQIM $7.5M Claim results from a payment of GST/QST which is *deemed* to have been made by CQIM as a result of the First Interim Distribution paid to the CQIM Creditors due to a fiction created by the tax statutes, should that $7.5M claim be treated in the same manner as the CQIM Creditors' provable claims[12] that triggered the damage payments made via the First Interim Distribution and be considered to be a pre-filing claim as well?

[17] The ARQ adds that even though they result from Notices of disclaimer issued by CQIM after the Filing Date, two realities must be considered namely, the damage claims lodged by the CQIM Creditors following CQIM's disclaimer of their contracts were nevertheless deemed to be provable claims in the present CCAA proceedings pursuant to Section 32 (7)[13] CCAA and those claims and damages are all directly related to pre-filing contracts entered into between CQIM and the CQIM Creditors prior to the Filing Date.

[18] In other words, given the very close and direct relationship between the damage payments made with the First Interim Distribution[14], the proofs of claim filed by the CQIM Creditors pursuant to Section 32 (7) CCAA and the (pre-filing) agreements or contracts that gave rise to the Notices of disclaimer issued by CQIM after the Filing Date, shouldn't the CQIM $7.5M Claim be afforded the same treatment and be "*considered*" a pre-filing claim as well?

[19] Ultimately, the ARQ having recognized proofs of claim of some $13M against CQIM does not want to have to disburse to CQIM/Monitor an additional $7.5M that would aggravate further its already deficit position.

CONTEXT

[20] On June 29, 2018, Justice Stephen W. Hamilton issued an Order[15] sanctioning the Joint Plan of Arrangement dated as of May 16, 2018,[16] submitted jointly by the Petitioners and the Mises en cause (collectively the "**CCAA Parties**" for the purposes hereof).

[21] Pursuant to the present CCAA proceedings initiated in January 2015, the CCAA Parties with the assistance of the Monitor, worked to implement the Plan of Arrangement and proceeded to wind down the estates of the CCAA Parties so that the net proceeds

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[12] Being either a pre-filing claim or *considered* to be a pre-filing claim.
[13] **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.
[14] That generated the *deemed* payment of the GST/QST by CQIM and the CQIM $7.5M Claim.
[15] **R-4**.
[16] **R-3**.

from such recoveries and realizations can finally be distributed to the creditors of the CCAA Parties as soon as possible.

[22] In August 2018, the Monitor commenced the first interim distributions totaling $59,258,118 to Affected Third Party Unsecured Creditors[17] from each of the Unsecured Creditor Cash Pools and Pension Cash Pools[18], while interim distributions on account of the Salaried Late Employee Claims[19] and the USW Late Employee Claims[20] were made in January 2020, in accordance with the Order for leave to file late claims and authorization to make modifications to the Plan dated December 3, 2019 (collectively, the "**First Interim Distribution**").

[23] As previously mentioned, the four CQIM Creditors were part of the First Interim Distribution and received on August 16, 2018, partial damage payments from CQIM which payments generated the CQIM $7.5M Claim against the ARQ.

1.1 **The ARQ $13M Claims and the ITC Claims**

[24] On October 2, 2020, the Monitor issued a Notice of Allowance[21] to the ARQ allowing its proofs of claim for an aggregate amount of $13,392,752.86[22] based on:

- Section 25[23] of the *Act respecting fiscal administration*[24] ("**FAA**") with respect to unpaid QST in the amount of $5,653,595.34; and

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[17] *Ibid*.
[18] *Ibid*.
[19] As defined in the December 3, 2019, Order for leave to file late claims and authorization to make modifications to the Plan of Arrangement.
[20] *Ibid*.
[21] **R-6**.
[22] **ARQ-8** and **ARQ-9**.
[23] **25**. The Minister may determine or redetermine the amount of the duties, interest and penalties owed by a person under a fiscal law as well as the amount of the refund to which a person is entitled under a fiscal law and send a notice of assessment to him in this regard.
However, no such assessment may be made
(a) more than four years after the later of
i. the date on which the duties should have been paid, and
ii. the date on which the return was filed; or
(b) more than four years after the application for a refund was filed.
This section does not apply in respect of a repayment referred to in section 21.0.1.
[24] C.Q.L.R., c. A-6.002.

- Section 296 (1)[25] of the *Excise Tax Act*[26] ("**ETA**") with respect to unpaid GST in the amount of $7,739,157.52 on account of taxable supply of goods and services received by CQIM prior to the Filing Date;

  where such tax amounts remained unpaid by CQIM as at the Filing Date of January 27, 2015.

[25] Acting as agent for the Québec Minister of Revenue, the ARQ is responsible for the administration of tax legislation in Québec, including the *Act respecting the Québec sales tax*[27] ("**QSTA**").

[26] Under an agreement between the federal and Québec governments, the ARQ also administers on behalf of the CRA in Québec the *Goods and services tax* ("**GST**").

[27] As a result, in Québec, the ARQ is responsible for the collection of *Québec sales taxes* ("**QST**") and GST, as well as the reimbursement of net tax refunds determined based on the amount of tax collected, minus *input tax credits* ("**ITCs**") for the purpose of the GST and *input tax refunds* ("**ITRs**") for the purpose of the QST (collectively, the "**ITC Claims**").

[28] Neither the quantum of the ARQ $13M Claims nor their pre-filing nature is disputed by the parties.

1.2 **The Damage Payments ITCs and the CQIM $7.5M Claim**

[29] The gravamen of the dispute between the parties lies in the determination of the nature of the ITC Claims for QST and GST that were *deemed* paid in 2018 as part of the First Interim Distribution remitted to the four CQIM Creditors on account of their damage claims against CQIM arising from the resiliation or disclaimer of their contracts effected after the Filing Date pursuant to Section 32 CCAA (the "**Damage Payments ITCs**").

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[25] **296 (1)** The Minister may assess
(a) the net tax of a person under Division V for a reporting period of the person,
(b) **any tax payable by a person under Division II, IV or IV.1**,
(c) any penalty or interest payable by a person under this Part,
(d) any amount payable by a person under any of paragraphs 228 (2.1)(b) and (2.3)(d), section 230.1 and paragraphs 232.01 (5)(c) and 232.02 (4)(c), and
(e) any amount which a person is liable to pay or remit under subsection 177 (1.1) or Subdivision A or B.1 of Division VII,
and may reassess or make an additional assessment of tax, net tax, penalty, interest or an amount referred to in paragraph (d) or (e).
[Emphasis added]

[26] R.S.C. 1985, c. E-15.

[27] C.Q.L.R., c. T-01.

[30] Do the Damage Payments ITCs[28] constitute a pre-filing or post-filing claim against the ARQ? The answer will dictate whether the Damage Payments ITCs can validly be offset with the ARQ $13M Claims?

[31] In furtherance of the Bloom Lake Initial Order[29], CQIM decided to disclaim or resiliate certain of its contracts, the whole in accordance with Section 32 CCAA[30].

[32] As a result thereof, each of Canadian Iron Ore Railcar Leasing LP[31], Québec North Shore and Labrador Railway Company, Inc.[32], The CSL Group Inc.[33] and Western Labrador Rail Services[34] representing the CQIM Creditors, has asserted a damage claim against CQIM (collectively the "**Restructuring Claims**") in accordance with the Claims Procedure Order[35] issued by Justice Hamilton on November 16, 2015.

[33] Following the First Interim Distribution, in its sales tax returns for the period ended November 30, 2018, CQIM claimed the Damage Payments ITCs in connection with the sales taxes *deemed* paid with the partial damage payments remitted to the CQIM Creditors on account of their Restructuring Claims.

[34] Based on its audit work, the ARQ assessed the Damage Payments ITCs (as they relate to partial damage payments of the Restructuring Claims made to the CQIM Creditors) to be in the amount of $7,459,257.85, hence the CQIM $7.5M Claim.

1.3 **Other ITCs**

[35] In addition to the Damage Payments ITCs (becoming the CQIM $7.5M Claim), the ARQ is also in indebted to CQIM for an amount of $422,490.35 representing other post-filing ITCs that are not in relation to the Restructuring Claims, but rather in relation to supplier invoices issued after the Filing Date and which were not covered in the ARQ $13M Claims. The sum of $422,490.35 includes $234,755.16[36] in relation to services actually rendered in favour of CQIM during the post-filing period[37].

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[28] Represented by the CQIM $7.5M Claim against the ARQ.
[29] **R-1**.
[30] The Notices of resiliation were issued to the four CQIM Creditors on January 28, 2015 (with effect as of February 27, 2015), save and except for Canadian Iron Ore Railcar Leasing with a Notice bearing the date of March 6, 2016.
[31] **ARQ-2**.
[32] **ARQ-4**.
[33] **ARQ-6**.
[34] **ARQ-5**.
[35] **R-2**.
[36] Amount admitted by the ARQ as being post-filing.
[37] Based on the May 14, 2021, Contestation filed by ARQ, paragraphs 22, 23, 24(c), 89–92 and 94 III.

[36] The Monitor also contends that these additional ITCs in the amount of $234,755.16 for services rendered after the Filing Date clearly represent a post-filing claim that cannot be offset by the ARQ with its pre-filing claims (i.e., the ARQ $13M Claims).

[37] The difference of $188,185.19 constitutes an undisputed pre-filing claim that can validly be compensated with the ARQ $13M Claims which is not at issue herein.

2. THE ISSUES

[38] Is the CQIM $7.5M Claim against the ARQ a pre-filing or a post-filing claim susceptible to be set-off or compensated with the ARQ $13M Claims which are pre-filing claims?

[39] What treatment should be given to the other ITCs claim of $234,755.16 which clearly results from services rendered to CQIM after the Initial Order (or after the Filing Date) and which clearly constitutes a post-filing claim?

[40] Given the fact that according to the ARQ, the Court of Appeal's judgment in the case of *Kitco*[38] is of limited importance and that it does not find application in the context of liquidation proceedings performed under the CCAA as opposed to restructuring proceedings, should the CQIM $7.5M Claim and the sum of $234,755.16 being post-filing claims, be nevertheless treated just as if they were pre-filing claims and therefore, be subject to set-off and compensation with the ARQ $13M Claims?

3. ANALYSIS

3.1 The fiscal legal provisions pertaining to the Damage Payments ITCs

[41] According to the Monitor, the Damage Payments ITCs giving rise to the CQIM $7.5M Claim, arose as of the date of damage payments of the First Interim Distribution pursuant to Sections 182 (1) ETA and 318 QSTA which read as follows:

182 ETA	**318 QSTA**
*182 (1) For the purposes of this Part, **where at any time**, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant to a person, **an amount is paid or forfeited to the registrant otherwise than***	***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*

[38] *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268, confirming 2016 QCCS 444 ("***Kitco***").

***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* [. . .] *(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 (. . .)* [Emphasis added]	*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.* [Emphasis added]

3.2 **The position of the Monitor and CQIM**

[42] The Monitor and CQIM contend that:

- Sections 182 (1) ETA and 318 QSTA *deem* the damage payment on account of the Restructuring Claims (which were made in 2018) to be a consideration for a taxable supply;

- The Restructuring Claims themselves asserted previously by the CQIM Creditors with their respective proofs of claim, were not *deemed* to be consideration payable for a taxable supply before the 2018 damage partial payments were made via the First Interim Distribution;

- However, Sections 182 (1) ETA and 318 QSTA nevertheless not only *deem* that such damage payments include GST and QST but also *deem* that the GST and QST were collected and paid by CQIM to the CQIM Creditors at the time of said damage payments, hence the right of CQIM to file with the ARQ for the Damage Payments ITCs resulting therefrom, hence the CQIM $7.5M Claim;

- In the absence of those *deeming* rules found in those two tax statutes, the damage partial payments made in 2018 on account of the Restructuring Claims would not have been a consideration for a taxable supply and would not have given rise to any obligation of the CQIM Creditors to remit any GST/QST and no portion of the payments made to the CQIM Creditors would have been considered to be GST/QST also paid by CQIM;

- Of crucial importance for the Monitor, the wording of Sections 182 (1) ETA and 318 QSTA makes it clear that these *deeming* rules only apply at the time of the damage partial payments were actually made, i.e., during the post-filing period in the present instance;

- The wording of those two sections does not suggest nor *deem* GST/QST to have been paid nor to have become payable during the pre-filing period i.e., before the actual damage partial payments were made by CQIM to the CQIM Creditors in August 2018 or at any time prior to the Filing Date of January 27, 2015;

- The Damage Payments ITCs were requested by CQIM in its sales tax returns for the period ended November 30, 2018, on the basis that GST/QST only arose and became payable upon payments made during the First Interim Distribution in 2018;

- CQIM's right to the Damage Payments ITCs (the CQIM $7.5M Claim) only arose as a result of Sections 182 (1) ETA and 318 QSTA *deeming* that GST and QST were included in its damage partial payments to the CQIM Creditors made on account of the Restructuring Claims in August 2018;

- Those damage partial payments that gave rise to the CQIM $7.5M Claim, were all made in the post-filing period and cannot have a retroactive effect and application to the pre-filing period insofar as the GST and QST are concerned.

[43] The Monitor and CQIM also argue that pursuant to Sections 182 (1) ETA and 318 QSTA, the tax obligation giving rise to the Damage Payments ITCs did not exist at the time of the:

(i) Bloom Lake Initial Order;

(ii) Disclaimer or resiliation of the contracts entered into with the CQIM Creditors giving rise to the Restructuring Claims;

(iii) Filing of the Restructuring Claims by the CQIM Creditors, nor

(iv) When the Restructuring Claims became Proven Claims under the Claims Procedure Order.

[44] Instead, always pursuant to Sections 182 (1) ETA and 318 QSTA, the tax obligations only arose when the First Interim Distribution was made in 2018 on account of the Restructuring Claims.

[45] In their view, the clear and unambiguous wording of the relevant provisions of the ETA and QSTA are dispositive of the issue.

[46] The mere existence of the Restructuring Claims, or indeed of any of the relevant pre-filing contracts for the supply of goods or services, does not give rise to GST and QST being paid or becoming payable. Therefore, it cannot form the basis of the Damage Payment ITCs which are solely dependent upon the GST and QST becoming payable or having been paid to the CQIM Creditors.

[47] Consequently, the right to claim the Damage Payments ITCs is a post-filing right as it only arose from and at the time of the distribution of the damage payments on account of the Restructuring Claims, which clearly occurred post-filing.

3.3 **The position of the ARQ**

[48] In a nutshell, the ARQ asserts the position that:

> a) the Damage Payment ITCs must be treated as pre-filing claims owed by the ARQ to CQIM, which can be set-off against the ARQ's pre-filing claims, namely the ARQ $13M Claims;
>
> b) Alternatively, on the basis that the reasoning of the Court of Appeal in the case of *Kitco*[39] is of limited importance and that it does not find application in the context of liquidation proceedings performed under the CCAA as opposed to restructuring proceedings, the particular circumstances of the present case permit the ARQ to set-off the CQIM $7.5M Claim against its pre-filing ARQ $13M Claims, even if the CQIM $7.5M Claim were to be considered a post-filing claim.

[49] The ARQ's approach is completely different from the arguments made by the Monitor and CQIM to support their position.

[50] It is recognized that the four CQIM Creditors who received damage payments with the First Interim Distribution were all bound by contracts that were entered into prior to the Filing Date with CQIM to provide and make taxable supplies to the latter in Canada.

[51] According to the ARQ, the conditions giving rise to the Damage Payment ITCs pursuant to Sections 182 (1) ETA and 318 QSTA already existed before the Bloom Lake

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[39] *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268, confirming 2016 QCCS 444 ("***Kitco***").

Initial Order[40] that defines the Filing Date due to their close if not direct connection with the Disclaimed Contracts[41].

[52] Indeed, on the Filing Date, CQIM already had ongoing contractual obligations towards the four CQIM Creditors that will subsequently see their respective contracts disclaimed or resiliated (the "**Disclaimed Contracts**").

[53] The partial damages paid to the CQIM Creditors via the First Interim Distribution on account of the Disclaimed Contracts must be considered as payments on account of pre-filing debts since the proofs of claim filed by the CQIM Creditors in connection therewith were treated as provable claims pursuant to the provisions of Section 32 (7) CCAA.

[54] In fact, the ARQ argues that since Section 32 (7) CCAA provides that the CQIM Creditors are *considered* to have a provable claim with respect to losses (damages) arising out of the Disclaimed Contracts, it ensues that the damages paid to the CQIM Creditors by CQIM after the Filing Date are payments made against pre-filing debts of CQIM to the CQIM Creditor given that such losses can be compromised as part of the Plan of Arrangement pursuant to Section 19 (1) (b) CCAA.

[55] The damage partial payments made to the CQIM Creditors via the First Interim Distribution, although made after the Filing Date, simply crystallized pre-filing obligations of CQIM to compensate the CQIM Creditors for the Disclaimed Contracts.

[56] Therefore, the funds forming the CQIM $7.5M Claim must be considered and treated as accessories to those pre-existing (or pre-filing) contractual damages since the Damage Payments ITCs result from and are closely connected to the pre-filing Disclaimed Contracts and to the payments made on account of pre-filing provable claims.

[57] In other words, the only occurrence that happened after the Filing Date, was the determination (quantification) of the ITCs and of the RTIs linked to pre-filing obligations (the Disclaimed Contracts). The damage partial payments made to the CQIM Creditors simply crystallized the exact amount of the Damage Payments ITCs, hence the CQIM $7.5M Claim must be treated as a pre-filing claim.

[58] This post-filing determination or crystallization of the Damage Payments ITCs generating the CQIM $7.5M Claim, did not cause to change or alter its pre-filing nature. The Damage Payments ITCs are only an accessory of the damages sought by the CQIM Creditors which were *considered* provable claims pursuant to Section 32 (7) CCAA.

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[40] **R-1**.
[41] As defined below.

[59] Therefore, under such circumstances, the ARQ is in its absolute right to compensate the CQIM $7.5M Claim with its ARQ $13M Claims.

[60] To characterize the pre-filing or post-filing nature of the CQIM $7.5M Claim, the ARQ also resorted to a contextual and purposive approach to statutory interpretation.

[61] The ARQ expressed the view that Sections 182 (1) ETA and 318 QSTA had to be considered in conjunction with Section 21 CCAA dealing with set-off and compensation as well as Sections 19(1) b) and 32(7) CCAA.

[62] Section 19 (1) (b) CCAA determines what claims may be provable claims in the context of a compromise or of an arrangement:

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

[63] Section 32 (7) essentially flows from Section 32 (1) CCAA:

> **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 (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**.

[Emphasis added]

[64] The ARQ proposed that in a CCAA insolvency context, such as the present one, Sections 182 (1) ETA and 318 QSTA cannot be read in a silo or in a vacuum as suggested by the Monitor and CQIM, without considering Sections 19 (1) (b) and 32 (7) CCAA as well.

[65] Contrary to the approach advocated by the Monitor and CQIM that there is no need to resort to other legislative provisions since the wording of Sections 182 (1) ETA and 318 QSTA is clear and unambiguous, the ARQ pointed out that nowadays fiscal laws must no longer be interpreted in a restrictive manner but more as part of a coherent system[42].

[66] Taking into consideration the present particular context, the ARQ also urged the Court to interpret these sections together in compliance with the principle that laws are presumed to be coherent among themselves and that concept applies equally to tax laws.[43]

[67] Moreover, the ARQ pointed out that in the case of *Bellatrix Exploration Ltd (Re)*[44], the Alberta Court of Appeal favoured a liberal interpretation of Section 32 CCAA:

> [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:

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[42] *Québec (Revenu) v. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49 (CanLII), par. 19 and 21; *Agence du revenu du Québec v. Des Groseillers* 2021 QCCA 906, par. 67.

[43] P-A. Côté avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois,* 4 th ed., Montréal, Éditions Thémis, 2009 EYB2009THM227, par. 1269-1270 ; Ruth Sullivan, *On the Construction of Statutes*, 6th ed., Lexis Nexis, page 338; Ruth Sullivan, *Statutory Interpretation*, 3rd ed., Irwin Law, page 181.

[44] 2021 ABCA 85.

> 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".

[65] Similarly, Antonin Scalia and Bryan Garner wrote in *Reading Law: The Interpretation of Legal Texts* (2012) at p. 180:

> **The imperative of harmony among provisions is more categorical than most canons of construction because it is invariably true that intelligent drafters do not contradict themselves. . . Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously**".

See also *Geophysical Service Inc v EnCana Corporation*, 2017 ABCA 125 at para 38, [2017] 9 WWR 55, leave denied [2017] SCCA No 260 (QL) (SCC No 37634).

[Emphasis added]

[68] A year earlier in 2020, in the matter of *Repsol Canada Energy Partnership v Delphi Energy Corp*[45], the Alberta Court of Appeal made the following comment with respect to Section 19 CCAA stated:

> "16. In determining whether something is a pre-filing claim under the CCAA, regard must be had to the wording of the CCAA itself. Analysis of the issue in the context of the Limitations Act of a particular jurisdiction, while interesting, cannot provide guidance if it is directly in contradiction to what the CCAA provides. **The specific provisions of s 19 were designed to capture claims that are broader than crystallized causes of action** [. . .]
>
> [Emphasis added]

[69] Relying on the foregoing principles, the ARQ suggested that the legal effects of Sections 19 (1) (b) and 32 (7) CCAA allow to safely conclude that ITCs and ITRs stemming from Sections 182 (1) ETA and 318 QSTA are pre-filing claims or debts as they are accessories to the damages paid by the Monitor following the Notices of disclaimer sent to the CQIM Creditors that triggered their proofs of claim who must necessarily be *considered* as pre-filing claims given the explicit wording of Section 32 (7) CCAA.

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[45] 2020 ABCA 364.

[70] In any event, should the Court conclude that the CQIM $7.5M Claim is a post-filing claim, the ARQ should nevertheless be allowed to compensate the same with its pre-filing ARQ $13M Claims as the teachings of the Court of Appeal in *Kitco* involved a CCAA restructuring and that the same should not apply to Liquidating CCAAs where the debtor corporation is not seeking to survive beyond the restructuring process.

3.4 Is the CQIM $7.5M Claim against the ARQ a pre-filing or a post-filing claim susceptible to set-off or be compensated with the ARQ $13M Claims which are pre-filing claims?

[71] The Court is confronted with two competing positions that are mutually exclusive.

[72] However, for the reasons that follow, the Court finds that the CQIM $7.5M Claim is a post-filing debt of the ARQ that may not be set-off or compensated with its pre-filing ARQ $13M Claims.

[73] On the one hand, the Monitor and CQIM argued that the wording of Sections 182 (1) ETA and 318 QSTA is clear and unambiguous in that these sections contain specific *deeming* provisions, whereby certain types of payments like the damage partial payments made to the CQIM Creditors in the present instance, were *deemed* to be a consideration for taxable supplies.

[74] This *deeming* rule only occurs when an amount of money is actually paid from one person (CQIM) to another (the CQIM Creditors) as compensation or indemnification for damages that result from terminating or disclaiming an agreement for the "making[46]" of a taxable supply, otherwise known as damage payments.

[75] In other words, upon actually making (not before) the damage partial payments to the CQIM Creditors via the First Interim Distribution of August 2018, CQIM was *deemed* to:

- have paid, at the time of payment, to the CQIM Creditors an amount in consideration of the taxable supply;

- have paid, at the time of payment, to the CQIM Creditors all the taxes (QST/GST) in respect of that supply; and

- the CQIM Creditors were *deemed* to have collected[47] said taxes from CQIM with the reporting obligations that ensue.

[76] There is no doubt in the mind of the Court that in the absence of those *deeming* rules, the damage partial payments made to the CQIM Creditors by CQIM on account of

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[46] As this word is used in Sections 182 (1) ETA and 318 QSTA.
[47] Which implies that the CQIM Creditors had to account to the ARQ for those collected taxes.

the Restructuring Claims would not have been a consideration for a taxable supply and would not have given rise to any obligation to pay and to remit any GST/QST, and no portion of the First Interim Distribution on account of the Restructuring Claims would have been considered or *deemed* to be GST/QST paid by CQIM to the CQIM Creditors.

[77] Indeed, without the legal fiction created by Sections 182 (1) ETA and 318 QSTA, the damage partial payments made on account of the Restructuring Claims would not be a consideration for the taxable supplies which were initially to be provided by the CQIM Creditors under the Disclaimed Contracts, but rather sums which were paid to partially indemnify the CQIM Creditors who suffered losses as a result of the Notices of disclaimer.

[78] Those damage partial payments were only *deemed* to be a consideration for taxable supplies and inclusive of GST/QST due to the specific *deeming* rules of Sections 182 (1) ETA and 318 QSTA.

[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.

[80] Moreover, the Damage Payment ITCs were, rightfully so, only claimed by CQIM in its sales tax returns for the period ending November 30, 2018, on the basis that GST/QST only arose and became payable upon the damage partial payments of the First Interim Distribution made in August 2018.

[81] CQIM had no right to file such a claim with the ARQ at any time before the damage partial payments were actually made some three years after the Filing Date.

[82] Indeed, the Court finds that CQIM's right to the Damage Payment ITCs only arose as a result of Sections 182 (1) ETA and 318 QSTA *deeming* them to become due, at the time of the damage payments on account of the Restructuring Claims, as the applicable GST and QST were included in such partial payments. Those damage partial payments were only made during the post-filing period.

[83] Pursuant to Sections 182 (1) ETA and 318 QSTA, the tax obligation of CQIM only arose when the First Interim Distribution was made to the CQIM Creditors in August 2018 on account of Restructuring Claims.

[84] With all due respect, the mere existence of the Restructuring Claims, or any of the relevant pre-filing contracts for the supply of goods or services, did not give rise to GST and QST being paid or becoming payable before the Filing Date with respect to the Disclaimed Contracts.

[85] Therefore, it cannot form the basis of the Damage Payments ITCs (the CQIM $7.5M Claim), which are dependent upon GST and QST being payable or having been paid, which occurred in August 2018.

[86] CQIM's right to the Damage Payments ITCs only arose from and at the time of the damage partial payments made with the First Interim Distribution on account of the Restructuring Claims, which clearly occurred post-filing.

[87] For those reasons, the Monitor and CQIM were of the view that the clear wording of the relevant provisions of Sections 182 (1) ETA and 318 QSTA was dispositive of the issue.

[88] With all due respect, the Court shares the same opinion.

[89] Be that as it may, the Court shall nevertheless address the additional principal arguments raised in a very able manner by the counsels for the ARQ, arguments who were very appealing at first glance, but that could not overcome or outweigh the compelling wording of Sections 182 (1) ETA and 318 QSTA that leaves no doubt as to when the Damage Payments ITCs' claims came into existence.

[90] The Restructuring Claims themselves filed by the CQIM Creditors via their proofs of claim were not *deemed* to be a consideration payable for taxable supplies before the damage payments were actually made in August 2018.

[91] With respect to the contextual interpretation of Sections 182 (1) ETA and 318 QSTA such that they should be read harmoniously with Sections 19, 21 and 32 CCAA, before favouring a contextual and purposive approach to statutory interpretation, the Court believes that it must first rely on the plain wording used by the legislator.[48]

[92] First and foremost, the *deeming* provisions set out by Sections 182 (1) ETA and 318 QSTA and the right to claim input tax credits in respect of taxable supplies must be construed in the light of the ETA[49] and the QSTA as a whole.

[93] Needless to say, the objects and purposes of the ETA, on the one hand, and of the *Bankruptcy and insolvency Act* ("**BIA**") and the CCAA, on the other hand, are completely different and cannot be considered as statutes in *pari materia* or dealing with the same subject matter.

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[48] *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, par. 10; *Bell ExpressVu v. Rex*, 2002 SCC, par. 26-27 ; *Placer Dome Canada Ltd v. Ontario (Minister of finance)*, 2006 SCC 20, par. 21–23; *Centre de traitement de la biomasse de la Montérégie Inc. v. Agence du revenu du Québec*, 2021 QCCA 1068, par. 30-32.

[49] *Reference Re G.S.T.*, [1992] 2 S.C.R. 445, page 471.

[94] Therefore, the “contextual” analysis of the ETA requires a reading of its provisions in light of that statute as a whole.

[95] Such a reading of the relevant provisions of the ETA dealing with ITCs does not in any way support any argument to the effect that regard must be had to the underlying contracts to determine when a tax obligation arises.

[96] The Court noted from different provisions in the ETA, that the legislator clearly expressed its intentions when certain provisions needed to be read in conjunction with provisions of the CCAA by making express references to same.[50] The same findings apply to the QSTA and the *Tax Administration Act*.

[97] Yet, with respect to Sections 182 (1) ETA and 318 QSTA, the legislator did not choose to specifically address situations involving the payment of damages or compensation in the context of a breach or termination of an agreement for the making of a taxable supply in the context of bankruptcy or CCAA proceedings, which would have prevented the present debate in all likelihood.

[98] Maybe the legislator should consider amending these specific sections to clarify the situation when circumstances such as to one raised in the present instance occur.

[99] With all due respect, nothing in the ETA (and in the QSTA) leads the Court to conclude that for the purposes hereof, those tax statutes constitute somehow an accessory of civil law, and that the timing of a tax liability on account of damage claims linked to the Disclaimed Contracts should rely on private law concepts and be determined by reference to the date of execution of the underlying contracts, despite the clear wording of Sections 182 (1) ETA and 318 QSTA.

[100] In summary, the Court shares the view of counsels for the Monitor and CQIM that, a “contextual” analysis of the relevant provisions in the ETA relating to ITCs in the context of this file yields the following result:

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

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

[50] See Sections 82(2.6) (d), 222 (1.1) and 265 ETA for examples.

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

[101] What about the argument that the Restructuring Claims are pre-filing claims?

[102] The Court understands that based on Sections 19(1) and 32 (7) CCAA, the ARQ is of the view that the proofs of claim filed by the CQIM Creditors in connection with the Disclaimed Contracts, evidence that said claims are pre-filing claims notwithstanding the fact that they result from Notices of disclaimer sent after and in compliance with the Initial Order.

[103] Therefore, should any subsequent payment made in connection therewith retain the same pre-filing characteristics including its accessory, i.e., the Damage Payments ITCs?

[104] Again, with all due respect, the Court disagrees with such a proposition.

[105] Firstly, nothing in the wording of Sections 182 (1) ETA and 318 QSTA leads to such a conclusion regarding the Damage Payments ITCs.

[106] Secondly, the Restructuring Claims herein cannot only be characterized in light of Sections 19 and 32(7) CCAA.

[107] The Court cannot ignore the provisions of the Plan of Arrangement[51] that was sanctioned by Order of Justice Hamilton of June 29, 2018[52].

[108] The mere fact that Section 32(7) CCAA provides that “*if an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim*”, and that such a claim can be subject to a compromise or an arrangement pursuant to Section 19 (1)(b) CCAA, does not automatically confer upon the same, the characteristic of a pre-filing claim.

[109] While it is true that a claim in damages resulting from a breach or non-performance of a contract occurring prior to the applicable Initial Order would clearly amount to a pre-filing claim, this is not the case herein. A Restructuring Claim, which can only arise as a result of a disclaimer or resiliation after the issuance of an Initial Order under the CCAA in relation to a contract entered before that date[53], cannot be considered a pre-filing claim *per se*.

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[51] **R-3**.

[52] **R-4**.

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

[110] The Court is rather of the view that the word "*considered*" ("*réputée*" in the French version) used by the legislator in Section 32(7) CCAA is the equivalent of the word "*deemed*" to be a provable claim.

[111] Under such circumstances, the claim resulting from an agreement or contract that was disclaimed or resiliated after the Filing Date pursuant to Section 32 CCAA[54], remains a post-filing claim even though the legislator chose to consider the same as an admissible provable claim for the purpose of treatment in the context of an arrangement or a compromise under the CCAA.

[112] In light of the *deeming* provision of Section 32 (7) CCAA, the legislator determined that such a post-filing claim was to be treated (or *considered*) as if it was a pre-filing claim in order to permit the application of Section 19 CCAA that deals with claims that may be subject to a compromise or an arrangement under the CCAA.

[113] Being *deemed* to be a provable claim that is subject to a compromise or an arrangement under the CCAA does not necessarily convert such a claim from post-filing to pre-filing claim for the purpose of set-off or compensation.

[114] Section 32(7) CCAA simply clarifies and removes any uncertainty that a claim stemming from a contract that was disclaimed or resiliated after the Initial Order pursuant to Section 32(1) CCAA, must (not may) nevertheless be *considered* as a provable claim subject to a compromise or an arrangement just as if it had occurred before the Initial Order.

[115] In the Court's opinion, the claims of the CQIM Creditors made in connection with their Disclaimed Contracts are and remain post-filing claims (Restructuring Claims) that were granted a special treatment by the legislator for the purpose of an arrangement or a compromise.

[116] The Court was cited the judgment rendered in the matter of *Aveos*[55] where a creditor with a $501,381 claim (a cancellation indemnity) resulting from the disclaimer of its contract pursuant to Section 32 CCAA was disputing (i) the right to cancel its contract and (ii) was nevertheless trying to execute the same immediately against Aveos on the basis that it was a "post-filing claim" that was not subject to the stay provisions of the Initial Order.

[117] The facts in that case differ significantly from those in the present instance. Moreover, the *Aveo* case does not involve any issue of compensation or set-off.

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[54] Necessarily after the Initial Order for Section 32 CCAA to apply.
[55] *Aveos Fleet Performance Inc. /Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796.

[118] Firstly, the creditor was contesting the right of Aveos to disclaim its contract pursuant to Section 32 CCAA as it was in a liquidation mode as opposed to a restructuring mode. Aveos was not to resume its activities afterwards.

[119] Justice Mark Schrager found that regardless of the fact that Aveos was involved in liquidation CCAA proceedings, it could nevertheless avail itself of the provisions of Section 32 CCAA and disclaim or cancel the contract in question.

[120] The case also raised the issue that if Aveos had the right to cancel the contract, could the creditor exact immediately the full amount of the indemnity on the basis that it was a "post-filing claim"?

[121] Finding that the claim in question was a provable claim pursuant to Section 19(1)(b) CCAA that deals with provable claims that are subject to a compromise or an arrangement under the CCAA, Schrager J. stated that, although Aveo may have triggered the cancellation penalty after the CCAA filing, the underlying obligation stemmed from a contract to which both parties were bound pre-CCAA filing.

[122] Schrager J. added that the creditor's $501,381 claim being a provable claim, it *would not have the status of a "post-filing claim" payable immediately, i.e., prior to the claims of other creditors*.[56]

[123] The judge then echoed the jurisprudence that pre-filing creditors cannot under the guise of a post-filing claim, obtain a preference over the other creditors under the CCAA and that *the equitable treatment of creditors' demands that claims for contractual damages arising from the termination of contracts after filing under the CCCAA be treated on a par with other provable claims*[57].

[124] At paragraph 65, Schrager J. made the following brief comment with respect to Section 32(7) CCAA without, however, addressing the incidence of the specific wording (*is considered to have a provable claim*) on the *pre* or *post*-filing status of such a claim in the context of set-off or compensation, which was not at issue at the time:

> [65] Regarding the $501,381.00 cancellation indemnity, the following should be added. Section 32(7) C.C.A.A. provides that any loss suffered in relation to the disclaimer is a provable claim. [. . .]

[125] With all due respect, the Court does not find that the *Aveos* case is of any assistance to the ARQ given the very particular context of the present question at issue and the compelling wording of Sections 182 (1) ETA and 318 QSTA that creates the legal fiction of the GST/QST being *deemed* to have been paid at the time of the damages

[56] *Ibid*., par. 59.
[57] *Ibid*., par. 60.

payments since those payments are also *deemed* to be amounts of consideration for a taxable supply.

[126] In short, the present context is totally different than the context was prevailing in *Aveos*.

[127] On a different note, the relevant provisions of the Claims Procedure Order[58] confirm the special and distinct status of the Restructuring Claims and paragraphs 4.11(a) and (b) of the definition of "*Claim*" provide as follows:

> 4.11 "**Claims**" means:
>
> (a) Any right or claim of any Person that may be asserted or made in whole or in part against the CCAA Parties (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an event, fact, act or omission which occurred in whole or in part **prior to** the applicable Determination Date[59], at law or in equity, by reason of the commission of a tort (intentional or unintentional), any breach of contract, lease or other agreement (oral or written), any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty), any breach of extra-contractual obligation, any right of ownership of or title to property, employment, contract or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any of the CCAA Parties or any of their property or assets, and whether or not any such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured (by guarantee, surety or otherwise), unsecured, present, future, known or unknown, and whether or not any such right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable under the BIA had the CCAA Parties (or any one of them) become bankrupt on the applicable Determination Date, including, for greater certainty, any Tax Claim and any monetary claim in connection with any indebtedness, liability or obligation by reason of a breach of a collective bargaining agreement, including grievances in relation thereto, or by reason of a breach of a legal or statutory duty under any employment legislation or pay equity legislation; or
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> (b) **any Restructuring Claim**;[60]

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[58] **R-2**, Order rendered on November 16, 2015, by Hamilton J.

[59] With respect to CQIM, the Determination Date is January 27, 2015, as provided by Section 4.23 of the Claims Procedure Order.

[60] **R-2**.

> [. . .]
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> [Emphasis added]

[128] At paragraph 4.60, the expression *Restructuring Claim* is defined as follows:

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

[129] The Court shares the view of counsels for the Monitor and CQIM that if the expression *Restructuring Claims* referred to pre-filing claims, there would have been no point to make such a distinction in the Claims Procedure Order approved by Hamilton J.

[130] The Court also bears in mind that the Plan of Arrangement was sanctioned by Justice Hamilton on June 29, 2018,[61] after having been approved by the requisite majorities of creditors.

[131] Moreover, the Court also agrees that the Damage Payment ITCs cannot be dissociated from the GST/QST becoming payable and *deemed* paid on account of the Restructuring Claims as of the date of payments during the First Interim Distribution, which occurred in August 2018.

[132] With all due respect, there exists no reason to justify the proposition that the Damage Payments ITCs should be treated otherwise or differently, since the Restructuring Claims merely represent the present value of the services which were intended to be provided post-filing over time by the CQIM Creditors to CQIM pursuant to the Disclaimed Contracts.

[133] Absent of any payment made on account of those Restructuring Claims, CQIM could not claim any Damage Payments ITCs. The tax obligations created by the *deeming* rules of Sections 182 (1) ETA and 318 QSTA could only materialize if and when damage

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[61] **R-4**.

payments are actually made on account of the Restructuring Claims in question, not before.

[134] Another element to consider is Section 11.01 CCAA that stipulates that no order made by the Court has the effect of *prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made,* does not rely on the pre-filing nature of contracts but rather on the timing of the consideration that must be provided after the Initial Order is made[62].

3.5 **The incidence of the *Kitco* case**

[135] The ARQ argues that the teachings of the Court of Appeal in the *Kitco* case which involved the right to compensate claims related to ITCs for sales tax in the context of CCAA proceedings, are of limited application in the present case since the company Kitco was in a restructuring process with ongoing operations *pre*- and *post*-filing as opposed to the present instance which only involves a liquidation process.

[136] In a nutshell, in *Kitco*[63], the Court of Appeal confirmed the decision of the Superior Court[64] and the principle that an ARQ post-filing claim could not be compensated with a pre-filing claim.

[137] For a better understanding, it is opportune to summarize the facts of *Kitco* as follows:

> a) Métaux Kitco inc. ("**Kitco**") was in the business of purchasing and extracting scrap gold in order to produce and sell pure gold. Kitco paid GST/QST on the scrap gold but did not collect it on the pure gold it sold, as the sale of pure gold is not taxable. Therefore, Kitco's ITCs claims generally resulted in a net tax refund for each reporting period;
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> b) The ARQ and the CRA (the "**Agencies**") conducted audits and disallowed several ITCs it had paid to Kitco. It was alleged that Kitco participated in a fraudulent tax scheme, as it had claimed ITCs for sales tax that was never paid to its suppliers. In order to avoid enforcement measures by the Agencies, Kitco filed

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

[63] 2017 QCCA 268.

[64] 2016 QCCS 444 ("**Kitco QCCS**").

a Notice of intent under the *BIA*. The proceedings were then continued under the *CCAA* and an Initial Order was granted;

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

[138] Madam Justice Marie-Anne Paquette concluded:

- The rules relating to compensation in an insolvency context are to be applied in light of the civil law rules relating to compensation (article 1673 *CCQ*), in that legal compensation can be operated between debts that are mutual, liquid, certain and exigible, and for judicial compensation to be effected, debts must also be connected;[65]

- Section 21 CCAA, which allows recourse to the compensation mechanism in CCAA proceedings, must be interpreted restrictively;[66]

- Such a restrictive interpretation of Section 21 CCAA is justified as the compensation mechanism in an insolvency context is an exception to the principle of equality of creditors, as it unavoidably has the effect of securing the claim of the party invoking compensation;[67]

- Compensation can only be operated between mutual debts that came into existence before the date of commencement of proceedings under the CCAA;[68]

- The debts were not connected, except for the identity of the parties and for the laws involved. But the ITCs forming part of both debts related to distinct periods, transactions and suppliers;[69]

- The ITCs claimed after Kitco's CCAA proceedings commenced were post-filing amounts, and as a result, could not be set-off by the Agencies against the pre-filing debts that they were owed by Kitco for the disallowed ITCs.[70]

[139] The Court's perusal of the Court of Appeal judgment also revealed that:

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[65] *Kitco QCCS*, par. 77–87.
[66] *Kitco QCCS*, par. 99.
[67] *Kitco QCCS*, par. 100.
[68] *Kitco QCCS*, par. 102.
[69] *Kitco QCCS*, par. 116-117.
[70] *Kitco QCCS*, par. 118.

- the Court considered the ARQ's argument that the provisions of Section 21 CCAA permitted pre/post set-off, ran contrary to the objectives of the CCAA and the principle of equality of creditors;[71]

- The post-filing ITCs owed by the ARQ to Kitco were indeed post-filing amounts, since Kitco had no right to those post-filing ITCs on the day it commenced its insolvency proceedings; the right of Kitco to the post-filing ITCs arose from the payment of taxes to its suppliers after the Initial Order for taxable supplies or services rendered post-filing;[72]

- The ARQ was essentially attempting to claim a security interest on Kitco's property in setting off the post-filing ITCs owed to Kitco with its pre-filing debt, which was not permitted.[73]

[140] With all due respect, upon reading the Court of Appeal's decision, the Court does not find any comment that would allow or justify pre/post compensation or set-off in the context of insolvency proceedings under the CCAA.

[141] The Court of Appeal clearly pointed out that under the CCAA (and the BIA) the *pre*-filing or *post*-filing status of a claim is determined in light of the existence of a claim on the date of filing (the Initial Order):

> [81] Ce n'est pas de savoir si une dette existe, si elle est liquide et exigible ou connexe à une autre qui importe, c'est de déterminer si elle constitue une réclamation prouvable dûment prouvée ou « réputée prouvée » pour que la compensation s'opère.
>
> [82] À mon avis, les articles 21 *L.a.c.c.* et 97 (3) *L.f.i.* qui édictent que « les règles de la compensation s'appliquent à toutes les réclamations… », précisent par là le moment où la compensation s'opère, soit au moment où doivent être établies les réclamations ; c'est au jour d'Ouverture que s'établit la réciprocité temporelle.
>
> [83] Ainsi, le créancier établit sa réclamation au jour d'Ouverture, dont il soustrait sa propre dette à la débitrice. Si le solde est en sa faveur, il constitue sa réclamation prouvable, sinon, si le solde est en faveur de la débitrice, elle sera en droit de lui réclamer le solde, mais pas plus.
>
> [Emphasis added]

[142] The Court bears in mind that pursuant to Sections 182 (1) ETA and 318 QSTA, CQIM's tax liability only arose, and the Damage Payment ITCs only became payable upon payment of the First Interim Distribution well after the Filing Date.

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[71] *Kitco*, par. 20-21.
[72] *Kitco*, par. 40.
[73] *Kitco*, par. 71.

[143] Therefore, much like in *Kitco*, it is plainly obvious that CQIM had no right to claim the Damage Payments ITCs when the Bloom Lake Initial Order was issued in January 2015. Accordingly, the CQIM $7.5M Claim represents post-filing amounts owed to CQIM which cannot be set-off against the ARQ $13M Claims which are pre-filing claims or debts.

[144] Notwithstanding the above, the ARQ also argued that the principles confirmed in *Kitco*, can only apply in the context of a "true" CCAA proceeding which contemplates the restructuration of an insolvent company that intends to carry on its operations after the completion of the restructuring process.

[145] Hence, the ARQ's proposition implies that a different set of rules should apply to liquidating CCAA proceedings such as the present one, where pre/post compensation or set-off should be allowed.

[146] With all due respect, the existing case law does not support such an interpretation.

[147] Nothing in the CCAA or the case law suggests that CCAA proceedings which involve sales of assets rather than restructuring ("**Liquidating CCAAs**") should be subject to a different set of rules.

[148] Liquidating CCAA proceedings have now been accepted in practice and case law[74].

[149] Indeed, in *Callidus*[75], the Supreme Court of Canada stated that liquidation was not inconsistent with the remedial objectives of the CCAA, as it may be a means to eliminate further loss for creditors. The Court noted that CCAA proceedings had evolved to permit outcomes that result in liquidation:

> [42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally". In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself. Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape.
>
> [. . .]

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[74] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 at para 68:
[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA* and the expanded view of the role of the monitor, indeed the baptism of the "super monitor". [. . .] [Emphasis added, references omitted]

[75] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10.

> [45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership. Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para.51).
>
> [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 center 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.
>
> [Emphasis added, references omitted]

CONCLUSION

[150] Therefore, the Court finds that for the purposes hereof, the *Kitco* judgment of the Court of Appeal is not limited in scope and application by restraining its findings to Restructuring CCAAs only as opposed to Liquidating CCAAs and therefore, does not allow pre/post compensation or set-off in Liquidating CCAAs for the reason that the debtor corporation shall not resume its ongoing operations at the termination of the CCAA proceedings.

[151] Finally, the Court also agrees with counsel for the Monitor that the ARQ $13M Claims and the Damage Payments ITCs are not in any way connected. They arise from

different tax obligations and transactions, and the Damage Payments ITCs did not exist as of the date of the Bloom Lake Initial Order.

[152] Therefore, compensation (be it legal or judicial compensation) cannot operate herein. Moreover, there is no valid reason in fact or at law to allow for pre/post set-off or compensation in this case.

[153] In the present instance, the ARQ does not revendicate the status of secured creditor. All the claims in question are unsecured claims.

[154] In fact, the conclusions sought by the ARQ, if granted, would defeat the fundamental objectives of insolvency law and run contrary to the *pari passu* principle or the principle of equality between creditors.

[155] To all intents and purposes, under the present circumstances, allowing a pre/post compensation or set-off would be tantamount to grant a $7.5M security to the ARQ's unsecured $13M Claim.

[156] Limiting compensation between claims which did not exist as of the date of the Initial Order is tied to the fundamental objectives of maximizing creditor recovery and treating creditors equally, which remain applicable even under bankruptcy and liquidation.

[157] In closing, the Court shall not grant the request of the Monitor to issue a "blanket Order" that would bind the ARQ for all future Damage Payments ITCs resulting from additional distribution and from additional Damage Payments ITCs.

[158] With all due respect, the Court shares the view of counsel for the ARQ that at this juncture, the additional conclusions sought by the Monitor are too wide and hypothetical.

[159] Under the present circumstances, it is not unreasonable for the ARQ to adopt the position that should the facts surrounding the second Interim Distribution and any future distributions generating future Damage Payments ITCs, allow or warrant it, the ARQ will apply the conclusions of the present judgment once final, without necessarily being ordered to do so in advance without the benefit of the relevant facts.

[160] In any event, as the supervising judge in these CCAA proceedings, all future issues with the ARQ, if any, shall be submitted to the undersigned.

[161] Finally, the Court also shares the view of counsel for the ARQ that this matter being a tax litigation, the interests payable should be calculated in conformity with the applicable legislation relating to tax refunds as opposed to the interests and the additional indemnity calculated pursuant to the *Code of civil procedure* and the *Civil Code of Québec*.

FOR THESE REASONS, THE COURT HEREBY:

[162] **GRANTS** in part the *Amended Motion by the Monitor for Directions with respect to Set-off and Damage Payment ITCs* dated June 18, 2021 (the "**Amended Motion**");

[163] **DECLARES** that the notices given for the presentation of the Amended Motion are proper and sufficient;

[164] **DECLARES** that for the purposes hereof, the applicable filing date is January 27, 2015 (the "**Filing Date**"), when Justice Stephen W. Hamilton issued the Bloom Lake Initial Order;

[165] **DECLARES** that the following claims in the aggregate amount of $13,392,752.86 accepted by the Monitor on October 2, 2020 (collectively, the "**ARQ $13M Claims**") constitute pre-filing claims owing to the Agence du Revenu du Québec ("**ARQ**") by Cliffs Québec Iron Mining ULC (**"CQIM"**):

- The proof of claim submitted on August 11, 2016, by the ARQ acting on behalf of Canada Revenue Agency ("**CRA**") based on Section 296 (1) of the *Excise Tax Act* with respect to unpaid goods and services tax ("**GST**") in the amount of $7,739,157.52 on account of taxable supplies of goods and services received by CQIM prior to the Filing Date where such tax amounts remained unpaid by CQIM as of the Filing Date;

- The proof of claim submitted on August 25, 2020, by the ARQ acting on its own behalf based on Section 25 of the *Tax Administration Act* with respect to unpaid Québec sales tax ("**QST**") in the amount of $5,653,595.34 on account of taxable supplies of goods and services received by CQIM prior to the Filing Date where such tax amounts remained unpaid by CQIM as of the Filing Date;

[166] **DECLARES** that the input tax credits with respect to GST ("**ITCs**") and input tax refunds with respect to QST ("**ITRs**") for GST and QST *deemed* paid per Section 182 (1) of the *Excise Tax Act* and Section 318 of the *Act respecting the Québec Sales Tax* claimed by CQIM in its sales tax returns for the reporting period ending November 30, 2018, with respect to the First Interim Distribution in the aggregate amount of $7,459,257.85 for claims in damages arising from the disclaimer of contracts pursuant to Section 32 of the CCAA ("**Damage Payment ITCs**"), constitute post-filing amounts;

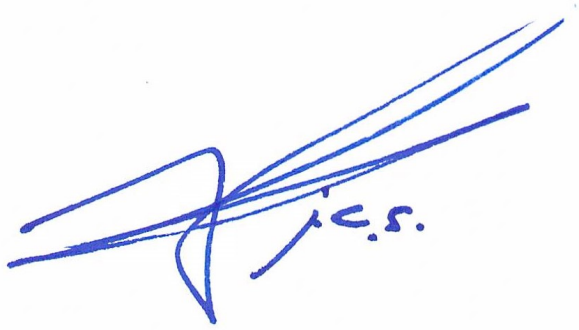
[167] **DECLARES** that the ARQ (acting on its own behalf and on behalf of the CRA) cannot offset the ARQ $13M Claims ($13,392,752.86) against the Damage Payment ITCs of $7,459,257.85;

[168] **ORDERS AND DECLARES** that the ARQ (acting on its own behalf and on behalf of the CRA) shall, without set-off of any kind, pay to FTI Consulting Canada Inc. acting as monitor (the "**Monitor**"), on behalf of the CCAA Parties and their creditors, the Damage Payment ITCs in the amount of $7,459,257.85 with respect to the First Interim Distribution, together with interest on that amount from the moment that this sum became due once calculated pursuant to Sections 28 (2) and 28 (3) of the *Tax Administration Act*[76] on the amount of $3,160,210 and pursuant to Section 230 of the *Excise Tax Act*[77] on the amount of $4,299,048, until payment in full;

[169] **ORDERS AND DECLARES** that the ARQ (acting on its own behalf and on behalf of the CRA) shall, without set-off of any kind, pay to the Monitor (acting on behalf of the CCAA Parties and their creditors) the post-filing ITCs and ITRs in the sum of $234,755.16, together with interest on that amount from the moment that this sum became due once calculated pursuant to Sections 28 (2) and 28 (3) of the *Tax Administration Act*[78] on the applicable amount of the ITRs and pursuant to Section 230 of the *Excise Tax Act*[79] on the applicable amount of the ITCs, until payment in full;

[170] **DECLARES** that the Court shall **REMAIN SEIZED** of this case should any issue arise in connection to the present judgment and its execution;

[171] **WITH COSTS** to be paid by the Agence du revenu du Québec**.**



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[76] C. A-6.002.
[77] R.S.C. 1985, c. E-15.
[78] C. A-6.002.
[79] R.S.C. 1985, c. E-15.

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Hearing dates: August 19 and 20th, 2021