

TRANSLATION OF THE ORIGINAL FRENCH VERSION

## SUPERIOR COURT

Commercial Division

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

No : 500-11-040900-116

DATE: February 1, 2016

---

**PRESENT: THE HONOURABLE MARIE-ANNE PAQUETTE J.S.C.**

---

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

**MÉTAUX KITCO INC.**  
DEBTOR - Petitioner

v.

**AGENCE DU REVENU DU QUÉBEC  
ATTORNEY GENERAL OF CANADA**  
CREDITORS - Respondents

and

**RSM RICHTER INC.**  
MONITOR - Impleaded party

and

**ATTORNEY GENERAL OF QUÉBEC**  
Impleaded party

---

JUDGMENT  
ON KITCO'S RE-AMENDED MOTION CONCERNING  
SET-OFF EFFECTED BY THE TAX AUTHORITIES (SEQ. 132)<sup>1</sup>

---

---

<sup>1</sup> Long title: *Re-amended Motion to enforce the initial order, to declare illegal certain rights of set-off exercised by the Agence du Revenu du Québec and the Attorney General of Canada, to declare inapplicable, invalid, inoperative, unconstitutional or of no force and effect certain provisions of certain tax statutes of the province of Québec and of Canada and to condemn l'Agence du Revenu du Québec and the Attorney General of Canada to pay to the Petitioner the input tax credits and the input tax refunds to which it is entitled (set-off motion).*

## **OVERVIEW**

[1] Métaux Kitco inc. (**Kitco** or **Debtor**) is being restructured under the *Companies' Creditors Arrangement Act (CCAA)*.<sup>2</sup>

[2] The dispute relates to sales tax refunds that Kitco, as a supplier, can obtain with respect to the sales taxes it paid to its own suppliers (**Tax Credits**).<sup>3</sup>

[3] Specifically, the dispute arises from the set-off or compensation which the federal<sup>4</sup> and Québec<sup>5</sup> fiscal authorities (the **Agencies**)<sup>6</sup> effect between two debts.

[4] On the one hand, Kitco claims from the Agencies, on a monthly basis, Tax Credits in connection with the continuation of its operations. These credits relate to transactions during the restructuring and are not in dispute (**Undisputed Credits**).

[5] On the other hand, the Agencies claim the reimbursement of Tax Credit refunds that Kitco allegedly collected fraudulently before the present proceedings commenced. Kitco is disputing the Agencies' claims in this regard (**Disputed Fiscal Debt**).

[6] The Court concludes that the Agencies cannot effect compensation between the Undisputed Credits and the Disputed Fiscal Debt.

[7] Indeed, the conditions for compensation in a context of insolvency are not met in this case. The two debts in question are not connected, certain, liquid and exigible.

[8] In addition, compensation cannot be effected between a prior debt (Disputed Fiscal Debt) and a debt (Undisputed Credits) which is subsequent to the commencement of the insolvency proceedings.

[9] Moreover, the letter and spirit of the CCAA excludes the application of the presumptions of exigibility and validity provided for in the fiscal laws, and the Agencies cannot rely on these presumptions in this case in order to effect compensation.

---

<sup>2</sup> R.S.C. (1985), c. C-36.

<sup>3</sup> As concerns GST refunds (input tax credit (**ITC**)), see the *Excise Tax Act*, R.S.C., 1985, c. E-15 (**ETA**), s. 169.

As concerns QST refunds (input tax refund (**ITR**)), see the *Act respecting the Québec sales tax (AQST)*, s. 199.

<sup>4</sup> The Canada Revenue Agency (**CRA**), represented in this case by the Attorney General of Canada (**AGC**).

<sup>5</sup> The Agence du Revenu du Québec (**ARQ**).

<sup>6</sup> The Minister of Revenue of Québec, through the ARQ, is responsible for the administration of fiscal laws in Québec, including the *Act respecting the Québec sales tax*, CQLR, c. T-0.1 (**AQST**).

The Minister of Revenue of Québec, through the ARQ, is also a mandatary for the purposes of the application of the Goods and Services Tax (**GST**) in Québec (*Agreement with Respect to the Administration by Quebec of Part IX of the Excise Tax Act (R.S.C. 1985, c. E-15) relating to the Goods and Services Tax*).

Thus, the ARQ handles collection of the Québec Sales Tax (**QST**) and the GST in Québec, and the refund of tax Credits (ITRs for the GST and ITCs for the QST).

## **HISTORY OF THE EVENTS**

### **Kitco's activities and sales tax payments**

- [10] Kitco purchases scrap gold from various suppliers (goldsmiths and silversmiths) and subsequently sells the pure gold which it extracts from it.
- [11] Kitco must pay GST and QST to its suppliers when it purchases scrap gold.
- [12] Pure gold (precious metal) transactions are tax-exempt,<sup>7</sup> whereas purchases of jewellery and scrap gold are subject to sales taxes.<sup>8</sup>
- [13] The fiscal laws<sup>9</sup> allow Kitco to thereafter claim Tax Credits in order to recover the sales taxes it paid to its suppliers, among other things on purchases of scrap gold.

### **Disputed fiscal debt**

- [14] The Disputed Fiscal Debt exceeds \$313 million.<sup>10</sup> The Agencies have filed their proof of claim in this respect.<sup>11</sup>
- [15] According to the Agencies, Kitco and some of its suppliers participated in a stratagem whereby Kitco fraudulently claimed and received Tax Credits in the course of its scrap gold purchasing operations. The Agencies state that Kitco did not actually pay its suppliers the GST and QST for which it claimed and obtained Tax Credits.
- [16] The notices of assessment (**Notices of Assessment**)<sup>12</sup> issued in this regard relate to Tax Credits that Kitco received from January 1, 2006 to August 31, 2010, before the insolvency proceedings commenced.
- [17] Kitco subsequently filed notices of objection (**Notices of Objection**)<sup>13</sup> denying any role in the alleged fraudulent stratagem.
- [18] On June 7 and 8, 2011, the Agencies took steps to enforce the Notices of Assessment, and seized Kitco's property before judgment.<sup>14</sup>
- [19] The fiscal laws allow the Agencies to require immediate repayment of the Disputed Fiscal Debt, notwithstanding Kitco's contestation.

---

<sup>7</sup> AQST, s. 191.4.

<sup>8</sup> For the GST, see the ETA, s. 165.

For the QST, see the AQST, s. 16.

<sup>9</sup> For recovery of the GST by means of an ITC, see the ETA, s. 169.

For recovery of the QST by means of an ITR, see the AQST, s. 199.

<sup>10</sup> QST in the amount of \$227 088 232.97 and GST in the amount of \$85 301 550.75.

<sup>11</sup> Exhibit R-8, proof of claim amended on October 15, 2012 (Exhibit R-9).

<sup>12</sup> Exhibit R-2: notices of assessment issued on November 5, 8, 9, 16 and 17, 2010, January 26 and February 7, 2011.

<sup>13</sup> Exhibit R-2.

<sup>14</sup> Exhibit R-4.

[20] Specifically, they stipulate that claims made in Notices of Assessment are deemed valid<sup>15</sup> and immediately payable,<sup>16</sup> notwithstanding any contestation of same.

### **Judicialization of the dispute**

[21] On June 8, 2011, Kitco, which was unable to abide by the forced execution measures initiated by the Agencies, filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act* (**BIA**),<sup>17</sup> together with a notice to stay the proceedings.

[22] On July 7, 2011, it was agreed to continue the proceedings under the CCAA, and an initial order was issued under that Act (**Initial Order**).

[23] On July 5, 2012, in conjunction with the current restructuring, the Agencies filed their proof of claim with respect to the Disputed Fiscal Debt.<sup>18</sup>

[24] The contestation proceedings with regard to the Disputed Fiscal Debt are presently at the stage of disclosure and examination of the evidence before the competent fiscal authorities.<sup>19</sup> The existence of related penal proceedings complicates and slows down the progress of this tax dispute.

### **Continuation of Kitco's operations and the Undisputed Credits**

[25] Kitco is maintaining operations during its restructuring and continues to claim Tax Credits on a monthly basis.

[26] The Agencies acknowledge that Kitco is entitled to the refund of those Undisputed Credits, which are not related to the fraudulent stratagem at the origin of the Disputed Fiscal Debt. The Undisputed Credits concern subsequent transactions between Kitco and other suppliers not suspected of having taken part in the alleged fraud.

[27] However, the Agencies refuse to pay the Undisputed Credits. They are effecting compensation and applying these credits to the payment of the Disputed Fiscal Debt.

### **The payment set-offs (compensation) and the denial of Tax Credits claimed by Kitco during its restructuring**

[28] The Undisputed Credits that the Agencies refuse to pay to Kitco since the commencement of the insolvency proceedings amount to \$1 779 579.94.<sup>20</sup> That amount increases every month, in keeping with the sales taxes which Kitco pays to its suppliers and for which Kitco is not currently being refunded.

<sup>15</sup> For the GST, see: ETA, s. 299(3)(4).

For the QST, see: *Taxation Act*, CQLR, c. I-3 (**TA**), s. 1014, which applies to the QST in accordance with the *Tax Administration Act*, CQLR, c. A-6.002 (**TAA**), s. 95.

<sup>16</sup> For the GST, see: ETA, ss. 299(3)(4) and 315.

For the QST, see: TAA, ss. 13 and 27.01.1.

<sup>17</sup> R.S.C., 1985, c. B-3, ss. 50.4(1) and 69(1).

<sup>18</sup> Exhibit R-8. Proof of claim amended on October 15, 2012 (Exhibit R-9).

<sup>19</sup> Before the Tax Court of Canada for the GST, and the Court of Québec, Civil Division, for the QST.

<sup>20</sup> \$1 443 713.16 for ITRs (QST) and \$335 866.78 for ITCs (GST).

[29] The fiscal laws allow the Agencies to effect compensation when a person who is entitled to a refund also owes amounts under a fiscal law.<sup>21</sup>

[30] The Agencies invoke the right to effect such compensation in the context of the present restructuring.

[31] It should be noted that the Agencies assigned Undisputed Tax Credits to the payment of the Disputed Fiscal Debt, both before and after commencement of the insolvency proceedings on June 8, 2011.

[32] From June 8, 2011<sup>22</sup> to November 30, 2015,<sup>23</sup> the Agencies assigned Undisputed Credits of \$1 779 579.94 to the payment of the Disputed Fiscal Debt. These amounts are at the heart of the present debate on compensation.

[33] Prior to June 8, 2011, the Agencies also assigned Undisputed Credits of \$4 754 656.60<sup>24</sup> to the payment of the Disputed Fiscal Debt. The current motion does not deal with those amounts.<sup>25</sup>

[34] In 2010 and 2011, the ARQ also denied Kitco more than \$76 million<sup>26</sup> in Tax Credits on grounds other than compensation. This motion does not directly relate to those denials either.<sup>27</sup>

[35] In fact, both the compensation effected before the commencement of the insolvency proceedings and the denial of Tax Credits are subject to an action seeking damages and a declaration of abuse of process which Kitco brought against the ARQ, the AGQ and the AGC before the Superior Court.<sup>28</sup>

[36] In addition, Kitco reserved its right to eventually challenge the compensation effected before June 8, 2011, on the ground that it would amount to fraudulent preferential treatment in favour of the Agencies.

[37] The current dispute therefore only relates to the compensation effected after commencement of the insolvency proceedings (June 8, 2011).

### **CCAA PROVISION ON COMPENSATION**

[38] As stipulated in section 21 CCAA, the compensation rules apply in conjunction with restructuring carried out under the CCAA:

---

<sup>21</sup> For the QST: the ETA, s. 318. For the QST: the TAA, s. 31.

<sup>22</sup> Date on which insolvency proceedings commenced.

<sup>23</sup> Date of latest available estimate.

<sup>24</sup> \$2 892 769.45 \$ in ITRs (QST) and \$1 861 887.06 in ITCs (GST).

<sup>25</sup> Re-amended motion for compensation, para. 64.1.

<sup>26</sup> \$47 051 044.47 for ITRs (QST) and \$29 880 336.78 for ITCs (GST).

<sup>27</sup> However, the Court's conclusions concerning CRA's right to effect compensation after June 8, 2011 will have an impact on this claim also, should the Agencies' grounds for denial eventually be dismissed.

<sup>28</sup> Exhibit R-14, case number 500-17-072346-128. Action brought on June 6, 2012, in which Kitco is claiming compensatory damages of \$120 738 959.72 and punitive damages of \$1 500 000 from the ARQ, the AGC and the AGQ.

<p><b>21. [Compensation]</b> Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.</p>	<p><b>21. [Law of set-off or compensation to apply]</b> 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.</p>
---	--

[39] Sections 97(3) and 101.1(1) BIA are to the same effect. Thus, in matters of assignment of assets or proposals under the BIA, the rules of compensation also apply.

[40] The rules of compensation therefore apply in an insolvency context. The Court must determine if the conditions for effecting compensation in a context of insolvency are met in the case at hand.

### **POSITIONS OF THE PARTIES**

[41] In essence, Kitco, the monitor, RSM Richter Inc. (**Monitor**) and Heraeus Metals New York LLC (**Heraeus**), a Kitco creditor, have the same position.

[42] They are of the opinion that the Agencies cannot effect compensation and that, if necessary, the provisions of the fiscal laws on which they rely to effect compensation must be declared inoperative within the framework of insolvency proceedings.

[43] The Agencies claim that those provisions are valid and apply, even in an insolvency context.

### **QUESTIONS IN DISPUTE**

[44] Thus, the questions in dispute may be summarized as follows:

- 1- Are the conditions for effecting compensation between the Disputed Fiscal Debt and the Undisputed Credits, within the framework of Kitco restructuring, met?
- 2- Within the framework of Kitco restructuring, can the Agencies rely on the fiscal law presumptions of exigibility and validity to claim that they fulfil the conditions of compensation?

[45] Based on the cardinal principles in matters of insolvency and on the conditions of compensation in a context of insolvency, the Court answers these two questions in the negative.

## **ANALYSIS**

### **The cardinal principles in bankruptcy and insolvency matters**

#### **Equality of creditors**

[46] Within the exercise of its powers over matters of bankruptcy and insolvency,<sup>29</sup> Parliament has adopted two main laws: the CCAA and the BIA.

[47] The CCAA distinguishes itself from the BIA by its remedial objective. It seeks to avoid the devastating effects of bankruptcy or the termination of business operations.<sup>30</sup> Nonetheless, it shares the same philosophy as the BIA. The CCAA and the BIA form part of an integrated body of insolvency law.<sup>31</sup>

[48] Two objectives are at the heart of both these laws:<sup>32</sup>

- (1) the financial rehabilitation of the debtor, who is discharged of past debts;
- (2) the equitable distribution of the debtor's assets among his or her creditors in accordance with the order of priority established in the CCAA and in the BIA.

[49] The first objective is achieved through the mechanism of discharge at the end of the process, provided for in the CCAA and the BIA. A stay of proceedings also constitutes a rehabilitation tool in that, among other things, it provides the debtor with the minimum needed for subsistence.<sup>33</sup>

[50] The principle of equality of creditors, a cornerstone of the CCAA and the BIA, stems from the second objective mentioned previously.

[51] In order to ensure the equitable distribution of a debtor's assets among the creditors, the CCAA and the BIA impose a single proceeding before the same court. The goal of the single proceeding is to avoid inefficiency and chaos. If not for the single proceeding, creditors would have to strive hard and swift to institute their own proceedings against the debtor and thereby maximize their chances of recovering their claim.

[52] The single proceeding model allows the court to stay most of the execution measures against the debtor's assets, thus preserving the status quo during

<sup>29</sup> The French version of the *Constitution Act, 1867*, s. 91(21) refers to "La banqueroute et la faillite", whereas the English version refers to "Bankruptcy and Insolvency".

<sup>30</sup> *Century Services Inc. v. Canada (Attorney General)* [2010] 3 S.C.R. 379, at paras. 18, 59, 60.

<sup>31</sup> *Ibid.*, paras. 15, 22 - 24, 78.

<sup>32</sup> *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, para. 32; *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 S.C.R. 443, para. 21; *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, paras. 22, 60; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, paras. 7, 8; *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417, para. 38; *Girard (Syndic de)*, 2014 QCCA 1922 (motion for leave to appeal dismissed by the Supreme Court of Canada), paras. 33, 34; *2713250 Canada inc. (Proposition de)*, 2011 QCCS 6119, paras. 95, 96 (Clément Gascon J.).

<sup>33</sup> *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, paras. 38 and 39; *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417, para. 39.

negotiations with the creditors for the purposes of the transaction or arrangement to be made.

[53] It also simplifies negotiations with the creditors by placing them all on an equal footing.

[54] As a result, any provision that is at variance with the principle of equality of creditors must be interpreted restrictively. Therefore, a creditor cannot be unduly advantaged in relation to the others, unless the law expressly authorizes it.<sup>34</sup>

[55] The principle of the equality of creditors takes several forms.

[56] Naturally, a change in the order of priority established by the BIA or CCAA, not expressly provided for by law, is deemed contrary to that principle.

[57] Any other asymmetry in the rules applicable to creditors, unless expressly provided for by law, is also considered contrary to the principle of equality of creditors.

[58] For example, any provision that would subject certain creditors to distinct rules with respect to the burden of proof required to establish their claim or with respect to the time period available to the Trustee or the Monitor to contest their claim are considered derogatory to the principle of the equality of creditors.<sup>35</sup>

### **The Crown is an unsecured creditor**

[59] As stipulated in its section 40, the CCAA applies to the Crown.<sup>36</sup>

<b>40. [Obligation de Sa Majesté]</b> La présente loi lie Sa Majesté du chef du Canada ou d'une province.	<b>40. [Act binding on Her Majesty]</b> This Act is binding on Her Majesty in right of Canada or a province.
---	--

[60] According to section 38(1) CCAA,<sup>37</sup> Crown claims are, in principle, unsecured claims in the context of a restructuring.

<b>38. (1) [Réclamations de la Couronne]</b> Dans le cadre de toute procédure intentée sous le régime de la présente loi, les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme <u>réclamations non garanties</u> .	<b>38. (1) [Status of Crown claims]</b> In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 39 called a "workers' compensation body", rank as <u>unsecured claims</u> .
--	---

<sup>34</sup> *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, para. 55.

<sup>35</sup> *Girard (Syndic de)*, 2014 QCCA 1922 (motion for leave to appeal dismissed by the Supreme Court of Canada), paras. 48, 62, 63.

<sup>36</sup> Section 4.1 BIA is to the same effect.

<sup>37</sup> Section 86(1) BIA is to the same effect.



[Soulignement ajouté]	[Emphasis added.]
-----------------------	-------------------

[61] However, the CCAA provides for certain exceptions to this principle.

[62] Among other things, section 38(2) CCAA provides that the Crown can invoke charges or securities of a kind that can be obtained by any person:<sup>38</sup>

<p><b>38. (2) [Exceptions]</b> Sont soustraites à l'application du paragraphe (1) :</p> <p>a) <u>les réclamations garanties par un type de charge ou de sûreté dont toute personne, et non seulement Sa Majesté ou l'organisme, peut se prévaloir au titre de dispositions législatives fédérales ou provinciales n'ayant pas pour seul ou principal objet l'établissement de mécanismes garantissant les réclamations de Sa Majesté ou de l'organisme, ou au titre de toute autre règle de droit;</u></p> <p>[...].</p> <p>[Soulignement ajouté]</p>	<p><b>38. (2) [Exceptions]</b> Subsection (1) does not apply</p> <p>(a) in respect of claims that are secured by a <u>security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body</u></p> <p>(i) <u>pursuant to any law, or</u></p> <p>(ii) <u>pursuant to provisions of federal or provincial legislation if those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or a workers' compensation body;</u> and . . . .</p> <p>[Emphasis added.]</p>
---	--

[63] Section 38(3) CCAA<sup>39</sup> also lists several other exceptions to the Crown's status as unsecured creditor. Those exceptions refer, among other things, to claims of the Crown or the provinces for income tax or source withholdings in relation to the Canada Pension Plan or a plan of a province, or employment insurance contributions (**Source Withholdings**).

[64] Note here that none of the exceptions provided for in section 38(3) CCAA relate to claims of the Crown or of the provinces in sales tax matters.

[65] In keeping with the intention to treat the Crown as an unsecured creditor, section 37 CCAA<sup>40</sup> neutralizes deemed trusts which other laws establish in favour of the Crown:<sup>41</sup>

<b>37. (1) [Fiducies présumées]</b> Sous réserve du paragraphe (2) et par	<b>37. (1) [Deemed trusts]</b> Subject to subsection (2), <sup>42</sup> despite <u>any provision in</u>
---	---

<sup>38</sup> Section 86(2) BIA is to the same effect.

<sup>39</sup> Section 86(2) BIA is to the same effect.

<sup>40</sup> Section 67(2)(3) BIA is to the same effect.

<sup>41</sup> Except claims in relation to income tax or source withholdings, which are covered by section 37(2) CCAA.

<sup>42</sup> Section 37(2) CCAA concerns deemed trusts in relation to income tax and source withholdings.

dérogation à toute <u>disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté</u> , aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.	<u>federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty</u> , property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
[Soulignements du Tribunal]	[Emphasis added]

[66] Deemed trusts established in favour of the Crown, in the same way as the powers of garnishment that certain laws grant to the Crown, are one of the mechanisms frequently used to secure Crown claims and permit their enforcement.<sup>43</sup>

[67] The exclusion of the deemed-trust mechanism underscores the importance and the precedence given to the principle of the equality of creditors in a context of insolvency.

[68] It is also clear from the preceding that, when the legislator wants to secure certain claims in a context of insolvency, such intent is expressed clearly, explicitly and thoroughly. Thus, in the absence of an express legislative provision leading to the conclusion that a claim of the Crown is granted preferential treatment under the CCAA, the Crown will be treated as an ordinary creditor.<sup>44</sup>

[69] In 1992, in response to criticism to the effect that in bankruptcies, the existing priority scheme often left nothing for ordinary creditors, the BIA reform, among other things, significantly lessened the Crown's priorities. The Crown's priorities were, at the time, seen as one of the flagrant injustices of the BIA.<sup>45</sup>

[70] The CCAA provisions dealing with the Crown's status as a creditor share the same philosophy and are similar to those of the BIA. They must also be interpreted by taking the same historical context into account. The goal of maintaining a balance among the creditors is of equal importance in both the CCAA and the BIA.

[71] The courts have adopted several times a restrictive interpretation and application of the provisions that, outside of a context of insolvency, would have vested the Crown with more extensive rights than those conferred by the BIA or the CCAA.<sup>46</sup>

<sup>43</sup> *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, para. 30.

<sup>44</sup> *Ibid.*, [2010] 3 S.C.R. 379, paras. 45, 51; *Deputy Minister of Rev. (Que.) v. Rainville*, [1980] 1 S.C.R. 35, at 35 and 46; *Girard (Syndic de)*, 2014 QCCA 1922, paras. 33-34, 48, 62, 63.

<sup>45</sup> *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, [2009] 3 S.C.R. 286, paras. 12-14.

<sup>46</sup> *Alberta (Attorney General) v. Moloney*, 2015 SCC 51; *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, [2009] 3 S.C.R. 286; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; [2009] 3 S.C.R. 286; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Deloitte Haskins & Sells v. Worker's Comp. Board*, [1985] 1 S.C.R. 785; *Deputy Minister of Rev. (Que.) v. Rainville*, [1980] 1 S.C.R. 35; *Girard (Syndic de)*, 2014 QCCA 1922; *2713250 Canada inc. (Proposition de)*, 2011 QCCS 6119.

[72] It is acknowledged that the Agencies are not on a different footing from other creditors merely by reason of the nature of their claim and the presumptions related to it.<sup>47</sup>

### **Compensation in a context of insolvency or bankruptcy**

[73] As stipulated in section 21 CCAA, the compensation rules apply even within the framework of a restructuring carried out under the CCAA.<sup>48</sup>

<p><b>21. [Compensation]</b> <u>Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.</u></p> <p>[Soulignements du Tribunal]</p>	<p><b>21. [Law of set-off or compensation to apply]</b> <u>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.</u></p> <p>[Emphasis added]</p>
---	---

[74] As explained below, to effect compensation in a context of restructuring or bankruptcy in Québec, the court must be satisfied that the general conditions of Québec civil law in compensation matters are met. Thus, the debts at issue must be mutual, certain, liquid, exigible and connected.

[75] In addition, both parties must mutually be debtors and creditors before the date of bankruptcy or the date that proceedings commenced under the CCAA, whichever date is earlier.

### **Conditions stemming from the general rules of Québec civil law**

[76] Section 21 CCAA incorporates the compensation mechanism in insolvency matters, but without defining it. The rules that apply to the compensation mechanism in a context of insolvency are therefore established in light of the relevant law and of the provincial suppletive law. In Québec, civil law, not common law, is the suppletive law in bankruptcy and insolvency matters. Among other things, this excludes the application of the concept of equitable set-off, which belongs to common law and is foreign to Québec civil law.<sup>49</sup>

<sup>47</sup> 2713250 Canada inc. (*Proposition de*), 2011 QCCS 6119, paras. 95-98 (Clément Gascon J.).

<sup>48</sup> Sections 97(3) and 101.1(1) BIA are to the same effect.

<sup>49</sup> *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, paras. 34-36, 64.

[77] In Québec civil law, the rules of compensation are set out in article 1673 of the *Civil Code of Québec*, which provides that compensation is effected between debts that are (1) mutual, (2) liquid, (3) certain and (4) exigible.

**1673.** La compensation s'opère de plein droit dès que coexistent des dettes qui sont l'une et l'autre certaines, liquides et exigibles et qui ont pour objet une somme d'argent ou une certaine quantité de biens fongibles de même espèce.

Une partie peut demander la liquidation judiciaire d'une dette afin de l'opposer en compensation.

[Soulignements du Tribunal]

**1673.** Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and the object of both of which is a sum of money or a certain quantity of fungible property identical in kind.

A party may apply for judicial liquidation of a debt in order to set it up for compensation.

[Emphasis added]

[78] Article 1681 of the *Civil Code of Québec* adds that, if third parties acquire rights before the right to compensation is obtained, compensation cannot withdraw that right from those parties:<sup>50</sup>

**1681.** La compensation n'a pas lieu, et on ne peut non plus y renoncer, au préjudice des droits acquis à un tiers.

**1681.** Compensation may neither be effected nor be renounced to the prejudice of the acquired rights of a third person.

[79] Let us go back to each of the conditions mentioned above.

[80] The notion of mutuality requires the co-existence of counter-claims or cross obligations. The holders of the two claims must therefore be the same persons in the same capacities.<sup>51</sup>

[81] The liquidity of a debt relates to its amount. A debt of unspecified amount is not liquid.

[82] The certainty of a debt pertains to its legal validity. A debt the validity of which is contested is not certain.

<sup>50</sup> *Ibid.*, paras. 34-36; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, paras. 61-62.

<sup>51</sup> Didier Luelles and Benoît Moore, *Droit des Obligations*, 2nd ed., (Montréal, QC: Thémis, 2012), para. 2677.

[83] A debt is exigible if its execution is likely to be forced. An obligation that comes with a term or a condition is not exigible as long as the term has not expired or the condition has not been met.

[84] Compensation may be effected by means of various mechanisms. It may be effected by operation of law (legal compensation) or in conjunction with a judgment ruling on a dispute between the parties with respect to compliance with the conditions of compensation (judicial compensation).

[85] Legal compensation is effected by operation of law when both debts meet the four conditions mentioned above.

[86] Judicial compensation is effected when the court settles a dispute between the parties on this issue and concludes that the conditions mentioned above have been met.

[87] To effect judicial compensation, however, an additional requirement applies. The court must be convinced that the debts are not only (1) mutual, (2) liquid, (3) certain and (4) exigible, but also that they are (5) connected.

[88] The notion of connection is often discussed in relation to article 172 of the *Code of Civil Procedure*,<sup>52</sup> which requires that there be a connection between a main claim and a cross-claim. The reasoning developed in that context may be used to assess the connectivity between two debts for compensation purposes.<sup>53</sup>

[89] That jurisprudence teaches us that connectivity corresponds to a [TRANSLATION] "direct affinity", an [TRANSLATION] "intimate connection", a [TRANSLATION] "close link", and calls for [TRANSLATION] "dependency or similarities between elements".<sup>54</sup> The possibility of submitting joint evidence and the risk of contradictory judgments if the various debts or issues were dealt with separately constitute strong indications of connectivity.

[90] The common law notion of equitable set-off also requires the two debts in question to be connected.<sup>55</sup>

### **The conditions or alleviations stemming from the CCAA and the BIA**

[91] In bankruptcy and insolvency matters, the compensation mechanism also incorporates two specific features stemming from provisions of the CCAA and the BIA:<sup>56</sup>

- 1- the claims involved in the compensation must be provable by means of a

<sup>52</sup> *Code of Civil Procedure* (c. C-25.01), a. 172.

<sup>53</sup> Didier Lluellas and Benoît Moore, *Droit des Obligations*, 2nd ed., (Montréal, QC: Thémis, 2012), para. 2705.

<sup>54</sup> *Peerensal inc. c. Toshiba International Corp.*, J.E. 97-169, at 3 (C.A.); *Foessl c. Banque Royale du Canada*, [1986] R.J.Q. 1857 at 7 (C.A.).

<sup>55</sup> As concerns the definition of the criterion of connectivity in matters of equitable set-off, see: *Holt v. Telford*, [1987] 2 S.C.R. 193, paras. 34, 37, 38: "A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim".

<sup>56</sup> *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, paras. 40, 41, 53.

proof of claim (thus, they must antedate the bankruptcy or the commencement of proceedings);

2- compensation may be effected as if the bankrupt were the plaintiff.

**Mutual claims must be provable by means of a proof of claim (thus, they must antedate the bankruptcy or the commencement of proceedings)**

[92] This feature stems from section 21 CCAA, which provides that the rules of compensation apply "to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company"<sup>57</sup>.

[93] Section 2 CCAA defines "claim" with reference to the notion of "claim provable" within the meaning of the BIA.

[94] Section 121(1) BIA, which defines "claim provable", requires the claim to stem from an obligation incurred before the day of the bankruptcy.

<p><b>121 (1) [Réclamations prouvables]</b> Toutes créances et tous engagements, présents ou futurs, auxquels le failli est <u>assujéti à la date à laquelle il devient failli, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à cette date</u>, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.</p> <p>[Soulignements du Tribunal]</p>	<p><b>121 (1) [Claims provable]</b> 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 <u>by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt</u> shall be deemed to be claims provable in proceedings under this Act.</p> <p>[Emphasis added.]</p>
--	--

[95] In addition, claims dealt with by an arrangement under the CCAA are defined in section 19 CCAA, which requires that they relate to debts or liabilities incurred on the day on which CCAA proceedings were commenced or the date of the initial bankruptcy event, within the meaning of the BIA, whichever date is earlier:

<p><b>19. (1) [Réclamations considérées dans le cadre des transactions ou arrangements]</b> Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie</p>	<p><b>19. (1) [Claims that may be dealt with by a compromise or arrangement]</b> Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are</p>
---	--

<sup>57</sup> In bankruptcy matters, the terms of section 97(3) are, in essence, to the same effect.

<p>débitrice sont :</p> <p>a) <u>celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :</u></p> <p>(i) <u>la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,</u></p> <p>(ii) <u>la date d'ouverture de la faillite, au sens de l'article 2 de la Loi sur la faillite et l'insolvabilité, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la Loi sur la faillite et l'insolvabilité;</u></p> <p>b) <u>celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.</u></p> <p>[Soulignements du Tribunal]</p>	<p>(a) <u>claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of</u></p> <p>(i) <u>the day on which proceedings commenced under this Act, and</u></p> <p>(ii) <u>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</u></p> <p>(b) <u>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).</u></p> <p>[Emphasis added.]</p>
--	---

[96] Thus, in a context of insolvency, compensation can only be effected in respect of commitments or debts stemming from an obligation incurred, as the case may be, before the date of bankruptcy or the date of commencement of proceedings under the CCAA, whichever date is earlier.

[97] The Supreme Court set forth this principle in *D.I.M.S.*:

[40] First, s. 97(3) *BIA* specifies that compensation applies to claims against the bankrupt's estate. Creditors must therefore meet the conditions set out in s. 121(1) *BIA*, the relevant portion of which reads as follows:

**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.

Thus, a creditor who wishes to effect compensation must be able to prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy.<sup>58</sup>

[Emphasis added.]

[98] To effect compensation in an insolvency context, the rule mentioned above must be complied with for all debts in respect of which compensation is sought. Hence, both the debt against the debtor or the bankrupt and the debt owed to the debtor or the bankrupt must exist at the time of the bankruptcy or of the commencement of proceedings.

[99] Such is the case because the provisions allowing recourse to the compensation mechanism in a context of insolvency must be restrictively interpreted.

[100] The compensation mechanism in a context of insolvency is an exception to the principle of equality of creditors. It unavoidably has the effect of securing the claim of the party invoking compensation.<sup>59</sup>

[101] This provision must therefore be narrowly interpreted in conjunction with the sections that define what constitutes a provable claim<sup>60</sup> and with the sections that establish the scheme of distribution or identify the claims to be preferred over others.<sup>61</sup>

[102] In accordance with these preoccupations and this reasoning, the Supreme Court specifically stated in *D.I.M.S.*<sup>62</sup> that section 97(3) BIA, which allows compensation in a context of bankruptcy, implicitly requires that the mutual debts be incurred before the bankruptcy.

[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 . . . 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.

[Emphasis added.]

[103] Moreover, the Court of Appeal of Québec has abided by this rule in a number of decisions.<sup>63</sup>

<sup>58</sup> *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, para. 40.

<sup>59</sup> *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, paras. 57, 58.

<sup>60</sup> BIA, s. 121; CCAA, s. 19.

<sup>61</sup> BIA, ss. 136, 141; CCAA, s. 2 "unsecured creditor" and "secured creditor", ss. 6, 19(2).

<sup>62</sup> *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, para. 55.

<sup>63</sup> *CSST c. Dolbec Transport inc.*, 2012 QCCA 698, para. 37; *Daltech Architectural Inc. (Syndic de)*, 2008 QCCA 2441, paras. 58, 61; *2945-2802 Québec c. Ville de St-Léonard*, J.E. 98-2341, paras. 22, 23, 25 (C.A.).



[104] In 2004, in accordance with that rule and in a context similar to that of the current dispute, the Court of Appeal for Ontario ruled<sup>64</sup> that Revenue Canada cannot assign refunds owing to a debtor for tax overpayments made after a proposal to the payment of a debt incurred by the debtor toward Revenue Canada for taxes unpaid before the proposal.

[105] Given the strong similarity between sections 97(3) BIA and 21 CCAA, and the fact that both laws are part of an integrated body of insolvency law,<sup>65</sup> that conclusion applies just as well to compensation in a context of restructuring. There is no reason to differentiate between the compensation mechanism in the context of a bankruptcy or proposal and in the context of an arrangement.

[106] The Agencies are attempting to reach contrary conclusions based on other Court of Appeal rulings, which the Court has not dealt with up to this point. With all due respect, their submissions do not seem to withstand a thorough analysis of the precedents which the Agencies are raising. It is worthwhile to summarily rectify certain elements.

[107] Compensation was not a disputed issue in *Montreal Fast Print*,<sup>66</sup> a case prior to the Supreme Court's decision in *D.I.M.S.* and to the Court of Appeal's rulings in *Daltech* and *Dolbec*. The comments of Rousseau-Houle J. on the matter are not included in the reasons of the majority ruling. In addition, the two debts in question in *Montreal Fast Print* were incurred before the bankruptcy.

[108] The *Davies*<sup>67</sup> decision, which also antedates *D.I.M.S.*, *Daltech* and *Dolbec*, concluded that compensation was not covered by a stay of proceedings ordered under the BIA and thus did not prevent Revenue Canada from issuing a notice of statutory compensation under the ITA.<sup>68</sup> The issue of the date on which the debts to be compensated were incurred was not in dispute in that case.

[109] In *D'Auteuil (Syndic) (Re)*,<sup>69</sup> which also antedated *D.I.M.S.*, *Daltech* and *Dolbec*, the two debts were incurred before the date of bankruptcy, i.e. the date of refusal of the proposal in that case.

[110] In *2945-2802 Québec c. Ville de St-Léonard*,<sup>70</sup> the two debts for which compensation was effected were incurred after the date of bankruptcy. The matter of compensation between a post-bankruptcy debt and a pre-bankruptcy debt therefore did not arise.

**The rule that compensation can be effected only between the same parties is more relaxed in a context of insolvency**

[111] This second feature stems from the very text of section 21 BIA.

<sup>64</sup> *Re Jones*, (2004) 45 C.B.R. (4th) 263, para. 19.

<sup>65</sup> *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, at paras. 15, 22-24, 78.

<sup>66</sup> *Montreal Fast Print Ltd. c. Edifice 9500 Inc.*, J.E. 2003-1229 (C.A.).

<sup>67</sup> *Industries Davie inc. (Groupe Mil inc.) (Proposition concordataire de)*, J.E. 2000-147 (C.A), para. 33.

<sup>68</sup> ITA, s. 224.1.

<sup>69</sup> J.E. 99-864 (C.A.).

<sup>70</sup> J.E. 98-2341 (C.A.).

[112] The compensation rules in a context of insolvency therefore depart from the general principle according to which compensation can only be effected between the same parties. This variation to the general rules sets aside the status of the trustee or monitor as representative of the creditors.

[113] Thus, compensation cannot be opposed for the sole reason that the trustee is a third party. In this regard, the compensation rules are relaxed in a context of bankruptcy or restructuring.<sup>71</sup>

### **Application of the principles to the facts of the case**

[114] In accordance with the above principles, in this case, compensation cannot be effected between the Disputed Fiscal Debt and the Undisputed Credits in the context of the current restructuring.

[115] First, the two claims are not connected.

[116] The Disputed Fiscal Debt and the Undisputed Credits are unrelated, except for the identity of the parties and for the laws involved. This is not enough to conclude that a connection exists.

[117] The events at the origin of each debt are different. They relate to distinct and independent contexts, periods and transactions. In addition, the transactions involved relate to different suppliers. The suppliers involved in the transactions at the origin of the Undisputed Credits are not involved in the transactions that resulted in the Disputed Fiscal Debt.

[118] Secondly, as mentioned above, the CCAA, as interpreted by the jurisprudence, does not allow compensation between the Disputed Fiscal Debt, which was incurred before the insolvency proceedings and the debt related to the Undisputed Credits, which was incurred after those proceedings.

[119] Although these two conclusions are sufficient to dispose of the dispute, the Court considers useful, given the representations submitted, to deal with the validity and exigibility of the Disputed Fiscal Debt, in view of the presumptions stipulated in the fiscal laws.

[120] The Disputed Fiscal Debt is neither certain nor exigible within the meaning of the general rules of Québec's civil law on compensation.

[121] The existence (certainty) and exigibility of the debt are contested. Kitco denies having been a party to any fraudulent stratagem whatsoever. The Court cannot settle this dispute, which lies with the tax courts.

[122] Moreover, the presumptions of exigibility and validity that the fiscal laws establish in favour of the Agencies do not apply in the context of insolvency proceedings under the CCAA.

[123] In this case, resorting to such presumptions in order to give preferential treatment to the Crown, to the detriment of the other creditors, would run contrary to the cardinal

---

<sup>71</sup> *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, [2005] 2 S.C.R. 564, para. 41.

principle of equality of all creditors, including the Crown. Along these lines, the Court of Appeal for Ontario recently ruled that the Crown, especially the revenue agencies, cannot use the presumptions of validity and exigibility provided for in the fiscal laws to avail themselves of an unjustified advantage over the other creditors.<sup>72</sup>

[124] In the case at hand, there is every reason to adopt such an interpretation of the laws involved. Such reading down of the laws preserves the constitutionality of the fiscal provisions discussed and prevents the presumptions in the fiscal laws, which are otherwise valid, from hindering the achievement of the CCAA objectives.<sup>73</sup>

### **CONCLUSION**

[125] Therefore, the Court answers the questions in dispute as follows:

- 1- Are the conditions for effecting compensation between the Disputed Fiscal Debt and the Undisputed Credits, within the framework of Kitco restructuring, met?

No. The two debts are not connected, certain, liquid and exigible, and they were not incurred before the insolvency proceedings.

- 2- Within the framework of Kitco restructuring, can the Agencies rely on the fiscal law presumptions of exigibility and validity to claim that they fulfil the conditions of compensation?

No. Although those presumptions are constitutionally valid, they do not apply in a context of insolvency.

### **THEREFORE, THE COURT:**

[126] **DECLARES** that the Agencies cannot effect compensation between the Disputed Fiscal Debt, for which the Agencies filed proofs of claim in the course of the present proceedings, and the Undisputed Credits that Kitco is claiming as input tax refunds (**ITRs**) and input tax credits (**ITCs**) in relation to the transactions incurred after commencement of the present proceedings;

[127] **CONDEMNS** the Agence du Revenu du Québec to pay \$1 443 713.16 to Kitco, representing the ITRs owing to Kitco up to November 30, 2015, with interest at the legal rate and the additional indemnity, as of the date at which each of the ITRs claimed was due. The said payment must be made directly to the Monitor, in trust;

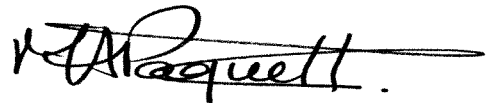
[128] **CONDEMNS** the Attorney General of Canada to pay \$335 866.78 to Kitco, representing the ITCs owing to Kitco up to November 30, 2015, with interest at the legal rate and the additional indemnity, as of the date at which each of the ITCs claimed was due. The said payment must be made directly to the Monitor, in trust;

[129] **ORDERS** the Monitor to withhold the total amount of \$1 779 579.94 mentioned above in its trust account until judgment by the Court on the manner of disposing of it;

<sup>72</sup> *Schnier v. Canada (Attorney General)*, 2016 ONCA 5, para. 64.

<sup>73</sup> See by way of analogy: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, paras. 25, 29.

[130] **WITH LEGAL COSTS** to be paid by the respondents.



---

MARIE-ANNE PAQUETTE J.S.C.

Mtre. Patrice Benoît  
Mtre. Yves Ouellette  
Mtre. Alexander Bayus  
**GOWLING LAFLEUR HENDERSON**  
For the petitioner, Kitco Metals inc.

Mtre. Daniel Cantin  
**CABINET LARIVIÈRE MEUNIER**  
For the respondent, Agence du revenu du Québec

Mtre. Chantal Comtois  
**DEPARTMENT OF JUSTICE CANADA**  
For the respondent, the Attorney General of Canada

Mtre. Sylvain Vauclair  
**WOODS S.E.N.C.R.L./LLP**  
For the Monitor, RSM Richter Inc.

Mtre. Jean C. Fontaine  
**STIKEMAN ELLIOTT**  
For the impleaded party, Heraeus Metals New York LLC

Dates of hearing: December 8, 9 and 10, 2015  
Additional written representations submitted on January 21, 2016  
(AGC, ARQ, AGQ)

## **TABLE OF CONTENTS**

<b>1.</b>	<b>OVERVIEW .....</b>	<b>2</b>
<b>2.</b>	<b>HISTORY OF THE EVENTS .....</b>	<b>3</b>
2.1	Kitco's activities and sales tax payments.....	3
2.2	Disputed fiscal debt .....	3
2.3	Judicialization of the dispute .....	4
2.4	Continuation of Kitco's operations and the Undisputed Credits.....	4
2.5	The payment set-offs (compensation) and the denial of Tax Credits claimed by Kitco during its restructuring .....	4
<b>3.</b>	<b>CCAA PROVISION ON COMPENSATION .....</b>	<b>5</b>
<b>4.</b>	<b>POSITIONS OF THE PARTIES .....</b>	<b>6</b>
<b>5.</b>	<b>QUESTIONS IN DISPUTE .....</b>	<b>6</b>
<b>6.</b>	<b>ANALYSIS .....</b>	<b>7</b>
6.1	The cardinal principles in bankruptcy and insolvency matters.....	7
6.1.1	Equality of creditors.....	7
6.1.2	The Crown is an unsecured creditor .....	8
6.2	Compensation in a context of insolvency or bankruptcy.....	11
6.2.1	Conditions stemming from the general rules of Québec civil law .....	11
6.2.2	The conditions or alleviations stemming from the CCAA and the BIA..	13
6.2.2.1	Mutual claims must be provable by means of a proof of claim (thus, they must antedate the bankruptcy or the commencement of proceedings) .....	14
6.2.2.2	The rule that compensation can be effected only between the same parties is more relaxed in a context of insolvency .....	17
6.3	Application of the principles to the facts of the case.....	18

7. <b>CONCLUSION</b> .....	19
THEREFORE, THE COURT:.....	19
TABLE OF CONTENTS.....	1