

CANADA

SUPERIOR COURT
COMMERCIAL DIVISION

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-040900-116

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

KITCO METALS INC.

Petitioner

vs.

L'AGENCE DU REVENU DU QUEBEC

and

THE ATTORNEY GENERAL OF CANADA

Respondent

-and-

THE ATTORNEY GENERAL OF QUEBEC

Mis en cause

-and-

RSM RICHTER INC.

Monitor/Mis en cause

**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 QUEBEC 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**

**(Articles 11 and 21 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985,
c. C-36 ("CCAA"))**

TO THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C., SITTING IN COMMERCIAL DIVISION, IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONER (HEREINAFTER “KITCO”) RESPECTFULLY SUBMITS AS FOLLOWS:

PURPOSE OF THE PRESENT PROCEEDINGS

1. Pursuant to the present motion, Kitco is seeking orders from this honourable Court:
 - Declaring illegal (i) the confiscation by the ARQ of uncontested and duly owed input tax credits (“**ITC**”) and input tax refunds (“**ITR**”) and (ii) the application by the ARQ of said ITC and ITR in payment of its alleged ordinary, vigorously disputed, contingent and uncertain claim against Kitco;
 - To the extent necessary, declaring inapplicable, invalid, inoperative, unconstitutional, or of no force in effect certain self-serving provisions of tax statutes on which the ARQ is relying to set-off the ITC and ITR duly owed to Kitco against its contingent and uncertain claim;
 - Condemning the ARQ (with respect to the QST) and the Attorney General of Canada (the “AGC”) (with respect to the GST) to pay to Kitco the said ITC and ITR;

BACKGROUND

2. Kitco carries on business in the precious metals industry for over thirty (30) years;
3. Over times, Kitco has become a global leader and an international reference in the precious metals industry and currently employs over one hundred (100) people;
4. Kitco is a perfectly viable company that was forced to seek protection, initially under the *Bankruptcy and Insolvency Act* (“**BIA**”) and subsequently under the CCAA, in the wake of precipitous proceedings and seizures taken by the ARQ that followed the issuance of notices of assessment for a total amount of approximately \$313,000,000;
5. Although Kitco is vigorously contesting the notices of assessment issued by the ARQ, it was nevertheless compelled, under the applicable tax legislation, to immediately pay the ARQ’s contingent, unliquidated and uncertain claim of over \$313,000,000 in order to avoid the exercise by the ARQ of enforcement remedies (which amount it would be entitled to recover only after a successful resolution of its contestation of the notices of assessment);
6. Kitco was unable to pay said amount of \$313,000,000 and had therefore no other choice, in the days following the enforcement measures taken by the ARQ, namely on June 8, 2011, to file a notice of intention under the BIA;
7. On July 6, 2011, this honourable Court granted Kitco’s petition for the issuance of an initial order under the CCAA, which initial order has, since then, been renewed on a number of occasions;

THE ARQ CONTINGENT CLAIM RELATES TO THE SCRAP GOLD PURCHASING MADE BY KITCO

8. As part of its operations, Kitco has a department that purchases scrap gold from various manufacturers or jewelers, which is afterwards refined through the Royal Canada Mint or other refineries;
9. No matter what payment method the supplier wishes to use for the payment of the scrap gold purchased by Kitco, the taxes (GST and QST) relating to each transaction are always paid to the supplier by cheque or by bank transfer;
10. Indeed, the sale of scrap gold to Kitco is a taxable supply under the relevant tax statutes (the Quebec Sales Tax Act and the Canada Excise Tax Act);
11. Kitco thus has a very strict account opening procedure for clients who wish to sell their scrap gold. More precisely, the following information is requested from the manufacturers that wish to do business with Kitco :
 - a. a copy of the certificate of incorporation of the Company;
 - b. the declaration of the Company to the Registraire des entreprises du Québec;
 - c. the Quebec business number;
 - d. a copy of the driver's license of the owner or the director;
 - e. a copy of the social insurance card of the owner or the director;
 - f. an original void check;
 - g. the original invoice for the purchase of scrap gold by Kitco;
 - h. valid GST/QST registration numbers;
 - i. a visit of the premises of the manufacturers or jewelers by Kitco representatives, at which time photographs are taken and placed in the relevant supplier's file;
 - j. a confirmation that the Company is in business since at least two years.
12. Each scrap gold purchase transaction by Kitco is carried out in a secure premises situated in its place of business and is filmed on video. The video is then kept for a few weeks following the transaction;
13. During each transaction, Kitco representatives test the scrap gold to evaluate the level of purity prior to weighing it;
14. The supplier is then informed of the weight and the level of purity of the scrap gold and of the price offered by Kitco;
15. If the supplier agrees with the data, the transaction is completed by the issuance of an invoice by the supplier that is immediately paid by Kitco, by check, wire transfer, cash or by compensation, according to the client's wishes;

16. Once again, no matter what payment method the supplier wishes to use, the taxes (GST and QST) relative to each transaction are always paid by Kitco to the supplier by check or by bank transfer;
17. The scrap gold purchased by Kitco is then separated by category and shipped under seal to the Royal Canadian Mint or other refineries for refining purposes;
18. At the Royal Canadian Mint, or other refineries, the scrap gold is listed, controlled and weighed, the whole in order to ensure that Kitco is always in a position to reconcile the scrap gold purchased with the deliveries made to the Royal Canadian Mint;
19. The pure gold refined by the Royal Canadian Mint or other refineries is credited to Kitco;
20. Furthermore, since December 2005, Kitco has voluntarily set up a procedure whereby it issues to the Ministère du revenu du Québec (now the ARQ), on a monthly basis, reports identifying all the suppliers of scrap gold with which it dealt and to which it paid more than ten thousand dollars (\$10,000) of taxes (GST and QST). As an illustration of the foregoing, Kitco files examples of emails as **Exhibit R-1**, which were sent each month by Kitco to the ARQ;
21. These reports allow the ARQ to identify the scrap gold purchase transactions and to audit what it considers necessary to ensure that the suppliers remit the GST and the QST paid by Kitco;
22. On several occasions, Kitco was subject to normal and regular audits by representatives of the ARQ concerning the ITC and the ITR claimed by Kitco;
23. On each occasion, Kitco collaborated fully with the representatives of the ARQ and provided all the information and documentation requested;
24. To Kitco's surprise, during the fall of 2010, the ARQ issued draft notices of assessment for the period of January 1, 2006, to August 31, 2010, in order to claim the refund of the ITC and of the ITR allegedly illegally obtained by Kitco, the whole in the amount of \$227,088,232.97 for the QST (ITR) and \$85,301,550.75 for the GST (ITC) (including interest and penalties);
25. In addition to the draft notices of assessment, Kitco also learned, on June 7, 2011, that it is the subject of a penal investigation by the ARQ under the *Tax Administration Act*, Chapter A-6.002 ("TAA");
26. To Kitco's understanding, the ARQ claims that, for several years, some companies linked to the goldsmith trade have been using a fraudulent scheme to wrongfully avoid the remittance of the GST and QST paid to them by Kitco or others, and that Kitco is somehow part of this scheme (an allegation that Kitco has always strongly denied);
27. Prior to even receiving the draft notices of assessment, Kitco supplied the ARQ with all the useful and relevant information to demonstrate that it is not and could not be part of the alleged scheme contemplated by the ARQ;

28. Despite the fact that Kitco (i) advised the ARQ that the issuance of formal notices of assessment for amounts as significant as those mentioned above would likely jeopardize the maintenance and survival of its operations and (ii) requested more time to be able to satisfy the ARQ that it was erroneous in its suspicions, the ARQ issued formal notices of assessments for the aforementioned amounts of \$227,088,232.97 (ITR) and \$85,301,550.75 (ITC) on November 5, 8, 9, 16 and 17 2010, as well as January 26 and February 7, 2011 (the "Notices of Assessment"), a copy of said Notices of Assessment being filed in support hereof as **Exhibit R-2**;
29. Following the receipt of these Notices of Assessment, Kitco filed objections to the assessments, under the prescribed form and within the requested time-frame, copies of which are already filed in support hereof *en liasse* with the Notices of Assessment under **Exhibit R-3**;
30. Of course, in light of the magnitude of the amounts claimed by the ARQ of \$227,088,232.97 and \$85,301,550.75 (collectively the "**Contingent Claim**"), Kitco has not been able to pay them, as should normally be done in the context of contested notices of assessment pertaining to sale taxes, in order to avoid collection actions by the ARQ;
31. Following the issuance of the Notices of Assessment, serious negotiations ensued between the ARQ and Kitco in good faith, at least on the part of Kitco;
32. Within the context of the negotiations, Kitco offered to set up a mechanism that would allow (i) the normal progress of its objections to the Notices of Assessment before the courts (process that could take up to years) (ii) the maintenance of its operations and (iii) the absence of collection measures from the ARQ;
33. While the negotiations were taking place and Kitco remained fully transparent, the ARQ, without notice, transmitted a letter to the undersigned attorneys on June 6, 2011, to inform Kitco they were ending the negotiations, a copy of said letter being filed in support hereof as **Exhibit R-4**;
34. On June 7, 2011, the ARQ conducted a broad search of Kitco's offices in Montreal within the scope of the penal investigation under the TAA, the whole pursuant to search warrants obtained on May 31, 2011, a copies of which are filed *en liasse* in support hereof as **Exhibit R-5**;
35. In addition, while the search was ongoing, bailiffs, acting on behalf of the ARQ, arrived at Kitco's place of business and carried out a seizure of all movable property located at Kitco's place of business including equipment, inventory, gold bars and cash. A copy of the ARQ's *Motion for seizure in execution prior to the expiry of the delays and other measures*, presented *ex parte*, as well as the minutes of seizure prepared pursuant to the provisions of the *Code of Civil Procedure of Quebec* are filed in support hereof as **Exhibit R-5**;
36. Kitco emphasizes the fact that the ARQ carried out the above-mentioned seizure after obtaining *ex parte* certificates of judgment from the Superior Court of Quebec and the Federal Court, pursuant to tax laws, for the amount of its Contingent Claim. Said certificates were obtained in light of the fact that Kitco was obviously unable to pay the assessments after filing its oppositions to the Notices of Assessment (given the

magnitude of the amounts involved) and not in light of any default judgment or failure by Kitco to defend itself. Moreover, said certificates of judgment, filed in support hereof as **Exhibit R-6**, were not preceded by any proper judicial debate and no hearing on the merits was held;

37. As mentioned above, following the enforcement measures carried out by the ARQ, Kitco had no other choice but to file a notice of intention pursuant to the *Bankruptcy and Insolvency Act* and shortly thereafter obtained the issuance of an initial order under the CCAA;

ARQ'S ILLEGAL WITHHOLDING OF KITCO'S ITC AND ITR AND ITS ILLEGAL ATTEMPT TO SET-OFF SAID ITC AND ITR WITH ITS CONTINGENT CLAIM

38. Kitco underlines that not only has the ARQ issued the Notices of Assessment (R-2) and initiated the above-mentioned enforcement measures but, since January 2010, the ARQ, in the wake of its Contingent Claim, refuses to pay to Kitco all ITC and ITR amounts that Kitco is entitled pursuant to its monthly GST and QST reports;
39. With the issuance in November 2010, January 2011 and February 2011 of its Notices of Assessment (R-2), the ARQ effectively set-off said ITC and ITR, then accrued to the benefit of Kitco, against its Contingent Claim and systematically continued to confiscate them thereafter in response to the GST and QST reports filed by Kitco on a monthly basis;
40. This entails a significant loss of liquid earnings for Kitco;
41. Such a loss in earnings obviously has a significant negative impact as it makes it impossible for Kitco to operate its scrap gold business profitably;
42. Indeed, while for the fiscal year ended on March 31, 2011, this scrap gold purchasing division of Kitco generated \$640,574,826.71 in revenue, said revenue decreased to \$41,081,044.73 for the fiscal year ended on March 30, 2012 and to \$14,385,485.67 for the fiscal year ending on March 30, 2013, the whole as a direct consequence of the confiscation by the ARQ of the ITC and ITR amounts to which Kitco is entitled;
43. In the fall of 2011, Kitco requested that the ARQ confirm its position regarding the possibility of consenting to the reimbursement of the ITC and ITR;
44. On or about October 17, 2011, the ARQ, through its attorneys, denied Kitco's request in the following terms:

« Après avoir évalué la demande de votre cliente, l'ARQ continuera d'effectuer les affectations prévues à l'article 31 de la Loi sur l'administration fiscale et à l'article 318 de la Loi sur la taxe d'accise.

Ainsi, les remboursements auxquels votre cliente peut avoir droit en raison de ses demandes de RTI et de CTI continueront de faire l'objet d'une affectation au paiement de ses dettes, incluant les dettes résultant des cotisations émises en matière de TVQ et de TPS avant le moment où l'ordonnance initiale a été rendue par le

tribunal en vertu de la Loi sur les arrangements avec les créanciers des compagnies (et ce, tel que le prévoit l'article 21 de cette loi).»

The whole as more fully appears from the letter addressed to the undersigned attorneys by the ARQ's attorneys dated October 17, 2011 and filed in support hereof as **Exhibit R-6**;

45. On or about July 5, 2012, and in accordance with the Claims Process Order rendered by this honourable Court on April 18, 2012, the ARQ filed proofs of claim (for itself and on behalf of the AGC) in connection with its Contingent Claim. Copies of said proofs of claim are filed in support hereof as **Exhibit R-7**;
46. The proofs of claim filed by the ARQ did not include any breakdown of its alleged Contingent Claim, thus making it impossible for Kitco and the Monitor to determine, *inter alia*, the exact amounts of ITC and ITR duly owed to Kitco and that were, in effect, applied by the ARQ in reduction of its Contingent Claim, both before and after filing of Kitco's notice of intention pursuant to the BIA;
47. After numerous requests by Kitco and the Monitor to be provided with said information, the ARQ finally remitted to the Monitor, on or about October 15, 2012, a more detailed statement of account with respect to its proofs of claim, which is filed in support hereof as **Exhibit R-8** (the "**Amended Statement of Account**");
48. On or about March 8, 2013, the ARQ provided the Monitor, at the latter's request, with additional details and information pertaining to its proofs of claim, the whole as more fully appears from a letter addressed by the ARQ's attorney to the Monitor's attorney, dated March 8, 2013, and from the documents attached thereto and filed in support hereof *en liasse* as **Exhibit R-9** (the "**Additional Information**");
49. With the Amended Statement of Account and the Additional Information, the ARQ confirmed that, from the issuance of its Notices of Assessment (R-2) in November 2010 and in January and February 2011 to the filing by Kitco of a notice of intention pursuant to the BIA on June 8, 2011, it accepted and then set-off ITC and ITR duly earned by and owed to Kitco against its pre-filing Contingent Claim, in the amount of \$1,861,887.06 and of \$2,892,769.45 respectively;
50. With the remittance of the Amended Statement of Account and Additional Information to the Monitor, the ARQ further admitted that, between the filing of Kitco's notice of intention on June 8, 2011 and September 2012, namely during the post-filing period, it accepted and then set-off ITC and ITR duly earned by and owed to Kitco in the amount of \$132,231.16 and of \$710,508.76 respectively, against its pre-filing Contingent Claim;
51. In addition, it is obvious that since October 2012, the ARQ continues to apply the ITC and the ITR accruing to the benefit of Kitco in payment of its pre-filing Contingent Claim;

52. Indeed, although the ARQ, since October 2012, neglects or refuses (without providing any justification to Kitco) to respond to Kitco's monthly GST and QST reports with respect to the ITR (contrary to what the ARQ normally does, through the issuance of notices of assessment whereby it confirms its acceptance or refusal of the ITC and ITR claimed), the fact remains that both the ITC and ITR requested by Kitco pursuant to the said monthly GST and QST reports are not being paid by the ARQ;
53. In addition, as mentioned in paragraph 44 above, the ARQ made the following general statement, through its attorneys, on or about October 17, 2011 “(...) *les remboursements auxquels votre cliente peut avoir droit en raison de ses demandes de RTI et CTI continueront de faire l'objet d'une affectation au paiement de ses dettes, incluant les dettes résultant des cotisations émises en matière de TVQ et de TPS avant le moment où l'ordonnance initiale a été rendue par le tribunal en vertu de la Loi sur les arrangements avec les créanciers des compagnies (...)*”;
54. The only exception that the ARQ made to the foregoing occurred in the spring of 2012 when the ARQ not only accepted the ITC generated for the reporting period of February 2012 in the amount of \$82,512.34 but effectively paid the said amount to Kitco, the whole as more appears from a summary of (re)assessment dated April 12, 2012 and from a cheque from “Finances Québec” dated April 19, 2012, made to the order of Kitco, in the amount of \$82,512,34 filed in support hereof *en liasse* as **Exhibit R-10**;
55. However, the ARQ, through its attorney, was quick to clarify that “Ce paiement a été effectué par erreur et ne constitue pas un changement de politique de la part de notre cliente, ni une admission quelconque relative à la validité de la compensation dans les circonstances. Comme vous le savez, cette question doit être débattue dans le cadre d'une requête dont nous attendons toujours la signification. Notre cliente réserve tous ses droits relativement à la somme ci-avant mentionnée et contestera toute tentative de soulever ce paiement à l'encontre de sa position.”, the whole as more fully appears from a letter addressed to the undersigned attorneys by Heenan Blaikie on May 23, 2012 filed in support hereof as **Exhibit R-11**;
56. The ITC and ITR accrued to the benefit of Kitco and evidently applied by the ARQ in partial payment of its pre-filing Contingent Claim, between October 2012 and May 2013, amount to \$63,051.44 and \$196,704.89 respectively, the whole as more fully appears from Kitco's monthly GST and QST reports addressed to the ARQ from October 2012 to April 2013 filed in support hereof *en liasse* as **Exhibit R-12**;
57. Furthermore, the ARQ confirms in its Amended Statement of Account and Additional Information that ITR in the amount of \$47,051,044.47 and ITC in the amount of \$29,880,336.78 claimed by Kitco in 2010 and 2011 were simply refused and never disbursed by the ARQ (“refusé non décaissé”) as opposed to having been granted and then applied by the ARQ in partial payment of its Contingent Claim (set-off or affectation);
58. Indeed, to Kitco's understanding, these ITR and ITC refused and never disbursed by the ARQ, totalling more than \$76,000,000, relate to scrap gold purchases made by Kitco from goldsmith's companies that, according to the ARQ's allegation, are involved in a fraudulent scheme to wrongfully avoid the remittance of the GST and QST paid to them by Kitco or others;

59. Once again, Kitco emphasizes that the ARQ refused and did not disburse to Kitco (by way of set off or otherwise) the said ITC and ITR in excess of \$76,000,000 notwithstanding the fact that the ARC knows and does not contest the fact that the GST and QST relating to each and every scrap gold purchase transaction made by Kitco with these Goldsmith's companies have always been paid to them, by cheque or by bank transfer;
60. In summary, the following is a breakdown of the ITR and ITC illegally confiscated by the ARQ for its benefit or on behalf of the AGC:

	ITR (QST)	ITC (GST)
Set-off before June 8, 2011	\$2,892,769.45	\$1,861,887.06
Set-off after June 8, 2011 until September 2012	\$710,508.76	\$132,231.16
Set-off after September 2012 until May 2013	\$196,704.89	\$63,051.44
ITR and ITC refused and never disbursed to Kitco by the ARC in 2010 and 2011	\$47,051,044.47	\$29,880,336.78

61. As it appears from the ARQ's contestation (paragraph 72b)) and the ARC's contestation (paragraph 71), the ARQ and the ARC admit that the ITR and the ITC accepted and set-off after June 8, 2011 until November 2014 amount to \$1,259,089.28 and \$325,980.81, for a total of \$1,585,070.09;
62. At the hearing on the present motion, the parties undertook to confirm to this Court the updated amounts of the "post-filing" ITR and ITC accepted and set-off by the ARQ and the ARC, as of November 30, 2015. They are as follows:
- ITR (QST) from June 8, 2011 to November 30, 2015 : \$1,443,713.16
 - ITC (GST) from June 8, 2011 to November 30, 2015 : \$335,866.78
 - Total: \$1,779,579.94
63. The ITR and ITC in the amount of \$47,051,044.47 and \$29,880,336.78 refused and never disbursed to Kitco (by way of set off or otherwise) by the ARQ are currently being claimed by Kitco pursuant to its *Motion to institute proceedings in damages and obtain remedies pursuant to the Canadian Charter of Rights and Freedom and the Charter of Human Rights and Freedom* instituted on or about June 6, 2012 against the ARQ, the AGC and the Attorney General of Quebec in the Superior Court of Quebec file number 500-17-072346-128, a copy of which is filed in support hereof as **Exhibit R-13**;
64. However, in the event that the ARQ modifies its decision with respect to the said "refused and never disbursed" ITC and ITR and accepts them, in whole or in part, and

thereafter apply same in partial payment of its Contingent Claim, then Kitco will amend its proceedings to attack said compensation and to request, pursuant to the present Motion, the payment of these ITC and ITR;

64.1 With respect to the ITC and ITR accepted by the ARQ and set off prior to the filing of Kitco's notice of intention on June 8, 2011, Kitco has opted to no longer claim same within the scope of the present motion for the following reasons:

- a) These amounts are already claimed pursuant to Kitco's action for damages (R-13);
- b) The BIA (and thereafter, the CCAA), which render inoperative the provisions of the tax legislation deeming due and payable the ARQ's and ARC's claims, only came into play with the filing by Kitco of its notice of intention on June 8, 2011;
- c) While Kitco continues to believe that the ARQ's and the ARC's "pre-filing" set-off nevertheless constitutes, under the circumstances of this case, a fraudulent preference under both the BIA and CCAA, the debate on that point will require the presentation of extensive and complex evidence, while the parties have agreed before this Court, on June 18, 2015, to limit the debate, for the time being, to specific questions of law;

BASIS FOR RELIEF REQUESTED

- 65. Pursuant to sections 40 CCAA and 4.1 BIA, the CCAA and the BIA are binding on Her Majesty in right of Canada or a province;
- 66. The ARQ's Contingent Claim, if proven, will constitute, pursuant to section 37 CCAA and 86 BIA, an unsecured claim;
- 67. In addition, said claim, as it is vigorously contested by Kitco, is contingent and, as a consequence, uncertain, not liquid and unenforceable ("not exigible") under the general principles of law;
- 68. Section 21 CCAA and sub-section 97(3) BIA provide that:

« The law of set off or compensation applies to all claims made against a Debtor company (or against the estate of the bankrupt) and also to all actions instituted by it (or by the trustee) for the recovery of debts due to the company (or to the bankrupt) in the same manner and to the same extent as if the company (or the bankrupt) were plaintiff or defendant, as the case may be. »

- 69. The law of set-off or compensation, applicable in the province of Quebec, is codified in articles 1672 to 1682 C.c.Q.;
- 70. More particularly, pursuant to article 1673 C.C.Q., the compensation of two debts is possible only if they coexist and they are both certain, liquid and exigible;
- 71. Clearly, since the ARQ's Contingent Claim possesses none of the attributes required by article 1673 C.C.Q., it cannot be set-off with the ITC and ITR due to Kitco, pursuant to

the general principles of compensation applicable in the province of Quebec;

72. The ARQ, obviously conscious of the foregoing, relies, rather, on Section 31 of the *Tax Administration Act*, Chapter A-6.002 (the “**TAA**”) and 318 of the Excise Tax Act, R.S.C., 1985, c.E-15 (“**ETA**”), which, in the present instance, the ARQ attempts to apply in conjunction with Sections 27.0.1 and 95 TAA and 1014 of the Taxation Act, Chapter I-3 (“Taxation Act”) as well as Sections 299(3) and (4) and 315 ETA;
73. Section 31 TAA provides that “when a person entitled to a refund by reason of the application of a fiscal law (such as ITC and ITR) is also a debtor under such a law or about to become so, the Minister may apply such refund to the payment of the debt of that person”;
- 71.1 Section 27.0.1. TAA provides that where a notice of assessment is sent to a person, the duties, interest and penalties mentioned in the notice and still outstanding are payable without delay to the Minister upon the sending of the notice even if the assessment is the subject of an objection, an appeal or a summary appeal;
74. Section 95 TAA provides that Sections 1000 to 1079.16 of the Taxation Act apply to returns, assessments, payments, refunds, procedures and evidences in matters contemplated by a fiscal law;
75. As a consequence, Section 1014 of the Taxation Act applies to assessments pertaining to QST and any related ITR and provides that: “*An assessment shall, subject to being varied or vacated on an objection, appeal or summary appeal and subject to a reassessment be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment, or in any proceeding relating thereto*”.
76. In addition, pursuant to Section 31.1 TAA, the ARQ, after proceeding with the allocation provided for in Section 31 TAA, may apply the remainder of the refund to which a person is entitled under the ACT respecting the Quebec Sales Tax to the payment of a debt owed by the person under part IX of the ETA (GST);
77. Section 318 ETA provides that “where a person is indebted to Her Majesty in right of Canada under this Part, the Minister may require the retention by way of deduction of set-off of such amount as the Minister may specify out of amounts that may be or become payable to the person by Her Majesty in right of Canada”;
78. Pursuant to Section 299(3) and (4) ETA, an assessment is deemed to be valid and binding, notwithstanding any error, defect or omission therein, and such, until it is reassessed or vacated as a result of an objection or appeal;
- 76.1 In addition, pursuant to Section 315 ETA, any amount remaining unpaid following the issuance of a notice of assessment is payable forthwith to the Receiver General and the Minister of National Revenue is entitled to take collection actions in respect of any such amount;
79. The combined effect of these self-serving provisions, available only to the ARQ and the AGC, is to broadly extend the scope of application of compensation as it allows the ARQ to apply amounts duly owed by them to the tax debtor in payment of any contingent claim they may have against said tax debtor in connection with GST and QST and that is

“deemed valid and binding” without regards to the fact that they are contested;

80. In other words, sections 27.0.1, 31 TAA and 31.1 TAA and 1014 Taxation Act, as well as Sections 299(3) and (4), 315 and 318 ETA deem any such contingent claim of the ARQ and AGC to be certain, liquid and enforceable while, in reality and in accordance with the general principles of law, it is not the case;
81. Kitco respectfully submits that these provisions of the TAA, Taxation Act and ETA are inapplicable and, to the extent necessary, inoperative, of no force, unconstitutional and invalid in an insolvency context under the BIA or the CCAA, to the extent that said provisions are being used by the ARQ to justify the compensation of any contingent claim it may have against the Debtor with tax refunds owed to the latter;
82. Indeed, Sections 97 (3) BIA and 21 CCAA only authorize the compensation of claims where the requirements established by the law of set-off are met (in the province of Quebec, article 1673 C.c.Q.). These sections do not allow the application of self-serving provisions of tax statutes that solely benefit the tax authorities and that have the effect of broadly extending the scope of application of the general principles of law governing compensation;
83. In addition, since Sections 97 (3) BIA and 21 CCAA are exceptions to the rule of equality between creditors, they must be interpreted narrowly;
84. To interpret Sections 97 (3) BIA and 21 CCAA as authorizing statutory compensation rights that solely benefit the tax authorities and that lack the attributes of the provincial law of set-off would be to grant the equivalent of a security to the tax authorities and to permit the payment of their unsecured **and** contingent claims, the whole contrary to Sections 86 BIA and 37 CCAA;
85. On a subsidiary basis, and as it will be further argued at the hearing of the present motion, Sections 97(3) BIA and 21 CCAA do not allow the compensation of a Debtor's pre-filing debts with its post filing claims;
86. In addition, Kitco respectfully submits that the ARQ and the AGC should also be condemned to reimburse any and all ITC and ITR accrued to the benefit of Kitco and withheld prior to the filing by Kitco of a notice of intention pursuant to the BIA on June 8, 2011, even if Section 97 (3) BIA (and, shortly thereafter, Section 21 CCAA) only came into play at that time;
87. Indeed, the ARQ exercised its alleged rights and withheld the ITC and ITR due to Kitco concurrently and subsequently to the issuance of its notices of assessment of approximately \$313,000,000 (R-2), the direct effect of which was to knowingly place Kitco in an insolvency situation;
88. In doing so, the ARQ created Kitco's technical insolvency and, at the same time, confiscated ITC and ITR due to Kitco in an attempt to secure its own unsecured and Contingent Claim, the whole against Kitco's will and knowing full well that Kitco was vigorously contesting said claim;
89. In addition, the exercise by the ARQ (for itself and on behalf of the AGC) of its alleged rights of set-off prior to June 8, 2011 equates to preferential payments that the ARQ

made to itself and the AGC (or self-controlled transactions) while simultaneously putting Kitco in an insolvency situation;

90. Finally, Section 30.3 TAA provides that :

« 30.3. If a person becomes bankrupt within the meaning of the Bankruptcy and Insolvency Act (Revised Statutes of Canada, 1985, chapter B-3) or files a proposal or notice of intention to file such a proposal under that Act or if an order is made in respect of the person in accordance with the Companies' Creditors Arrangement Act (Revised Statutes of Canada, 1985, chapter C-36), the following rules apply:

(a) any refund applied for by the person following the filing of a return or an application, for a reporting period or for a taxation year ending on or before the date of bankruptcy, the date of filing of the proposal or notice of intention to file such a proposal or the date on which the order is made, as the case may be, is equal to zero; and

(b) no refund or amount to which the person would have been entitled had the person applied therefor for a period or a taxation year ending on or before the date of bankruptcy, the date of filing of the proposal or notice of intention to file such a proposal or the date on which the order is made, as the case may be, may be applied for in a return filed for a period or a taxation year ending after that date. »

91. To the extent that the ARQ would attempt to rely on Section 30.3 TAA to deny Kitco's rights to the payment of ITCs and ITRs accrued and duly earned prior to the filing of its notice of intention under the BIA on June 8, 2011, Kitco respectfully submits that said Section 30.3 TAA is inapplicable, inoperative, of no force and effect and, to the extent necessary, invalid and unconstitutional in an insolvency context under the BIA and the CCAA, to the extent that said provision is being used by the ARQ to justify the non payment of amounts clearly due to Kitco and forming part of its assets that cannot, in an insolvency context, simply be deemed to "equal" zero dollar.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present Motion;

CONDEMN the Agence du Revenu du Québec to pay to Kitco, with such payment being made directly to the Monitor, in trust, the sum of \$1,443,713.16 representing the input tax refunds to which Kitco is entitled up to and including November 30, 2015, together with interest at the legal rate and the additional indemnity calculated from the date on which each of the said input tax refunds became due;

CONDEMN the Attorney General of Canada to pay to Kitco, with such payment being made directly to the Monitor, in trust, the sum of \$335,866.78 representing the input tax

credits to which Kitco is entitled up to and including November 30, 2015, together with interest at the legal rate and the additional indemnity calculated from the date on which each of the said input tax refunds became due;

ORDER that the Monitor shall retain the total sum of \$1,779,579.94 referred to above in trust until further order of this Court;

DECLARE inapplicable, inoperative, of no force and effect or unconstitutional and invalid sections 27.0.1, 30.3, 31 and 31.1 of the *Tax Administration Act*, Chapter A-6.002 as well as Section 1014 of the Taxation Act, Chapter I-3, to the extent that they are being used by the Agence du Revenu du Québec to compensate input tax refunds due to a tax debtor with a contingent claim and where the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangements Act* applies to said tax debtor;

DECLARE inapplicable, inoperative, of no force and effect or invalid sections 299(3) and (4), 315 and 318 of the *Excise Tax Act*, R.S.C. 1985, c.E-15, to the extent that they are being used by the Canada Revenue Agency to compensate input tax refunds due to a tax debtor with a contingent claim and where the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangements Act* applies to said tax Debtor;

THE WHOLE with costs.

MONTREAL, December 17, 2015

(S) GOWLING LAFLEUR HENDERSON

GOWLING LAFLEUR HENDERSON LLP

Attorneys for Petitioner