CANADA

SUPERIOR COURT
(Commercial Division)

PROVINCE OF QUEBEC
DISTRICT OF ST-FRANÇOIS

N°: 450-11-000167-134

(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. c. C-36, as amended)

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

MONTREAL, MAINE & ATLANTIC CANADA CO. (**MONTREAL, MAINE & ATLANTIQUE CANADA CIE**)

Debtor

and

RICHTER ADVISORY GROUP INC. (**RICHTER GROUPE CONSEIL INC.**)

Monitor

and

CANADIAN PACIFIC RAILWAY COMPANY

Petitioner

PLAN OF ARGUMENT OF THE COURT APPOINTED REPRESENTATIVES OF CLASS MEMBERS IN RESPONSE TO THE MOTION BY CANADIAN PACIFIC RAILWAY COMPANY ON JURISDICTION AND REVIEW OF THE INITIAL ORDER

PART I. OVERVIEW

1. Guy Ouellet, Serge Jacques and Louis-Serges Parent, the court-appointed representatives of the class defined in the order of this court dated April 4, 2014, as amended (the "**Class Representatives**"), oppose the motion brought by Canadian Pacific Railway Company ("**CP**") seeking to block these proceedings on the basis that this Court lacked jurisdiction to make the Initial Order almost two years ago on August 8, 2013 (the "**CP Motion**").

2. The Class Representatives submit that the CP's Motions should be dismissed on the basis of the facts and arguments presented by the Debtor in its argument plan, which the Class Representatives adopt in their entirety. In summary:

(a) the jurisdictional issue raised by CP is *res judicata*, the time for appeal has long passed, and the "comeback clause" in the Initial Order is of no assistance to CP;

(b) the issues surrounding the original jurisdiction of the court are now moot—even if it could once be argued that the Debtor should have been excluded from the CCAA, by virtue of being a railway, the Debtor ceased being a railway once it completed the sale of its assets in January 2014;[1]

(c) the Debtor never was a railway within the meaning of the CCAA; and,

(d) the jurisdiction decision is not *ultra petita* because the Debtor expressly asked the court to "DECLARE that the Petitioner is a Debtor company to

[1] *Borowski v Canada (Attorney General)*, 198 CarswellSask 241, [1989] 1 SCR 342; *AH (MTL) inc, Re* 2009 QCCA 2066.; *PPD Solution de mousse inc. c. Quebec (Commission des relations du travail)* 2013 QCCA 737; *Siemens Canada ltée c. Groupe Enerstat inc.* 2014 QCCA 2023.

which the CCAA applies"—the issue could not have been raised more directly.

PART II. THE FACTS

3. The Class Representatives provide the following perspective on behalf of the class members whom they represent.

4. In this case, CP was engaged in the transport of mislabelled, highly explosive Bakken shale liquids over dilapidated rail lines that CP had previously owned and entrusted this shipment to MMA, who at the time had one of the worst safety records of any railway in North America. In doing so, CP put in motion a series of events that led to the most devastating railway disasters in the history of Canada.

5. For nearly two years, lawyers, government officials, the courts and others have worked to resolve the class action, various actions initiated in the United States and the CCAA process.

6. The order which has given rise to CP's jurisdiction motion dates back to August 2013. At that time, the Debtor applied to the court to commence proceedings under the CCAA (the "**CCAA Application**").

7. CP was fully and completely apprised of the CCAA Application, their lawyers were in the court room in Montreal during the CCAA Application and have been on the Service List since the inception of this proceeding and has been an active participant throughout the CCAA proceedings in Sherbrooke. CP, until now, has objected to none of it.

8. Now, at the penultimate stage of the CCAA proceedings, on the heels of a unanimous vote of creditors at Lac Megantic on June 9, 2015 and following the announcement of a further contribution by World Fuel Services of $135 million bringing the total settlement fund to $431 million, when the Debtor is on the cusp of completing its restructuring, CP has declared, in effect, that there has been an important misunderstanding; this Court has no jurisdiction; and now its judgments should all be set aside.

9. At the 2013 hearing of the CCAA Application, the presiding judge expressly asked the Debtor to address the issue of whether it was a "company" within the meaning of the CCAA, which excludes a "railway". After hearing extensive submissions, the court made an order declaring that the Debtor "is a debtor company to which the CCAA applies," and stayed proceedings against the Debtor until September 6, 2013.[2] CP's counsel was present at the hearing.[3]

10. Since the CCAA Application and subsequent to its determination of jurisdiction, the CCAA Court has rendered over 40 different orders upon which the parties and stakeholders have relied, including the following:

(a) The Court has extended stay of proceedings against the Debtor on September 4, 2013, October 9, 2013, January 23, 2014, February 11, 2014, February 25, 2014, March 12, 2014, April 29, 2014, June 30, 2014, September 24, 2014, November 24, 2014, January 12, 2015, and April 15,

[2] Initial Order para. 4, 7.
[3] See paragraph 4 of the Plan D'Argumentation de MMAC.

2015, with the result that nobody has been able to pursue legal proceedings against the Debtor, its directors and officers or their insurers;

(b) The Court has entered a cross-border protocol to coordinate these proceedings with Chapter 11 proceedings brought by the Debtor's parent company before the United States Bankruptcy Court in Maine, and has communicated with the US Bankruptcy Court pursuant to the protocol;

(c) Acting in cooperation with the US Bankruptcy Court, the Court has authorized a process leading to the sale of the Debtor's assets, and ultimately vested title in the purchaser, with the result that the purchaser has been operating the business for over a year;

(d) Acting in cooperation with the US Bankruptcy Court, the Court has approved and given effect to the settlement of certain insurance claims; and,

(e) The Court has authorized the distribution of the Debtor's funds in priority to the claims of the Debtor's secured creditors who, but for these proceedings, would otherwise have been entitled to the monies;

11. Most importantly, from the perspective of the Class Representatives, the Court, based upon its finding of CCAA jurisdiction:

(a) Approved and implemented a process for the completion of proofs of claim against the Debtor (the "Claims Process"), resulting in a tremendous expenditure of time, effort and expense on the part of the Class

Representatives and their counsel and the many thousands of victims of the derailment in these proceedings; and,

(b) ordered and presided over an unprecedented cross-border settlement conference conducted jointly with the US Bankruptcy Court in Bangor, Maine, resulting in a lengthy process of good-faith negotiations, among most of the stakeholders in these proceedings, including the Debtors, the Chapter 11 Trustee, government representatives, the Class Representatives, representatives of other victims and CP's counsel, with a view to formulating a CCAA Plan, which has now been filed with the Court, and received the unanimous approval of the creditors present and voting at the creditors meeting.

12. CP now announces that the CCAA does not apply to the Debtor because MMA is not a "company" within the meaning of that statute. CP has, presumably harboured this view since the outset of this proceeding, when this same jurisdictional issue was decided.

13. A worse case of "waiting in the weeds" could not be imagined.

14. CP maintains, they did not seek to revisit the issue until now because these proceedings did not really affect them—notwithstanding:

(a) CP is itself a creditor of the Debtor;

(b) CP's claims against the Debtor were stayed by the Initial Order and were made subject to the Claims Procedure Order;

(c) the Debtor has been transparent throughout that it intended to restructure the claims against it by establishing a claims process, and obtaining contributions third party entities including from CP's co-defendants in the Class Action to fund a CCAA plan of compromise and arrangement that would release the contributors from their liability;

(d) CP was "affected enough" to have a lawyer present, in person or by telephone, at virtually every court appearance, including the cross-border case conference/settlement conference held in Bangor, Maine.

PART III. LAW AND ARGUMENT

15. Through the Claims Process and CCAA Plan negotiations, Class Representatives have disclosed information, made concessions and irreversibly altered not only their own positions, but the bargaining position of the entire Class whom they represent. This cannot be undone. We cannot simply pretend that it is still August 8, 2013, and nothing has changed. Very substantial and irreparable prejudice will be suffered by the Class Members in the event the CCAA process is set aside.

16. Other stakeholders, no doubt, are similarly affected. For example, if this court lacks jurisdiction, what is the effect of the order vesting title to Debtor's undertaking pursuant to the CCAA? What if the purchaser no longer wants the business? What if they want to renegotiate the price? What if the Debtor wants to renegotiate the price? What if another bidder steps forward? Who is entitled to the profits earned in the intervening period? Who must bear the losses? Who is the employer? What is the impact on the US component of the sale and the US proceedings?

17. As previously observed by this court, litigation is not a game of “deux balles, meilleure balle”: a rule that allows a litigant to raise jurisdictional issues at any stage of the proceedings is not the same as a rule that allows an endless (and timeless) number of “do-overs” after the issue has been put squarely before the court, and adjudicated upon.

18. Where a court has decided an issue, an unhappy litigant may move before the court in a timely way to seek reconsideration of the decision if it was made without notice to them, and/or he may appeal. If the unhappy litigant does neither, then order is final and stakeholders are entitled to rely upon it, even if it is incorrect.[4] At best, this is a thinly disguised appeal, brought well outside any appeal period.

19. In real-time restructuring cases, the integrity and certainty of the process is paramount.[5] The finality of judgments must be respected. CP was served with notice of the application for CCAA protection and could have returned to court in a timely way to seek reconsideration of the jurisdictional issue; alternatively, CP could have appealed. The option that is not and has never been legitimately available to CP or any litigant is to lay in the weeds for nearly two years and then, when faced with a Plan that they don’t like, attempt to mount a collateral attack on the Initial Order, in an effort to block the proceedings to the prejudice of other stakeholders.

20. CP cannot rely on a “comeback clause” in the Initial Order at this late stage in an effort to block the proceedings. Courts have made it clear that if a party is to rely on a

[4] *Dorion v. Roberge* [1991] 1 S.C.R. 374 at para 72.
[5] *Royal Bank of Canada v. Soundair Corp.,* [1991] O.J. No. 1137 (C.A.). *AbitibiBowater Inc., Re* 2010 QCCS 1742 at paras 35-36.

comeback clause, it must be done in a timely fashion.[6] By participating in the CCAA proceedings for as long as they have, CP cannot now decide that the CCAA Court does not have jurisdiction. It is submitted that the within motions brought by CP represent a flagrant abuse of process.

21. The Class Representatives respectfully request that this Court dismiss the CP Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Lac-Mégantic, June 12, 2015

(s) Daniel Larochelle
ME DANIEL E. LAROCHELLE
Attorney for the Class Action Plaintiffs

Montréal, June 12, 2015

(s) Jeff Orenstein
CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein

[6] *General Chemical Canada Ltd., Re* 2005 CarswellOnt 210, 7 C.B.R. (5th) 102 at para 2.