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 Company

and

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

Monitor

and

GUY OUELLET, **SERGE JACQUES** and **LOUIS-SERGES PARENT**

Court Appointed Representatives of the Class Members

COURT APPOINTED CLASS REPRESENTATIVES' ARGUMENT PLAN IN SUPPORT OF THE SANCTION OF THE AMENDED PLAN OF ARRANGEMENT AND COMPROMISE

A. OVERVIEW

1. Guy Ouellet, Serge Jacques and Louis-Serges Parent, acting in their capacity as court-appointed representatives for the class of derailment victims described in the order of this Court dated April 4, 2014, as amended (the "**Class Representatives**") support the Debtor's motion for an order sanctioning the Amended Plan of Arrangement and Compromise, served June 8, 2015 (the "Plan").

2. The technical requirements of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") are satisfied. In particular, the CCAA is not limited in the manner in which Canadian Pacific Railway Ltd. ("**CP**"), the only creditor opposing the plan, suggests.

3. The CCAA is remedial legislation that must be broadly interpreted with a view to attaining its objective of facilitating compromises between insolvent companies and their creditors. That objective is plainly being achieved in the present case. Although stakeholders will be dealing with the consequences of the train derailment that took place on July 6, 2013 in Lac-Mégantic, Quebec (the "**Train Derailment**") for some time, the immediate economic tragedy surrounding the Debtor will be largely resolved by the Plan.

4. The terms of the Plan are fair and reasonable:

    a) As demonstrated by the creditors' unanimous support for the Plan, the amounts being paid to creditors are quite reasonable having regard to the alternatives; and,

    b) The releases contemplated by the Plan are provided in exchange for meaningful financial contributions provided by the beneficiaries of the releases, and, as such, they are a necessary feature of the Plan;

5. CP's complaint that the Plan is somehow defective because it does not release claims against the Debtor or against CP is part of an ill-conceived, last-minute tactical argument intended to benefit CP's unique interests as the last remaining Respondent in the Class Action; CP's argument does not address the interests of creditors generally or even CP's interests as a creditor.

6. The Class Representatives adopt and wholly support the Debtor's submissions. These submissions in support of the Plan focus on the main themes of CP's opposition to the Plan. Notably:

    a) Whether these proceedings are consistent with the objectives intended to be achieved by the CCAA;

    b) The propriety of the release structure in the Debtor's Plan, including whether the absence of a release in favour of a non-settling party (namely, CP) is a basis to refuse to sanction the Plan; and,

    c) Whether this case raises a constitutional question.

B. The Objectives of the CCAA and Their Application to This Case

7. As is made clear by the full title of the statute and the decisions of this Court in the *AbitibiBowater* case (among others), the objective of the CCAA is "to facilitate compromises and arrangements between companies and their creditors".[1]

8. The statute is to be given a broad, liberal interpretation; it is deemed remedial, and should be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object.

9. As has been held by this court, by reference to the decision of the Court of Appeal for Ontario in the *Metcalfe & Mansfield* case (sometimes cited as "*ATB Financial"*): **[TAB 1]**

> [44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), 1998 CanLII 14907 (ON SC), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), 1995 CanLII 7370 (ON SC), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".
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> [48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:
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> > The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and

[1] *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended; *AbitibiBowater Inc., Re.* 2009 QCCS 5482 at paras. 42-46 [*AbitibiBowater*].

> being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Québec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.[2] [Emphasis added]

10. As recently noted in the case of *Sun Indalex Finance, LLC v. United Steelworkers* **[TAB 2]**, by Justice Cromwell (writing for the majority in the result), the CCAA reflects society's interest in providing "a constructive solution for all stakeholders when a company has become insolvent."[3]

11. Clearly, this objective is most easily understood and expressed in the context of a going-concern restructuring in which the debtor company is able to reach an accommodation with its creditors, in the form of a plan, without divesting itself of the entirety of its business.

12. Thus, for example, in *Century Services Inc. v. Canada* **[TAB 3]**, Justice Deschamps held for the majority that the purpose of the CCAA "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[4] Later in her decision, she observed:

> Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (ibid., at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.[5]

13. Similarly, in the seminal decision of the Court of Appeal for British Columbia in the case of *Chef Ready Foods Ltd*. v. *Hongkong Bank of Canada* **[TAB 4]** the court had this to say about the CCAA:

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[2] *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 at paras. 44 & 48 [*Metcalfe & Mansfield*]; cited with approval in *AbitibiBowater, supra* note 1, at para. 42.
[3] *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6 at para. 205 [*Indalex*].
[4] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 15.
[5] *Ibid*., at para. 18.

The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent, liquidation followed because that was the consequence of the only insolvency legislation which then existed -- the *Bankruptcy Act*, R.S.C. 1927, c. 11, and the *Winding-up Act*, R.S.C. 1927, c. 213. Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement *under which the company could continue in business*. These excerpts from an article by Stanley E. Edwards (1947) 25 Can. Bar Rev. 587, of 1947 Vol. 25 of the Canadian Bar Review, entitled "*Reorganizations Under the Companies' Creditors Arrangement Act*," explain very well the historic and continuing purposes of the Act:

> "It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)[6]

14. However, as this court has already recognized in its judgment in these proceedings dated February 17, 2014 (the "**February 2014 Judgment**"), the application of the CCAA is not limited only to those cases in which the solution involves the debtor continuing in business.[7]

15. There are many cases in which the objective of the CCAA is achieved through the sale of Debtor's going concern, in what has commonly become known as a

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[6] *Chef Ready Foods Ltd*. v. *Hongkong Bank of Canada*, 1990 CanLII 529 (BC CA) at pages 10-12.

[7] *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co. (MMA)) (Arrangement relatif à)*, 2014 QCCS 737 at paras. 57-95 [*Montréal, Maine & Atlantique Canada*].

"Liquidating CCAA" proceeding. Indeed, more careful statements of the purpose of the CCAA focus on the survival of *the business* as opposed to *the debtor*. For example, in the *AbitibiBowater* case **[TAB 5]**, Justice Gascon (as he then was), stated:

> [46] Accordingly, in any application brought under the CCAA such as this one, it is fair to say that in giving weight to broader socio-economic or public interest considerations, the Court must keep in mind the key objectives of the Act. That is, to facilitate a restructuring so as to reach a compromise between the debtor company and its creditors and allow the business to continue as a going concern.[8]

16. A number of Liquidating CCAA cases are cited by the Court in its February 2014 Judgment. Other noteworthy examples include the following:

    a) The restructuring of *Nortel Networks Corporation* **[TAB 6]**. In that case, the court authorized the sale of all of Nortel's various lines of business as going concerns, thereby preserving jobs around the world and maximizing recoveries for creditors. Notably, relying on the decision of Justice Gascon (as he then was) in the *AbitibiBowater* case, Justice Newbould expressly held (albeit in obiter dictum) that it had jurisdiction to authorize the distribution of the proceeds of sale outside of a bankruptcy and without a plan:

> [19] When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.
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> [20] The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

[8] *AbitibiBowater, supra* note 1, at para. 46.

[21] In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US$4.5 billion. In Re Nortel Networks Corp., 2012 ONSC 1213 (CanLII), 88 C.B.R. (5th) 111, Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, Rescue! The Companies' Creditors Arrangement Act, 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

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Need for a CCAA plan

[48] The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

[49] One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a pari passu basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as Stelco.

[52] It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

[53] I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken

that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process. There is no provision that requires distributions to be made under a plan of arrangement.

[54] A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

> 65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).
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> 67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.
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> 68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence. (underlining added)

[55] I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Limited (Re)*, 2014 ONSC 3393 (CanLII), Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the CCAA to do so.

[56] In *AbitibiBowater Inc.*, (Re), 2009 QCCS 6461 (CanLII), Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

> 56 The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.
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> 57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.
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> 58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[57] Justice Gascon did not accept this argument. He stated:

> 71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several

> examples of such distributions having been authorized by Courts in Canada. (underlining added)
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> [58] Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.
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> [59] There is a comment by Laskin J.A. in *Ivaco Inc., (Re)* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a CCAA process, in that case to pension plan administrators for funding deficiencies. He stated:
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> > [I]n my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.
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> [60] This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the obiter statement as being applicable. As stated by Justice Gascon , distribution orders without a plan are common in Canada.
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> [61] While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.[9]

b) The restructuring of *Sino Forest Corporation* **[TAB 7]**. In that case the overall effect of the plan was a foreclosure over certain assets allegedly held by Sino Forest's subsidiaries overseas, and the debtor entity was ultimately wound-up. Importantly, as in this case, certain dissident investors objected to the auditor and other settlements that were facilitated

[9] *Re Nortel Networks Corporation et al*, 2014 ONSC 4777 at paras. 19-21, 48-61; leave to appeal granted. The appeal has been argued and the decision is under reserve.

by the plan independently of the conveyance of the assets, on the basis that the settlements were not essential to the restructuring purpose of the proceedings. This prompted the court to observe that the settlement proceeds were the only tangible value in the Sino-Forest plan:

> [51] The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting third-party releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.
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> [58] The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See ATB Financial, supra, para. 70, as quoted above.
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> [59] In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.
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> [60] Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.
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> [61] Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be

> separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.
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> [62] Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.
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> [63] Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.[10]

c) The restructuring of *Poseidon Concepts Corporation.* This is an Alberta case much like this one. CCAA proceedings were commenced following revelations that the publicly held debtor company had overstated its receivable by over 80%. All or substantially all of the Debtor's business assets were sold as a going concern.[11] Although the proceeds of sale were insufficient to repay the debtor's senior secured lenders, the proceedings continued and mediation was ordered to facilitate the resolution of the star-burst of securities and other litigation arising from the debtor's financial misrepresentations[12]. Although it remains to be seen whether a plan will be filed in that case, and, if so, what form it will take, the stay of proceedings has been extended from time to time on the basis of the ongoing negotiations.

17. As noted by this court in its February 2014 Judgment:

> [97] Dans la recherche d'une solution, il faut garder à l'esprit les objectifs de la LACC qui doivent guider l'interprétation qu'on en fait et que Kaplan résume comme suit:
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> > « The judicial and academic pronouncements all identify the following general policy objectives: maximization of creditor recovery, minimization of the

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[10] *Labourers' Pension Fund of Central and Eastern Canada* v. *Sino-Forest Corporation*, 2013 ONSC 1078 at paras. 51 & 58-63 [*Sino-Forest*].

[11] *Poseidon Concepts Corp*., Sale Approval and Vesting Order dated June 6, 2013; Court File No. 1301-04364 (Calgary) (Alta. Q.B.); Sale Approval and Vesting Order (Real Property) dated August 16, 2013; Court File No. 1301-04364 (Calgary) (Alta. Q.B.).

[12] *Poseidon Concepts Corp.,* Mediation Order dated October 11, 2013; Court File No. 1301-04364 (Calgary) (Alta. Q.B.).

> detrimental impact upon employment and supplier, customer and other economic relationships, preservation of the tax base and other contributions the enterprise makes to its local community, and the rehabilitation of the debtor company. »[13]

18. Applying that principle to this case, there can be no serious question that these proceedings have served the CCAA's objective of allowing stakeholders "to avoid the negative consequences of liquidation," as this Court has already recognized, through the Initial Order, through the various orders extending the stay of proceedings and, most significantly, in the February 2014 Judgment. As noted by the Debtor, none of those orders were contested or appealed by CP.

19. One need simply compare the circumstances that prevailed, due to the Debtor's insolvency, on the day before the present proceedings were commenced, to the conditions that currently prevail to see that the purposes of the CCAA have been served:

AUGUST 7, 2013	**PRESENT-DAY**
MMAC's business was in distress and would likely not carry on.	The business has been conveyed into safe hands, and service continues.
Creditors and other stakeholders who depended on MMAC's rail line were at risk of losing a conduit of supply and delivery;	
MMAC's suppliers were at risk of losing a customer, and employees would be out of work.	Suppliers and employees have the opportunity for continued business or employment with the purchaser of MMAC's business.
MMAC was the subject of indeterminate claims alleged to be in the billions of dollars.	MMAC has been able to: • Determine the number of claims against it and identify the claimants; • Agree on the value of the claims against it;
The only assets available to MMAC for the purpose of funding its obligations to Derailment Victims were an insurance policy having a value of $25 million; and, contingent, unliquidated claims for contribution against various third parties related to the derailment.	MMAC has been able to assemble a fund totalling approximately $435 million to compensate derailment victims.

[13] *Montréal, Maine & Atlantique Canada*, supra note 7 at para. 97.

MMAC's derailment victims were facing the prospect of years of litigation before the receipt of any meaningful compensation.	Subject to the sanction and implementation of the Plan, and but for any appeal that may be brought by CP, funds could be distributed to derailment victims before the end of this year
MMAC's co-defendants also faced the prospect of years of litigation with uncertain outcomes, negative publicity and negative impact on their business.	Subject to implementation of the Plan, settling defendants will now be able to carry on with their business.

20. These proceedings have been and continue to be a distinct improvement on the conditions that would have prevailed had the insolvent Debtor abandoned itself to a piecemeal liquidation. Any argument that they are somehow outside the scope of the legitimate purposes of the CCAA must plainly fail.

C. The Propriety of the Release Structure of the Plan

21. The releases that are provided by the Plan are wholly justified. CP raises three issues:

    a) While admitting, as it must, that the CCAA authorizes the release of non-debtor parties, CP has chosen to argue that such releases are not justified in this case because nothing is being restructured;

    b) CP suggests that an essential feature of any restructuring is the delivery of a release to the Debtor; and,

    c) CP protests that it is not benefitting from a release.

    Each of these issues is addressed, in turn, below.

1. The Non-Debtor Releases Contemplated by the Plan are Appropriate in the Circumstances

22. The core of CP's argument is that the releases being granted by the Plan pursuant to the CCAA are not justified because there is no "restructuring" of the debtor taking place in this case. The Class Representatives respectfully disagree.

23. The word "restructuring" is not defined in the CCAA—the term does not even appear in the statute.[14] As used in the jurisprudence and learned commentary, the use of the term "restructuring" in relation to CCAA is really just a euphemism

[14] Other than in references to the *Winding-up and Restructuring Act*.

for any transaction or series of transactions serving the purposes of the Act. As a result, this argument is repetitive of the one addressed above.

24. Because, as argued above, these proceedings are properly constituted under the CCAA, there is, per force, a "restructuring" taking place. Plainly, for the reasons given above, a "restructuring" has occurred in this case:

    a) The Debtor's business has been transferred into safe hands for the benefit of its customers, suppliers, employees and the community as a whole;

    b) Through this process, the claims against the Debtor have been identified, categorized, quantified and agreed upon;

    c) Should the plan be approved, the Debtor's claims against third parties related to the derailment will be liquidated, creditors will have a substantial portion of their claims monetized, and the Debtor's balance sheet will be immediately improved to the tune of approximately $431 million.

25. We cannot predict the future of the Debtor with certainty. It is possible that the Debtor could simply continue in an insolvent state as sometimes happens following successful liquidating restructurings, as in the *Indalex* case[15], or a receivership or bankruptcy may follow as in the *Cinram* case.[16] However, in keeping with the foregoing, we can say with certainty that the Debtor's situation on the day that the Plan is implemented will be much better than it would have been without the restructuring that has been taking place.

26. The one fundamental difference between this case and a "typical" Liquidating CCAA case like *Indalex* or *Cinram* is this:

    a) In a typical Liquidating CCAA case, the debtor's main asset is its business, which can be monetized through a sale transaction, without delivering a release to the purchaser or anyone else;

    b) This case is exceptional in that the Debtor has another significant asset in addition to its business: its claim to seek contribution from various third parties for the damages caused by the Derailment (the "Contribution Claim").

27. It goes without saying that in order to be able to liquidate its "Contribution Claim", the Debtor must provide the financial contributors with releases. As such, the releases in this case are more than just "reasonably related to the restructuring at

[15] E.g., see: *Indalex, supra* note 3 at paras. 7, 18-20; *Indalex Ltd., Re*, CCAA Discharge Order dated December 19, 2013, Court File No. 09-CV-09-8122-00CL.
[16] E.g., see *Re Cinram,* Endorsement of Morawetz J. dated October 19, 2012, Court File No. CV12-9767-00CL.

issue" as required by the jurisprudence[17], they are the *sine qua non* of the restructuring.

2. The CCAA Does Not Require that the Debtor be Released

28. CP asks this Court to read into the CCAA a requirement that every Plan must include a release of the Debtor. That would be a grave mistake.

29. The CCAA contains express provisions defining the boundaries of a Plan: that for which the Plan must provide[18]; and that for which the Plan cannot provide.[19] It neither requires nor prohibits a release in favour of the debtor company.

30. The CCAA also imposes mandatory requirements in respect of the liquidation of the debtor's assets.[20] These do not include the filing of a Plan or the delivery of releases, and, as noted above, courts have held that it is acceptable to use the CCAA to liquidate and distribute the proceeds of sale without a Plan, much less a release.[21]

31. Thus, inasmuch as a CCAA plan is a contract negotiated by the stakeholders[22] it is entirely consistent with the scheme of the Act and its purpose that the inclusion of a release in favour of the debtor in a plan, where one is filed, remain a matter for negotiation between the parties. As noted by the Court of Appeal for Ontario in the *Metcalfe & Mansfield* case [already Tab 1]:

> [61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.
>
> [[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract…. In my view, a compromise

[17] *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403, denying leave to appeal from 2009 QCCS 6121; *Metcalfe & Mansfield*, *supra* note 2 at paras. 69-73, 78, 113; *Sino-Forest*, *supra* note 10 at paras. 47-48.
[18] CCAA, s-s. 6(3), (5), (6) & (8).
[19] CCAA, s-s. 5.1(2), 19(1) & (2).
[20] CCAA s.-s. 36(7).
[21] *Supra* notes 7, 13 and 14.
[22] See *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, *supra* note 17, at para. 21; and *AbitibiBowater Inc., Re*, 2010 QCCS 445 at para. 73.

> or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), 2004 CanLII 34416 (ON SC),[2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 1993 CanLII 8492 (ON SC), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.[23]

32. In the present case, the Debtor has been unable to negotiate for its release by the Plan. However, the Debtor has made the very practical decision that it is better to proceed with the Plan in its current form, than to abandon these proceedings. It is entitled to make that decision. As noted by the authorities cited at paragraphs 21 and 22 of the Debtors argument plan, the purpose of the sanction hearing is not to second guess the business decisions of the participants in the process.

33. Arguably, CP, in its capacity as a defendant in various actions, might be advantaged by a release of the Debtor, by virtue of article 1690 of the C.c.Q. If that is so, it is not a basis upon which this Court should refuse to sanction the Plan:

    a) First, the Class Representatives submit that absent extraordinary circumstances, this Court should assess the Plan having regard to its impact on *creditors, as such*. This issue has been addressed by Justice Farley in the context of the approval of a bankruptcy proposal, in the case of *Timmins Nickel Inc.* **[TAB 8]**:

> [13] The Proposal contains nothing which would prevent it from being successfully carried out subject to standard regulatory authority as to the issue of shares; Timmins has sufficient cash to pay up to $350,000 cash under the amendment. The Proposal appears to me to be favourable to the creditors generally *qua* creditors. I recognize that Marshall objects vehemently to the Proposal being approved; however it seems to me that the basis of its objection is founded in its condition *qua* litigation opponent (who would prefer to have the other side knocked out of the litigation on a practical basis, although I recognize that technically the trustee in bankruptcy could deal with it) and not *qua* creditor: see *Laserworks Computer Services Inc., Re* (1997), 48 C.B.R. (3d) 8 (N.S. S.C.) and particularly at pp.15-7 and its reliance on the statements of principle by Viscount Haldane in British America *Nickel Corp. v. M.J. O'Brien Ltd.*, [1927] A.C. 369 (Ontario P.C.) at p.371:

[23] *Metcalfe & Mansfield*, s*upra* note 2, at paras. 61-22.

> To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.[24]

In *Laserworks Computer Services Inc*. **[TAB 9]**, the Nova Scotia Supreme Court held:

> [24] If the Appellant numbered company really voted on the basis of what it, as a creditor believes would be the best interest of the creditor class, then it is entitled to so vote; but, if the motive for voting is not to benefit the class of creditors but simply an ulterior motive not related to the interests of the creditor class of which it is a member but rather is related to its own personal interest, then such a vote does not conform to the interests of the class and is not properly exercised.[25]

Laserworks Computer Services Inc. has most recently been applied by this Court in the case of *Triage T.R.I.M. ltée.* **[TAB 10]**[26]

> [78] Alfred Boivin a donc eu sa chance, avant même Benoît Girard. L'objectif d'acheter les actifs apparaît donc comme un prétexte qui masque la véritable intention d'Alfred Boivin qui est de contrer les efforts de Benoît Girard de se donner une position commerciale enviable en achetant les actions de la proposante. Il apparaît évident que la véritable intention d'Alfred Boivin n'est pas

[24] *Timmins Nickel Inc., Re,* 1998 CarswellOnt 1214 (Gen. Div.) at para. 13.
[25] *Laserworks Computer Services Inc.,* 1997 CanLII 15009 (NS SC) at para. 24.
[26] *Triage T.R.I.M. ltée, Re* 2003 CarswellQue 1273(S.C.) at para. 83-84.

d'acheter les actifs mais bien de bloquer la transaction entre la proposante et Benoît Girard.

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[83] Voici comment la Cour d'appel de la Nouvelle-Écosse s'exprime dans l'arrêt LaserWorks7 quant aux manoeuvres inappropriées :

> 65 It is undeniable that the appellant caused injury to the debtor not negligently but deliberately. The debtor made its proposal to avoid bankruptcy; bankruptcy therefore must have been seen by Laserworks as a more injurious alternative than acceptance of the proposal by the creditors. Laserworks had the heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the BIA to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the BIA. It does not qualify as "the orderly and fair distribution of (its) property." Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the purpose of the BIA. Use of the Act to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied.

[84] Le Tribunal conclut dans le même sens. À cause de l'action d'Alfred Boivin, la proposante n'a pas eu l'occasion de convaincre ses créanciers que sa proposition, de surcroît amendée, était intéressante pour eux. Le processus statutaire, démocratique, axé sur la compromission et la chance offerte à un commerçant malchanceux ou inhabile de continuer en affaires, tel qu'envisagé par la L.F.I., a été, ici, entravé par l'action habile mais illégale d'Alfred Boivin.

In its capacity *as a creditor*, it is obvious that CP is in a *better* position because its claims against the Debtor are not released. As in the *Timmins Nickel* case, CP is protesting simply because it wishes to obtain a collateral advantage in its individual litigation. That is not a legitimate reason to vote against the Plan, much less a reason to oppose its sanction in this Court.

b) Second, CP is no worse off under the Plan than if the Plan was to be rejected and MMA was bankrupt. In those circumstances, CP would remain exposed for the full amount of the damages sustained by the derailment victims, having regard to its solidary liability.

3. CP Does Not Qualify for a Release

34. Remarkably, CP also opposes the sanction of the Plan on the basis that it is not receiving a release; specifically, it says that it should be released to the extent of the liability of the settling third parties. This is “remarkable” because CP has expressed its view of its liability in no uncertain terms. An article published on the front page of The Globe and Mail on Wednesday, June 10, 2015 **[TAB 11]**, reports as follows:

> CP will go before a Quebec Superior Court judge on Monday in Sherbrooke and argue it played no role in the fiery derailment of a Montreal, Maine and Atlantic Railway train that killed 47 people. CP will also argue the court has no jurisdiction over the proposed settlement, which is set to be approved by the judge overseeing MM&A's insolvency proceeding.
>
> "While some parties would like to tie us to this terrible event, CP is not among those responsible for the incident as the train was not operated by CP employees or travelling on CP tracks, nor were our locomotives, rail cars or product involved in the derailment," said Martin Cej, a CP spokesman. "We did not have custody or control of the train."
>
> ***
>
> CP's chief executive officer has been an outspoken critic of the tougher rules on oil shipping that followed the Lac-Mégantic tragedy.
>
> In an interview with The Globe and Mail in October, Hunter Harrison said railway regulators "overreacted." He recently cast the railway as a reluctant shipper of oil, which has been a source of fast-growing revenue for the rail industry. The company's board sought a legal opinion on its right to refuse to haul some dangerous goods, but determined the common carrier obligations leave it no choice.
>
> "Lac-Mégantic happened, in my view, because of one person's behaviour, if I read the file right," he said in the interview. "An individual did not set the brakes. And I think that we have overreacted and looked at a thousand different things about what

> we want to do with [regulations]. And you're not going to write [regulations] that are going to stop behaviour."
>
> ***
>
> "CP firmly believes the victims of this terrible incident should be compensated. But we also believe that compensation must come from those responsible for the derailment, and this compensation fund should not be used to free those parties responsible for the derailment from future liability and legal action," Mr. Cej said.

35. Simply put, CP can't have it both ways. It cannot vehemently deny having *any* responsibility in respect of the Train Derailment, and then argue in court 7 days later that the Debtor cannot implement a $435 million settlement fund for the benefit of derailment victims in serious need of compensation because the Plan unreasonably increases the liability that CP denies having.

36. It is not unreasonable for the stakeholders and the court to require CP to live by the strength of its convictions. To the contrary, it is actually one of the legitimate objectives of the CCAA. As noted by the Court of Appeal for Ontario in *Metcalfe & Mansfield* [already Tab 1]:

> [51]….Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1990 CanLII 6979 (ON CA), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).
>
> [52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:
>
> > [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.[27]

37. The public interest rests in requiring actors like CP to internalize the costs of their activities in a timely way, so as to avoid temporal and other distortions in economic decision making. One can understand why CP, Mr. Harrison and the

[27] *Metcalfe & Mansfield*, *supra* note 2, at para 51-52.

New York Hedge Fund that owns CP may well want to limit their down-side risk so that they can more easily punt this disaster down the road for 7 years and, in the interim, collect profits, bonuses, dividends and capital gains on the strength of all that oil that they "forced" to haul. But CP's strategy for near-term profits is not a reason for this court to refuse to sanction the Plan.

38. Finally, while it is uncertain whether or not CP will ultimately be adjudged to be liable, what is certain is that overall liability in the case is being reduced by up to $435 million, and that is of tangible value to all creditors, including CP. Weighed against this, CP's complaints are of no matter. As noted by the Court of Appeal for Ontario in connection with the complaints of the dissident noteholders in the *Metcalfe & Mansfield* case [already Tab 1]:

> [115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan… Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.
>
> [116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).
>
> [117] In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of

> prejudices," inasmuch as everyone is adversely affected in some fashion.[28]

D. This Case Does Not Raise Any Constitutional Questions

39. CP also raises an ill conceived and wholly unnecessary constitutional argument. It says that this Court should not approve the Plan because interpreting this Court's jurisdiction under the CCAA as permitting approval of such a plan would be, in effect, *ultra vires* as CP says the Plan is not sufficiently grounded in the federal power over "Bankruptcy and Insolvency".[29] Rather, CP says that to interpret the CCAA as authorizing the Plan would be an unconstitutional encroachment on provincial power over "Property and Civil Rights in the Province"[30] and that a constitutionally compliant interpretation of the CCAA ought to be preferred.

40. It has long been established that the CCAA is valid federal legislation.[31] For all of the reasons above, it is clear that the Plan is intended to further the valid federal objectives of the CCAA. As the Court of Appeal for Ontario held when faced with an analogous constitutional argument, "Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs."[32] In the present case, the Plan does.

41. This is not to say that approval of the Plan will not have an impact on property and civil rights. However, it is trite to observe that *any* plan of arrangement will have such an impact. This does not make the approval of the Plan constitutionally suspect. As the Supreme Court of Canada recognized in 1934, it is simply an example of a "double aspect":

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.[33]

42. To the extent there is any inconsistency (which CP submits there is in the present case), such inconsistency does not assist CP. The federal law is

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[28] *Ibid*., at paras. 115-117.
[29] *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U,K,), s. 91(21).
[30] *Ibid*., s. 92(13).
[31] *Reference re Constitutional validity of the Companies Creditors Arrangement Act (Dom.)*, [1934] S.C.R. 659, 1934 CanLII 72 (SCC) ["*Reference re CCAA*"].
[32] *Metcalfe & Mansfield Alternative Investments II (Re)*, 2008 ONCA 587 at para. 104.
[33] *Reference re CCAA, supra* note 31 at 661.

paramount,[34] though there is no need to decide whether there is a sufficient inconsistency in the present case.

43. Indeed, there is no reason to decide the constitutional issue at all, and it is well-settled that courts should avoid undertaking a constitutional analysis where other means will suffice to resolve an issue.[35] CP's real complaint is that, in its view, the Plan is not fair and reasonable, which, for the reasons above, it is. CP's constitutional argument is just window dressing as sanctioning the Plan will not be constitutionally improper so long as the Plan advances the objectives of the CCAA, which it does.

44. The whole respectfully submitted.

LAC-MÉGANTIC, June 15, 2015

_____
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MONTRÉAL, June 15, 2015

_____
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[34] See, e.g., *Marine Services International Ltd. v. Ryan Estate*, [2013] 3 SCR 53 at para. 65.
[35] See, e.g., *Moysa v. Alberta (Labour Relations Board)*, [1989] 4 WWR 596 at 1579-1580.