UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC RAILWAY, LTD., Debtor.	Bk. No. 13-10670 Chapter 11

TRUSTEE'S OMNIBUS REPLY TO OBJECTIONS FILED IN RESPONSE TO THE TRUSTEE'S MOTION FOR ENTRY OF AN ORDER AUTHORIZING FILING OF SETTLEMENT AGREEMENTS UNDER SEAL

Robert J. Keach, as trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), by and through his undersigned counsel, hereby submits this omnibus reply to the *United States Trustee's Objection to Motion for Entry of an Order Authorizing Filing of Settlement Agreements Under Seal* [D.E. 1459] (the "UST Objection"), the *Canadian Pacific Railway Company's Objection to the Trustee's Motion to File Settlement Agreements Under Seal* [D.E. 1461] (the "CPR Objection"), and the *Wheeling & Lake Erie Railway Company's Supplemental Objection to Motion for Entry of an Order Authorizing Filing of Settlement Agreements Under Seal* [D.E. 1465] (the "Wheeling Objection" and collectively, the "Objections"), filed in response to the Trustee's *Motion for Entry of an Order Authorizing Filing of Settlement Agreements Under Seal* [D.E. 1397] (the "Motion to Seal"). In support of this omnibus reply, the Trustee states as follows:[1]

A. The Treatment of the Settlement Agreements in the CCAA Case

1. The same issues raised by the Motion to Seal were recently litigated in the CCAA Case of the Debtor's Canadian subsidiary, Montreal Maine & Atlantic Canada Co. ("MMAC").

[1] Unless otherwise indicated, all capitalized terms used but not defined herein have the same meaning as ascribed to such terms in the Motion to Seal.

In the CCAA Case, Canadian Pacific Railway Company ("CPR") sought to compel production of un-redacted copies of the Settlement Agreements despite the fact that it had been offered redacted copies.

2. On June 15, 2015, the Superior Court of Canada (the "Canadian Court") held a hearing on the request by CPR. Following the hearing, the Canadian Court denied CPR's request for un-redacted copies of the Settlement Agreements.

3. In its ruling (the "Canadian Sealing Order"), attached hereto in English and French as **Exhibit A**, the Canadian Court, in fact, found that CPR was not, as a matter of law, entitled to receive the Settlement Agreements in any form. The Canadian Court found and reasoned that:

> Regarding Canadian Pacific's argument that the creditors renounced to confidentiality, the court will not elaborate much on this point since it is in fact the contrary. The creditors always maintained the confidentiality of the discussions and the confidentiality of the agreements. As such, there is absolutely no tacit waiver by third parties.
>
> That being said, the court would have dismissed Canadian Pacific's motion with costs were it not for the fact that certain creditors agreed to provide the information even if such parties were not obliged.
>
> The court also points out that Canadian Pacific has been informed of the global amount offered by the third parties. We are at over $430,000,000. Whether one party or another offers a different amount does not change Canadian Pacific's position. Canadian Pacific did not give the court the information necessary to have allowed the court to make a distinction that Canadian Pacific did not itself make.

Canadian Sealing Order, ¶¶ 9-11.

4. However, since the Released Parties had agreed to deliver redacted copies to CPR (and only to CPR) under certain, specific conditions relating to confidentiality and use, the Canadian Court granted CPR's request in part, ruling that the Canadian Court:

> **ORDERS** the third parties who signed the settlement agreements to transmit them to Canadian Pacific's attorneys with the financial details of the settlement agreements redacted. The redacted settlement agreements will be communicated

> only to Canadian Pacific's attorneys, the reason being that the motion would have been rejected if the third parties did not accept to transmit the documents under this express condition;
>
> **ALLOWS** the third parties to transmit information as it wishes and not in the manner Canadian Pacific wishes to receive it. The redacted settlement agreements and their content will be inadmissible as evidence with the exception of being used for the purposes of the Canadian approval order and the U.S. approval order. The settlement agreements must be filed in court under seal and must be the object of a sealing order prohibiting the disclosure, not to be interpreted as a renunciation by any of the third parties as to the confidentiality of the settlement agreements and to the privileges attaching thereto.

Canadian Sealing Order, ¶¶ 15-16.

5. Even with that ruling, the Canadian Court imposed costs upon CPR. *See* Canadian Sealing Order, ¶ 19.

6. Thus, the provision of the Settlement Agreements was expressly made subject to the following terms and conditions:

a. MMAC may redact the financial terms of the Settlement Agreements;

b. The redacted Settlement Agreements will be provided only to counsel for CPR (on an "attorneys eyes only" basis);

c. The redacted Settlement Agreements are inadmissible in Court except insofar as they may be used in connection with the hearing(s) in connection with the Canadian approval order and the U.S. approval order;

d. Even with these limitations, the Settlement Agreements must be filed under seal and will be subject to a publication ban; and

e. Communication of the redacted Settlement Agreements shall not be interpreted as a renunciation of the confidential and privileged nature of those agreements.

Canadian Sealing Order, ¶¶ 15-16.

7. Indeed, the Canadian Sealing Order provides unequivocally that the "settlement agreements must be filed in court under seal…." Canadian Sealing Order, ¶ 16. On June 16, 2015, the Monitor provided redacted copies of the Settlement Agreements to CPR pursuant to

the terms of the Canadian Sealing Order.[2]

8. Under the terms of the Cross Border Insolvency Protocol (the "Protocol"), adopted by this Court and the Canadian Court [D.E. 168], the Canadian Sealing Order, while not binding on this Court, is entitled, of course, to the utmost respect. Under section 5 of the Protocol, among the principal goals of the Protocol is to "harmonize and coordinate activities in the Insolvency Proceedings before the Courts," as well as to "promote international cooperation and respect for comity among the Courts…." Protocol, § 5(a), (c). Guideline 11 of the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines"), attached to the Protocol and made a part thereof, provides that:

> The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guidelines, p. 9.

B. The Court Should Grant the Motion to Seal with Limited Exceptions and Only Upon Similar Terms as the Canadian Sealing Order

9. While the Trustee is unconvinced by the arguments asserted by the United States Trustee (the "UST") and CPR, the Trustee is willing, if and only if the Released Parties provide prior written consent (as they did with respect to CPR in the CCAA Case), to alter the relief sought by the Motion to Seal so as to be consistent with the Canadian Sealing Order, but only on a limited basis. Specifically, the Trustee now requests that the Court grant the Motion to Seal

[2] The Monitor provided CPR with non-redacted copies of the Settlement Agreements with (i) Irving Oil Limited, Irving Oil Company, Limited, Irving Oil Operations General Partner Limited and Irving Oil Commercial G.P. (collectively, "Irving"), (ii) CIT Group, Inc. ("CIT"), and (iii) Western Petroleum Co., Strobel Starostka Transfer LLC, Dakota Plains Marketing LLC, Dakota Plains Holdings, Inc., DPTS Marketing Inc., Dakota Plains Transloading LLC, Dakota Petroleum Transport Solution LLC (collectively, the "WFS Entities"), given that the amount of the settlement payments made by each of these entities has been made public.

upon the following terms and conditions:

a. The Trustee must redact the financial terms of the Settlement Agreements, except for those terms that have been made public with respect to Irving, CIT and the WFS Entities; the forms of the Settlement Agreements provided will be identical to the forms provided in the CCAA Case;

b. The Trustee will provide copies of the redacted Settlement Agreements only to the UST, counsel to CPR, and counsel to the Official Committee of Victims (the "Committee") on an "attorneys eyes only" basis;

c. The redacted Settlement Agreements will be inadmissible in Court except insofar as they may be used in preparation for hearings with respect to the Plan;

d. Even in connection with that limited basis, the Settlement Agreements will be filed with the Court under seal and will be subject to a publication ban; steps will be taken during such hearing to preserve confidentiality; and

e. Provision of the redacted Settlement Agreements to the UST, CPR counsel, and the Committee counsel shall not be interpreted as a renunciation or waiver of the confidential and privileged nature of those agreements or any part thereof.

10. Such relief ensures consistent rulings with respect to the Settlement Agreements by this Court and the Canadian Court as intended by the Protocol. Any order by this Court denying the Trustee's request to file the Settlement Agreements under seal would violate the Canadian Sealing Order and render that order meaningless as parties could access this Court's electronic filing system to view the agreements ordered to be filed under seal in the CCAA Case. The Protocol was adopted for the purpose of preventing such inconsistent rulings between this Court and the Canadian Court. Indeed, as noted above, such harmony and coordination are among the principal goals of the Protocol.

11. Moreover, the relief requested above will permit the Settlement Agreements to be filed under seal while allowing those parties with an alleged actual interest in, and limited need for, the contents of the agreements to receive redacted copies, *i.e.* the UST and counsel for the Committee, although the Trustee continues to contend that neither such interest nor such need has been established. As noted above, counsel for CPR is already in possession of the redacted

agreements.

12. Conversely, Wheeling & Lake Erie Railway Company ("Wheeling") does not have a colorable interest, need, or right to view the Settlement Agreements, redacted or otherwise. As such, the Trustee does not consent to providing Wheeling redacted copies of the Settlement Agreements.

13. Wheeling argues that "there is no justification for preventing Wheeling from seeing [the Settlement Agreements], particularly where Wheeling maintains, on *bona fide* grounds, that the same purport to dispose of assets in which it has a valid, perfected and enforceable security interest." Wheeling Objection, ¶ 4. This argument ignores the history of this case.

14. In denying Wheeling's attempt to intervene in the Trustee's adversary proceeding against, among others, the WFS Entities, the Court preserved Wheeling's alleged rights, if any, to the proceeds of certain settlement payments. *See* Order on Wheeling & Lake Erie Railway Company's Motion to Intervene as of Right Pursuant to Bankruptcy Rule 7024 and Rule 24(a) of the Federal Rules of Civil Procedure (Case No. 14-01001) [D.E. 54] (the "Intervention Order"). Specifically, it provides, in part, that "no…categorization or description of, the proceeds received by the Trustee on account of such judgment and/or settlement shall be binding upon Wheeling." Order on Motion to Intervene, ¶ 2(B). The same order further provides that "Wheeling shall, at any time, be entitled to seek a determination by this Court…as to the actual nature, characterization or description of any such proceeds of judgment or settlement." Id., ¶ 2(C). In connection with such determination, "Wheeling shall not be bound by any preclusive rule, or presumptive effect as to the nature, characterization or description of such proceeds arising from such judgment or settlement." Id. As such, Wheeling is neither bound by the terms of the Settlement Agreements in relation to the characterization of the settlement proceeds nor

prejudiced by the same. Wheeling, therefore, has neither need nor entitlement to view the contents of the Settlement Agreements, redacted or otherwise, prior to the date when those agreements will no longer be confidential.

15. Wheeling's rights are preserved and, if and when proceeds are paid (which will not occur until September, 2015 at the earliest), Wheeling can reassert its contention that, despite not being bound by the same, it has a right to see the Settlement Agreements.

16. The Motion to Seal must be considered, as were the issues in the CCAA Case, in the context of the overall settlement structure, which now has the potential to distribute almost (CAD) $435 million to victims of the Derailment and other stakeholders. Revealing the terms of the Settlement Agreements, without the express consent of the Released Parties (whose consent preceded the provision of the redacted agreements in the CCAA Case) would breach, and permit termination of, the Settlement Agreements, thus placing in jeopardy the entire settlement process and risking the loss of payments to all of the victims of the Derailment. The interest of the objecting parties, however sincere, pale in comparison to the need to preserve the settlement.

WHEREFORE, the Trustee requests that the Motion to Seal be granted upon the terms set forth above, the Objections denied, and the Court grant such other and further relief as is just and proper.

Dated: July 7, 2015

ROBERT J. KEACH
CHAPTER 11 TRUSTEE OF MONTREAL MAINE & ATLANTIC RAILWAY, LTD.

By his attorneys:

/s/ Timothy J. McKeon

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UNOFFICIAL TRANSLATION

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF SAINT-FRANÇOIS

No: 450-11-000167-134

DATE: June 17, 2015

PRESIDING: THE HONOURABLE GAÉTAN DUMAS, J.C.S.

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

MONTREAL, MAINE & ATLANTIC CANADA CO.
Debtor

v.

RICHTER ADVISORY GROUP INC.
Monitor

and

CANADIAN PACIFIC RAILWAY COMPANY
Petitioner

REASONS FOR JUDGMENT RENDERED FROM THE BENCH
June 15, 2015

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[1] The court is faced with a *De Bene Esse* motion from Canadian Pacific Railway Company to order the communication of documents.

[2] This is the court's 42nd judgment in this matter. The court would have obviously preferred a more refined judgment but there is danger among us. The reason there is presently urgency and nothing was done before.

[3] Already in March of 2014, there were discussions in the present matter with third parties potentially liable for the tragic Mégantic train derailment of July, 2013. The court has discussed this in many of the judgments it has rendered. These judgments are still relevant and continue to apply.

[4] In March of 2014 there were confidential discussions initiated with potentially liable third parties. At the time, creditors of the MMA tragedy, including amongst others, the representatives of the class action and the Québec government, informed the court of their concern that there would be confidential discussions with the "liable third parties". Counsel for MMA had advised the court that the third parties refused to negotiate unless they were guaranteed that such discussions would remain confidential. At that time, even the names of the "third parties" were not to be disclosed. MMA had accepted to negotiate on this basis.

[5] In January of 2015, the court was informed that firm agreements were concluded with creditors for an amount neighbouring $110,000,000. Canadian Pacific, who was always in the courtroom since the undersigned was seized of the matter, said nothing, did nothing, despite the fact that it is the defendant in a class action lawsuit which was authorized by my colleague the honourable Martin Bureau against Canadian Pacific and World Fuel Services. Canadian Pacific now asks to obtain the confidential settlement agreements entered into with third parties. The court puts "liable third parties" in quotations since there has obviously been no trial. Canadian Pacific does not allege a valid reason to be in possession of these confidential agreements. The only arguments raised by Canadian Pacific pertain more so to its means of defense relating to the class action than the present matter. This court is not to render an order in the class action matter.

[6] In the decision of *Sable Offshore* rendered by the Supreme Court of Canada, Madam Justice Abella mentions:

> "[1] The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.
>
> [2] The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible."

[7] In concluding, the Supreme Court of Canada mentions the following at page 637 by quoting Justice Bryson:

> " […] The court should hesitate to expropriate that advantage by ordering disclosure at the instance of non-settling parties,

> intransigent or otherwise. The argument that disclosure would facilitate settlement amongst the remaining parties ignores that, but for the privilege, the first settlement would often not occur.
>
> [30] A proper analysis of a claim for an exception to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but whether the reason for disclosure outweighs the policy in favour of promoting settlement."

[8] It seems to me that this decision of the Supreme Court of Canada should close the debate definitively, especially since it could be applied in the class action matter. In the present matter, Canadian Pacific is not a defendant. Canadian Pacific did not participate in the negotiations and the plan of arrangement is such that Canadian Pacific would not receive anything, as if MMA had gone bankrupt. Canadian Pacific would be an ordinary creditor if MMA went bankrupt. The assets were sold for $15,000,000 when there were secured creditors with claims of $30,000,000. Consequently, Canadian Pacific would not have received anything. The court understands that strategically, Canadian Pacific may want to have this information in the class action matter, however this court is not seized of that matter.

[9] Regarding Canadian Pacific's argument that the creditors renounced to confidentiality, the court will not elaborate much on this point since it is in fact the contrary. The creditors always maintained the confidentiality of the discussions and the confidentiality of the agreements. As such, there is absolutely no tacit waiver by third parties.

[10] That being said, the court would have dismissed Canadian Pacific's motion with costs were it not for the fact that certain creditors agreed to provide the information even if such parties are not obliged.

[11] The court also points out that Canadian Pacific has been informed of the global amount offered by the third parties. We are at over $430,000,000. Whether one party or another offers a different amount does not change Canadian Pacific's position. Canadian Pacific did not give the court the information necessary to have allowed the court to make a distinction that Canadian Pacific did not itself make.

[12] Finally, the court mentions that it would have preferred to refine the judgment, however:

- since the motion to approve the plan which was voted on unanimously by creditors, except for those who abstained, is presentable this Wednesday the 17th;

- since Canadian Pacific itself argued before the undersigned this morning that a CCAA judge cannot render a judgment with reasons to follow;

- since the decision must be made today and it is now 18:36;

- the court therefore has no other choice than to render a judgment with summary reasons.

But being convinced that my knowledge of the present matter, since the beginning, allows me to render this decision and to exercise my discretion.

[13] The court will grant in part the motion, seeing the consent by third parties. If third parties, such as Irving, accept to give more information than that which is necessary, they may do so, however with the restrictions that the court mentions in the present judgment.

FOR THESE REASONS, THE COURT:

[14] **GRANTS** in part the *De Benne Esse* motion of the Canadian Pacific Railway Company to order the communication of documents;

[15] **ORDERS** the third parties who signed the settlement agreements to transmit them to Canadian Pacific's attorneys with the financial details of the settlement agreements redacted. The redacted settlement agreements will be communicated only to Canadian Pacific's attorneys, the reason being that the motion would have been rejected if the third parties did not accept to transmit the documents under this express condition;

[16] **ALLOWS** the third parties to transmit information as it wishes and not in the manner Canadian Pacific wishes to receive it. The redacted settlement agreements and their content will be inadmissible as evidence with the exception of being used for the purposes of the Canadian approval order and the U.S. approval order. The settlement agreements must be filed in court under seal and must be the object of a sealing order prohibiting the disclosure, publication and communication of the redacted settlement agreements and is not to be interpreted as a renunciation by any of the third parties as to the confidentiality of the settlement agreements and to the privileges attaching thereto.

[17] And since the only question contested was the mode of communication of the agreements, the court:

[18] **GRANTS** the motion in part;

[19] **WITH COSTS** against Canadian Pacific

(SIGNED: Gaétan Dumas, J.C.S.)

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : 450-11-000167-134

DATE : 17 juin 2015

SOUS LA PRÉSIDENCE DE : L'HONORABLE GAÉTAN DUMAS, J.C.S.

**DANS L'AFFAIRE DE LA PROPOSITION
OU DU PLAN D'ARRANGEMENT DE :**

MONTRÉAL, MAINE & ATLANTIQUE CANADA CIE
Débitrice
c.
RICHTER GROUPE CONSEIL INC.
Syndic
et
**COMPAGNIE DE CHEMIN DE FER CANADIEN
PACIFIQUE**
Requérante

MOTIFS DU JUGEMENT RENDU SÉANCE TENANTE
le 15 juin 2015

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[1] Le tribunal est saisi d'une requête *De Bene Esse* de la compagnie de chemin de fer Canadien Pacifique pour ordonner la communication de documents.

[2] Le tribunal en est à son 42^{e} jugement dans le présent dossier. Le tribunal aurait évidemment préféré rendre un jugement plus peaufiné, mais il y a péril en la demeure. La raison pour laquelle il y a maintenant urgence et que rien n'a été fait avant.

JD 2364

[3] Déjà en mars 2014, il y avait des discussions dans le présent dossier avec des tiers potentiellement responsables de la tragédie ferroviaire survenue à Mégantic en juillet 2013. Le tribunal en discute dans plusieurs des jugements déjà rendus. Ces jugements sont toujours d'actualité et s'appliquent toujours.

[4] En mars 2014, il avait été question de discussions confidentielles entamées avec des tiers potentiellement responsables. À l'époque, des créanciers de la tragédie de MMA, entre autres, les représentants au recours collectif et le gouvernement du Québec, avaient fait part au tribunal de leur inquiétude qu'il y ait des discussions confidentielles tenues avec des « tiers responsables ». Le procureur de MMA avait alors avisé le tribunal que les tiers refusaient de négocier s'ils n'avaient pas la garantie que les discussions resteraient confidentielles. À ce moment-là, même le nom des « tiers responsables » ne devait pas être divulgué. MMA a accepté de négocier sur cette base.

[5] En janvier 2015, il était annoncé au tribunal que des « firm commitment », des ententes fermes avaient été conclues avec des créanciers pour un montant avoisinant les 110 000 000 $. Canadien Pacifique, qui a toujours été dans la salle de Cour depuis que le soussigné est saisi du dossier, n'a rien dit, n'a rien fait, malgré le fait qu'elle est défenderesse à un recours collectif qui a été autorisé par mon collègue l'honorable Martin Bureau contre Canadien Pacifique et Word Fuel Services. Canadien Pacifique demande maintenant d'avoir en main les ententes confidentielles de règlements intervenus entre les tiers. Le tribunal met toujours « tiers responsables » entre guillemets, parce qu'évidemment il n'y a pas eu de procès. Canadien Pacifique inc. n'allègue aucune raison valable pour être en possession de ces ententes confidentielles. Les seuls arguments soulevés par Canadien Pacifique se rapportent beaucoup plus à ses moyens de défense sur le recours collectif que dans le présent dossier. Le tribunal n'a pas à rendre d'ordonnance dans le dossier du recours collectif.

[6] Dans l'arrêt *Sable Offshore* rendu en 2013 par la Cour suprême[1], madame la juge Abella mentionnait :

> « [1] Le système de justice est toujours en quête de stratégies d'amélioration propres à réduire les délais, les coûts et le stress obstinément endémiques dans la conduite des litiges. Dans cette mission en évolution en vue de confronter les obstacles à l'accès à la justice, certaines stratégies de règlement des différends se sont avérées plus durablement efficaces que d'autres. Peu d'entre elles peuvent toutefois prétendre à la tradition de succès que l'on attribue avec raison aux règlements amiables.
>
> [2] Le privilège relatif aux règlements vise à favoriser les règlements amiables. Ce privilège entoure d'un voile protecteur les démarches prises par les parties pour résoudre leurs différends en assurant l'irrecevabilité des communications échangées lors de ces négociations. »

1 [2013] 2 R.C.S. 623.

[7] En conclusion, la Cour suprême mentionne à la page 637 en reprenant les propos du juge Bryson :

> « [...] Les tribunaux devraient hésiter à leur enlever cet avantage en leur ordonnant de dévoiler la somme à la demande des parties qui n'ont pas réglé à l'amiable parce qu'elles se sont montrées inflexibles ou pour d'autres raisons. L'argument selon lequel la divulgation favoriserait un règlement entre les autres parties ne tient pas compte du fait que souvent, s'il n'y avait pas de privilège, il n'y aurait pas de premier règlement.
>
> [30] Pour analyser comme il se doit la revendication d'une exception au privilège relatif aux règlements, il ne faut pas se demander simplement si les défendeurs non parties au règlement tirent un quelconque avantage tactique de la divulgation, mais si le motif de la divulgation *l'emporte* sur le principe suivant lequel il faut favoriser les règlements amiables. »

[8] Cet arrêt de la Cour suprême, il me semble, devrait clore le débat de façon définitive, d'autant plus qu'il pourrait s'appliquer dans le dossier de recours collectif. Dans le présent dossier, Canadien Pacifique n'est pas défenderesse. Canadien Pacifique n'a pas participé aux négociations et le plan d'arrangement fait en sorte que Canadien Pacifique ne recevra rien, comme si MMA avait fait faillite. Canadien Pacifique aurait été un créancier ordinaire si MMA avait fait faillite. Les actifs ont été vendus pour 15 000 000 $ alors qu'il y avait pour 30 000 000 $ de créanciers garantis. En conséquence, Canadien Pacifique n'aurait rien reçu. Le tribunal comprend que de façon stratégique, Canadien Pacifique peut vouloir détenir cette information dans le dossier du recours collectif, mais le tribunal n'en est pas saisi.

[9] Pour ce qui est de l'argument de Canadien Pacifique voulant que les créanciers aient renoncé au privilège de la confidentialité, le tribunal n'élaborera pas longtemps puisque c'est plutôt le contraire. Les créanciers ont toujours revendiqué la confidentialité des discussions et la confidentialité des ententes, il n'y a alors absolument aucune ouverture à une renonciation tacite de la part des tierces parties.

[10] Cela étant le tribunal aurait rejeté avec dépens, la requête du Canadien Pacifique n'eut été du fait que des créanciers acceptent de transmettre les informations même si les parties n'y sont pas obligées.

[11] Le tribunal rappelle d'ailleurs que la compagnie Canadien Pacifique est informée du montant global offert par les tierces parties. Nous en sommes à plus de 430 000 000 $. Qu'une partie ou une autre offre, un montant différent ne change en rien la position du Canadien Pacifique. Canadien Pacifique n'a pas donné au tribunal l'information nécessaire pour pouvoir permettre au tribunal de faire une distinction que Canadien Pacifique lui-même ne fait pas.

[12] Finalement, le tribunal mentionne qu'il aurait aimé peaufiner un peu plus le jugement, par contre :

- puisque la requête en approbation du plan qui a été votée à l'unanimité par les créanciers, sauf ceux qui se sont abstenus est présentable mercredi le 17 courant;

- puisque Canadien Pacifique, elle-même, a plaidé devant le soussigné ce matin qu'un juge de la LACC ne peut rendre un jugement « reason to follow »;

- puisque la décision devait être prise aujourd'hui et qu'il est 18 h 36;

- le tribunal n'a donc d'autre choix que de rendre un jugement avec des motifs sommaires.

Mais étant convaincu que ma connaissance du dossier, depuis le début, me permet de rendre cette décision et d'exercer ma discrétion.

[13] Le tribunal accueillera en partie la requête vu le consentement des tiers. Si des tiers, tel Irving, acceptent de donner plus d'information que ce qui est nécessaire, ils pourront le faire, mais avec les interdictions que le tribunal mentionnera dans le présent jugement.

POUR CES MOTIFS, LE TRIBUNAL :

[14] **ACCUEILLE** en partie la requête *De Bene Esse* de la compagnie de chemin de fer Canadien Pacifique pour ordonner la communication de documents;

[15] **ORDONNE** aux tierces parties ayant signé des ententes de règlement de les transmettre aux procureurs de Canadien Pacifique en caviardant les modalités financières de l'entente de règlement. Les ententes de règlement caviardées ne seront communiquées qu'aux procureurs de Canadien Pacifique, la raison étant que la requête aurait été rejetée; si les tiers n'avaient pas accepté de transmettre les documents sous cette condition expresse;

[16] **PERMET** aux tiers de transmettre l'information comme elle désire le transmettre et non pas comme Canadien Pacifique désire la recevoir. Les ententes de règlement caviardées et leur contenu seront inadmissibles en preuve à l'exception de leur utilisation aux fins de l'ordonnance d'approbation canadienne et l'ordonnance d'approbation aux États-Unis. Les ententes de règlement devront être déposées sous scellé au dossier de la Cour et faire l'objet d'une ordonnance de non-diffusion et de non-publication et la communication de l'entente de règlement caviardée ne doit pas être interprétée comme une renonciation par aucune des tierces parties à la confidentialité de l'entente de règlement et au privilège s'y rattachant;

[17] Et puisque la seule question contestée était le mode de transmission des ententes, le tribunal :

[18] **ACCUEILLE** la requête en partie;

[19] **AVEC DÉPENS** contre Canadien Pacifique.

GAÉTAN DUMAS, J.C.S.

Me Patrice Benoit
Me Alexander Bayus
Gowling Lafleur Henderson LLP
Pour Montréal, Maine & Atlantic Canada Co.

Me Sylvain Vauclair
Woods LLP
Pour Richter Groupe Conseil inc.
(Richter Advisory Group inc.)

Me Enrico Forlini
Me André Durocher
Me Brandon Farber
Fasken Martineau Dumoulin
Pour la compagnie de chemin de fer
Canadien Pacifique

Date d'audience : 15 juin 2015