UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

CHAPTER 11 TRUSTEE'S REPORT ON CCAA PROCEEDINGS

Robert J. Keach, the chapter 11 trustee in the above-captioned case of Montreal Maine & Atlantic Railway, Ltd. (the "Trustee"), files this report, pursuant to the Cross-Border Insolvency Protocol adopted by this Court, regarding certain filings in the *Companies' Creditors Arrangement Act* case (the "Canadian Case") of Montreal, Maine & Atlantic Canada Co. ("MMAC") currently pending in the Superior Court of Canada, Province of Québec, District of Saint-François (the "Canadian Court").

On July 14, 2015, the Trustee filed the *Chapter 11 Trustee's Report on CCAA Proceedings* [D.E. 1524] (the "Report") to report that, on July 13, 2015, the Canadian Court entered the *Jugement Sur Requête En Approbation Du Plan D'Arrangement* (the "Plan Sanction Order") which is the Canadian Court's Order sanctioning MMAC's Amended Plan of Compromise and Arrangement dated June 8, 2015.

At the time the Report was filed, only a French version of the Plan Sanction Order was available, which the Trustee attached as Exhibit A to the Report. The Trustee has obtained an unofficial English translation of the Plan Sanction Order and files it herewith as **Exhibit A**.

Dated: July 24, 2015

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

By his attorney:

/s/ Roma N. Desai

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EXHIBIT
A

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF SAINT-FRANÇOIS

N°. . **450-11-000167-134**

DATE: July 13, 2015

IN THE PRESENCE OF: THE HONORABLE GAÉTAN DUMAS, S.C.J.

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

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

Debtor

and

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

Monitor

and

CANADIAN PACIFIC RAILWAY COMPANY

Opponent

JUDGMENT ON MOTION
TO APPROVE THE PLAN OF ARRANGEMENT

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[1] The Court is seized with a motion to approve a plan of arrangement unanimously accepted at a meeting of the creditors of the debtor held in Lac-Mégantic on June 9, 2015.

[2] This plan of arrangement is filed following the railway tragedy that cost the lives of 48 people and devastated the downtown area of the City of Lac-Mégantic on July 6, 2013.

[3] Following an initial order issued by our colleague, Martin Castonguay, S.C.J., in August 2013, the undersigned was assigned this case.

[4] More than 40 judgments and orders have been rendered by the undersigned in this matter.

[5] As the undersigned pointed out in a judgment rendered on February 17, 2014:

> [26] The CCAA proceedings sought, to the extent possible, to maintain the operation of the railway in order to service the many municipalities and the numerous clients situated along the railway. The proceedings also sought to put in place a sale process in order to sell the assets of MMA and MMAR as a going concern. Railroad Acquisition Holdings ("RAH") was the winning bidder for the quasi-totality of the assets of the companies and the court authorized the sale on January 23, 2014.
>
> [27] One of the objectives of the CCAA proceedings was to maintain the employment of specialized personnel that continue to work for the Petitioner in order to maximize the value of the Petitioner's assets and ideally to ensure that these jobs would be maintained after the sale.
>
> [28] According to the Asset Purchase Agreement, RAH will conserve most of MMA's current employees.
>
> [29] The CCAA proceedings also sought to establish a claims process to avoid the multiplicity of parallel judicial proceedings and to efficiently treat the claims of all of the interested parties, including the families of the victims and the holders of claims related to the derailment.

[6] The importance of maintaining a railway for the industries served does not require any further explanation.

[7] This first objective was achieved as early as February, 2014, namely less than seven months after the railway tragedy, through the sale of the Debtor's assets and the orders necessary to complete that sale. The second objective clearly expressed by the Debtor from the start was to indemnify the victims of this railway tragedy for which the Debtor almost immediately acknowledged its liability. This objective remains to be achieved.

[8] The Court will not reiterate the complete history of the case since it fully appears from the orders previously rendered. Suffice to say that the undersigned rendered a judgment on May 27, 2015 summarizing the facts since the beginning of the case. Moreover, a judgment rendered by the undersigned on February 17, 2014 also outlined the situation then prevailing.

[9] It is important to recall that, as early as February 2014, the undersigned raised questions as to whether it was necessary to file a viable plan of arrangement in order to maintain the stay. The undersigned also raised questions as to whether a plan of arrangement could provide for the liquidation of the company or whether it was necessary for the plan to provide a complete restructuring of the company.

[10] Since the case seems to logically follow what is stated by the undersigned at pages 8 to 30 of the February 17, 2014 judgment, and since more than 4 000 creditors have relied on the direction provided by that judgment, it appears important to recall what the undersigned stated therein:

> **Obligation to File a Viable Plan of Arrangement in Order to Continue the Stay of Proceedings**
>
> [57] There has long existed a debate on the obligation to file a plan of arrangement if one wishes to benefit from the CCAA.
>
> [58] Before the 2009 amendments, there was also a debate on the authority of the courts to authorize the liquidation of a company without the acceptance of a plan of arrangement. Section 36 CCAA provides as follows:
>
> > "36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
> >
> > Notice to creditors
> >
> > *(2)* A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
> >
> > Factors to be considered
> >
> > (3) In deciding whether to grant the authorization, the court is to consider, among other things,
> >
> > > a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

> b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> d) the extent to which the creditors were consulted;
>
> e) the effects of the proposed sale or disposition on the creditors and other interested parties; and;
>
> f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[59] Before this amendment, no provision of the Act expressly permitted the partial or total liquidation of the assets of a company.

[60] The courts had used their inherent jurisdiction to authorize the sale of assets out of the ordinary course of business.

[61] Shelley C. Fitzpatrick[1] has mentioned that the flexibility of the CCAA has always allowed the liquidation of surplus assets. The debate centered more on the issue that some courts authorized the sale of assets that did not fit in this category :

> *"As is evident from the comments of Blair J.A. in Metcalfe, one of the major strengths of the CCAA is its flexibility in meeting any particular fact situation. Clearly, Parliament intended to allow a downsizing of reduntant assets as part of the restructuring process. Such downsizing would assist in returning the debtor company to profitability and thereby enable it to remain in business. (page 41)*
>
> *The courts, however, have permitted asset sales that extend well beyond a sale of redundant assets as part of a downsizing of operations. There are a variety of liquidation scenarios. On one end of the spectrum is a sale of assets to various purchasers who do not intend to continue the operations of any part of the debtor's business. On the other end of the spectrum is a sale to a single purchaser who does intend to continue operating the debtor's business. Somewhere in the middle is a sale to one or more purchasers who do intend to continue certain parts of the debtor's business on a going concern basis."*
>
> Shelley C. Fitzpatrick, *Liquidating CCAAs — Are We Praying to False Gods?,* dans *AnnualReview of Insolvency Law 2008,* Janis P. Sarra, Toronto, Thomson/Carswell, 2008, p.41.

[62] Bill Kaplan similarly writes that courts throughout Canada have confirmed that it is possible to authorize the liquidation of assets under the CCAA, however, the jurisprudence is not consistent in the manner in which this liquidation has been permitted:

> *"We will see later that there is no consensus among the Alberta Court of Appeal, die Ontario Courts and the British Columbia Court of Appeal considering the proper exercise of that jurisdiction, but there is no disagreement that there is jurisdiction under the CCAA to approve a liquidation of assets. »* (page 94)

[2] Bill Kaplan, *Liquidating CCAAs: Discretion gone Amy?,* dans *Annual Review of Insolvency Law 2008,* Janis **P.** Sarra, Toronto, Thomson/Carswell, 2008, p.79

[63] There has therefore been a debate on the circumstances in which a liquidation of assets under the CCAA can be authorized both with respect to the kinds of assets that may be sold and whether or not there is an obligation to submit the liquidation plan to a vote by creditors.

Arguments in favour of liquidation

[64] In some cases, the liquidation of assets through the *CCAA* is preferable to a liquidation under another insolvency scheme and this is why it was permitted by certain Courts. Continuing the company's operations may have the effect of increasing its value upon liquidation and therefore improving the result for the creditors and various stakeholders[3].

[3] *Ibid,* p.89.

[65] According to Fitzpatrick[4], this line of case law started with the following cases:

> *"The line of cases that, in obiter, "endorse" liquidating CCAAs can be traced to two early authorities: Re Amirault Fish Co. and Re Associated Investors of Canada Ltd."*
>
> **[Citations omitted]**

[4] *Supra,* note 1, p. 47.

[66] She also refers to other decisions that warranted the liquidation of assets in the interests of creditors. It should be noted that such decisions are derived from Ontario courts which, over time, were more proactive than courts elsewhere in Canada in authorizing the liquidation of assets under the *CCAA,* which will be discussed later:

> *"In Re Anvil Range Mining Corp., [...] Farley J. referred to Olympia & York and Lehndorff as support for the principle that "the CCAA may be used to affect a sale, winding up or liquidation of a company and its assets in appropriate circumstances".*
>
> *It is important to note that in Anvil Range, Farley J. also mentioned "maximizing the value of the stakeholders pie". In Lehndorff, Farley J. stated that it appeared to him that "the purpose of the CCAA is also to protect the interests of creditors" which may involve a liquidation or downsizing of the business, "provided the same is proposed in the best interests of the creditors generally". »*

[5] *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24; *Re Olympia & York Developments Ltd,* (1995), 34 C.B.R. (3d) 93; *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1.

[67] Secondly, and this is where the argument is most controversial, professionals involved in a liquidation incur less risk if the liquidation is conducted under the *CCAA* than under the "*Bankruptcy and Insolvency Act (BIA)*. Indeed, when an administrator is appointed under the *BIA* and takes possession and administers the assets of the company, he engages his liability. Under the *CCAA*, the company remains the owner of its assets and continues its operations, which does not give rise to a third party's liability, which may reassure creditors on the management of the business.

[6] *Supra,* note 2, p.90.

Arguments against liquidation

Use against the objective of the Act

[68] The first submission against the liquidation of assets other than excess assets, is that the objective of the *CCAA* is not to allow the liquidation of a business and that there are other ways, such as the *BIA,* under which the liquidation should take place. In the case of *Hongkong Bank of Canada* vs. *Chef Ready Foods Ltd*[7], the British Columbia Court of Appeal defines the purpose of the *CCAA* and the Court's role as follows:

> *"The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue business. [...] When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure."*

[7] (1990), 4 C.B.R. (3d) 311 (CB C.A.).

[69] Such interpretation is supported by the decision of the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments Ltd.* vs. *Fisgard Capital Corp.*[8] which will be discussed later.

[8] 2008 BCCA 327.

[70] In Québec, the Court of Appeal, per Justice Louis Lebel, expressed the same opinion and made a distinction between the *CCAA* and the *BIA.* It mentioned in *Laurentienne du Canada* vs. *Groupe Bovac Ltée*[9] *:*

> *"26 Moreso than focusing on the liquidation of the company, the Act is focused on the reorganization of the business and its protection during the interim period in which the plan of reorganization will be approved and executed. Conversely, the Bankruptcy Act (R.S.C. 1985, c. B-3) seeks the orderly liquidation of the bankrupt's assets and the*

> *distribution of the proceeds of such liquidation between the creditors, according to the order of priority defined by the Act. The Companies' Creditors Arrangement Act satisfies a separate need and objective, at least as generally interpreted since its enactment. The goal is to prevent bankruptcy or to have the business emerge form such situation."*
>
> [9] EYB 1991-63766 (QC C.A.), par. 26.

[71] However, as raised by Shelley C. Fitzpatrick[10], the situation remains unresolved since no Court of Appeal in Canada has recently looked at whether the liquidation of assets under the *CCAA* respects its objective.

[10] *Supra,* note 1.

The secured creditors are doing indirectly what they cannot do directly

[72] As was mentioned earlier, the liquidation of assets under the *CCAA* has the benefit of reducing the risks undertaken by the professionals involved. In the case of liquidation under the *BIA,* the secured creditors are required to pay an indemnity to the professionals in order to alleviate such risks. Although they must act the same way upon liquidation under the *CCAA,* the indemnity is undoubtedly lower, since the risk involved is reduced. Thus, with the agreement of the debtor company, the secured creditors are liquidating the assets of the company under the *CCAA* without ever having intended to agree on a plan of arrangement or to see the company survive, which is contrary to the purpose of the Act[11].

[11] *Supra,* note 2, p.54, 55.

Iniquities affecting various stakeholders

[73] As the Court of Appeal of Ontario reminds us in the *Metcalfe*[12] case, the *CCAA* was enacted during the Great Depression in the 1930's and was designed to reduce the number of business bankruptcies and thereby the unusually high employment rate. Over time, the courts have given a social purpose to this Act, which must now serve the interests of investors, creditors, employees and other stakeholders involved in a business.

[12] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.,* 2008 ONCA 587 (Ont. C.A.), par.51, 52.

[74] This evolution pushed the courts, in some cases, to take more political than judicial positions, the whole in the broader interest.

[75] The inclusion of social criteria in the court's decision-making process can sometimes result in the unequal treatment of the various stakeholders involved. Indeed, the interests of the investors, creditors, employees and other stakeholders rarely come together in one solution. This situation occurred in the *Re Pope &Talbot Ltd*[13] case in which the Supreme Court of British Columbia authorized the sale of assets of the company not to the party presenting most lucrative offer but, rather, to a company proposing to continue the operations of the business, despite the existence of a higher offer. Ultimately, the Court determined that the interests of the community and preserving jobs should take precedence over obtaining the best price and over the creditors' satisfaction. Author Shelley C. Fitzpatrick disagrees:[14]

> *"The court is essentially making a legislative statement grounded in public policy as to whether the community of Nanaimo is better off with pulp mil jobs as opposed to construction/golf course jobs (or whatever alternative use the site would have been put to). It is difficult to see the evidentiary basis upon which the court could come to the conclusion that the interests of the employees, suppliers and the community of Nanaimo outweighed obtaining the best price for the assets."*

[13] 2009 BCCS 17 (CanLII).

[14] *Supra,* note 1, p.60.

[76] The author also raises an interesting point in this excerpt when she mentions that the Court takes a legislative position. Indeed, as she subsequently states, this type of social position should be left to the legislators and not to the courts[15].

[15] *Supra,* note 1, p.61.

Impact on third parties' rights

[77] When a company is placed under the protection of the *CCAA***,** its suppliers are not required to fulfill their contractual obligations if the company does not wish it or if it does not intend to fulfill its correlative obligations[16].

[16] *Supra,* note 1, p.71.

[78] In the *Pope & Talbot* case, Canfor, a supplier of Pope & Talbot, was required to continue to fulfill its contractual obligations towards Pope & Talbot by a court order in the course of the initial application. In addition, the Court gave an order staying Canfor's right to terminate the contract binding it to Pope & Talbot, despite its breach of contract[17].

[17] *Supra,* note 1, p.72, 73.

[79] Thus, Pope & Talbot, and thus its creditors, could keep the contract alive without fulfilling their obligations and possibly transfer it to a purchaser of the business. This situation granted more rights to the creditors of the company placed under the protection of the *CCAA* than the company would otherwise have if it did not benefit from such protection, the whole to the detriment of suppliers such as Canfor[18]. To quote a metaphor used in Shelley C. Fitzpatrick's text, the creditors use the Act as a sword allowing them to obtain a better strategic position and, therefore, a higher price for the assets of the company; not as a shield allowing to maintain the status quo, as it should be[19].

[18] *Supra,* note 1, p.73.

[19] *Supra,* note 2, p.67.

Circumstances and parameters of the liquidation

[80] The new section 36 of the Act settled the question of whether the Court has the power to allow liquidation. However, it gives very little indication as to how the Court will exercise this power. This new section 36 provides, however, that the Court may authorize the liquidation without the approval of creditors.

Various examples of the discretion exercised by the courts

Ontario

[81] As previously mentioned, the Ontario courts are significantly more active than elsewhere in Canada in the exercise of their discretion to authorize the liquidation of assets under the *CCAA.* Thus, liquidations were authorized without a plan of arrangement having been previously approved.

[82] It is the case in *Re Canadian Red Cross Society I Société Canadienne de la Croix-Rouge*[20]. While the organization was faced with law suits of nearly 8 billion dollars from victims having developed various diseases through contaminated blood transfusions, the

Court authorized the transfer of its assets to other organisations before a plan of arrangement was proposed to creditors. Justice Blair justifies his decision through the flexibility of the *CCAA,* which allows him to so act, and by the circumstances of the case, which results in the best solution[21]:

> *"[45] It is very common in CCAA restructurings for the Court to approve the sale and distribution of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument and it is that very flexibility which gives it its efficacy.*
>
> *[…]*
>
> *[46] [...] There is no realistic alternative to the sale and transfer that is proposed and the alternative is a liquidation/bankruptcy scenario, which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To forego that purchase price supported as it is by reliable expert evidence would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view."*

[20] *1998* CanLII 14907 (ON S.C.).

21 *Mid,* par.45, 47.

[83] Author Bill Kaplan also gives the example of the *Re Anvil Range Mining Corp.*[22] case, in which the Court authorized the liquidation of the company's assets following a plan of arrangement that had been voted on only by the secured creditors. The plan provided that only the secured creditors were authorized to vote and the unsecured creditors would not receive any amounts following the liquidation. The Court relied on the fact that unsecured creditors would suffer no prejudice since, regardless of the solution put forward, the liquidation would in no event allow the payment of any indemnity to them[23].

[22] 2001 CanLII 28449 (ON S.C.).

[23] *Mid,* par.12.

[84] Bill Kaplan summarized the position of the Ontario Courts with respect to the liquidation of assets under the *CCAA* as follows, all while stating that it departs from that of other provinces[24]:

> *"The Ontario authority demonstrates not only that the courts in Ontario have embraced liquidating CCAAs, but will approve asset sales under the CCAA without requiring that a Plan of Arrangement be filed. That is not an approach sanctioned by the Alberta Court of Appeal, or apparently by the British Columbia Court of Appeal, nor as we shall see, is it an approach that as met favour with Courts in the province of Quebec. »*

24 *Supra,* note 2, p.103.

British Columbia

[85] The situation in British Columbia is interesting since, until recently, the courts of this province joined the Ontario courts when it came time to authorize the liquidation of assets under the *CCAA*. However, the situation has dramatically changed since the *Cliffs Over Maple Bay Investments Ltd. vs. Fisgard Capital Corp.*[25] decision.

[25] *Supra,* note 8.

[86] In this decision, the Court of Appeal of British Columbia concludes that, in accordance with the objective of the *CCAA*, it may not grant the protection of the *CCAA* when the debtor company does not intend to propose a plan of arrangement to its creditors. As Bill Kaplan[26] explains:

> *"The Court of Appeal observed that the fundamental purposes of the CCAA was to facilitate, comprises and arrangements between companies and their creditors. Section 11, the stay provision, was merely ancillary to that fundamental purpose, and should only be granted in furtherance of that fundamental purpose. While the filing of a draft Plan of Arrangement or compromise is not a prerequisite to the granting of a stay under s. 11, the Court concluded that a stay should not be granted if the debtor company does not intend to propose a compromise or arrangement to its creditors."*

[26] *Supra,* note 2, p.85.

Alberta

[87] The Alberta case law is more demanding than elsewhere in Canada when it comes to authorizing a liquidation of assets under the *CCAA*. The *Royal Bank vs. Fracmaster Ltd.*[27] case is a good example. Indeed, the Court of Appeal of Alberta took this opportunity to take a position on the conditions that should guide the Court when authorizing a liquidation under the *CCAA*[28]*:*

> *"Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the interests of the creditors generally [...] There must be an ongoing business entity that will survive the asset sale [...J A sale of all or substantially all of the assets of the company to an entirely diffèrent entity with no continued involvement by former creditors and shareholders does not meet this requirement."*

[citation taken from the *Liquidating CCAAs: Discretion Gone Awryl* text?]

[27] (1999), 11 C.B.R. (4th) 204 (Alta. Q.A.).

[28] *Ibid,* par.16.

[88] By imposing the condition of survival of the business for a liquidation of assets under the *CCAA* to be authorized, the *Fracmaster* case made it considerably more difficult to obtain such orders in Alberta than elsewhere in Canada[29].

[29] *Supra,* note 2, p.112.

Québec

[89] According to author Bill Kaplan, prior to granting a company protection under the *CCAA*, Québec courts require real evidence of the general structure and content of the potential plan of arrangement to be submitted to the creditors [30].

[30] *Supra,* note 2, p.113.

[90] In support of this view, he refers to the *Re Boutiques San Francisco Incorporées*[31] decision. In this case, the Court refuses to grant protection under section 11 of the *CCAA* because the plan submitted by the debtor company was incomplete[32]:

> "20 As a result, while it is receptive to issue some Initial Order to allow the BSF Group the possibility to avail itself of some of the protections of the CCAA under the circumstances, the Court will not grant all the conclusions sought at this stage because of this situation and the lack of information on the proposed plan."

[31] EYB 2003-51913 (QCCS).

[32] *Ib/d,* par.20.

[91] In support of this decision, the Court refers to the judgment of Justice LeBel of the Court of Appeal in *Banque Laurentienne du Canada vs. Groupe Bovac Ltée*[33]:

> *56 [...] If sections 4 and 5 indicate that the order to convene the creditors or, if applicable, the shareholders of the company depends on the judge's discretion, the exercise thereof implies an existing basic element. Such an event occurs when a transaction or an arrangement "is proposed". A draft arrangement must physically exist. A simple statement of intention is not enough. Otherwise, the mechanisms provided at law are fundamentally transformed. It then becomes a way to obtain a simple stay, without the obligation to establish that a draft arrangement does exist and without the possibility to assess its plausibility. The emphasis of the law is not on form. It does not require that the draft arrangement be incorporated in the text of the petition. It may appear in schedules, in draft letters to creditors, as long as it may be indicated to the judge being asked to call of the meeting that it exists and that the main elements thereof may be described. [...]*
>
> *57 This obligation not only stems from the text of the Act but it also corresponds to the requirements of a sufficiently informed exercise of the Court's discretion to convene the creditors and shareholders and, in some cases, to issue stay orders under section 11.*

> *58 In the absence of a description of the main elements of a draft of arrangement, certain information required to allow the Court to exercise its discretion on an informed basis are missing. These elements are required to ensure that the interests of all the concerned groups are considered. Indeed, the consequences of implementing the mechanisms of the Companies' Creditors Arrangement Act are more drastic, particularly for secured creditors and inversely involve less risk for the debtor, since unsuccessfully resorting to the Act or rejecting proposals thereunder does not entail bankruptcy. Moreover, all creditors' realization proceedings of any nature can be stayed for undetermined periods.*
>
> *59 Using the Act implies oversight by the Court. It is for the judge to weigh from the start the business interest in submitting a proposal, the plausibility of its success, the consequences of such proposal and of stay orders issued to creditors and , the risks they have for the secured creditors. The judge must examine these various interests before creditors can be convened and the Act applied. The Act is not intended to grant grace periods to struggling debtors without any conditions or qualifications. It is designed to be an Act of reorganization of struggling businesses. As such, seized of the application to call a meeting and for a stay, the judge must be able to first assess if the business is liable to survive throughout the interim periods until approval of the compromise, then, assess whether it is reasonable to believe that the proposed agreement can be realized. To determine whether it can be realized, one of the basic conditions is to know the material terms thereof, even if such terms will be specified or amended thereafter. [...] »*
>
> [33] *Supra,* note 9, par.56-59 (EYB 1991-63766).

[92] Despite what Mr. Kaplan states, such requirement to submit sufficient material evidence of a future plan of arrangement does not seem to have been uniformly followed by the Québec Courts. The *Re Papier Gaspésia Inc.*[34] case is an example in which the protection of the Act was granted without a plan of arrangements having been submitted.

> [34] 2004 CanLII 41522 (QC C.S.).

[93] As stated by the Court of Appeal in this same case[35], the process for the sale of assets in this case shall be submitted for approval by the creditors:

> *"[14] Moreover, the call for tenders that was allowed, subject to certain conditions, by the first instance judgment is not equivalent to a pure and simple liquidation, although it could be considered as the start of the future liquidation process, which, however, could not take place if a purchaser would come forward and show an interest in relaunching the business (although this seems unlikely). In addition, to ensure the protection of the creditors' interests (including the petitioners), the trial judge orders that the terms and conditions of the call for tenders, the recommendations of acceptance or refusal of the tenders received and the plan of distributions of the sale price be submitted to the them, the whole through an amendment of the plan of arrangement already*

> *proposed (see par. 101 of the trial judgment). Not only must the plan of arrangement be submitted to the creditors, but it must also be sanctioned by the Superior Court. If necessary, Petitioners may ensure that their rights are adequately protected (including by requesting the creation of a particular class of creditors) and may address the Court for such purpose. The Petitioner may also, which they did not fail to argue on several occasions at the hearing, vote against the arrangement if it is not suitable to them, or refer to the Court if they feel their rights will not be considered or will be ignored."*
>
> **[Citation omitted]**

[35] *Papier Gaspésia inc., Re,* 2004 CanLII 46685 (OC C.A.), par.14.

[94] Therefore, although a plan of arrangement is not automatically required in order to obtain the protection of the Act in Québec, such a plan is still required to be put to a vote by the creditors.

The right course of action

[95] We therefore find ourselves in a situation where the application and interpretation of an Act of federal jurisdiction are materially different from province to province. Notwithstanding certain more drastic decisions, such as *Fracmaster* or *Cliffs Over Maple*, it seems to be unanimously agreed that the liquidation of assets under the *CCAA* is possible, especially since the enactment of section 36 of the *CCAA*. One may disagree with this situation but this is presently the state of the law.

[96] There are, however, fundamental differences in the application of this discretion throughout Canada, both with respect to assets that may be liquidated and to criteria that must guide the Courts in the use of its power.

[97] In finding a solution, we must keep in mind the objectives of the *CCAA* that must guide the interpretation thereof. Mr. Kaplan summarizes them as follows[36]:

> *"The judicial and academic pronouncements all identify the following general policy objectives: maximization of creditor recovery, minimization of the 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."*

[36] *Supra,* note 2, p.117.

Solutions proposed by Bill Kaplan

[98] Author Bill Kaplan starts his assessment of the state of the case law by stating that the *Fracmaster* and *Cliffs Over Maple* cases did not condemn liquidations under the *CCAA*. According to him, both these material decisions mostly warn us against abusively using the *CCAA* to liquidate assets of a company and emphasize the creditors' rights that are violated when the liquidation is permitted.

[99] Kaplan however specifies that, according to him, the *Fracmaster* case is too drastic when interpreted as requiring the survival of the business for granting the protection of the Act. Kaplan does, however, see a usefulness in the decision when it suggests that a party requiring the protection of the *CCAA*, while commercial objectives at stake would be fulfilled by one of the other insolvency proceedings, such as the *BIA* for the execution of hypothecary rights, must demonstrate why the application of the *CCAA* is necessary.

[100] With respect to the creditors' vote before proceeding to a liquidation of assets, Kaplan is of the opinion that the vote is not required at all times and that it is up to the Court to determine when it is necessary. He points out that the Court's agreement is required to proceed to such a liquidation, which ensures a certain control, and that it would be detrimental to have mandatary voting in all situations since it is a long and costly process. In order to determine if a vote is required, the Court should assess to what degree the creditors are opposed to the liquidation and weigh the alternatives to a liquidation under the *CCAA*. He notes that the Court must place a greater emphasis on the creditors' rights than on the rights of other stakeholders when it is time to assess the pros and cons of a liquidation under the *CCAA* compared to the other proposed solutions.

[101] Finally, the author would like to make it a mandatory requirement that a plan of arrangement be submitted to the creditors in all cases. He adds that such a plan could be submitted to all creditors, including the ordinary creditors, even when these would not receive anything from the liquidation of assets. This measure would be more in line with the intent of the Act, which remains to obtain an arrangement with the creditors.

[102] It is important to note that the position put forward in the *Fracmaster* case does not close the door completely to the liquidation of assets under the *CCAA*. Indeed, and I am also of that opinion, the liquidation of surplus assets may and must be possible under the *CCAA* in order to improve the company's finances. The test should therefore come down to determining if the case, and not necessarily the company itself, will survive following the plan of arrangement.

[103] Bill Kaplan's solution is interesting, but it has the effect of granting a very broad discretion to the courts, which is at the very basis of the case law that is being criticized today. The *Fracmaster* approach is more drastic and has the effect of restricting the broad power of interpretation of the courts, but it is necessary in the circumstances.

[104] Although the undersigned is inclined to support the thesis that the *CCAA* and the BIA are two distinct regimes that apply to two types of distinct situations and serve different objectives, the amendments to the *CCAA* and the particular circumstances of the present file militate towards the possibility of allowing the liquidation of assets under the *CCAA*.

[105] All of the factors to take in consideration as mentioned in section 36 (3) *CCAA* militate in favor of the authorization of a sale of assets. Not only does this permit a higher realization than that which could be obtained by any other means, it also permits the continuation of an indispensable railway for the regional economy.

[106] The judgment rendered by the undersigned authorizing the sale of assets was rendered with the consent of all of the interested parties. There has not been an appeal of this judgment. The judgment thus has the authority of res judicata with respect to the sale of the assets of the company.

[107] It was also in taking into consideration the collective interests and the maintenance of employment that the court permitted the sale even if it would not have been at the best price. In the end, the best price was obtained but there was the possibility that it might not have been the case.

[108] That being said, what do we do going forward in this file?

[109] In its current state, it seems unlikely that a plan of arrangement can be filed. It is therefore of little use for the moment to foresee a costly claims process since no vote will be necessary if no plan of arrangement is proposed.

The only possibility for continuing the CCAA proceedings

[110] Many might consider that there is no longer any reason to continue the present file.

[111] On the other hand, simply reading the Service List and noting the presence of parties represented at each step of the proceedings might lead one to think that an arrangement could be possible.

[112] We have already mentioned that our colleague Martin Castonguay exceptionally ordered the stay of proceedings with respect to XL Insurance Company Ltd. This was done exceptionally and in order to avoid chaos and a race to judgment against the insurance company.

[113] We have already said, in principle, that the *CCAA* applies only to debtor companies. However, exceptionally, orders may be rendered to release certain third parties that participate in a plan of arrangement by way of monetary contributions in exchange for releases.

[114] The undersigned in the case of the plan of arrangement of the Société industrielle de décolletage et d'outillage (SIDO) sanctioned a plan of arrangement that envisaged releases to certain third parties in addition to directors.

[115] Madam Justice Marie-France Bich in a judgment dismissing a Motion for Leave to Appeal stated as follows[38]:

[38]2010 QCCA 403.

> [32] **The releases**. Article 7.2 of the plan of arrangement approved by the first instance judge includes the following provisions :
>
> **Article 7.2 Releases**
>
> On the implementation date, the Debtor and/or the other Person identified below will benefit from the following releases and renunciations, which shall take effect at the Implementation time:
>
> 7.2.1 A total, final and definitive release of the Creditors from any Claim against the Debtor and a renunciation by the Creditors of the right to exercise any real or personal right with respect to the Claims.
>
> 7.2.2 A total, final and definitive release of the Creditors with respect to any claim, other than a claim targeted by paragraph 5.1(2) CCAA, that they have or could have, directly or indirectly, against the directors, officers, employees or other representatives or mandataries of the Debtor as a result of or with respect to an Affected Claim and a renunciation by the Creditors of the right to exercise any real or personal right with respect to any such claim.
>
> 7.2.3 A total, final and definitive release of the Creditors with respect to any claim that they have or may have, directly or indirectly, against DCR and Fortin, as well as their officers, directors, employees, financial consultants, legal counsels, business bankers, consultants, mandataries, as well as their respective current and former accountants from all demands, claims, actions, causes of action, counterclaims, lawsuits, debts, monies, accounts, undertakings, damages, decisions, judgments, expenses, seizures, charges and other recoveries under a claim,

> obligation, demand or cause of action of any nature that a Creditor may have the right to make against DCR or Fortin.
>
> 7.2.4 A total, final and definitive release of the Creditors with respect to any claim that they have or may have, directly or indirectly, against the Debtor or the Monitor or their directors, officers, employees or other representatives or mandataries as well as their legal counsel with respect to any action taken or omission made in good faith within the scope of the Proceedings or the preparation and implementation of the Plan or of any contract, effect, release or other agreement or document created or concluded, or of any action taken or omission made in relation to the Proceedings or the Plan, it being understood that nothing in this paragraph shall limit the liability of a Person from any fault relating to an obligation expressly set out in the Plan or any agreement or other document concluded by said Person after the Determination Date or pursuant to the Plan, or with respect to any breach of the obligation of prudence towards any Person that may occur after the Implementation date. In any event, the Debtor and the Monitor and their employees, directors, officers, mandataries and respective consultants have the right to rely upon legal opinions regarding their obligations and responsibilities under the Plan; and
>
> 7.2.5 A total, final and definitive release of the Debtor from any claim that it has or may have, directly or indirectly, against its directors, officers and employees.

[…]

[37] However, before the Superior Court, based namely on the Court of Appeal judgment in *A.T.B. Financial v.. Metcalfe & Mansfield Alternative Invesments II Corp.,* Respondent argued that the release in favour of DCR was legal and appropriate in this case, considering that such a release has a reasonable connection with the proposed reorganisation. In the written argument submitted to the trial judge, Respondent cited the following paragraphs in the *Metcalfe* decision:

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that :
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[38] It seems obvious that the trial judge estimated that the release for the benefit of DCR pursuant to Article 7.2.3 of the Plan of Arrangement fulfilled these requirements.

[39] The submissions filed by Respondent before the Superior Court and the submissions filed for the purposes hereof also cite, among others, the *Muscletech Research and Development Inc.* case, recognizing the possibility, as part of an arrangement under the *CCAA* to state a release in favor of a third party financing the restructuring of the debtor company. However, it is precisely the case of DCR, which shall pay a considerable amount in order to support the reorganisation of Respondent's business under the Plan of Arrangement.

[40] It is worthwhile reproducing certain paragraphs of the *Muscletech* case*:*

> [7] With respect to the relief sought relating to Claims against ThirdParties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
> > the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.
>
> [8] Moreover, it is flot uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting

> Claimants did file Proofs Of Claim settling out in detail their claims against numerous Third Parties.
>
> [9] It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That clone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), Paperney J. stated at p. 92:
>
> > While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.
>
> [Underlining added]

[41] Subsequently, the Superior Court of Justice of Ontario, in a decision rendered in the same case in 2007, wrote the following:

> [20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behaif of' the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.
>
> [21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.
>
> [...]

[23] The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defendants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable; it is absolutely essentiel. There will be no funding and no Plan if the Third Party Releases are not provided. The representative Plaintifs and all the members of their classes had ample opportunity to submit individual proofs of daim and have chosen not to do so, except for two or three of the representative Plaintifs who did file individual proofs of daim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.

[…]
[underlining added]

> [42] To the same effect, the Superior Court decision in *Charles Auguste Fortier inc. (Arrangement relatif à),* which thoroughly deals with the question and concludes in favour of a release of the guarantor of the debtor company. This guarantor played a central role in the reorganisation of the business and, without his help, the Plan would have failed.
>
> [43] The situation in this case is similar: DCR will inject substantial amounts into Respondent's reorganisation under the Plan of Arrangement, which will not occur if it does not receive the release provided in paragraph 7.2.3. The Application for leave to appeal and the submissions presented at the hearing do not support a conclusion that Petitioner disputes this fact, nor that it disputes the absence of another source of financing. Rather, it argues that the release has no connection with the business. With respect, this argument cannot stand and, in my opinion, it has no reasonable chance of success before this Court. The Application for leave to appeal thus cannot be granted on this basis.

[116] The Debtor admits that it wishes to continue the proceedings under the *CCAA* to ultimately obtain the release of the directors.

[117] Various class actions have been filed against the Debtor. One of the actions filed in Québec, and in which the plaintiffs' motions were postponed to February 26, involves not only the Debtor and its directors but more than 35 other defendants as well.

[118] These are the defendants that the Debtor would like to see at the table to try and reach a settlement that would be beneficial for all. Several of these defendants have been present at all stages of this case.

[119] A settlement in this case would have the benefit of avoiding, for all parties thereto, legal proceedings that could unfold over several years.

[120] In the current state of the case, it is impossible for a court to order that amounts acknowledged to be owed by Compagnie d'Assurance XL be paid to a creditor, rather than to another one.

[121] The only pratical, economical and legally possible way to settle this case would be for third parties to enter into an arrangement that would be submitted to all creditors.

[122] Nothing will prevent the plaintiffs in the class action from continuing the proceedings against the defendants that do not participate therein, but this would allow them to participate in the distribution of insurance indemnity for a total of $25,000,000.

[123] Obviously, for this thing to be successful, third parties will have to contribute substantial amounts. The class action plaintiffs cannot be allocated any insurance amounts since they are not entitled thereto. There are other victims, not only the class action plaintiffs. Those other victims have as much right to the benefit of the insurance as the class action plaintiffs. Another fact to be considered is that the Government of Québec, through its attorneys, has indicated since the start that it wishes that the insurance amount be given to the victims. This wish was mentioned at various hearings but does not bind anybody for the time being. The Government's attorney also declared that his definition of victims is not the same as the Court's. Indeed, an insurance company that may have indemnified a merchant for the loss of a building or for the loss of sales is also a victim of the railway tragedy. Legally, such insurance company would be totally in its right to receive a part of the $25,000,000 XL Insurance proceeds.

[124] The Government of Québec may very well prefer the individual victims, but that does not bind XL Insurance.

[125] Of course, if the Province of Québec has a claim of $200,000,000 and succeeds in recovering amounts, it may use them as it sees fit.

[126] That $200,000,000 in fact appears conservative. If the Province recovers amounts, it may use them as it sees fit.

[127] For the time being, we are in a situation where there are no assets to be shared by the creditors. It is therefore useless to establish a very expensive claims process. Indeed, who would finance such a process? The Petitioners in the class action and the Government of Québec also cannot behave as if they were the sole creditors of MMA. One could easily believe that the value of the other claims also exceeds hundreds of millions of dollars. But the creditors are independent amongst themselves. If they decide that a class of creditors shall receive amounts while other creditors would have been entitled to receive such amounts but decide to waive these amounts, they are entitled to do it. They may be entitled thereto, but the means to quickly achieve this objective are limited. For the time being, the proceedings underway could lead to such a settlement, provided that a plan is filed and accepted by the creditors. We cannot consider a proposal in bankruptcy under the *BIA* as the process would be too expensive in the current state of the case. The *CCAA* also has the benefit of being more flexible. The only possible and quick solution is therefore the one proposed by the Debtor. Third parties must participate in developing a proposal. A monetary contribution is essential to participate. If an acceptable plan is proposed, the creditors may accept it and may decide on classes of creditors who may participate in the distribution. They could also agree that third parties be released.

[128] If the Court lifts the stay of proceedings against XL Insurance, there will be chaos and a race to obtain judgments.

> [129] The attorney for XL already mentioned to the Court, based on his interpretation of the contract, the insurer must pay the indemnities on a first-come, first-serve basis.
>
> [130] Numerous actions could then be brought against the Debtor and the insurance company, which would no longer be required to pay once an amount of $25,000,000 has been disbursed.
>
> [131] It is unrealistic to think that a judgment could be obtained in a class action before judgment is rendered in the ordinary lawsuits filed, especially when the Defendants admit their liability.
>
> [132] The Court does not see how proceedings before other courts could be stayed pending the result of the class action. No one is required to take part in such recourse.

[12] Following that judgment, a negotiation process began with potentially liable third parties. It is these negotiations that allowed for the creation of an indemnity fund in the amount of 430 million dollars to indemnify the victims of the railway tragedy, who, we cannot forget, are all creditors of the Debtor.

[13] All the Defendants that are being sued in a class action brought in Québec agree to take part in the indemnity fund, with the exception of the Opponent, Canadian Pacific Railway Company (CP).

[14] The Honorable Martin Bureau, S.C.J. granted the Motion for Leave to file a class action against CP and World Fuel Services, which later joined the group contributing to the indemnity fund.

[15] CP is refusing to participe in the fund, arguing that it is not responsible for the railway tragedy. It is absolutely entitled to do so.

[16] However, for the reasons set out hereafter, it is obvious that the sole objective of CP's challenge is to defeat the proposed Plan of Arrangement or to obtain a strategic negotiating advantage that would provide it with even more rights than it would have if the parties had simply decided to settle the class action out of court. We will come back to this point.

[17] In its submissions, CP raises the following questions:

a) Doe section 4 of the CCAA grant a Court sitting under the CCAA the jurisdiction to sanction a « Plan » that does not propose a transaction or an arrangement between a debtor under the CCAA and its creditors?

b) If the Court answers the question raised in (a) in the affirmative, does it have jurisdiction under the CCAA to sanction a release in favour of a solvent third party that is not "reasonably related to the restructuring" of the Debtor under the CCAA?

c) If the Court answers the question raised in (b) in the affirmative, does it have jurisdiction under the CCAA to sanction a « Plan » containing releases in favor of third parties without any connection with the settlement of all claims against the insolvent Debtor, that is that the claims against the Debtor are not covered by the Plan and that such Plan does not grant any advantage to the Debtor?

d) Does an affirmative answer to question (b) or question (c) constitute a valid constitutional interpretation of the Court's jurisdiction to sanction a plan of compromise or arrangement under the CCAA?

e) If the Court answers all the preceeding questions in the affirmative, is the plan and the partial settlement agreements which are an integral part thereof, reasonable, fair and equitable for all parties concerned, including the entities that are not parties to the settlement?

[18] On March 31, 2015, MMAC files a Plan of Compromise and Arrangement, which states as follows at section 2.1:

> **2.1 Purpose**
>
> The purpose of the Plan is:
>
> (a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all Affected Claims against the Released Parties;
>
> (b) to effect the distribution of the Funds for Distribution and payment of the Proven Claims as set forth in Sections 4.2 and 4.3;
>
> The Plan is put forward in the expectation that the Creditors, when considered as a whole, will derive a greater benefit from the implementation of the Plan than they would in the event of a bankruptcy of MMAC.

[19] The Monitor's *Nineteenth Report on Petitioner's Plan of Arrangement* dated May 14, 2015 states the context in which the Plan was put forward by MMAC, and more specifically, it underlying purpose.

> - Paragraphs 11 and 13 of the Nineteenth Report:
>
> 11. In order to compensate creditors for damages suffered as a result of the Derailment, it was clear to all concerned from the outset that this could only be accomplished through contributions from potentially liable third parties ("Third Parties") in exchange for full and final releases in respect of all litigation relating to the Derailment..

> [—]
>
> 13. The Plan is the result of many months of multilateral discussions between the Petitioner's counsel, the Monitor and its counsel, the Trustee, Petitioner's principal stakeholders, namely the Province of Quebec ("Province"), the Class Representatives, the attorneys for derailment victims in the Chapter 11 case ("US Legal Representatives") and the attorney for the Official Victims Committee (in the Chapter 11 ("Official Committee") (collectively the "Major Stakeholders") and the Third Parties, the purpose of which was to negotiate contributions by the Third Parties to a Settlement Fund to be distributed to derailment victims. [...]
>
> [Underlining added]

[20] CP submits that the sole purpose of the Plan is therefore irrefutable: *the settlement of the victims' claims against potentially liable third parties*, and that the Plan does not in any way address MMAC's restructuring.

[21] This is incorrect. If one follows CP's logic, the restructuring of the business would be required to occur after the Plan is approved by the creditors.

[22] However, the restructuring is often completed before the Plan is approved by the creditors. This is what happened in this case.

[23] Here, the railway is saved, jobs are saved and all industries and the municipalities serviced by the railway have assurances that service will continue.

[24] It is not because some of the initial objectives have been met that this success is to be ignored.

[25] Without the benefit of the CCAA, the railway tracks could very well have been sold as scrap metal. This second catastrophy was avoided.

[26] In consideration for the respective contributions to the indemnity fund, the released parties will have very broad « Releases and Injunctions ».

[27] MMAC is not a released party under the Plan.

[28] More specifically, paragraph 5.1 of the Plan provides for the execution (i) of very broad releases in favour of the Released Parties, and (ii) of injunctions preventing any future claim against the Released Parties:

> **5.1 Plan Releases and Injunctions**
>
> "All Affected Claims shall be fully, finally, absolutely, unconditionally, completely, irrevocably and forever compromised, remised, released, discharged, cancelled and barred on the Plan Implementation Date as against the Released Parties.
>
> All Persons (regardless of whether or not such Persons are Creditors or Claimants) shall be permanently and forever barred, estopped, stayed and enjoined from (i) pursuing any Claim, directly or indirectly, against the Released Parties, (ii)

> continuing or commencing, directly or indirectly, any action or other proceeding with respect to any Claim against the Released Parties, or with respect to any claim that could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, (iii) seeking the enforcement, levy, attachment, collection, contribution or recovery of or from any judgment, award, decree, or order against the Released Parties or property of the Released Parties with respect to any Claim, (iv) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or the property of the Released Parties with respect to any Claim, (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Approval Orders to the full extent permitted by applicable law, (vi) asserting any right of setoff, compensation, subrogation, contribution, indemnity, claim or action in warranty or forced intervention, recoupment or avoidance of any kind against any obligations due to the Released Parties with respect to any Claim or asserting any right of assignment of or subrogation against any obligation due by any of the Released Parties with respect to any Claim, and (vii) taking any actions to interfere with the Implementation or consummation of this Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan.
>
> Notwithstanding the foregoing, the Plan Releases and Injunctions as provided in this Section 5.1 (i) shall have no effect on the rights and obligations provided by the "Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic" signed on February 19, 2014 between Canada and the Province, (ii) shall not extend to and shall not be construed as extending to any Unaffected Claims."
>
> [Our underlining]

[29] In addition to the foregoing, paragraph 5.3 of the Plan expressly states that any claim against third party defendants**:**

> "(a) is unaffected by this Plan;
>
> (b) is not discharged, released, cancelled or barred pursuant to this Plan;
>
> (c) shall be permitted to continue as against said Third Party Defendants;
>
> (d) shall not be limited or restricted by this Plan in any manner as to quantum to the extent that there is no double recovery as a result of the indemnification received by the Creditors or Claimants pursuant to this Plan; and
>
> (e) does not constitute an Affected Claim under this Plan."

Moreover, paragraph 5.3 of the Plan repeats that no person can assert a claim against any of the Released Parties.

> **5.3 Claims against Third Party Defendants**
>
> Any Claim of any Person, including MMAC and MMA, against the Third Party Defendants that are not also Released Parties: (a) is unaffected by this Plan; (b) is not discharged, released, cancelled or barred pursuant to this Plan; (c) shall be

permitted to continue as against said Third Party Defendants; (d) shall not be limited or restricted by this Plan in any manner as to quantum to the extent that there is no double recovery as a result of the indemnification received by the Creditors or Claimants pursuant to this Plan; and (e) does not constitute an Affected Claim under this Plan. For greater certainty, and notwithstanding anything else contained herein, in the event that a Claim is asserted by any Person, including MMAC and MMA, against any Third Party Defendants that are not also Released Parties any and all right(s) of such Third Party Defendants to claim over, claim against or otherwise assert or pursue any rights or any Claim against any of the Released Parties at any time, shall be released and discharged and forever barred pursuant to the terms of this Plan and the Approval Orders.

[30] Finally, paragraph 3.3 of the Plan expressly states that certain claims are not covered by the Plan:

"3.3 Unaffected Claims

Notwithstanding anything to the contrary herein, this Plan does not compromise, release, discharge, cancel, bar or otherwise affect:

(a) the rights or claims of the Canadian Professionals and the U.S. Professionals for fees and disbursements incurred or to be incurred for services rendered in connection with or relating to the CCAA Proceeding or the Bankruptcy Case, including the implementation of this Plan and the U.S. Plan.

(b) to the extent that there is, or may be, coverage for such Claims under any policy of insurance issued by Great American or any affiliate, including, without limitation, the Great American Policy, and only to the extent such coverage is actually provided, which coverage shall be assigned to the Trustee and MMAC and without any obligation on the part of the Rail World Parties or the D&O Parties to make any payment or contribution to supplement what is actually obtained by the Trustee or MMAC from such insurance policy (i) claims by MMAC or the Trustee (and only the Trustee, MMAC, their designee, or, to the extent applicable, the Estates) against the Rail World Parties and/or the D&O Parties; and (ii) claims by the holders of Wrongful Death Claims against Rail World, Inc., provided further, that any right or recovery by such holders of any right or recovery by such holders of Wrongful Death Claims pursuant to the action authorized by this subparagraph shall be, in all respects, subordinate to the claims of the Trustee and MMAC, and their successors under the Plan, in the above policies and (iii) claims by MMAC or the Trustee against the D&O Parties for any alleged breach of fiduciary duty or any similar claim based upon the D&O parties' authorization for payments to holders of notes and warrants issued pursuant to that certain Note and Warrant Purchase Agreement dated January 8, 2003 between MMA and certain noteholders (as amended from time to time) to the extent such payments arise from the sale of certain assets of MMA to the State of Maine.

(c) claims by MMAC and the Trustee under applicable bankruptcy and non bankruptcy law to avoid and/or recover transfers from MMA, MMAC or MMA Corporation to the holders of notes and warrants issued pursuant to that certain Note and Warrant Purchase Agreement dated as of January 8, 2003 between

MMA and certain noteholders (as amended from time to time) to the extent such payments arise from the distribution of proceeds from the sale of certain assets of MMA to the State of Maine.

(d) claims or causes of action of any Person, including MMAC, MMA and the Released Parties (subject to the limitations contained in their respective Settlement Agreements), against third parties other than any of the Released Parties (subject to paragraph 3.3(e)).

(e) claims or other rights preserved by any one of the Released Parties as set forth in Schedule A.

(f) MMAC's obligations under the Plan, the Settlement Agreements, and the Approval Orders.

(g) Claims against MMAC, except any Claims of the Released Parties other than Canada. However, subject to the Approval Orders becoming Final Orders, the Attorney General of Canada (i) has undertaken to irrevocably withdraw the Proof of Claim filed on behalf of Department of Transport Canada and the Proof of Claim filed on behalf of the Department of Public Safety and Emergency Preparedness, (ii) has agreed to the reallocation in favor of the Creditors of any and all dividends payable pursuant to this Plan or the U.S. Plan on the Proof of Claim filed on behalf of Canada Economic Development for Quebec Regions, as set forth in Section 4.3, and (iii) has agreed not to file any additional Proof of Claim under the CCAA Proceeding or the Bankruptcy Case.

(h) any liability or obligation of and claim against the Third Party Defendants, insofar as they are not Released Parties, of whatever nature for or in connection with the Derailment, including but not limited to the Class Action and the Cook County Actions.

(i) any Person for fraud or criminal and quasi-criminal charges filed or that may be filed and, for greater certainty, for any fine or penalty arising from any such charges.

(j) any claims that any of the Rail World Parties and the D&O Parties may have to seek recovery from any of their insurers for any attorneys' fees, expenses and costs they have incurred prior to the Approval Date.

(k) claims that fall under Section 5.1(2) of the CCAA.

All of the foregoing rights and claims set out in this Section 3.3, inclusive, are collectively referred to as the "Unaffected Claims" and any one of them is an "Unaffected Claim"."

[Our underlining]

[31] This is what leads CP to state that:

The Plan « does not compromise, release, cancel or bar, nor has any consequence relating to » the claims against MMAC, that is that the claims

> against MMAC are not covered by the Plan. MMAC is not undergoing a restruturing.

[32] In addition, CP submits the following:

> a) The claims of all "victims" and even possibly of the Released Parties may be maintained or new recourses may be instituted both in Canada and in the United States against the entities that are not parties to the settlement, including CP;
>
> b) The class action plaintiffs may continue their legal action against Defendants CP and World Fuel Services with the added benefit that such Defendants thereby "inherit" MMAC's liability, while they are prevented from claiming any contribution or indemnity from the Released Parties!

[33] Indeed, that is CP's main argument. What it finds wrong with the Plan is that CP is now the only one targeted in the class action. It also argues that, since it is not released under the Plan, it would be sued by all persons having sustained damages following the derailment. It also argues that it would have to assume the portion of liability that should be borne by MMA. We will come back to this.

[34] CP properly summarizes the criteria for the exercice of the Court's judicial discretion concerning the approval of a plan when it states:

> a) The Plan shall be in strict compliance with all statutory requirements and previous orders of the Court;
>
> b) All materials filed and proceedings carried out shall be examined to determine if any measure taken or deemed to have been taken is prohibited under the CCAA;
>
> c) The Plan must be fair and reasonable.[1]

[35] CP submits that the Plan is illegal and goes beyond what is authorized by the CCAA.

[36] It is true that, at the stage of the hearing on sanction, the Court must ensure that the process conducted under the *CCAA* respected the Act and that nothing in the proposed Plan is contrary thereto[2].

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1 *Dairy Corporation of Canada Limited (Re),* (1934) O.R. 436, paragr. 1, 4; *Northland Properties Limited,* (1998) 73 C.B.R. (N.S. 175), paragr. 24 *et* 29; *Olympia & York Developments Ltd. (Re),* (1993) 17 C.B.R. (3d) 1 (Ont. Gen. Div.), paragr. 1; *Canadian Airlines Corp. (Re),* 2000 ABQB 442, paragr. 60; *Uniforêt Inc., Re (Trustee of),* 2002 CanLII 24468, paragr. 14.

2 *Olympia & York Developments Ltd. (Re),* (1993) 17 C.B.R. (3d) 1 (Ont. Gen. Div.), paragr. 23-26;

[37] CP submits that a compromise or an arrangement necessarily involves the reorganisation of the Debtor's business.

[38] However, CP disregards the fact that, as already mentioned, the reorganisation of the Debtor's business already took place more than a year ago.

[39] On the other hand, CP states:

> "In any event, upon the sale of all assets of MMAC to RAH, the "secondary objective" consisting in maximising the value of MMAC's assets was accomplished and the application of the CCAA could therefore no longer accomplish a legitimate objective; indeed, all MMAC's business, with the exception of its liabilities, had been completely and finally liquidated."

[40] Once again, CP seems to submit that, since the assets are sold, the Court should end the process under the CCAA.

[41] Such claim has no legal basis and was indeed addressed in a judgment[3] by the undersigned that did not give rise to any complaint from anyone.

[42] We must recall that CP's representatives participated in all hearings presided over by the undersigned.

[43] CP alternatively submits that the Court does not have jurisdiction to sanction the releases and injunctions provided in favor of the Released Parties.

[44] In addition to having been addressed by a decision from the undersigned in this case, the Court believes that it is now well established that the Courts may, under the CCAA, sanction plans of arrangement providing for releases in favour of third parties.

[45] In the *Metcalfe*[4] case, the Court of Appeal of Ontario states the criteria to be applied in determining if the granting of releases in favour of third parties may be approved:

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

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3 See judgment dated February 17, 2014, p. 22-29, paragr.113-123.

4 *Metcalfe & Mansfield Alternative Investments II Corp.,* 2008 ONCA 587

> a) **The parties to be released are necessary and essential to the restructuring of the debtor;**
>
> b) **The claims to be released are rationally related to the purpose of the Plan and necessary for it;**
>
> c) **The Plan cannot succeed without the releases;**
>
> d) **The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;**
>
> e) **The Plan will benefit not only the debtor companies but creditor Noteholders generally;**
>
> f) **The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,**
>
> g) **The releases are fair and reasonable and not overly broad or offensive to public policy.**

[46] In that case, Justice Blair came to the conclusion that the releases sought in favour of third Parties were justified. He also concludes that the releases must be reasonably connected to the Plan:

> [63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. **In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them.** Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan --including the provision for releases -- becomes binding on all creditors (including the dissenting minority).
>
> […]
>
> [66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. **The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51).**
>
> […]

> [69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> [70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party daim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[47] In the *Muscletech*[5] case, the Superior Court of Ontario also approves the granting of releases to third parties having financed a plan of liquidation. Although it is of the opinion that it is premature to object to the contemplated releases (which objection should be raised at an eventual hearing on the motion for sanction), the Honorable Justice Ground nonetheless concludes that the CCAA allows this type of release:

> [7] With respect to the relief sought relating to Claims against Third Parties the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
> > "the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis."
>
> […]
>
> [9] **It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by**

5 *Muscletech Research and Development Inc., Re,* 2006 CanLII 34344 (ON SC).

> **the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties**.
>
> […]
>
> [11] In any event, it must be remembered that the Claims of the Objecting Claimants are at this stage unliquidated contingent claims which may in the course of the hearings by the Claims Officer, or on appeal to this court, be found to be without merit or of no or nominal value. **It also appears to me that, to challenge the inclusion of a settlement of all or some claims against Third Parties as part of a Plan of compromise and arrangement, should be dealt with at the sanction hearing when the Plan is brought forward for court approval and that it is premature to bring a motion before this court at this stage to contest provisions of a Plan not yet fully developed.**

[48] In this case, the releases sought are an essential condition to the viability of the Plan since the Released Parties are the only ones financing the Plan. This weighs strongly in favour of the fair and reasonable nature of the releases sought**:**

> [23] [...] As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. **Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided.**[66]

[49] Alternatively, CP also submits that the Plan may not be used as a tool to settle disputes between solvent third parties without granting a release to MMAC. This subsidiary argument is in line with CP's argument that the Plan negatively impacts its rights.

[50] Indeed, CP submits the following **:**

> Since CP's liability is, among others, sought on a solidary basis in the class action, and since CP is not a Released Party under the Plan, its rights shall be directly and considerably affected.

[51] CP submits *inter alia* that the partial settlement of multi-party litigation must be at least a neutral event for the defendants that are not parties to the settlement.

---

6 *Muscletech Research and Development Inc. (Re),* 2007 CanLII 5146
Voir aussi : *Sino-Forest Corporation (Re),* 2012 ONSC 7050, paragr. 74 (autorisation d'appeler refusée, 2013 ONCA 456

[52] It submits that the Plan does not grant CP the ordinary protections it would receive under the partial settlement of a class action in civil law.

[53] As already mentioned, nothing will prevent CP from defending itself in any action brought against it. If it is not liable, the action will be dismissed.

[54] If it claims that the damages were caused by a third party, it may submit this argument even if such third party is not involved in the proceedings.

[55] In fact, there would even be an advantage for CP as it may continue to argue that the tragedy is everybody's fault, except its own.

[56] Indeed, the Supreme Court recently reminded us of the following[7]

> [138] In our opinion, the Court of Appeal was also right to intervene on the issue of damages. There was an overriding error in the trial judge's analysis. She failed to take into account the requirement that the liability be apportioned solidarily, and to establish the amounts being awarded on the basis of the actual liability of each of the solidary debtors. As the Court of Appeal noted, [translation] "to every extent that more than one solidary debtor could be liable for the heads of claim, Mr. Hinse's releases made it necessary to examine the causal faults and apportion liability": para. 189. Mr. Hinse should have borne the shares of the solidary debtors he had released: arts. 1526 and 1690 C.C.Q.
>
> [139] The trial judge addressed the issue of damages as if the Minister were the only party to commit a fault and as if the damage sustained by Mr. Hinse was due solely to the Minister's [translation] "institutional inertia": paras. 75□77. Indeed, rather than fixing the damages amounts that could be specifically attributed to the AGC, she simply relied on Mr. Hinse's claims:
>
> [translation] Furthermore, since, following the transaction entered into between the AGQ and Hinse, the latter amended his proceeding so as to claim from the AGC only the portion he had attributed to [the AGC] on the basis of the various heads of damage he raised, the Court will examine, for the purpose of this proceeding and in compliance with the provisions quoted above, only the applications that are in line with this new reality and that concern solely the AGC. [para. 22]

7 [7] *Hinse* **c.** *Canada (Procureur général),* **2015 CSC 35.**

> [140] Thus, except in the case of the punitive damages, the trial judge awarded the amounts being claimed on the assumption that Mr. Hinse had correctly limited them to the amounts that solely concerned the AGC. However, the apportionment of the liability of Mr. Hinse's various co-debtors had to be determined on the basis of the seriousness of each one's fault: art. 1478 C.C.Q. The trial judge could not simply rely on the apportionment suggested by Mr. Hinse; her role as the arbiter of damages required that she herself fix each debtor's share of the liability.
>
> [141] In addition to this overriding error, which skews the amounts awarded under all the heads of damages, the grounds for each of those amounts were also flawed.
>
> (1) Pecuniary Damage
>
> [142] Poulin J. ordered the AGC to pay a total of $855,229.61 in respect of pecuniary damage. This amount seems excessive, given that the AGQ had already paid $1,100,000 under this head pursuant to the transaction entered into with Mr. Hinse. At the very least, the onus was on Mr. Hinse to show that the payments concerned distinct heads of compensation. He did not do so. Moreover, when the amounts awarded are broken down, it is clear that there was no justification for the amounts being claimed.

[57] In short, if CP is not liable, the action shall be dismissed against it.

[58] If it is liable, and third parties also liable were released, CP will be released from the portion of liability attributable to the solidary debtors that were released.

[59] In fact, what would be unfair would be to allow CP to benefit from a release while it did not financially contribute to the Plan, contrary to the other co-defendants.

[60] CP also submits that it should be released from its pro rata share of liability with MMA.

[61] It is certainly not within the jurisdiction of the undersigned judge to make that decision.

[62] The judge presiding over the proceedings against CP will make that decision.

[63] With respect to the constitutional question raised in CP's outline of arguments and for which notices under section 95 CCP were sent, the Court acknowledges CP's lack of emphasis on this argument at the hearing.

[64] The Court adopts the arguments set out by the Attorney General of Canada when it states:

4. On May 15, 2015, the AGC received a notice from Canadian Pacific Railway Company (CP) under section 95 of *Code of Civil Procedure (CCP).*

5. CP does not challenge the constitutional validity of the *Companies' Creditors Arrangement Act ("CCAA")* or any of its provisions.

- *Submission Plan in support of Canadian Pacific Railway Company's objection to the Plan of Arrangement,* para. 110.

6. Rather, CP argues that the sanction by the Court of MMAC's Plan under the CCAA would massively and unlawfully encroach upon the provincial legislatures' jurisdiction with respect to property and civil rights.

7. In the absence of argument from CP with respect to constitutional applicability or validity of the *CCAA,* the notice under the CCP was not required.

8. We must also recall that the constitutional validity of a law depends on its true nature and whether such nature is related to a matter falling under the jurisdiction of the legislature that adopted it. The true nature of a law is established pursuant to the purpose of the act and its legal effects. However, the constitutional validity of a law does not depend on the effects it may produce in a particular case.

- *Canadian Western Bank* c. *Alberta,* [2007] 2 S.C.R. 3, para. 25-27 (MMAC's authorities, Tab 44).

9. Also, and even though this is not the case here, the existence of a conflict between a federal law and a provincial law is not relevent to the constitutional validity of the law. The existence of a conflict of law could be relevent pursuant to the doctrine of federal paramountcy — but such doctrine would have the effect of rendering the provincial law inoperative to the extent that it is inconsistent with the federal law.

- Peter HOGG, *Constitutional Law of Canada, Se* éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 16-1 - 16-3 (PGC's authorities, Tab 1)

10. By its true and dominant nature, the *CCAA* is insolvency legislation. Its purpose and effects favour the conclusion of fair and reasonable compromises and arrangements, all while taking into consideration the interests of the debtor company, its creditors, other interested parties and the public interest.

- *Century Services Inc.* v. *Canada (Attorney General),* [2010] 3 SCR 379, 2010 CSC 60, paragr. 60 (MMAC's authorities, Tab14)

11. As such, the *CCAA* stems clearly from bankruptcy and insolvency, an area of jurisdiction that is clearly attributed to Parliament by paragraph 91(21) of the *Constitutional Act* of 1867.

- *Reference re constitutional validity of the Compagnies Creditors Arrangement Ace* (Dom.) [1934] S.C.R. 659, p. 660 (MMAC's authorities, Tab 46)

12. There is no doubt that the *CCAA* cannot be held to be unconstitutional simply because the exercise of the court's jurisdiction thereunder produces effects on the property and civil rights of the parties involved and that jurisdiction over same is otherwise reserved for provincial legislatures.

    - *Canadian Western Bank* c. *Alberta,* [2007] 2 S.C.R. 3, paragr. 28 (MMAC's authorities, Tab 44)

    « The fundamental corollary to this approach to constitutional analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. »

13. Otherwise, the efficiency of the *CCAA* would be completely compromised.

    - Peter HOGG *Constitutional Law of Canada,* 5e ed., vol. 1, loose leaves, Thomson/Carswell, p. 25-3 (MMAC's authorities, Tab 45)

14. The *CCAA* is constitutional, even to the extent that the powers that it grants the courts allows for the approval of plans that grant releases to third parties.

    - *Metcalfe & Mansfield Alternative Investments II Corp.,* (Re), 2008 ONCA 587, par. 104 (MMAC's authorities, Tab 24)

15. On the other hand, the Privy Council confirmed the constitutional validity of an act of Parliament, derived from its jurisdiction regarding bankruptcy and insolvency, allowing farmers to enter into plans of arrangement with their creditors without such farmers being released from their debts.

    - *Farmers' Creditors Arrangement Act (FCAA),* [1937] A.C. 391, p. 403-404 (MMAC's authorities, Tab 49), confirming *Reference re legislative jurisdiction of Parliament of Canada to enact the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935,* [1936] S.C.R. 384, p. 398 (MMAC's authorities MMAC, Tab 48)

16. As a result, the *CCAA* is *intra vires* of parliament even insofar as it allows the Courts to sanction a plan of arrangement whereby the debtor company is not released.

17. The remedial and flexible nature of the *CCAA* allows the Courts to issue innovative orders to the extent that they are issued in conformity with the Act, which is the case here.

18. In fact, a plan of arrangement that grants releases to third parties and not to the principal debtor was already endorsed by the Federal Court of Australia.

    - *Lehman Brothers Australia Ltd. In the matter of Lehman Brothers Australia Ltd ((in liq) No2),* [2013] FCA 965, par. 34-57 (Australia) (MMAC's authorities, Tab 52)

19. It should also be noted that constitutional doctrine acknowledges that, "the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism"."

    - *Canadian Western Bank* vs. *Alberta,* [2007] 2 S.C.R. 3, par. 24 (MMAC's authorities)

20. In the circumstances, the notice of constitutional question served by CP upon the attorneys general does not apply and must therefore be dismissed.

[65] In short, the undersigned not only believes that the proposed plan is fair and reasonable but to accept the arguments presented by CP would undermine public confidence in the courts.

[66] Indeed, for over two years, the victims of the terrible Lac-Mégantic tragedy have submitted themselves to the judicial process. For two years, all actions in this case were focused on the presentation of the plan of arrangement that was then unanimously accepted by the Debtor's creditors.

[67] Although judicial resources are limited, considerable resources were employed so that Lac-Mégantic's victims could find justice.

[68] Attorneys and citizens of the districts of Mégantic, Saint-François and Bedford were aware that the considerable judicial resources used in the Lac-Mégantic case meant that those resources were not available to them.

[69] The use of these judicial resources thus delayed other cases.

[70] Killing the plan of arrangement today for the sole benefit of a third party against which a class action has been authorized, while that same third party has been involved in the proceedings from the start, would be unfair and unreasonable.

[71] A final comment should be made. The Petitioner filed under seal the settlement agreements entered into between the potentially liable third parties. A judgment was rendered by the undersigned on CP's request to review such agreements.

[72] CP was authorized to review redacted versions of the agreements. Therefore, it does not know the amounts contributed by liable third parties, except with respect to Irving Oil and World Fuel Services, which both made their contributions public.

[73] From the bench, the Court questioned whether it should review the individual contributions made by every third party contributing to the indemnity fund while CP would have no knowledge of those amounts.

[74] Indeed, the rules of *audi alteram partem* and of public hearings may not be respected if the Court considers evidence that is not available to one of the parties that opposes the relief sought.

[75] It is for this reason that the Court did not review the contributions made by the parties that contributed to the indemnity fund.

[76] The Court appreciates that the total contribution of $430M is reasonable in this case.

[77] Moreover, the Court was informed throughout the process of all steps taken by MMA. The Court designated attorneys to represent the victims of the Lac-Mégantic tragedy and these attorneys were involved in the negotiation of the indemnity fund. The government of Québec also took part in this negotiation.

[78] Because the Court knows the final amount that will be paid from the indemnity fund, it does not need to know the exact amount contributed by each party. The Court considers that the settlement that was unanimously accepted by the creditors is reasonable.

WHEREFORE, THE COURT:

[79] GRANTS the Motion for approval of the Amended Plan of Arrangement;

DEFINITIONS

[80] **ORDERS that capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Amended Plan of Compromise and Arrangement of the Petitioner dated June 8, 2015 and filed in the court record on** June 17, 2015, a copy of which is attached hereto as Schedule **"A"** (the **"Plan")** or in the Creditors' Meeting Order granted by the Court on May 5, 2015 (the **"Meeting Order"),** as the case may be;

SERVICE AND MEETING

[81] **ORDERS AND DECLARES** that that the Notification Procedures set out in paragraphs 61 to 66 of the Meeting Order have been duly followed and that there has been valid and sufficient notice of the Creditors' Meeting and service, delivery and notice of the Meeting Materials including the Plan and the Monitor's Nineteenth Report dated May 14, 2015, for the purpose of the Creditors' Meeting,

which service, delivery and notice was effected by (i) publication on the Monitor's Website, (ii) sending to the Service List, (iii) mailing of the documents set out in paragraph 64 of the Meeting Order to all known Creditors, by prepaid regular mail, courier, fax or email, at the address appearing on a Creditor's Proof of Claim, and (iv) publication of the Notice to Creditors in the Designated Newspapers, and that no other or further notice is or shall be required;

[82] **ORDERS AND DECLARES** that the Creditors' Meeting was duly called, convened, held and conducted in accordance with the CCAA and the Orders of this Court in these proceedings, including without limitation the Meeting Order;

SANCTION OF THE PLAN

[83] **ORDERS AND DECLARES** that :

a) the Petitioner is a debtor company to which the CCAA applies, and the Court has jurisdiction to sanction the Plan;

b) the Plan has been approved by the required majority of Creditors with Voting Claims in conformity with the CCAA and the Meeting Order;

c) the Petitioner has complied in all respects with the provisions of the CCAA and all the Orders made by this Court in the CCAA Proceedings;

d) the Court is satisfied that the Petitioner has neither done nor purported to do anything that is not authorized by the CCAA; and

e) the Petitioner, Creditors having Government Claims, the Class Representatives, and the Released Parties have each acted in good faith and with due diligence, and the Plan (and its implementation) is fair and reasonable, and in the best interests of the Petitioner, the Creditors, the other stakeholders of the Petitioner and all other Persons stipulated in the Plan;

[84] **ORDERS AND DECLARES** that the Plan and its implementation, are hereby sanctioned and approved pursuant to Section 6 of the CCAA;

PLAN IMPLEMENTATION

[85] **DECLARES** that the Petitioner and the Monitor are hereby authorized and directed to take all steps and actions, and to do all such things, as determined by the Monitor and the Petitioner, respectively, to be necessary or appropriate to implement the Plan in accordance with its terms and as contemplated thereby, and to enter into, adopt, execute, deliver, implement and consummate all of the steps, transactions and agreements, including, without limitation, the Settlement Agreements, as

required by the Monitor or the Petitioner, respectively, as contemplated by the Plan, and all such steps, transactions and agreements are hereby approved;

[86] **ORDERS** that as of the Plan Implementation Date, the Petitioner, represented by the Trustee, the sole shareholder of the Petitioner, shall be authorized and directed to issue, execute and deliver any and all agreements, documents, securities and instruments contemplated by the Plan, and to perform its obligations under such agreements, documents, securities and instruments as may be necessary or desirable to implement and effect the Plan, and to take any further actions required in connection therewith;

[87] **ORDERS** that the Plan and all associated steps, compromises, transactions, arrangements, releases, injunctions, offsets and cancellations effected thereby are hereby approved, shall be deemed to be implemented and shall be binding and effective in accordance with the terms of the Plan or at such other time, times or manner as may be set forth in the Plan, in the sequence provided therein, and shall enure to the benefit of and be binding upon the Petitioner, the Released Parties and all Persons affected by the Plan and their respective heirs, administrators, executors, legal persona) representatives, successors and assigns;

[88] **ORDERS,** subject to the terms of the Plan, that from and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of the Petitioner then existing or previously committed by the Petitioner, or caused by the Petitioner, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, lease, guarantee, agreement for sale, deed, licence, permit or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Petitioner arising directly or indirectly from the filing by the Petitioner under the CCAA and the implementation of the Plan and any and ail notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under any such agreement shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Petitioner from performing its obligations under the Plan or be a waiver of defaults by the Petitioner under the Plan and the related documents;

[89] **ORDERS** that from and alter the Plan Implementation Date, and for the purposes of the Plan only, if the Petitioner does not have the ability or the capacity pursuant to applicable law to provide its agreement, waiver, consent or approval to any matter requiring its agreement, waiver,

consent or approval under the Plan, such agreement, waiver, consent or approval may be provided by the Trustee, or that such agreement, waiver, consent or approval shall be deemed not to be necessary;

[90] **ORDERS** that upon fuifillment or waiver of the conditions precedent to implementation of the Plan as set out and in accordance with Article 6 of the Plan, the Monitor shall deliver the Monitor's Certificate, substantially in the form attached as Schedule "B" to this Order, to the Petitioner in accordance with Article 6.1 of the Plan and shall file with the Court a copy of such certificate as soon as reasonably practicable on or forthwith following the Plan Implementation Date and shall post a copy of same, once filed, on the Monitor's Website;

DISTRIBUTIONS BY THE MONITOR

[91] **ORDERS** that on the Plan Implementation Date, the Monitor shall be authorized and directed to administer and finally determine the Affected Claims of Creditors and to manage the distribution of the Funds for Distribution in accordance with the Plan and the Claims Resolution Order;

[92] **ORDERS AND DECLARES** that ail distributions to and payments by or at the direction of the Monitor, in each case on behalf of the Petitioner, to the Creditors with Voting Claims under the Plan are for the account of the Petitioner and the fulfillment of its obligations under the Plan including to make distributions to Affected Creditors with Proven Claims;

[93] **ORDERS AND DECLARES** that, notwithstanding:

a) the pendency of these proceedings and the declarations of insolvency made therein;

b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act,* R.S.C., c. B-3, as amended (the **"BIA")** in respect of the Petitioner and any bankruptcy order issued pursuant to any such application; and

c) any assignment in bankruptcy made in respect of the Petitioner;

the transactions contemplated in the Plan, the payments or distributions made in connection with the Plan and the Settlement Agreements contemplated thereby, whether before or alter the Filing Date, and any action taken in connection therewith, including, without limitation, under this Order shall not be void or voidable and do not constitute nor shall they be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable transaction under the BIA, article 1631 and following of the Civil Code or any other applicable federal or provincial legislation,

and the transactions contemplated in the Plan, the payments or distributions made in connection with the Plan and the Settlement Agreements contemplated thereby, whether before or alter the Filing Date, and any action taken in connection therewith, do not constitute conduct meriting an oppression remedy under any applicable statute and shall be binding on an interim receiver, receiver, liquidator or trustee in bankruptcy appointed in respect of the Petitioner;

APPROVAL OF SETTLEMENT AGREEMENTS

[94] **ORDERS AND DECLARES** that (i) the Petitioner has entered into the Settlement Agreements in exchange for fair and reasonable consideration; (ii) each Settlement Agreement is a good faith compromise, in the best interests of the Petitioner, the Creditors, the other stakeholders of the Petitioner and all other Persons stipulated in the Plan; (iii) each Settlement Agreement is fair, equitable and reasonable and an essential element of the Plan and (iv) each of the Settlement Agreements be and is hereby approved;

[95] **ORDERS** that the Settlement Agreements shall be sealed and shall not form part of the public record, subject to further Order of this Court;

[96] **ORDERS AND DIRECTS** the Monitor to do such things and take such steps as are contemplated to be done and taken by the Monitor under the Plan. Without limitation: (i) the Monitor shall hold the Indemnity Fund to which the Settlement Funds will be deposited; and (ii) hold and distribute the Funds for Distribution in accordance with the terms of the Plan and the Claims Resolution Order;

RELEASES AND INJUNCTIONS

[97] **ORDERS AND DECLARES** that the compromises, arrangements, releases, discharges and injunctions contemplated in the Plan, including those granted by and for the benefit of the Released Parties, are integral components thereof and are necessary for, and vital to, the success of the Plan and that all such releases, discharges and injunctions are hereby sanctioned, approved, binding and effective as and from the Effective Time on the Plan Implementation Date. For greater certainty, nothing herein or in the Plan shall release or affect any rights or obligations provided under the Plan;

[98] **ORDERS** that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan, any Claim that any Person (regardless of whether or not such Person is a Creditor or Claimant) holds or asserts or may in the future hold or assert against any of the Released Parties or that could give rise to a Claim against the

Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, arising out of, in connection with and/or in any way related to the Derailment, the Policies, MMA, and/or MMAC, is hereby permanently and automatically released and the enforcement, prosecution, continuation or commencement thereof is permanently and automatically enjoined and forbidden. Any and all Claims against the Released Parties are permanently and automatically compromised, discharged and extinguished, and all Persons and Claimants, whether or not consensually, shall be deemed to have granted full, final, absolute, unconditional, complete and definitive releases of any and all Claims to the Released Parties;

[99] **ORDERS** that all Persons (regardless of whether or not such Persons are Creditors or Claimants) shall be permanently and forever barred, estopped, stayed and enjoined from (i) pursuing any Claim, directly or indirectly, against the Released Parties, (ii) continuing or commencing, directly or indirectly, any action or other proceeding with respect to any Claim against the Released Parties, or with respect to any claim that, with the exception of any claims preserved pursuant to Section 5.3 of the Plan against any Third Party Defendants that are not also Released Parties, could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, (iii) seeking the enforcement, levy, attachment, collection, contribution or recovery of or from any judgment, award, decree, or order against the Released Parties or property of the Released Parties with respect to any Claim, (iv) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or the property of the Released Parties with respect to any Claim, (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Approval Orders to the full extent permitted by applicable law, and (vi) asserting any right of setoff, compensation, subrogation, contribution, indemnity, claim or action in warranty or forced intervention, recoupment or avoidance of any kind against any obligations due to the Released Parties with respect to any Claim or asserting any right of assignment of or subrogation against any obligation due by any of the Released Parties with respect to any Claim; and (vii) taking any actions to interfere with the implementation or consummation of this Plan, provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan;

[100] **ORDERS** that notwithstanding the foregoing, the Plan Releases and Injunctions as provided in this Order (i) shall have no effect on the rights and obligations provided by the "Entente d'assistance financière découlant

du sinistre survenu dans la ville de Lac-Mégantic" signed on February 19, 2014 between Canada and the Province, (ii) shall not extend to and shall not be construed as extending to any Unaffected Claims;

[101] **ORDERS** that, without limitation to the Meeting Order and Claims Procedure Order, any holder of a Claim, including any Creditor, who did not file a Proof of Claim before the applicable Bar Date shall be and is hereby forever barred from making any Claim against the Petitioner and Released Parties and any of their successors and assigns, and shall not be entitled to any distribution under the Plan, and that such Claim is forever extinguished;

CHARGES

[102] **ORDERS** that, subject to paragraphs 25 and 27 hereof, upon the Plan Implementation Date, all CCAA Charges against the Petitioner or its property created by the Initial Order or any subsequent orders (as defined in the Initial Order, the **"CCAA Charges")** shall be terminated, discharged and released;

[103] **ORDERS** that, notwithstanding paragraph 24 hereof, the Canadian Professionals and U.S. Professionals are entitled to the Administration Charge set out in Article 7 of the Plan as security for the payment of the fees and disbursements of the Canadian Professionals and U.S. Professionals;

[104] **DECLARES** that the Canadian Professionals and U.S. Professionals, as security for the professional fees and disbursements owed or to be owed to them in connection with or relating to the CCAA Proceeding including the Plan and its implementation, be entitled to the benefit of and are hereby granted a charge and security in the Settlement Funds, to the exclusion of the XL Indemnity Payment, to the extent of the aggregate amount of $20,000,000.00, plus any applicable sales taxes for the Canadian Professionals (defined in the Plan as the Administration Charge Reserve). The Administration Charge shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances, security or rights of whatever nature or kind or deemed trusts (collectively **"Encumbrances")** affecting the Settlement Funds, to the exclusion of the XL Indemnity Payment, if any;

[105] **ORDERS** that the Petitioner shall not grant any Encumbrances in or against the Settlement Funds that rank in priority to, or *pari passu* with, the Administration Charge unless the Petitioner obtains the prior written consent of the Monitor and the prior approval of the Court.

[106] **DECLARES** that the Administration Charge shall immediately attach to the Settlement Funds, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[107] **DECLARES** that the Administration Charge and the rights and remedies of the beneficiaries of same, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insoivency made herein; (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement or other arrangement which binds the Petitioner (a **"Third Party Agreement"),** and notwithstanding any provision to the contrary in any Third Party Agreement:

a) the creation of the Administration Charge shall not create or be deemed to constitute a breach by the Petitioner of any Third Party Agreement to which it is a party; and

b) any of the beneficiaries of the Administration Charge shall not have liability to any Person whatsoever as a resuit of any breach of any Third Party Agreement caused by or resulting from the creation of the Administration Charge;

[108] **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner and any receiving order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Settlement Funds made by the Monitor pursuant to the Plan and the granting of the Administration Charge, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewabie transactions or conduct meriting an oppression remedy under any applicable law;

[109] **DECLARES** that the Administration Charge shall be valid and enforceable as against all Settlement Funds, subject to the Administration Charge Reserve, and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioner, for all purposes;

[110] ORDERS that, notwithstanding any of the terms of the Plan or this Order, the Petitioner shall not be released or discharged from its obligation in respect of the Unaffected Claims, including, without limitation, to pay the fees and expenses of the Canadian Professionals and the U.S. Professionals;

STAY OF PROCEEDINGS

[111] EXTENDS the Stay Period (as defined in the Initial Order and as extended from time to time) to and including December 15, 2015;

[112] ORDERS that all orders made in the CCAA Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order,

the Meeting Order, the Claims Resolution Order or any further Order of this Court;

THE MONITOR

[113] **ORDERS** that all of the actions and conduct of the Monitor disclosed in the Monitor's Reports are hereby approved, and **DECLARES** that the Monitor has satisfied all of its obligations up to and including the date of this Order;

[114] **ORDERS** that, effective upon the Plan Implementation Date, any and all claims against (a) the Monitor in connection with the performance of its duties as Monitor of the Petitioner up to the Plan Implementation Date, (b) the Released Parties in connection with any act or omission relating to the negotiation, drafting or execution of their respective Settlement Agreements, or the negotiation, solicitation or implementation of the Plan, (c) Creditors having Government Claims in connection with the negotiation, solicitation and implementation of the Plan, and (d) the Class Representatives in connection with the negotiation, solicitation and implementation of the Plan shall, in each case, be and are hereby stayed, extinguished and forever barred and neither the Monitor, the Released Parties, Creditors having Government Claims nor the Class Representatives shall have any liability in respect thereof except for any liability arising out of gross negligence or willful misconduct on the part of any of them, provided however that this paragraph shall not release (i) the Monitor of its remaining duties pursuant to the Plan and this Order (the **"Remaining Duties")** or (ii) the Released Parties from their remaining duties pursuant to their respective Settlement Agreements;

[115] **ORDERS** that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court on notice to the Monitor and upon such terms as may be determined by the Court;

[116] **DECLARES** that the protections afforded to Richter Advisory Group Inc., as Monitor and as officer of this Court, pursuant to the terms of the Initial Order and the other Orders made in the CCAA Proceedings shall not expire or terminate on the Plan Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect;

[117] **DECLARES** that the Monitor has been and shall be entitled to rely on the books and records of the Petitioner and any information provided by thePetitioner without independent investigation and shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information;

[118] **DECLARES** that any distributions under the Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Petitioner for the purposes of section 14 of the Tax Administration Act (Québec) or any other similar provincial or territorial tax legislation (collectively the **"Tax Statutes")** given that the Monitor is only a disbursing agent of the payments under the Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder or under the Plan, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made or to be made under the Plan or this Order and any claims of this nature are hereby forever barred;

[119] **DECLARES** that the Monitor shall not, under any circumstances, be liable for any of the Petitioner's tax liabilities regardless of how or when such liability may have arisen;

[120] **DECLARES** that neither the Monitor, the Released Parties, Creditors having Governmental Claims nor the Class Representatives shall incur any liability as a result of acting in accordance with the Plan and the Orders, including without limitation, this Order, other than any liability arising out of or in connection with the gross negligence or willful misconduct of any of them;

[121] **ORDERS** that upon the completion by the Monitor of its Remaining Duties, including, without limitation, distributions made by or at the direction of the Monitor in accordance with the Plan, the Monitor shall file with the Court the Monitors Plan Completion Certificate, substantially in the form attached as Schedule **"C"** to this Order (the **"Monitor's Plan Completion Certificate")** stating that all of the Monitor's Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties, and upon the filing of the Monitor's Plan Completion Certificate, Richter Advisory Group Inc. shall be deemed to be discharged from its duties as Monitor of the Petitioner in the CCAA Proceedings and released from any

and all claims relating to its activities as Monitor in the CCAA Proceedings;

[122] **ORDERS AND DECLARES** that the Monitor and the Petitioner, and their successors and assigns, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable tax withholding and reporting requirements. Ail amounts withheld on account of taxes shall be treated for all purposes as having been paid to the Affected Creditors in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate governmental authority;

GENERAL

[123] **DECLARES** that the Monitor or the Petitioner may, from time to time, apply to this Court for any advice, directions or determinations concerning the exercise of their respective powers, duties and rights hereunder or in respect of resolving any matter or dispute relating to the Plan, the Claims Resolution Order or this Order, or to the subject matter thereof or the rights and benefits thereunder, including, without limitation, regarding the distribution mechanics under the Plan;

[124] **DECLARES** that any other directly affected party that wishes to apply to this Court, including with respect to a dispute relating to the Plan, its implementation or its effects, must proceed by motion presentable before this Court alter a 10-day prior notice of the presentation thereof given to the Petitioner and the Monitor in accordance with the Initial Order;

[125] **DECLARES** that the Monitor is authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for an order recognizing the Plan and this Order and confirming that the Plan and this Order are binding and effective in such jurisdiction and that the Monitor is the Petitioner's foreign representative for those purposes;

[126] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or

by any Person affected by the Order;

[127] **ORDERS** that Schedule **B** to the Amended Plan and the Settlement agreements included therein, save and except for the XL Settlement Agreement, be filed under seal, the whole subject to further Order of this Court;

[128] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

[129] **THE WHOLE** with costs against the Canadian Pacific Railway Company.

(S) Gaétan Dumas

GAÉTAN DUMAS, S.C.J.

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

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

Me Alain Riendeau
Me Enrico Forlini
Me André Durocher
Me Brandon Farber
Fasken Martineau Dumoulin
For Canadian Pacific Railway Company

Date of hearing : June 17, 2015

SCHEDULE "B"

MONITOR'S PLAN IMPLEMENTATION DATE CERTIFICATE

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. : 500-11-

SUPERIOR COURT

Commercial Division
(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 OF:

●

Petitioner

-and-

●

Monitor

CERTIFICATE OF THE MONITOR OF ● (Plan Implementation)

All capitalized terms not otherwise defined herein have the meanings ascribed thereto in the Plan of Compromise and Arrangement of • pursuant to the *Companies' Creditors Arrangement Act, R.S.C.* 1985, c. C-36, as amended, dated • (as may be amended, restated, supplemented and/or modified in accordance with its terms, the **"Plan").**

Pursuant to section ● of the Plan, ● (the **"Monitor"),** in its capacity as Court-appointed Monitor of **[DEBTOR],** delivers this certificate to **[DEBTOR]** and hereby certifies that all of the conditions precedent to implementation of the Plan as set out in section ● of the Plan have been satisfied or waived by ● . Pursuant to the Plan, the **[Plan Implementation Date]** has occurred on this day. This Certificate will be filed with the Court and posted on the Monitor's Website.

DATED at the City of Montréal, in the Province of Québec, this ____day of _____ ●

● , in its capacity as the Court-appointed Monitor of **[DEBTOR]**

Per: _____

Name:

Title:

SCHEDULE "C"

MONITOR'S PLAN COMPLETION CERTIFICATE

CANADA **SUPERIOR COURT**

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL **Commercial Division**
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act,*

IN THE MATTER OF THE PLAN OF COMPROMISE OF:

●

Petitioner

-and-

●

Monitor

CERTIFICATE OF THE MONITOR

(Plan Completion)

RECITALS:

A. Pursuant to an Order of the Honourable ● of the Québec Superior Court (Commercial Division) (the "Court") dated ● , ● was appointed as the Monitor (the "Monitor") of [DEBTOR].

B. Pursuant to an Order of the Honourable ● of the Court dated ● (the "Sanction Order"), the Court sanctioned and approved the Plan of Compromise of ● pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, dated ● (as may be amended, restated, supplemented and/or modified in accordance with its terms, the "Plan").

C. Pursuant to the Sanction Order, the Court ordered that upon the completion by the Monitor of its Remaining Duties, including, without limitation, distributions to be made by or at the direction of the Monitor in accordance with the Plan, the Monitor shall file with the Court a certificate stating that all of the Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties, and upon the filing of such certificate, ● shall be deemed to be discharged from its duties as Monitor of ● in the CCAA Proceedings and released from any and all claims relating to its activities as Monitor in the CCAA Proceedings.

D. Ail capitalized terms not otherwise defined herein shall have the meaning set out in the Sanction Order.

Pursuant to paragraph ● of the Sanction Order, • in its capacity as Court-appointed Monitor of ● (the "Monitor") hereby certifies that the Monitor has completed its Remaining Duties, including, without limitation, distributions to be made by or at the direction of the Monitor in accordance with the Plan and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties.

DATED at the City of Montréal, in the Province of Québec, this day of _____
●

● , in its capacity as the Court-appointed Monitor of •

Per: _____
Name:

Title: