UNITED STATES BANKRUPTCY COURT
District of Maine

VOLUNTARY PETITION

Name of Debtor (if individual, enter Last, First, Middle): Montreal, Maine & Atlantic Canada Co.	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names): Montreal, Maine & Atlantique Canada CIE	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):	Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):
Street Address of Debtor (No. and Street, City, and State): c/o Patrice Benoit Gowlings, 1, Place Ville-Marie, 37th Floor Montreal, Quebec CANADA ZIP CODE H3B 3P4	Street Address of Joint Debtor (No. and Street, City, and State): ZIP CODE
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP CODE	Mailing Address of Joint Debtor (if different from street address): ZIP CODE

Location of Principal Assets of Business Debtor (if different from street address above):
Quebec, Canada ZIP CODE

Type of Debtor (Form of Organization) (Check **one** box.)

- ☐ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form.*
- ☑ Corporation (includes LLC and LLP)
- ☐ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business (Check **one** box.)

- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ☑ Other

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check **one** box.)

- ☐ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☑ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Chapter 15 Debtors

Country of debtor's center of main interests:
Canada

Each country in which a foreign proceeding by, regarding, or against debtor is pending:
United States

Tax-Exempt Entity (Check box, if applicable.)

- ☐ Debtor is a tax-exempt organization under title 26 of the United States Code (the Internal Revenue Code).

Nature of Debts (Check **one** box.)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ☑ Debts are primarily business debts.

Filing Fee (Check one box.)

- ☑ Full Filing Fee attached.
- ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:
- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ☐ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:
- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,490,925 (*amount subject to adjustment on 4/01/16 and every three years thereafter*).

Check all applicable boxes:
- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

- ☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☑ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors

☐ 1-49	☐ 50-99	☐ 100-199	☐ 200-999	☑ 1,000-5,000	☐ 5,001-10,000	☐ 10,001-25,000	☐ 25,001-50,000	☐ 50,001-100,000	☐ Over 100,000

Estimated Assets

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☑ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Estimated Liabilities

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☑ $500,000,001 to $1 billion	☐ More than $1 billion

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s): Montreal, Maine & Atlantic Canada Co.	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)		
Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor: Montreal Maine & Atlantic Railway Ltd.	Case Number: 13-10670	Date Filed: 08/07/2013
District: District of Maine	Relationship: Parent of Debtor	Judge: Peter G. Cary

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____
Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☑ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D, completed and signed by the debtor, is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D, also completed and signed by the joint debtor, is attached and made a part of this petition.

Information Regarding the Debtor - Venue
(Check any applicable box.)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☑ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☑ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property
(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____
(Name of landlord that obtained judgment)

_____
(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s): Montreal, Maine & Atlantic Canada Co.

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

☑ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X /s/ Andrew Adessky
(Signature of Foreign Representative)

Richter Advisory Group, Inc. by Andrew Adessky
(Printed Name of Foreign Representative)

07/20/2015
Date

Signature of Attorney*

X /s/ Roger A. Clement, Jr.
Signature of Attorney for Debtor(s)

Roger A. Clement, Jr.
Printed Name of Attorney for Debtor(s)

Verrill Dana LLP
Firm Name

One Portland Square, P.O. Box 586
Portland, ME 04112-0586
Address

207-774-4000
Telephone Number

07/20/2015
Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social-Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
Address

X _____
Signature

_____
Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-_____

VERIFIED PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND RELATED RELIEF (With Memorandum of Law)

Richter Advisory Group Inc. is the court-appointed monitor (the "Monitor") and authorized foreign representative of Montreal, Maine & Atlantic Canada Co. ("MMA Canada") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), as amended, pending before the Québec Superior Court of Justice (Commercial Division) (the "Québec Court").

The Monitor has commenced this chapter 15 case ancillary to the Canadian Proceeding and respectfully files this Verified Petition for Recognition of Foreign Proceeding and Related Relief (the "Chapter 15 Petition") with the documentation required by sections 1504 and 1515 of title 11 of the United States Code (the "Bankruptcy Code") seeking the entry of an order: (a) recognizing the Canadian Proceeding as a "foreign main proceeding" pursuant to section 1517 of the Bankruptcy Code; (b) giving full force and effect in the United States to the *Initial Order* of the Québec Court dated August 8, 2013, including any extensions or amendments thereof (the "Initial Order"); and (c) granting such other and further relief as is appropriate under the circumstances. In support of the Chapter 15 Petition, the Monitor respectfully states as follows:[1]

[1] The information contained herein is based on a review of unaudited financial information provided to the Monitor by MMA Canada and its employees as well as information provided by the Chapter 11 Trustee to Montreal Maine & Atlantic Railway Ltd. and the Chapter 11 Trustee's professionals. The

JURISDICTION AND VENUE

The Court has Jurisdiction to Recognize the Canadian Proceeding and Grant the Relief Requested.

1. The United States District Court for the District of Maine (the "District Court") has original but not exclusive jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157 and Rule 83.6 of the District Court's local rules, the District Court has authority to refer and has referred this chapter 15 case to this Court.

2. A case under chapter 15 is a "case" under the Bankruptcy Code. Recognition of foreign proceedings and other matters under chapter 15 of the Bankruptcy Code have been expressly designated as core proceedings pursuant to 28 U.S.C. § 157(b)(2)(P).

3. Venue is proper in this district. The chapter 11 bankruptcy case of MMA Canada's parent company, Montreal Maine & Atlantic Railway Ltd. ("MMA"), is pending in this District. MMA and MMA Canada have been named as co-defendants in various suits arising out of the Derailment, and MMA and MMA Canada together operated a shortline freight railroad system that had 510 route miles, which extended through Maine and Vermont and into Quebec, Canada. Claims arising out of the Derailment and asserted against MMA will be administered or otherwise addressed during the course of the chapter 11 case; thus, claimants are already familiar, or will become familiar with this venue and, indeed, many such claimants have already retained counsel to represent them in this venue. Administering MMA Canada's chapter 15 case in this venue would be convenient for claimants and other parties in interest who have already appeared before this Court, many of whom have asserted identical claims against both MMA and MMA Canada. Therefore, venue in this district is consistent with the interests of justice and the

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Monitor has not conducted an audit or investigation of the information which has been provided to it by MMA Canada and, accordingly, no opinion is expressed regarding the accuracy, reliability or completeness of the information contained within this Chapter 15 Petition.

convenience of the parties, having regard to the relief sought by the Chapter 15 Petition, as provided by 28 U.S.C. § 1410.

4. The statutory predicates for the relief requested herein are sections 1504, 1515, 1516, 1517, and 1520 of the Bankruptcy Code.

BACKGROUND

5. For a more complete description of MMA Canada's business, corporate organization, capital structure, and circumstances leading to the Canadian Proceeding and the entry of the Plan Sanction Order, the court is respectfully referred to the documents annexed as exhibits to the Declaration of Roger A. Clement, Jr. (the "Clement Declaration") filed contemporaneously herewith. In addition, all of the pleadings, Orders, and Monitor's reports filed in connection with the Canadian Proceeding may be viewed at the Monitors website: http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co.

A. Business and Structure of MMA Canada

6. MMA Canada is a subsidiary of MMA, a Delaware corporation headquartered in Hermon, Maine, which operated rail lines in Maine and Vermont. MMA Canada is incorporated under the laws of the province of Nova Scotia, and specifically the *Companies Act*, R.S., c. 81, as an unlimited liability company. MMA Canada has its registered office at 1959 Upper Water Street, Suite 800, Halifax, Nova Scotia, but, does not operate or hold any assets there. Before it sold its assets on June 30, 2014, all of MMA Canada's operations occurred in Quebec, Canada. All of its physical assets and employees were located there. MMA Canada currently has claims to funds and causes of action located in the United States, as described below.

B. Events Leading to the Canadian Proceeding

7. On July 6, 2013, an unmanned eastbound MMA/MMA Canada train with 72 carloads of crude oil and 5 locomotive units, derailed in Lac-Mégantic, Quebec (the "Derailment"). The transportation of the crude oil had begun in New Town, North Dakota, by the Canadian Pacific Railway Company ("CP") and MMA Canada later accepted the rail cars from CP at CP's yards in Montréal. The crude oil was to be transported on the Saint-Jean-Lac-Mégantic line through Maine to its ultimate destination in Saint John, New Brunswick.

8. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, resulting in the death of 47 people.[2] A large quantity of oil was released into the environment, necessitating an extensive cleanup effort which is still ongoing. As a result of the Derailment and the related injuries, deaths, and property damage, lawsuits were filed against MMA and MMA Canada both in the United States and Canada.

9. Accordingly, MMA Canada, along with MMA, faced significant claims for wrongful death, property and environmental damage, among other claims. Meanwhile, although MMA Canada deployed efforts to maintain railway transportation services where possible to its customers in Québec, its railway transportation services were greatly reduced in Québec, and were reduced by MMA in the United States, as a result of the inability to transit through Lac-Mégantic into Maine (and vice-versa), greatly decreasing MMA and MMA Canada's cash flow.

10. Faced with significant claims resulting from the Derailment, and in light of the reduced service capacity of both MMA and MMA Canada as a result of the Derailment and the resulting decrease in cash flow, MMA Canada and MMA filed reorganization proceedings in

[2] A forty-eighth death resulted when a volunteer fireman who had worked in the post-Derailment recovery effort committed suicide. Accordingly, a total of 48 decedents' estates may hold claims, *inter alia*, for wrongful death.

Canada and the United States, respectively. On August 6, 2013, MMA Canada filed the *Petition for Issuance of an Initial Order*, later amended on August 8, 2013, on which date the Québec Court entered an *Initial Order*[3] commencing the Canadian Proceeding and granting an initial stay (through September 6, 2013) of actions against MMA Canada and its property, its affiliates, the directors and officers of MMA Canada and its affiliates, and the insurers of all of the foregoing. Initial Order at ¶ 7. Likewise, in the United States, MMA filed a Chapter 11 petition in this Court on August 7, 2013, commencing case styled In re Montreal Maine & Atlantic Railway, Ltd., Case No. 13-10670 (the "Chapter 11 Case"). On August 21, 2013, Robert J. Keach was appointed as the Chapter 11 trustee ("Trustee") in the MMA case. Both MMA Canada and MMA filed their respective petitions to ensure that the best interests of all stakeholders and potential stakeholders, including the individuals asserting claims related to the Derailment, are realized, through a plan that will maximize the value of assets for all creditors and potential creditors. The Québec Court extended the initial stay as follows:

Order	**Order Date**	**Amended Stay Period Termination Date**
Order	September 4, 2013	October 9, 2013
Order re Motion for a Second Order Extending the Stay Period	October 9, 2013	January 28, 2014
Order Regarding Motion for a Third Order Extending the Stay Period	January 23, 2014	February 11, 2014
Order Regarding Motion for a Fourth Order Extending the Stay Period	February 11, 2014	February 26, 2014
Order Regarding Motion for a Fifth Order Extending the Stay Period	February 25, 2014	March 12, 2014
Order Regarding Motion for a Sixth Order Extending the Stay Period	March 12, 2014	April 30, 2014
Order Regarding Motion for a Seventh Order Extending the Stay Period	April 29, 2014	June 30, 2014
Order Extending the Stay Period	June 30, 2014	September 30, 2014

[3] The *Petition for Issuance of an Initial Order* and the *Initial Order* are annexed to the Clement Declaration.

Order for a Ninth Extension of the Stay Period Until November 24, 2014	September 24, 2014	November 24, 2014
Order for a Tenth Extension of the Stay Period Until January 12, 2015	November 24, 2014	January 12, 2015
Order for an Eleventh Extension of the Stay Period Until May 15, 2015	January 12, 2015	May 15, 2015
Order for the Convening, Holding and conduct of the Creditors Meeting in for a Twelfth Extension of the Stay until December 15, 2015	April 15, 2015	December 15, 2015

C. Cross-Border Insolvency Proceedings

11. Shortly after the commencement of the cases, the Trustee and MMA Canada together with the Monitor negotiated a cross-border protocol to be implemented in both the Chapter 11 Case and the Canadian Proceeding, which enhanced the coordination and harmonization of proceedings in the two cases.

12. On September 3, 2013, MMA Canada filed the *Motion for an Order Extending the Stay Period and to Approve a Cross-Border Insolvency Protocol* and on September 4, 2013, the Québec Court entered an *Order* granting the foregoing *Motion*.[4] Similarly, on August 30, 2013, the Trustee filed with this Court a *Motion for Order Adopting Cross-Border Insolvency Protocol* [D.E. 126], which *Motion* was granted by *Order* dated September 4, 2013 [D.E. 168].

D. The Sale Process

13. MMA Canada and the Trustee, together with the Monitor and in consultation with the Federal Railroad Administration, determined that a sale of the assets of both MMA and MMA Canada, on a going concern basis, was in the best interests of creditors of both debtors. In order to preserve the going concern value of MMA and MMA Canada's assets, the sale had to occur on an expedited basis.

[4] The *Motion for an Order Extending the Stay Period and to Approve a Cross-Border Insolvency Protocol* and the *Order* granting the foregoing *Motion* are annexed to the Clement Declaration.

14. MMA Canada and the Trustee together with the Monitor, held discussions and negotiations with potential purchasers to sell substantially all of MMA's assets in conjunction with a sale of substantially all of the assets of MMA Canada (the "Sale"). These discussions and negotiations eventually led to the selection of Railroad Acquisition Holdings LLC ("RAH") as a stalking horse bidder in an auction for the Sale.

15. On December 12, 2013, the Trustee filed a motion for approval of bid procedures and a motion for authority to sell substantially all of its assets under an asset purchase agreement between the Trustee, MMA Canada, and RAH.

16. On December 19, 2013, the Bankruptcy Court entered an order approving the bid procedures.

17. Similarly, on December 12, 2013, MMA Canada filed with the Québec Court a motion for the authority to sell its assets pursuant to the asset purchase agreement with RAH. On December 16, 2013, MMA Canada filed with the Québec court a motion seeking approval of bid procedures.

18. On December 19, 2013, the Québec Court entered an order approving the bid procedures, including a sale auction.

19. On January 19, 2014, MMA Canada filed a motion seeking approval of the sale of its assets and for a vesting order. The auction was held on January 21, 2014. The bid of the stalking horse-RAH was declared the successful bid. On January 23, 2014, the Québec Court entered the *Approval and Vesting Order* approving the sale of the MMA Canada assets as part of the sale of the MMA's Assets.

20. The sale of MMA's assets closed on May 15, 2014, and upon final regulatory approval, the sale of the MMA Canada assets closed on June 30, 2014. In total, the Sale resulted in a $14,250,000 net payment to MMA and MMA Canada.

21. MMA Canada has not operated a railroad, or transported persons or goods over a railroad, or owned or leased any track or other railroad assets since June 30, 2014.[5]

E. The CCAA Plan Process

22. On January 9, 2015, MMA Canada filed a *Motion for an Eleventh Order Extending the Stay Period*, including a draft *Plan of Compromise and Arrangement* (the "Draft CCAA Plan"). MMA Canada sought additional time to finalize settlement agreements with various parties, as well as sufficient time under the stay to obtain approval of and execute the Draft CCAA Plan. The Draft CCAA Plan was crafted to work in conjunction with MMA's Chapter 11 Plan, particularly with respect to distributions to victims of the Derailment.

23. On January 12, 2015, the Québec Court approved the motion for the Eleventh Order Extending the Stay. On March 31, 2015, MMA Canada filed the *Plan of Compromise and Arrangement Dated March 31, 2015* (as later amended, the "CCAA Plan").

24. The Trustee filed the Trustee's Plan of Liquidation dated March 31, 2015, later amended by the Trustee's First Amended Plan of Liquidation dated July 7, 2015 (as amended and revised, the "Chapter 11 Plan").

25. On April 10, 2015, MMA Canada filed a *Motion for an Order for the Convening, Holding and Conduct of a Creditors Meeting and for a Twelfth Extension of the Stay Period*.

[5] Pursuant to a Decision of the Canadian Transportation Authority dated March 28, 2014, MMA Canada's Certificate of Fitness to engage in rail operations ended on June 30, 2014. A copy of the Decision may be viewed at: http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co.

26. On April 15, 2015, the Québec Court entered an *Order for the Convening, Holding and Conduct of a Creditors Meeting and for a Twelfth Extension of the Stay Period until December 15, 2015.*

27. On May 6, 2015, CP filed pleadings arguing that the Québec Court lacked jurisdiction to hear the MMA Canada case under the CCAA and opposing the sanction of the CCAA Plan. On July 13, 2015, the Québec Court entered an order overruling CP's objections.

28. On June 8, 2015, MMA Canada filed an *Amended Plan of Compromise and Arrangement Dated June 8, 2015* (as amended and revised, the "CCAA Plan").

29. On June 17, 2015, the Québec Court held a hearing on MMA Canada's motion for approval of the CCAA Plan. On July 13, 2015, the Québec Court entered a *Judgment on the Motion for Approval of Plan of Arrangement* approving the CCAA Plan (the "Plan Sanction Order").[6]

F. The Settlement Agreements

30. The Monitor, the Trustee, MMA, and MMA Canada have worked collectively since the commencement of the cases to engage in settlement discussions with various parties identified as potentially liable for damages arising from the Derailment. As a result of these negotiations, approximately 25 entities or groups of affiliated entities have entered into settlement agreements, whereby the "Released Party" (as defined in those agreements) will contribute to a settlement fund in exchange, *inter alia*, for a full and final release of all claims arising out of the Derailment, including any claims for contribution and/or indemnity (including contractual indemnity) asserted by third parties, as well as the protection of a global injunction barring assertion of any Derailment-related claims against the Released Parties. The settlement

[6] The CCAA Plan and the Plan Sanction Order are annexed to the Clement Declaration.

fund is, as of the date hereof, approximately (CDN) $431 million.[7] The CCAA Plan, *inter alia*, implements the settlement fund.

31. As of the filing of this Petition, under the CCAA Plan, the Released Parties include all parties who were named in lawsuits brought by the Trustee arising out of the Derailment, other than CP. CP is the sole remaining "Non-Released Party." To the extent a settlement is not reached with CP, the Monitor understands that litigation will commence and/or continue against CP to recover damages.

G. MMA Canada's Property in the United States

32. MMA Canada's property in the United States consists of, *inter alia*, a retainer paid to the Monitor's counsel in the United States, which retainer is held by counsel in a United States bank account, a proof of claim filed against the MMA bankruptcy estate, a claim to cash being held on deposit by the Trustee in the United States, rights in certain claims against CP under Federal law in the United States, rights in certain assigned claims and causes of action against U.S.-based defendants, as well as assigned rights in insurance policies issued and payable within the United States. These property interests are more fully described later in this Verified Petition.

RELIEF REQUESTED

33. By this Chapter 15 Petition, the Monitor seeks an order: (a) recognizing the Canadian Proceeding as a "foreign main proceeding" pursuant to section 1517 of the Bankruptcy Code and as defined in section 1502(4) of the Bankruptcy Code, or, in the alternative, as a "foreign nonmain proceeding;" (b) giving full force and effect in the United States to the Initial Order; (c) granting relief afforded foreign main proceedings automatically upon recognition,

[7] Canadian funds are calculated using and exchange rate of approximately $1.25 Canadian to $1.00 U.S., which was the approximate rate as of June 8. 2015. The actual amount available for distribution will fluctuate along with the exchange rate.

pursuant to section 1520 of the Bankruptcy Code, including, without limitation, imposition of the stay under section 362 and application of section 363 of the Bankruptcy Code; or, alternatively, if not as of right under section 1520 of the Bankruptcy Code, then pursuant to sections 1521, 1507, and 105(a) of the Bankruptcy Code, as applicable; and (d) granting such other and further relief as is appropriate under the circumstances.

GROUNDS FOR RELIEF

34. The purpose of the Canadian Proceeding is to facilitate the reorganization of MMA Canada for the benefit of all creditors, including those individuals and entities that have suffered losses as a result of the Derailment. As a proceeding under the CCAA in the Québec Court, the Canadian Proceeding is entitled to the recognition and relief provided by chapter 15 of the Bankruptcy Code. Further, the Monitor believes that granting the relief sought herein will best ensure the fair and efficient administration of the Canadian Proceeding consistent with the principles set forth in chapter 15 of the Bankruptcy Code.

35. Chapter 15 applies where, as here, assistance is sought in the United States by a foreign representative, such as the Monitor, in connection with a foreign proceeding. 11 U.S.C. § 1501(b)(1). The Monitor asks this Court to give effect in the United States to the Initial Order for the purpose of facilitating the liquidation of MMA Canada for the benefit of all creditors. This relief is authorized by section 1520 of the Bankruptcy Code.

36. Section 1517 of the Bankruptcy Code provides that

> "Subject to section 1506 . . . an order recognizing a foreign proceeding ***shall*** be entered if—
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
> (2) the foreign representative applying for recognition is a person or body; and
> (3) the petition meets the requirements of section 1515."

11 U.S.C. § 1517(a) (emphasis added).

37. Section 1515 of the Bankruptcy Code provides that

(a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.

(b) A petition for recognition shall be accompanied by—

(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

(d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

38. Section 1516 of the Bankruptcy Code provides guidance to the Court in applying the requirements of section 1515. Section 1516 states, in pertinent part

(a) If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume.

(b) The court is entitled to presume that documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.

39. As discussed more fully below, the Canadian Proceeding is entitled to recognition as a foreign main proceeding under chapter 15 of the Bankruptcy Code for the following reasons:

(a) The Canadian Proceeding is a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code because it is a judicial proceeding in a foreign country under a law relating to insolvency in which the assets and affairs of the debtor are subject to supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) The Canadian Proceeding is a foreign main proceeding within the meaning of section 1502(4) of the Bankruptcy Code, because the Canadian Proceeding is pending in the location of MMA Canada's center of main interest;

(c) This case was commenced by a "person" within the meaning of section 101(41) of the Bankruptcy Code and a "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code;

(d) The Chapter 15 Petition was filed in accordance with sections 1504, 1509, and 1515 of the Bankruptcy Code; and

(e) MMA Canada is Eligible for Relief under Chapter 15;

(f) Granting recognition of the Canadian Proceeding as a foreign main proceeding would not be manifestly contrary to a public policy of the United States, and is therefore required pursuant to section 1517 of the Bankruptcy Code.

40. Additionally, even if this Court were to determine that the Canadian Proceeding were a foreign nonmain proceeding (which the Monitor respectfully submits the Canadian Proceeding is not), recognition pursuant to section 1517 would be compelled.

41. Moreover, recognizing the Canadian Proceeding would not be manifestly contrary to the public policy of the United States, as prohibited by section 1506 of the Bankruptcy Code. In fact, granting recognition will promote the U.S. public policy of respecting foreign proceedings as articulated in, *inter alia*, sections 1501(a) and 1508 of the Bankruptcy Code and further cooperation between courts to the maximum extent possible, as mandated by section 1525(a) of the Bankruptcy Code. Thus, the conditions for mandatory recognition of the Canadian Proceeding under section 1517 of the Bankruptcy Code have been satisfied.

42. In addition to recognition as a foreign main proceeding, the Monitor seeks an order enforcing the Initial Order in the United States. By the Initial Order, the Québec Court expressly authorized the Monitor to seek such relief in this Court as necessary to give effect to the Initial Order in the United States. *See* Initial Order, ¶ 57. Specifically, the Québec Court requested this Court's assistance in the following provision, which is contained in both the Initial Order and the Plan Sanction Order:

> [The Québec Court] requests the aid and recognition of any Court or administrative body in any Province in 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 this Order].[8]

Initial Order, ¶ 58; Plan Sanction Order, ¶ 126.

43. Section 1525(a) of the Bankruptcy Code provides that, "[c]onsistent with section 1501, the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative." 11 U.S.C. §§ 1525(a). The Monitor believes that recognition of the Canadian Proceeding and enforcement of the Initial Order is necessary to give effect to such

[8] The bracketed language appears only in the Plan Sanction Order.

order in the United States. Thus, in addition to the reasons set forth above, this Court should enter an order pursuant to sections 1501 and 1525 of the Bankruptcy Code, and under well-established principles of international comity.

THE CHAPTER 15 PETITION

A. The Canadian Proceeding is a Foreign Proceeding for Purposes of Chapter 15

44. Bankruptcy Code section 101(23) provides in pertinent part, as follows:

> The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or the adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization of liquidation.

11 U.S.C. § 101(23). The Canadian Proceeding under the CCAA provides a statutory means for MMA Canada to restructure its business under the supervision of the Québec Court. As such, the Canadian Proceeding is a judicial proceeding in a foreign country under a law relating to insolvency and adjustment of debt in which the assets and affairs of MMA Canada are subject to control or supervision by the Québec Court for the purpose of reorganization or liquidation. Indeed, since the passage of chapter 15, U.S. courts have recognized a number of Canadian proceedings under the CCAA. *See, e.g.*, In re Sino-Forest Corp., 13-10361(MG) (Bankr. D. Del. April 15, 2013); In re Cinram Int'l Inc., Ch. 15 Case No. 12-11882 (KJC) (Bankr. D. Del. 2012); In re Valle Foam Indus. (1995) Inc., Ch. 15 Case No. 12-30214 (Bankr. N.D. Ohio 2012); In re White Birch Paper Co., Ch. 15 Case No. 10-31234 (DOT) (Bankr. E.D. Va. 2010); In re Nortel Networks Corp., Ch. 15 Case No. 09-10164 (KG) (Bankr. D. Del. 2009); In re MuscleTech Res. & Dev. Inc., Ch. 15 Case No. 06-10092 (Bankr. S.D.N.Y. 2006). Accordingly, chapter 15 cases involving proceedings under the CCAA concern a foreign proceeding within the meaning of

section 101(23) of the Bankruptcy Code.[9] Likewise, the Canadian Proceeding is entitled to recognition.

B. The Canadian Proceeding is a Foreign Main Proceeding

45. The Bankruptcy Code provides that a foreign proceeding for which chapter 15 recognition is sought must be recognized as a "foreign main proceeding" if it is pending in the country where the debtor has its center of main interests. 11 U.S.C. § 1517(b)(1). The term "center of its main interests" is not defined in chapter 15. However, the Bankruptcy Code provides that, in the absence of evidence to the contrary, the debtor's registered office is presumed to be the center of the debtor's main interests. 11 U.S.C. § 1516(c); In re Tri-Continental Exch. Ltd., 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006) ("In effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, 'center of main interests.').

46. MMA Canada's center of main interests is in Québec, Canada. As set forth above, the registered office of MMA Canada is located at 1959 Upper Water Street, Suite 800, Halifax, Nova Scotia. Prior to the sale of its assets to RAH on June 30, 2014, substantially all of MMA Canada's assets and operations were in the province of Québec. MMA Canada has been registered in the province of Québec pursuant to *An Act respecting the legal publicity of enterprises*, R.S.Q., c. P-44.1 (the "LPEA"), since November 14, 2002. MMA Canada's primary place of business was in Québec, Canada, where it owned rail line. Specifically, MMA Canada had a place of business at 191 Victoria Street in Farnham, Québec. When it had operations, MMA Canada conducted business solely *in Canada, specifically in Québec.* MMA

[9] In fact, under former section 304 of the Bankruptcy Code, the statutory predecessor to chapter 15, Canadian proceedings, including insolvency proceedings, were regularly granted comity. *See, e.g.*, Smith v. Dominion Bridge Corp., 1999 WL 111465 at *3 (E.D. Pa. Mar. 2, 1999) ("As a sister common law jurisdiction, courts have consistently extended comity to Canadian Bankruptcy proceedings.").

Canada had its own employees,[10] substantially all of whom resided and performed their jobs in the Province of Quebec. All of MMA Canada's rail lines and buildings were located in Québec. Additionally, MMA Canada maintains an account at the Canadian Imperial Bank of Commerce in Toronto, Ontario. As of the filing of this Verified Petition, that account had approximately (CDN) $87,252 in it. Accordingly, the Canadian Proceeding is pending in the center of main interest of MMA Canada -- Quebec -- and constitutes a "foreign main proceeding" as defined in section 1502(4) of the Bankruptcy Code.

47. If MMA Canada is not found to have its center of main interests in Canada, then, the Canadian Proceeding constitutes a "foreign nonmain proceeding" within the meaning of section 1502(5) of the Bankruptcy Code because it is pending in a jurisdiction where MMA Canada has an "establishment," a place where it carries out "nontransitory economic activity." 11 U.S.C. § 1502(2)(5); *see also* In re Fairfield Sentry Ltd., 2011 WL 4357421 *1, 10 n.8 (S.D.N.Y. Sept. 16, 2011) (granting main recognition but noting that nonmain recognition would also be appropriate because the debtor "has an establishment [in the foreign country] for the conduct of nontransitory economic activity, i.e. a local place of business."). Accordingly, although the Canadian Proceeding should be recognized as a main proceeding, the same facts that support recognition as a main proceeding would also support nonmain recognition if for any reason the Court were to decline to recognize the Canadian Proceeding as a main proceeding.

C. This Case Was Commenced by a Person who is a Foreign Representative

48. The Monitor commenced this chapter 15 case. The Monitor is the "foreign representative" of MMA Canada, duly authorized in the Canadian Proceeding within the

[10] Shortly after the Derailment, MMA Canada had 62 employees, of which 34 were active. The balance had been temporarily laid off, were receiving benefits under the CSST (the Province of Quebec's worker's compensation program), or were not working because of a disability. See, First Report of Monitor, Aug. 21, 2013. http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co

meaning of section 101(24) of the Bankruptcy Code, which defines a "foreign representative" in pertinent part as a "person or body . . . authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

49. The Québec Court authorized the Monitor to, *inter alia*, "*act as a 'foreign representative'* of [MMA Canada] or in any other similar capacity in any insolvency, bankruptcy or reorganization or other proceedings outside of Canada." Initial Order, ¶ 33(l) (emphasis added).[11]

50. Similarly, the Plan Sanction Order permits the Monitor to "*act as a foreign representative*" of MMA Canada with authorization to apply to "any other court or administrative body for an order recognizing the [CCAA Plan] and [Plan Sanction Order] and confirming that the [same] are binding and effective." Plan Sanction Order, at ¶ 125 (emphasis supplied). Under section 1516(a) of the Bankruptcy Code, the Court is entitled to presume that the representative identified in the Initial Order and in the Plan Sanction Order is a "foreign representative."

51. By virtue of its appointment, the Monitor is a "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code. *See, e.g.*, In re Gandi Innovations Holdings, LLC, 2009 WL 2916908 at *1 (Bankr. W.D. Tex. June 4, 2009) (finding that the monitor appointed in CCAA proceeding was a person within the meaning of § 101(41) and a duly appointed "foreign representative" within the meaning of § 101(24)). Furthermore, the

[11] In the Initial Order, the Québec Court also ordered, directed, and empowered the Monitor to monitor MMA Canada's receipts and disbursements, assist MMA Canada in dealing with its creditors during the operation of the stay, advise and assist MMA Canada in reviewing its business and opportunities for cost reduction and revenue enhancement, assist MMA Canada in discussions and negotiations with creditors, including creditors asserting claims arising out of or relating to the Derailment, and assist in any insolvency proceedings commenced by any member of MMA Canada's corporate group in any foreign jurisdiction. Initial Order at ¶ 33.

Court is entitled to presume under section 1516(a) that the foreign representative identified in the Initial Order is a foreign representative. 11 U.S.C. § 1516(a) ("If the [Initial Order] indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume."). In addition, this Court is aware of the role of the Monitor as the foreign representative of MMA Canada and the Canadian Proceeding by virtue of the cross-border insolvency protocol that has facilitated cooperation between this Court and the Québec Court, pursuant to the *Order Adopting Cross-Order Insolvency Protocol* dated September 4, 2013 [D.E. 168]. *See* Order at ¶ 3(a) (as used in the Protocol, the term "Estate Representative," means the Trustee or the Monitor).

52. Courts have consistently granted chapter 15 recognition of Canadian proceedings in which the monitor appointed in the proceeding acted as its foreign representative in the United States. *See, e.g.,* In re Sino-Forest Corp., 13-10361 (MG) [D.E. 16] (Bankr. D. Del. April 15, 2013); Collins v. Oilsands Quest, Inc., 484 B.R. 593 (S.D.N.Y. 2012); In re Metcalfe & Mansfield Alternative Investments, et al., 421 B.R. 685 (Bankr. S.D.N.Y. 2010); In re Nortel Networks Corp., No, 09-10164 (KG) [D.E. 40] (Bankr. D. Del. Feb. 27, 2009); In re Muscletech Research and Development Inc. et al., Nos. 06 CIV 538 and 539 (S.D.N.Y. March 2, 2006).

53. Accordingly, the Monitor constitutes a "foreign representative" for purposes of sections 101(24), 1515 and 1517. Moreover, the Monitor is a "person" as that term is used in section 101(41).

D. This Case was Commenced in Accordance with Sections 1504, 1509, at 1550 of the Bankruptcy Code

54. The Monitor properly commenced this case, as required by sections 1504 and 1509 of the Bankruptcy Code, by filing the Chapter 15 Petition for recognition of a foreign proceeding under section 1515 (a), accompanied by all documents and information required by

section 1515(b) and (c). *See* In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 127 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008) ("A Case under Chapter 15 is commenced by a foreign representative filing a petition for recognition of a foreign proceeding under section 1515 of the Bankruptcy Code."). Specifically, the Monitor, as foreign representative, has provided the Court with (i) copies of the Initial Order and the Plan Sanction Order, both of which affirm the existence of the Canadian Proceeding and appointed the Monitor to act as foreign representative of MMA Canada in satisfaction of section 1515 (b) (2) and/or (3), and (ii) a statement (at the end of this Verified Petition) verifying that the Monitor, as foreign representative, is not aware of any foreign proceedings with respect to MMA Canada other than the Canadian Proceeding in satisfaction of section 1515(c).

E. MMA Canada is Eligible for Relief Under Chapter 15 of the Bankruptcy Code

1. *The Eligibility Requirements under Section 109(a) do not apply in Chapter 15 Cases.*

55. Section 109(a) of the Bankruptcy Code states that "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." Whether the debtor eligibility requirements set forth in section 109(a) apply *at all* in chapter 15 cases has not been decided in the First Circuit. Based on the language and purposes of chapter 15, as well as commentary from Collier and others, it appears very likely that the First Circuit would not apply section 109(a) to chapter 15 cases. Section 109 refers to eligibility requirements for debtors under chapters 7, 9, 11, 12, and 13. Section 109(a) contains general eligibility requirements that apply to each of the chapter-specific requirements in the subsequent subsections of section 109. Section 109 does not have a subsection relating to chapter 15 cases, nor does it mention

chapter 15 at all. This is logical because section 1502 contains its own definition of "debtor" for purposes of chapter 15. For purposes of chapter 15, the term "debtor" means "an entity that is the subject of a foreign proceeding."

56. In contrast, the term "debtor" as used in section 109 is defined in section 101(13) to mean a "person or municipality concerning which a case under this title has been commenced." Indeed, section 1511 permits a recognized foreign representative to commence a case under Title 11. A recognized foreign representative can, for example, file a case under chapter 11. If the Monitor wished to commence a case under Title 11, then MMA Canada would, indeed, need to meet the eligibility requirements under the applicable subsection of section 109, as well as section 109(a), which applies to all subsections.

57. The Monitor, however, does not wish to commence a case under Title 11. Rather, the Monitor wishes to be recognized as the foreign representative of MMA Canada, and to have the Canadian Proceeding recognized as a foreign proceeding. Because chapter 15 contains its own definition of debtor, because section 109 does not mention chapter 15, and because neither a foreign representative nor the section 1502(1) "debtor" that is the subject of a foreign proceeding is a "debtor" as that term is used in section 109, section 109(a) does not apply in chapter 15 cases.

58. Moreover, applying section 109(a) to chapter 15 cases would be to ignore the entire structure and purpose of chapter 15. A chapter 15 case is not the equivalent of a "full" bankruptcy case. "Cases brought under Chapter 15 are intended to be ancillary to cases brought in the debtor's home country, unless a full US bankruptcy case is brought under another chapter." Glosband and Westbrook, *Chapter 15 Recognition in the United States: Is a Debtor*

"Presence" Required? Int. Insolv. Rev. Vol. 24: 28, 29 (2015)[12] (hereinafter, "Glosband & Westbrook") (quoting House Report 109-31, pt. 1, 109th Cong., 1st Sess. (2005) at 106). Section 1517 states that "an order recognizing a foreign proceeding *shall be entered* if (1) such foreign proceeding . . . is a foreign main proceeding or a foreign nonmain proceeding . . .; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515." 11 U.S.C. §1517(a) (emphasis added). As stated by Glosband & Westbrook, "Chapter 15 requires no determination concerning the attributes or financial circumstances of the debtor." Glosband & Westbrook at 29. This makes sense because a chapter 15 debtor does not obtain bankruptcy relief in the United States. Id.

59. In contrast to the foregoing analysis, the Second Circuit has held that a foreign debtor needed to be an eligible debtor under section 109(a) of the Bankruptcy Code in order for its foreign representative to achieve recognition by a U.S. Court under chapter 15. *See*, Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet), 737 F.3d 238, 246-251 (2d Cir. 2013).

60. The Barnet decision has been sharply criticized and is unlikely to be followed by other Circuits. *Collier on Bankruptcy* asserts that "the Barnet decision should not be followed outside of the Second Circuit . . . ." 8 *Collier on Bankruptcy* ¶1501.03[3] (Alan N. Resnick & Henry J. Sommer eds. 16th ed. 2014). *Collier* notes that "[t]he ruling in Barnet *clearly misconstrues the intent of the statute* to focus on eligibility of the foreign proceeding, not of the debtor, never mentions the direction of section 1508 to consider the international origin of chapter 15 and does not follow the suggestion of the legislative history of section 1508 to consult the Guide to Enactment." Id. at ¶1517.01 (emphasis added). Also, "the intent of chapter 15 was

[12] Published online 10 February 2015 in Wiley Online Library (wileyonlinelibrary.com). DOI: 10.1002\iir.1230.

to determine eligibility based on the attributes of the foreign proceeding, not of the debtor," Id. at ¶1501.03[3].

61. In an unreported decision in the case of In re Bemarmara Consulting, S.A., No. 13-13037 (KG), (Bankr. D. Del. Dec. 17. 2013, (Gross, J.), [DE 38], the Delaware Bankruptcy Court stated that it did not agree with the Barnet decision, and further opined that the Third Circuit would not follow the ruling in Barnet. Noting that the definition of "debtor" in section 1502 is different from the definition of "debtor" in section 109(a), the Court suggested that Congress did not intend section 109 to restrict eligibility for chapter 15 relief. A transcript of the Bemarmara decision is attached hereto as Exhibit A for the Court's convenience.

62. The Barnet decision was the catalyst for the Glosband & Westbrook article, which is sharply critical of the decision. Glosband & Westbrook point out that "prior to Barnet, every chapter 15 decision by a Circuit Court of Appeals[13] . . . recited the requirements for recognition and none of them included section 109(a) among those requirements." Moreover, unlike Barnet, all of those decisions discussed section 1508 (entitled "Interpretation")[14] and acknowledged the importance of considering the Model Law and Guide to Enactment[15] in interpreting individual provisions within chapter 15.

63. Another commentator notes that the Barnet holding "is ill-suited for deciding the jurisdictional requirements for a chapter 15 case." R. Adam Swick, *Section 109(a)'s*

[13] *See* In re Condor Insurance Ltd., 601 F.3d 319, 321 (5th Cir. 2010); In re Ran, 607 F.3d 1017, 1020 – 21 (5th Cir. 2010); In re Vitro, S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2013); In re ABC Learning Centres Ltd., 728 F.3d 301, 304 (3d Cir. 2013); Jaffe v. Samsung, 737 F.3d 14 (4th Cir. 2013).

[14] "In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508

[15] The Model Law on Cross-Border Insolvency was drafted by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law and Guide to Enactment can be found at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

Jurisdictional Requirements Applied to Chapter 15, 33 American Bankr. Inst. J. 30, 92 (March 2014).

64. The Delaware Court's decision in Bemarmara, as well as the thoughtful analyses expounded by *Collier*, Glosband &Westbrook, and Swick are in accord with In re Tri-Continental Exchange Ltd., 349 B.R. 627, 632 (Bankr. E.D. Cal. 2006), in which the court stated, in *dicta*, that a foreign debtor need not be eligible under section 109 and that the drafters of chapter 15 anticipated the "possibility that an entity that is ineligible to be a debtor under the Bankruptcy Code could be the subject of a chapter 15 proceeding" and defined "debtor" for chapter 15 purposes broadly in section 1502(1)).

2. *Even if Section 109(a) Applies in Chapter 15 Cases, MMA Canada meets the Eligibility Requirements thereunder because it has Property in the United States.*

65. Barnet is not the law of the First Circuit, but even if it were, to be eligible for chapter 15 recognition and relief, a foreign debtor would have to have property or a place of business in the U.S. Because MMA Canada has property in the United States, it easily meets this test.

66. MMA Canada has the following property in the United States:

(a) An interest in a $5,000 retainer paid to and being held by the Monitor's attorneys – Verrill Dana LLP – which retainer was paid with funds from the account of MMA Canada at the Canadian Imperial Bank of Commerce in Toronto, Ontario (the "Retainer Funds"). The Retainer Funds are being held in Verrill Dana's account at Bank of America in Portland, Maine.

(b) A claim against the MMA bankruptcy estate, as evidenced by a timely filed proof of claim (the "Proof of Claim") in the Chapter 11 Case, a copy of which is attached hereto as Exhibit B;[16]

(c) A claim to a portion of the cash being held on deposit by the Trustee in the United States, including $1 million paid by Federal Insurance (a/k/a Chubb Insurance) pursuant to a settlement with the so-called "Railworld Parties"[17] (the "Chubb/Rail World Claim")

(d) Rights in (including the right to designate) certain claims (the "Carmack Claims") against Canadian Pacific under the so-called "Carmack Amendment," which is a federal statute that imposes and governs certain aspects of carrier liability. See, 49 U.S.C. §§ 11706, 10501, and 15906, as well as regulations promulgated thereunder; and

(e) Pursuant to certain settlement agreements, rights in other assigned claims and causes of action against U.S.-based defendants, as well as certain assigned rights in insurance policies issued and payable within the U.S., including without limitation the insurance policy (the "Great American Policy") issued by Great American Insurance Company to MMA Canada and bearing policy number DML 9924 836 (the "Great American Claims").

[16] The proof of claim, which was jointly filed with the Monitor, is in the amount of $748,182,730.67. MMA Canada's claims against MMA arise out of MMA's liabilities for the debts of MMA Canada under the Nova Scotia *Companies Act*.

[17] The term "Rail World Parties" means: (a) Rail World Holdings, LLC; (b) Rail World, Inc.; (c) Rail World Locomotive Leasing LLC; (d) The San Luis Central R.R. Co.; (e) Pea Vine Corporation; (f) Montreal Maine & Atlantic Corp.; (g) LMS Acquisition Corp; (h) Earlston Associates, L.P.; and (i) each of the shareholders, directors, officers, members or partners of the foregoing (in such capacity only).

67. As set forth in paragraph 5 *supra.*, MMA Canada is a Nova Scotia unlimited liability company, organized under the Nova Scotia *Companies Act*, R.S., c.81. As such, its sole shareholder – MMA – has liability for certain of its unsatisfied obligations. This forms the basis for the proof of claim filed by MMA Canada in the Chapter 11 Case. MMA Canada's claim against MMA constitutes "property in the United States" for purposes of section 109(a). With respect to the Chubb/Rail World Claims, the Trustee admits that MMA Canada has claims to a portion of certain funds the Trustee is holding in the United States arising out of settlements between the Trustee and MMA Canada on one hand and the Rail World Parties on the other hand. Those funds include $1 million paid by Chubb to the Trustee for the benefit of its insureds -- the Rail World Parties -- in connection with settlement agreements reached with the Rail World Parties.

68. The Carmack Claims involve claims under the Carmack Amendment originally held by World Fuel Services and its affiliates against Canadian Pacific arising out of the Derailment. Indeed, World Fuel Services has submitted notices of claims against Canadian Pacific under the Carmack Amendment seeking to recover for all injuries associated with, and indemnification for all claims arising from, the Derailment. CP has acknowledged World Fuel Services' Carmack claims against it in its 2014 10-K Report filed with the Securities and Exchange Commission, stating as follows:

> "CP has received two damage to cargo notices of claims from the shipper of the oil on the derailed train, Western Petroleum. Western Petroleum has submitted U.S. and Canadian notices of claims for the same damages and, under the Carmack Amendment (the U.S. Damage to cargo statute), seeks to recover for all injuries associated with, and indemnification for all claims arising from, the derailment."

CP Annual Report at 107. A copy of the relevant pages of CP's Annual Report is attached hereto as Exhibit C.

69. On or about June 8, 2015, MMA Canada, the Monitor and the Trustee entered into a Plan Support and Settlement Agreement (the "WFS Settlement") with World Fuel Services and nine of its affiliates (collectively, "WFS"). Under the WFS Settlement, which is subject to approval of both the Chapter 11 Plan and the CCAA Plan, WFS assigned to MMA Canada and the Trustee all rights held by WFS under the Carmack Amendment relating to the Derailment. The Carmack Claims are property of MMA Canada in the United States.

70. Each of the foregoing – the Retainer Funds, the proof of claim, the Chubb/Rail World Claim, the Carmack Claims, and the Great American Claims -- is "property in the United States" for purposes of section 109 (a). Accordingly, MMA Canada satisfies the requirements of section 109 (a). *See, e.g.*, In re Octaviar Administration Pty., Ltd., 511 B.R. 361, 371-74 (Bankr. S.D.N.Y. 2014) (recognizing that rights to a retainer held by counsel in the U.S., as well as intangible assets such as causes of action are "property" for purposes of New York law and therefore "property" for purposes of section 109.); In re Zais Investment Grade Ltd. VII, 455 B.R. 839, 844-46 (Bankr. D.N.J. 2011) (finding that securities and funds in U.S. in which debtor claimed an interest sufficient, even if those funds were pledged as collateral and held by a trustee). *See also*, In re McTague, 198 B.R. 428, 432 (Bankr. W.D.N.Y. 1996) (finding that $194 in a bank account is sufficient, noting that Congress did not give the court discretion to examine the requisite quantity of property to determine eligibility to be a debtor under the Code).

71. In summary, section 109(a) should not be found to limit eligibility in chapter 15 cases, but even if it did MMA Canada satisfies the requirements because it has property in the United States, consisting of (without limitation) an interest in a retainer paid to MMA Canada's attorney in the United States, a claim against the United States bankruptcy estate of MMA (as evidenced by a timely filed proof of claim), a claim to proceeds from the sale to RAH, which

proceeds are currently being held by the Trustee in the United States, and claims against CP under the Carmack Amendment. Moreover, MMA Canada is no longer a "railroad" as defined in the Bankruptcy Code. Accordingly, MMA Canada meets the requirements for chapter 15 recognition and relief.

3. *MMA Canada is Not a Railroad as Defined in the Bankruptcy Code*

72. MMA Canada is eligible for relief under chapter 15 of the Bankruptcy Code. Section 1501(c) states that chapter 15 does not apply to entities identified by exclusion in section 109(b) of the Bankruptcy Code. Among the entities identified by exclusion in section 109(b) are "railroads." 11 U.S.C. § 109(b)(1). MMA Canada is not, however, a "railroad" for purposes of section 1501(c)(1) as it has not been a railroad under the Bankruptcy Code from and after June 30, 2014 (i.e., the date its assets were sold).

73. Section 101(44) of the Bankruptcy Code provides that "[t]he term 'railroad' means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier." 11 U.S.C. § 101(44). As set forth above, on June 30, 2014, MMA Canada sold all of its operating assets. Thereafter, MMA Canada no longer hauled freight, no longer owned trackage or facilities of any kind, and had none of the insurance coverage required for operation of a railroad. MMA Canada could not legally operate its business without a Certificate of Fitness issued by the Canadian Transportation Authority (the "CTA"). In order to maintain its Certificate of Fitness, MMA Canada needed to maintain specified minimum levels of insurance coverage, as well as demonstrate the ability to fund any self-insured portion of such coverage. On August 20, 2013, the CTA suspended MMA Canada's Certificate of Fitness, effective August 20, 2013. Through a series of proceedings involving the CTA, MMA Canada was ultimately able to retain its

Certificate of Fitness through to the closing on the sale of its operating assets to RAH on June 30, 2014. Significantly, MMA Canada's insurance coverage, as well as its Certificate of Fitness, expired as of the June 30, 2014 closing. In light of the foregoing, from and after June 30, 2014, MMA Canada has not been a "railroad" as defined in the Bankruptcy Code or otherwise.

74. The only relevant inquiry is whether MMA Canada was a "railroad" when it filed its chapter 15 petition. *Cf.* In re Eureka S. R. Co., Inc., 177 B.R. 323, 324 (Bankr. N.D. Cal. 1995) (holding that the case of a former railroad may be converted to a proceeding under chapter 7 of the Bankruptcy Code "[s]ince the debtor is not now a railroad [after the sale of its assets], and since section 109(b) does not specify the petition date as the date for determining eligibility, and since section 1112 applies to railroad reorganization cases, the court concludes that this case can be converted to Chapter 7."). Likewise, courts have consistently held that a former common carrier by rail that no longer transports people or freight, or owns trackage, at the time of the filing of the bankruptcy petition, is not a "railroad" under section 101(44) (or its statutory predecessors). *See*, e.g., Hileman v. Pittsburgh & Lake Erie Props., Inc. (In re Pittsburgh & Lake Erie Props., Inc.), 290 F.3d 516 (3d Cir. 2002) (In assessing whether railroad provisions of chapter 11 applied, court found that an entity that had abandoned the transport of goods and people did not "on the most natural reading of this language concern a railroad; it concern[ed] a *former* railroad.") (emphasis added); Wheeling-Pittsburgh Steel Corp. v. McCune, 836 F.2d 153 (3d Cir. 1987) (central issue was whether debtor which had been a common carrier currently met the Bankruptcy Code definition of "railroad;" court found that in light of state supreme court's finding that debtor was no longer a common carrier, debtor no longer met the bankruptcy code definition of railroad even though regulatory agency had not formally decertified the debtor's

status as common carrier); In re Wheeling-Pittsburgh Steel Corp., 155 B.R. 351 (Bankr. W.D. Pa. 1993) (holding that a state statute providing for protection of railroad employees did not apply to an entity that had already ceased operations as a carrier at time of its bankruptcy filing). This is all in accord with courts examining eligibility under section 109 of the Bankruptcy Code in other contexts. See, e.g., In re Global Ocean Carriers Ltd., 251 B.R. 31, 37 (Bankr. D. Del. 2000) ("The test for eligibility [under section 109(a)] is as of the date the bankruptcy petition is filed."); In re Town of Westlake, Tex., 211 B.R. 860 (Bankr. N.D. Tex. 1997) ("Reference date for determining municipal debtor's insolvency, for purpose of assessing debtor's eligibility for Chapter 9 relief, is date that Chapter 9 petition is filed."); In re New York City Off-Track Betting Corp., 427 B.R. 256, 271 (Bankr. S.D.N.Y. 2010) ("Insolvency is analyzed from the date of the petition."); In re Sullivan Cnty. Reg'l Refuse Disposal Dist., 165 B.R. 60, 75 (Bankr. D.N.H. 1994) (In determining whether a chapter 9 debtor met the insolvency test for eligibility described in section 109(c)(3), the court stated that "[t]he reference point of the analysis is the date of petition.")

4. *MMA Canada is Not a Railway Company Under the CCAA*

75. Moreover, as asserted by MMA Canada in the *Amended Petition for Issuance of an Initial Order* dated August 8, 2013 (which was granted by entry of the Initial Order), MMA Canada was never a "railway company" under Canadian law. As described above, MMA Canada operated as a shortline freight railway carrier within Québec and held a certificate of fitness under the *Canada Transportation Act*, S.C. 1996, c. 10. However, MMA Canada was not constituted as a railway company by charter or under special legislation (such as under railway

acts); it was constituted as an "ordinary" company under the Nova Scotia *Companies Act*, as stated above.[18]

76. Although the CCAA, like the Canadian *Bankruptcy and Insolvency Act* and the *Winding Up and Restructuring Act*, excludes "railway companies" from the definition of "company," historically, these statutes referred to railway companies created and governed by specific railway legislation or charter. Therefore, as also asserted by MMA Canada in the *Amended Petition for Issuance of an Initial Order*, these statutes do not exclude a company incorporated by ordinary corporate legislation that may operate as a freight railway carrier such as in the case of MMA Canada

77. In accord with the provisions of the CCAA, as the Québec Court expressly found in paragraph 4 of the Initial Order, MMA Canada was and is a company to which the CCAA applies. Initial Order, at ¶ 4 ("[the Québec Court] declares that the Petitioner [MMA Canada] is a debtor company to which the CCAA applies."). The Québec Court re-confirmed this finding in the Plan Sanction Order. Plan Sanction Order, at ¶ 83(a) ("[MMA Canada] is a debtor company to which the CCAA applies . . .").

78. Although "railroads" are excluded from chapter 15 by section 1501(c)(1), the term "railroads" should be defined under applicable foreign, rather than U.S. law. The Québec Court, applying the applicable foreign law in this case -- Canadian law -- determined that MMA Canada was a debtor to which the CCAA applied.[19] Since the CCAA excludes railway companies, implicit in the Initial Order's finding that the CCAA applies is a finding that MMA Canada is not a railway company. This determination of the Québec Court, set forth in the Initial

[18] *See* ¶5, *supra*. Additionally, the Railways Act of Nova Scotia, SNS 1993, c. 11 (the purpose of which is to ensure the safe operation of railways in the province of Nova Scotia) likely only applies to companies which operate, or intend to operate, railways within the province of Nova Scotia; thus the statute does not apply to MMA Canada.

[19] Initial Order, at ¶ 4; Plan Sanction Order, at ¶ 83(a)

Order and confirmed by the Plan Sanction Order, should be respected in determining whether MMA Canada is eligible under chapter 15. In the interest of comity, the findings of the Québec Court, as well as its interpretation of Canadian law, should be applied in this case. *See* 11 U.S.C. § 1508 ("In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.")

79. Finally, and as set forth above, even if MMA Canada was at one time a railroad (under the Code or the CCAA), it is beyond dispute that, following the sale of its assets on June 30, 2014, it is no longer a "railroad" for purposes of section 109(b) and is not disqualified from eligibility for chapter 15 relief under § 1501(c)(1).

F. Granting Recognition would not be Manifestly contrary to a Public Policy of the United States

80. This Court's recognition of the Canadian Proceeding (and enforcing the Initial Order in the United States) would not be manifestly contrary to the public policy of the United States as prohibited by section 1506 of the Bankruptcy Code. 11 U.S.C. § 1506 ("Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."). To the contrary, granting such recognition furthers the U.S. public policy respecting foreign proceedings as articulated, among other ways, through the objectives set forth in sections 1501(a) and 1508 of the Bankruptcy Code. As noted above, Canadian proceedings under the CCAA have routinely been granted recognition by courts in the United States. Therefore, the introductory language to section 1517 of the Bankruptcy Code is satisfied, and no basis exists for the Court to refuse recognition pursuant to section 1506 of the Bankruptcy Code.

ENFORCEMENT OF THE INITIAL ORDER IS APPROPRIATE

A. The Monitor is Entitled to an Order Granting Recognition and Enforcing the Initial Order and the Plan Sanction Order Pursuant to Section 1517

81. The Monitor also seeks enforcement in the United States of the Initial Order of the Québec Court. The Initial Order provides MMA Canada with relief that is similar to and consistent with the relief that is available automatically under the Bankruptcy Code to chapter 11 debtors. Specifically, the Initial Order provides MMA Canada with, *inter alia*:

(a) Stay relief to protect business and property;

(b) Protection of its contractual rights from the possibility **o**f termination, discontinuance, alteration, or interference;

(c) The authority to remain in possession and control of its assets and operate its business;

(d) The authority to restructure its business; and

(e) The authority to file a plan of compromise or arrangement between, *inter alia*, MMA Canada and one or more classes of its creditors.

In addition, the Initial Order provides relief, such as injunctive relief to protect the former and current directors and officers of MMA Canada and their insurers and the ability to pay certain prepetition obligations. This relief is consistent with the relief often granted to chapter 11 debtors under the bankruptcy court's broad equitable powers under section 105(a) of the Bankruptcy Code.

B. Principles of Comity Embodied in Chapter 15 Strongly Favor Enforcement of the Initial Order

82. Upon recognition of the Canadian Proceeding as a "foreign main proceeding," longstanding principles of international comity embodied in chapter 15 heavily weigh in favor of

enforcing the Initial Order in the United States. "American courts have long recognized the need to extend comity to foreign bankruptcy proceedings." Victrix S.S., Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987). The definition of comity comes from a Supreme Court case granting enforcement to a judgment obtained by a foreign bankruptcy trustee:

> "Comity" . . . is recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-164 (1895).

83. Accordingly, granting comity to judgments in foreign proceedings is appropriate as long as parties are provided the fundamental protections assured to litigants in the United States. *See* id. at 202-03 (applying comity analysis to French judgment obtained by foreign liquidator against U.S. citizens, and finding it was "satisfied that [ ] there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries . . . .").

84. Furthermore, the importance of granting comity is heightened in the insolvency context because the collective nature of insolvency proceedings requires that "the assets of a debtor are dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities." Cunard S.S. Co., Ltd. v. Salen Reefer Services AB, 773 F.2d 452, 456-58 (2d Cir. 1985). Accordingly, in considering judgments rendered by foreign courts in insolvency matters,

comity may be withheld only if its extension would cause American creditors to be "treated in some manner inimical to this country's policy of equality." Id. at 459.

85. The purpose of chapter 15 is to continue and enhance the United States' long history of granting comity in cross-border insolvency proceedings. *See* 11 U.S.C. § 1501; In re Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) (chapter 15 "specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief."); 11 U.S.C. § 1525 ("[T]he [ancillary] court shall cooperate to the *maximum extent possible* with a foreign court") (emphasis added); 11 U.S.C. § 1509(b) ("If the court grants recognition under section 1517, and subject to limitations that the court may impose consistent with the policy of this chapter . . . (3) a court in the United States *shall* grant comity or cooperation to the foreign representative.") (emphasis added).

86. Comity is appropriate here because the Initial Order sought to be enforced was issued by a court of competent jurisdiction in Canada. United States courts consistently note that orders emanating from a common law jurisdiction akin to that of the United States are particularly deserving of comity. *See* In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd., Inc., 238 B.R. 25, 67 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) ("[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." (internal quotations and citations omitted)).

87. Accordingly, the principles of international comity embodied in chapter 15 weigh strongly in favor of enforcement of the Initial Order.

NOTICE

88. The Monitor requests a finding that service and notice of hearing on this Chapter 15 Petition given in the following manner to the following persons be approved as adequate and sufficient pursuant to Bankruptcy Rules 2002(q), 2002(m), 9007, and 9008: service by United States mail and/or Canadian mail (as appropriate), first-class postage prepaid or by overnight courier, or by e-mail if authorized by the relevant creditor or party and by publication of notice in *The Wall Street Journal* (National Edition) and *The Globe and Mail* (Canada), upon (a) all known U.S.-based creditors or their counsel, (b) the Office of the United States Trustee for the District of Maine, (c) counsel to the Creditors' Committee in the Chapter 11 Case, (d) all parties (or their counsel) to any litigation pending in the United States or Canada to which MMA or MMA Canada is a party or has been a party at any time since August 6, 2013, including without limitation counsel in the wrongful death cases arising out of the Derailment and counsel to the plaintiffs in the class action case filed in Québec, (e) all parties that request or have requested notice pursuant to Bankruptcy Rule 2002, (f) all Released Parties, (g) all known Canadian-based creditors, or their counsel. The Monitor requests that the foregoing be approved as adequate and sufficient notice of the Chapter 15 Petition and the hearing thereon under Bankruptcy Rules 2002, 9007, and 9008.

CONCLUSION

As evidenced above, the Canadian Proceeding is a "foreign main proceeding" within the meaning of section 1502 of the Bankruptcy Code. Additionally, the Monitor is a "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code, and the Chapter 15 Petition meets the requirements of section 1515 of the Bankruptcy Code with respect to MMA Canada. Accordingly, the Monitor respectfully submits that the Court is required to

enter an order recognizing the Canadian Proceeding pursuant to section 1517 of the Bankruptcy Code.

WHEREFORE, the Monitor respectfully requests that this Court grant this Chapter 15 Petition and enter an Order: (a) recognizing the Canadian Proceeding as a "foreign main proceeding" pursuant to section 1517 of the Bankruptcy Code and as defined in section 1502(4) of the Bankruptcy Code; (b) giving full force and effect in the United States to the Initial Order; (c) granting the Canadian Proceeding relief afforded foreign main proceedings automatically upon recognition, pursuant to section 1520 of the Bankruptcy Code, including, without limitation, imposition of the stay under section 362 and application of section 363 of the Bankruptcy Code; or, alternatively, if not as of right under section 1520 of the Bankruptcy Code, then pursuant to sections 1521, 1507, and 105(a) of the Bankruptcy Code, as applicable; and (d) granting such other and further relief as is appropriate under the circumstances.

Dated: July 20, 2015

RICHTER ADVISORY GROUP INC.,
MONITOR AND FOREIGN REPRESENTATIVE
OF MONTREAL MAINE & CANADA CO.

By its attorneys:

/s/ Roger A. Clement, Jr.

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VERIFICATION

Pursuant to 28 U.S.C. § 1746, Andrew Adessky declares as follows:

I am a duly authorized agent of Richter Advisory Group Inc., which was appointed as the monitor and authorized to act as foreign representative of Montreal, Maine & Atlantic Canada Co. by the Québec Superior Court (Commercial Division). I have full authority to verify the foregoing *Verified Petition for Recognition of Foreign Proceeding and Related Relief* (the "Chapter 15 Petition"). Pursuant to section 1515(c) of the Bankruptcy Code, I hereby state that I am unaware of any foreign proceedings with respect to the debtor other than the Canadian Proceeding. I have read the foregoing Chapter 15 Petition, and am informed and do believe that the factual allegations contained therein are true and accurate to the best of my knowledge, information and belief.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: July 20, 2015

/s/Andrew Adessky
Andrew Adessky, CPA, CA, CIRP, MBA
Richter Advisory Group Inc.

EXHIBIT LIST

Exhibit A - Transcript of Bemarmara Decision

Exhibit B - Proof of Claim in the Chapter 11 case

Exhibit C - Relevant pages of CP's Annual Report

Notice: To eliminate waste and unnecessary expense, some or all of the Exhibits (and/or exhibits and schedules to the Exhibits) may not be attached. A copy of any Exhibit (including all exhibits and schedules) may be obtained by sending an e-mail request to mhenderson@verrilldana.com or pnoyes@verrilldana.com or by calling Marilyn Henderson or Pam Noyes at 207-774-4000.

Alternatively, most Exhibits may be found on the website of the Monitor – – Richter – – using the following link: http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co .

All pleadings, with Exhibits, may be viewed and are on file at the Clerk's office, United States Bankruptcy Court, 202 Harlow Street, Bangor, Maine.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-_____

ORDER GRANTING RECOGNITION AND RELATED RELIEF

This matter having been brought before the Court by Richter Advisory Group Inc., the court-appointed monitor (the "Monitor") and authorized foreign representative of Montreal, Maine & Atlantic Canada Co. ("MMA Canada") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), as amended, pending before the Québec Superior Court of Justice (Commercial Division) (the "Québec Court"), to consider the *Verified Petition for Recognition of Foreign Proceeding and Related Relief*, which was filed on July ___, 2015 on behalf of MMA Canada (the "Chapter 15 Petition"), commencing the above-captioned chapter 15 case (the "Chapter 15 Case") pursuant to sections 1504, 1515 and 1517 of title 11 of the United States Code (the "Bankruptcy Code"), and seeking enforcement pursuant to sections 1504, 1515, 1516, 1517, and 1520 of the Bankruptcy Code of the Initial Order dated August 8, 2013 of the Québec Court (the "Initial Order"); and sufficient notice of the Chapter 15 Petition having been given; and the Court having reviewed and considered the pleadings and exhibits submitted by the Monitor in support of the Chapter 15 Petition; and objections to the Chapter 15 Petition, if any, having been resolved or overruled; and after due deliberation and sufficient cause appearing therefore; the Court hereby **FINDS** and **CONCLUDES** as follows:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and section 1501 of the Bankruptcy Code.

B. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

C. Venue is proper in this District pursuant to 28 U.S.C. §§ 1410.

D. The Monitor is a person within the meaning of section 101(41) of the Bankruptcy Code and is the duly appointed foreign representative of MMA Canada within the meaning of section 101(24) of the Bankruptcy Code.

E. The Chapter 15 Case was properly commenced pursuant to sections 1504 and 1515 of the Bankruptcy Code.

F. The Chapter 15 Petition meets the requirements of section 1515 of the Bankruptcy Code.

G. The Canadian Proceeding is a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code.

H. The Canadian Proceeding is entitled to recognition by this Court pursuant to section 1517 of the Bankruptcy Code.

I. The Canadian Proceeding is pending in Canada, which is the location of MMA Canada's center of main interests, and as such, constitutes a foreign main proceeding pursuant to section 1502(4) of the Bankruptcy Code and is entitled to recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

J. The Monitor is entitled to all the relief provided by section 1520 of the Bankruptcy Code without limitation.

K. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and will

not cause any hardship to any party in interest that is not outweighed by the benefits of granting that relief.

L. The interest of the public will be served by this Court granting the relief requested by the Monitor.

NOW, THEREFORE, IT IS HEREBY **ORDERED**, **ADJUDGED**, AND **DECREED** AS FOLLOWS:

1. The form and manner of notice of the Verified Petition and the notice of hearing on the Verified Petition described therein is adequate and sufficient, and is hereby approved.

2. The Canadian Proceeding is hereby recognized as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code.

3. All provisions of section 1520 of the Bankruptcy Code apply in this Chapter 15 Case, including, without limitation, the stay under section 362 and the provisions of section 363 of the Bankruptcy Code throughout the duration of this Chapter 15 Case or until otherwise ordered by this Court.

4. The Initial Order (and any amendments or extensions thereto as may be granted from time to time by the Québec Court) are hereby given full force and effect in the United States.

5. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any request for additional relief or any adversary proceeding brought in and through this Chapter 15 Case, and any request by any entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

6. The Chapter 15 Petition and related papers shall be made available by the Monitor through its website at http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co , or upon request at the offices of Richter Advisory Group Inc./Richter Groupe Conseil Inc., 1981 McGill College Avenue, 12th Floor, Montréal, Québec, to the attention of Andrew Adessky, CPA, CA, MBA, CIRP, aadessky@richter.ca, (514) 934-3513.

7. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

Dated:

_____

The Honorable Peter G. Cary
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-_____

NOTICE OF FILING AND HEARING ON PETITION SEEKING RECOGNITION OF CANADIAN PROCEEDING PURSUANT TO CHAPTER 15 OF THE UNITED STATES BANKRUPTCY CODE, AND SEEKING APPROVAL OF FORM AND MANNER OF NOTICE

On July 20, 2015, Richter Advisory Group Inc., the court-appointed monitor (the "Monitor") and authorized foreign representative of Montreal, Maine & Atlantic Canada Co. in a proceeding under Canada's *Companies' Creditors Arrangement Act*, pending before the Québec Superior Court of Justice filed (a) a *Petition commencing a case under chapter 15 of United States Bankruptcy Code*, (b) a *Verified Petition for Recognition of Foreign Proceedings and Related Relief*, and (c) a *Memorandum of Law in Support of Verified Petition for Recognition* (collectively, the "Chapter 15 Petition") with the United States Bankruptcy Court for the District of Maine (the "Bankruptcy Court"). The Chapter 15 Petition commenced a case ancillary to the Canadian proceeding, seeks recognition of the Canadian proceeding as a "foreign main proceeding," seeks recognition of an order entered by the Québec Superior Court, and seeks related relief, all as more fully described in the Chapter 15 Petition.

If you do not want the Court to approve the Chapter 15 Petition, then on or before **August 13, 2015 at 4:00 p.m. (ET)**, then you or your attorney must file with the Court a response or objection explaining your position. If you are not able to access the CM/ECF Filing System, then your response should be served upon the Court at:

Alec Leddy, Clerk
U.S. Bankruptcy Court
District of Maine
202 Harlow Street
Bangor, ME 04401

Any response mailed to the Court for filing must be mailed early enough so that the Court will receive it on or before **August 13, 2015 at 4:00 p.m. (ET).**

A hearing has been scheduled in the Bankruptcy Court, 537 Congress St., 2nd Floor, Portland, Maine for **August 20, 2015 at 9:00 a.m. (ET)**, to consider the Chapter 15 Petition. You may attend the hearing. If no objections are timely filed and served, then the Court may enter a final order approving the Chapter 15 Petition without any further hearing.

Please take further notice that on July 20, 2015, the Monitor filed with the Bankruptcy Court a Motion for Order Specifying Form and Manner of Service of Notice (Chapter 15 Petition) (the "Notice Motion"). The Monitor has requested the Bankruptcy Court to grant the Notice Motion without a hearing. If you oppose the Notice Motion, then you should file an objection with the Bankruptcy Court no later than **August 13, 2015 at 4:00 p.m. (ET)**. If an objection to the Notice Motion is filed, then the Bankruptcy Court will conduct a hearing thereon at 537 Congress Street, 2nd Floor, Portland Maine on **August 20, 2015 at 9:00 a.m. (ET)**.

If you or your attorney do not take these steps, the Court may decide that you are not opposed the relief sought, and may enter an order granting the requested relief without further notice or hearing.

Dated: July 20, 2015

RICHTER ADVISORY GROUP INC.,
MONITOR AND FOREIGN REPRESENTATIVE
OF MONTREAL MAINE & CANADA CO.

By its attorneys:

/s/ *Roger A. Clement, Jr.*

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-_____

MOTION FOR ENTRY OF AN ORDER RECOGNIZING AND ENFORCING THE PLAN SANCTION ORDER OF THE QUÉBEC SUPERIOR COURT

Richter Advisory Group Inc. is the court-appointed monitor (the "Monitor") and authorized foreign representative of Montreal, Maine & Atlantic Canada Co. ("MMA Canada") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, pending before the Québec Superior Court of Justice (Commercial Division) (the "Québec Court"). The Monitor has contemporaneously commenced a chapter 15 case ancillary to the Canadian Proceeding by filing the *Verified Petition for Recognition of Foreign Proceeding and Related Relief (With Memorandum of Law)* [D.E. 2] (the "Chapter 15 Petition").

The Monitor moves this Court (the "Motion") pursuant to sections 105(a), 1507, and 1521 of title 11 of the United States Code (the "Bankruptcy Code") for entry of an order recognizing and enforcing the *Decision Sanctioning the Plan of Compromise and Arrangement* dated July 13, 2015, including any extensions or amendments thereof (the "Plan Sanction Order") sanctioning MMA Canada's *Plan of Compromise and Arrangement* dated June 8, 2015 (as the same may be amended, revised or supplemented in accordance with its terms, the "CCAA Plan"). In support of this Motion, the Monitor respectfully states as follows:

JURISDICTION AND VENUE

1. The United States District Court for the District of Maine (the "District Court") has original but not exclusive jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157 and Rule 83.6 of the District Court's local rules, the District Court has authority to refer and has referred this chapter 15 case to this Court.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

3. Venue over this chapter 15 case is proper in this district pursuant to 28 U.S.C. § 1410.

4. The statutory predicates for the relief requested herein are sections 105(a), 1507, and 1521 of the Bankruptcy Code.

BACKGROUND

5. For a more complete description of MMA Canada's business, corporate organization, capital structure, and circumstances leading to the Canadian Proceeding and the entry of the Plan Sanction Order (as defined below), the court is respectfully referred to the documents annexed as exhibits to the Declaration of Roger A. Clement, Jr. (the "Clement Declaration") filed contemporaneously herewith. In addition, all of the pleadings, Orders, and Monitor's reports filed in connection with the Canadian Proceeding may be viewed at the Monitors website: http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co.

A. Business Structure of MMA Canada

6. MMA Canada is a subsidiary of Montreal Maine & Atlantic Railway Ltd. ("MMA"), a Delaware corporation headquartered in Hermon, Maine, which operated rail lines in Maine and Vermont. MMA Canada is incorporated under the laws of the province of Nova Scotia, and specifically the *Companies Act*, R.S., c. 81, as an unlimited liability company. MMA

Canada has its registered office at 1959 Upper Water Street, Suite 800, Halifax, Nova Scotia Halifax, Nova Scotia, but, does not operate or hold any assets there. Before it sold its assets on June 30, 2014, all of MMA Canada's operations occurred in Quebec, Canada.

7. Prior to the commencement of the Canadian Proceeding, MMA Canada provided services as a shortline freight railway carrier operating various rail lines in the province of Québec, Canada.

8. MMA Canada operated rail lines in Québec in corridors extending from Saint-Jean to Farnham, from Bedford to Sainte-Rosalie, and from Farnham through Lac-Mégantic to the United States border, where it joined the rail lines of MMA. The transportation of products through Maine and Vermont was effected by MMA.

9. In effect, MMA Canada, with its parent, MMA, operated an integrated, international shortline freight railroad system (the "MMA System") that had 510 route miles of track in Maine, Vermont, and Québec. The MMA System was a substantial component of the transportation system of northern New England, Québec, and New Brunswick. Main-line operations in the MMA System were conducted regularly between Millinocket and Searsport, Maine, and from Brownville Junction, Maine, to Montreal, Québec. Service was also provided between Farnham, Québec and Newport, Vermont to connect with the northeastern U.S. westbound trains to Montreal. As a whole, the MMA System provided:

(a) The shortest rail transportation route between Maine and Montreal and a critical rail artery between Saint Johns, New Brunswick and Montreal;

(b) Strategic links to the Canadian Pacific Railroad, the Canadian National Railroad, and Guilford Rail System and beyond to the North American rail system;

(c) Outlets for major producers of paper, lumber, wood and agricultural products in eastern and northern Maine; and

(d) In-bound transportation for chemicals and other products used by paper products and consumers in Maine.

10. While MMA Canada and MMA were formed as separate companies, their business operations and accounting systems were tightly integrated. Accordingly, MMA Canada and MMA shared the expenses and costs related to the management of both companies, including costs related to the head office of MMA, which is located in the United States.

11. However, MMA Canada and MMA each assumed their own particular expenses (specifically incurred by the entity for its own operations). As a result, MMA Canada was responsible for expenses incurred solely in relation to the operation of its business, such as the payment of employees of MMA Canada, payment of its suppliers, and payment for its office in Farnham and its fuel consumption in Canada. MMA collected substantially all of the income realized by MMA Canada and MMA, and transferred the portion of income required to fund MMA Canada's costs and expenses to MMA Canada's bank account maintained at the Canadian Imperial Bank of Commerce in Toronto.

B. Events Leading to the Canadian Proceeding

12. On July 6, 2013, an unmanned eastbound MMA train with 72 carloads of crude oil and 5 locomotive units, derailed in Lac-Mégantic, Quebec (the "Derailment"). The transportation of the crude oil had begun in New Town, North Dakota, by the Canadian Pacific Railway ("CP") and MMA Canada later accepted the rail cars from CP at CP's yards in Montreal, Quebec. The crude oil was to be transported via the Saint-Jean-Lac-Mégantic line through Maine to its ultimate destination in Saint John, New Brunswick.

13. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, resulting in the death of 47 people.[1] A large quantity of oil was released into the environment, necessitating an extensive cleanup effort which is still ongoing. As a result of the Derailment and the related injuries, deaths, and property damage, lawsuits were filed against MMA and MMA Canada both in the United States and Canada.

14. Accordingly, MMA Canada, along with MMA, faced significant claims for wrongful death, property and environmental damage, among other claims. Meanwhile, although MMA Canada deployed efforts to maintain railway transportation services where possible to its customers in Québec, its railway transportation services were greatly reduced in Québec, and were reduced by MMA in the United States, as a result of the inability to transit through Lac-Mégantic, greatly decreasing MMA and MMA Canada's cash flow.

15. Faced with significant claims resulting from the Derailment, and in light of the reduced service capacity of both MMA and MMA Canada as a result of the Derailment and the resulting decrease in cash flow, MMA Canada and MMA filed reorganization proceedings in Canada and the United States, respectively. On August 6, 2013, MMA Canada filed the *Petition for Issuance of an Initial Order*, later amended on August 8, 2013, and the Québec Court entered an *Initial Order*[2] commencing the Canadian Proceeding and granting an initial stay against MMA Canada and its property to September 6, 2013. Likewise, in the United States, MMA filed a Chapter 11 petition in this Court on August 7, 2013, commencing case styled *In re Montreal Maine & Atlantic Railway, Ltd.*, Case No. 13-10670 (the "Chapter 11 Case").

[1] A forty-eighth death resulted when a volunteer fireman who had worked in the post-Derailment recovery effort committed suicide. Accordingly, a total of 48 decedents' estates may hold claims, *inter alia*, for wrongful death.

[2] The *Petition for Issuance of an Initial Order* and the *Initial Order* are annexed to the Clement Declaration.

16. On August 21, 2013, Robert J. Keach was appointed as the Chapter 11 trustee ("Trustee") in the MMA case. Both MMA Canada and MMA filed their respective petitions to ensure that the best interests of all stakeholders and potential stakeholders, including the individuals asserting claims related to the Derailment, are realized, through a plan that will maximize the value of assets for all creditors and potential creditors. The Québec Court extended the initial stay as follows:

Order	**Order Date**	**Amended Stay Period Termination Date**
Order	September 4, 2013	October 9, 2013
Order re Motion for a Second Order Extending the Stay Period	October 9, 2013	January 28, 2014
Order Regarding Motion for a Third Order Extending the Stay Period	January 23, 2014	February 11, 2014
Order Regarding Motion for a Fourth Order Extending the Stay Period	February 11, 2014	February 26, 2014
Order Regarding Motion for a Fifth Order Extending the Stay Period	February 25, 2014	March 12, 2014
Order Regarding Motion for a Sixth Order Extending the Stay Period	March 12, 2014	April 30, 2014
Order Regarding Motion for a Seventh Order Extending the Stay Period	April 29, 2014	June 30, 2014
Order Extending the Stay Period	June 30, 2014	September 30, 2014
Order for a Ninth Extension of the Stay Period Until November 24, 2014	September 24, 2014	November 24, 2014
Order for a Tenth Extension of the Stay Period Until January 12, 2015	November 24, 2014	January 12, 2015
Order for an Eleventh Extension of the Stay Period Until May 15, 2015	January 12, 2015	May 15, 2015
Order for the Convening, Holding and conduct of the Creditors Meeting in for a Twelfth Extension of the Stay until December 15, 2015	April 15, 2015	December 15, 2015

C. Cross-Border Insolvency Proceedings

17. Shortly after the commencement of the cases, the Trustee and MMA Canada together with the Monitor negotiated a cross-border protocol to be implemented in both the Chapter 11 Case and the Canadian Proceeding, which enhanced the coordination and harmonization of proceedings in the two cases.

18. On September 3, 2013, MMA Canada filed the *Motion for an Order Extending the Stay Period and to Approve a Cross-Border Insolvency Protocol* and on September 4, 2013, the Québec Court entered an *Order* adopting the Cross-Border Protocol.[3]

D. Litigation

19. Beginning on July 22, 2013 and continuing through August 14, 2013, the representatives and administrators of the estates of some of the Derailment victims commenced civil actions against MMA and other co-defendants in the Circuit Court of Cook County, Illinois (the "Circuit Court"). In total, twenty civil actions were commenced in the Circuit Court (the "PITWD Cases").

20. On July 15, 2013, certain parties seeking to represent Derailment victims in Québec filed a *Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative* in the Québec Superior Court for the Judicial District of Mégantic (the "Québec Class Action"). The petitioners sought to represent a class consisting of all persons or entities, as well as their heirs and successors, suffering a loss of any kind related to the Derailment. MMA and MMA Canada were putative defendants, among others, in the Québec Class Action.

21. In addition to the PITWD Cases and the Québec Class Action, several other claims for environmental damage, property damage, and business interruption have been alleged, including claims by the Provence of Québec, the village of Lac-Mégantic, and the federal government of Canada. The total amount of all of these claims was estimated to be in the hundreds of millions of dollars.

E. Sale Process

[3] These documents are annexed to the Clement Declaration.

22. Following the Derailment, MMA and MMA Canada were in default with their secured lenders and were incurring significant operating losses. Given MMA and MMA Canada's reduced cash flow, continued operating losses, increased liabilities, litigation costs, and denial of insurance coverage, a bankruptcy filing was the only option to preserve the value of the MMA System.

23. MMA Canada, the Trustee, together with the Monitor and in consultation with the Federal Railroad Administration, determined that a sale of the assets of both MMA and MMA Canada, on a going concern basis, was in the best interests of creditors of both debtors. In order to preserve the going concern value of MMA and MMA Canada's assets, the sale had to occur on an expedited basis.

24. The Trustee, with MMA Canada together with the Monitor, held discussions and negotiations with potential purchasers to sell substantially all of MMA's assets in conjunction with a sale of substantially all of the assets of MMA Canada (the "Sale"). These discussions and negotiations eventually led to the selection of Railroad Acquisition Holdings LLC ("RAH") as a stalking horse bidder in an auction for the Sale.

25. On December 12, 2013, the Trustee filed a motion for approval of bid procedures and a motion for authority to sell substantially all of its assets under an asset purchase agreement between the Trustee, MMA Canada, and RAH.

26. On December 19, 2013, the Bankruptcy Court entered an order approving the bid procedures.

27. Similarly, on December 12, 2013, MMA Canada filed with the Québec Court a motion for the authority to sell its assets pursuant to the asset purchase agreement with RAH. On

December 16, 2013, MMA Canada filed with the Québec court a motion seeking approval of bid procedures.

28. On December 19, 2013, the Québec Court entered an order approving the bid procedures, including a sale auction.

29. On January 19, 2014, MMA Canada filed a motion seeking approval of the sale of its assets and for a vesting order. The auction was held on January 21, 2014. The bid of the stalking horse--RAH--was declared the successful bid. On January 23, 2014, the Québec Court entered the *Approval and Vesting Order* approving the sale of the MMA Canada assets as part of the sale of the MMA's Assets.[4]

30. The sale of MMA's assets closed on May 15, 2014, and upon final regulatory approval, the sale of the MMA Canada assets closed on June 30, 2014. In total, the Sale resulted in a $14,250,000 net payment to MMA and MMA Canada.

F. Executory Contracts and Unexpired Leases

31. On January 17, 2014, MMA Canada filed the *Motion for an Order Approving and Authorizing the Assignment of Contracts*, and on January 23, 2014, the Québec Court entered the *Order Approving and Authorizing the Assignment of Contracts.*

G. Claims Bar Date

32. The Monitor, the Trustee, MMA Canada, and other interested parties engaged in extensive negotiations for the development of a cross-border bar date and claims procedure. This coordination was critical to avoid creditor confusion, and to streamline proceedings in the two cases aiding in the efficient and timely resolution and payment of claims to the benefit of all creditors.

[4] These documents are annexed to the Clement Declaration.

33. On December 13, 2013, MMA Canada filed the *Motion for an Order Approving a Process to Solicit Claims and For the Establishment of a Claims Bar Date*. The Trustee filed a similar motion in the Chapter 11 Case. On February 4, 2014, the Québec Class Action plaintiffs filed in the Québec Court the *Cross-motion of the Class Action Plaintiffs for an Order Approving a Process to Solicit Claims and for the Establishment of a Claims Bar Date.*

34. On April 4, 2014, the Québec Court entered the *Claims Procedure Order* setting the claims bar date as June 13, 2014. On June 13, 2014, the *Amended Claims Procedure* Order was entered to extend the deadline to file proofs of claim for wrongful death to July 14, 2014. The Bankruptcy Court entered similar orders in the Chapter 11 Case.

H. CCAA Plan Process

35. On January 9, 2015, MMA Canada filed a *Motion for an Eleventh Order Extending the Stay Period*, including a draft *Plan of Compromise and Arrangement* (the "Draft CCAA Plan"). MMA Canada sought additional time to finalize settlement agreements with various parties, as well as sufficient time under the stay to obtain approval of and execute the Draft Plan. On January 12, 2015, the Québec Court approved the motion. On April 10, 2015, MMA Canada filed a Motion for an Order for the Convening, Holding and Conduct of a Creditors Meeting and for a Twelfth Extension of the Stay Period. On April 15, 2015, the Québec Court entered an *Order for the Convening, Holding and Conduct of the Creditors Meeting and for a Twelfth Extension of the Stay Period until December 15, 2015.*

36. On March 31, 2015, MMA Canada filed the *Plan of Compromise and Arrangement Dated March 31, 2015.* On June 8, 2015, MMA Canada filed an *Amended Plan of Compromise and Arrangement Dated June 8, 2015* (the "CCAA Plan"). The CCAA Plan was crafted to work in conjunction with MMA's chapter 11 plan in distributing funds to victims of

the Derailment. On May 6, 2015, CP filed pleadings arguing that the Québec Court lacked jurisdiction to hear the MMA Canada case under the CCAA and opposing the CCAA Plan. On June 17, 2015, the Québec Court held a hearing on MMA Canada's motion for approval of the CCAA Plan, and took the issues before it under advisement. On July 13, 2015, the Québec Court approved the CCAA Plan by issuing the *Judgment on Motion for Approval of the Plan of Arrangement* (the "Plan Sanction Order").[5]

37. On July 7, 2015, the Trustee filed the *First Amended Disclosure Statement for the Trustee's Plan of Liquidation dated July 7, 2015* (the "Disclosure Statement")

38. The Trustee filed the *Trustee's Plan of Liquidation dated March 31, 2015*, later amended by the *Trustee's First Amended Plan of Liquidation* dated July 7, 2015 (the "Chapter 11 Plan")

39. On July 17, 2015, the Court entered an *Order Approving (I) the Proposed Disclosure Statement; (II) Establishing Notice, Solicitation, and Voting Procedures; (III) Scheduling Confirmation Hearing; and (IV) Establishing Notice and Objection Procedures for Confirmation of the Plan* approving the Disclosure Statement and providing related relief.

I. The Settlement Agreements

40. The Monitor, Trustee, MMA, and MMA Canada have worked collectively since the commencement of the cases to engage in settlement discussions with various parties identified as potentially liable for damages arising from the Derailment. As a result of these negotiations, approximately 25 entities or groups of affiliated entities have entered into settlement agreements, whereby the "Released Party" (as defined in those agreements) will contribute to a settlement fund in exchange, *inter alia*, for a full and final release of all claims arising out of the Derailment, including any claims for contribution and/or indemnity (including

[5] The CCAA Plan and the Plan Sanction Order are attached to the Clement Declaration.

contractual indemnity) asserted by third parties, as well as the protection of a global injunction barring assertion of any Derailment-related claims against the Released Parties. The settlement fund is, as of the date hereof, approximately (CDN) $431 million.[6] The CCAA Plan, *inter alia*, implements the settlement fund.

41. As of the filing of this Petition and the CCAA Plan, the Released Parties include all parties named in lawsuits brought in the United States by or on behalf of Derailment victims, the US Legal Representatives (as defined below), the Province of Québec, and the Trustee arising out of the Derailment, other than CP. Settlements have been reached with oil producers, tank car lessors, insurance companies, as well as all of the directors and officers of MMA and MMA Canada and various companies related to one or more of the directors. CP is the sole remaining "Non-Released" (*i.e.*, non-settling) Party. To the extent a settlement is not reached with CP, it is expected that litigation will commence and/or continue against CP to recover damages.

J. Plan Approval

42. Approval of creditors at a properly called creditors' meeting is a prerequisite to entry of an order – known as a "plan sanction order" – approving a plan under the CCAA. On June 9, 2015, the statutorily required meeting of creditors was held (the "Meeting of Creditors") in Lac-Mégantic, where the CCAA Plan was approved with 3,879 positive votes representing approximately (CDN) $694 million of claims. No negative votes were cast.

43. On June 17, 2015, a hearing was held before the Québec Court for the approval of the CCAA Plan (the "Sanction Hearing"). At the Sanction Hearing, no claimants who voted at the Meeting of Creditors opposed the sanctioning of the CCAA Plan.

[6] Canadian funds are calculated using and exchange rate of approximately $1.25 Canadian to $1.00 U.S., which was the approximate rate as of June 8. 2015. The actual amount available for distribution will fluctuate along with the exchange rate.

44. Of the 26 entities included in various litigation as potentially liable for claims arising from the Derailment, only CP has failed to enter into a settlement agreement with the Trustee and the Monitor. As the sole holdout, CP, not surprisingly, opposed approval of the CCAA Plan. Notwithstanding CP's opposition, on July 13, 2015, the Québec Court approved the CCAA Plan by entering the Plan Sanction Order.

45. Under its terms, the CCAA Plan will become effective upon the Approval Orders (as defined in the CCAA Plan) becoming final Orders.[7]

K. Summary of the CCAA Plan

46. The CCAA Plan is the result of many months of multilateral discussion between MMA Canada's counsel, the Monitor, the Monitor's counsel, the Trustee, MMA Canada's principal stakeholders, namely the Province of Québec, the Class Representatives, the attorneys for victims of the Derailment in the Chapter 11 Case (the "US Legal Representatives"), and the third parties who entered into the settlement agreements described above (the "Released Parties" and collectively, the "Major Stakeholders"), the purpose of which was to negotiate contributions by the Released Parties to a settlement fund (the "Settlement Fund") to be distributed to Derailment[8] victims.

47. The allocation of the Settlement Funds, as described in the CCAA Plan, among and within the categories of creditors has been the result of intensive discussions with and compromises among the Major Stakeholders. In exchange for contributions to the Settlement

[7] Under the CCAA Plan, the Approval Orders are (i) the Plan Sanction Order, (ii) an order confirming the Chapter 11 Plan or an order under chapter 15 for enforcement and recognition of the Plan Sanction Order; and (iii) an order in the Québec Class Action declaring that the Plan Sanction Order and the chapter 11 Plan confirmation order are binding and given full effect against the parties designated and part of the Québec Class Action.

[8] Capitalized terms not defined herein have the meaning ascribed to them in the CCAA Plan.

Fund, the CCAA Plan provides the Released Parties with full, complete and final releases in both Canada and the United States from all litigation relating to the Derailment.

48. For non-settling third parties, the CCAA Plan provides that all litigation already commenced in Canada and the United States against such non-settling party may be continued and all parties will be free to institute new litigation in any jurisdiction.

49. Based on the information available as of the date hereof, the distribution to the various categories of claims can be summarized as follows:

(All in Canadian Dollars)	**Estimated Distribution (prior to redistribution)**	**% Distribution (prior to redistribution)**	**Reallocated Dividends from Governments**	**Total Estimated Distribution**
Wrongful Death Claims	$98,798,714	24.1%	$12,422,714	$111,221,428
Bodily Injury and Moral Damages Claims	$42,635,130	10.4%	$6,211,357	$48,846,487
Property and Economic Damages Claims	$36,895,785	9%	$4,658,518	$41,554,303
Subrogated Insurer Claims	$16,808,080	4.1%	--	$16,808,080
Province	$193,148,733	89.9% (of Government Claims)	($13,383,000)	$179,765,733
Attorney General	$9,909,589	4.6% (of Government Claims)	($9,909,589)	--
Lac-Mégantic	$9,437,703	4.4% (of Government Claims)	--	$9,437,703
CSST	$2,319,437	1.1% (of Government Claims)	--	$2,319,437
Total	**$409,953,171**		**--**	**$409,953,171**

50. The CCAA Plan provides that all Affected Claims shall be fully, finally, irrevocably and forever compromised, remised, released, discharged, cancelled and barred on the CCAA Plan Implementation Date as against the Released Parties. Moreover, all debentures, indentures, notes, certificates, agreements, invoices, and other instruments evidencing Affected Claims are cancelled as of the CCAA Plan Implementation Date. The CCAA Plan also contains releases in favor of directors and officers of MMA Canada.

51. The CCAA Plan provides for a permanent injunction against any person from commencing or continuing any action on account of a claim released under the CCAA Plan.

52. Lastly, the CCAA Plan provides that the Monitor will seek recognition and enforcement of the CCAA Plan and of the Plan Sanction Order in this Court pursuant to chapter 15 of the Bankruptcy Code.

L. <u>Certain Terms of the Plan Sanction Order</u>

53. The terms of the Plan Sanction Order include, among others:

(a) approval of the CCAA Plan and authorization of the Monitor to take all steps necessary or appropriate to implement the CCAA Plan;

(b) specific terms related to the compromises and releases of Affected Claims as set out in the CCAA Plan (and described above);

(c) a permanent stay and injunction related to all claims released under the CCAA Plan; and

(d) a request for foreign aid and recognition from other courts.

54. The Plan Sanction Order authorizes the Monitor to act as the foreign representative in respect of the Canadian Proceeding for the purposes of a filing in the United States under chapter 15 of the Bankruptcy Code, and authorizes the Monitor to make such further applications, motions or proceedings to or before such other courts as may be necessary to give effect to the Plan Sanction Order and any other order granted by the Québec Court. Plan

Sanction Order at ¶125. Moreover, the Plan Sanction Order requests the aid and recognition of, *inter alia*, any federal court in the United States to act in aid of and to be complementary to the Québec Court in carrying out the terms of the Plan Sanction Order. *Id.* at ¶126.

RELIEF REQUESTED

55. The Monitor brings this Motion to ensure that the terms of the CCAA Plan and the Plan Sanction Order are given full force and effect in the United States. By this Motion, the Monitor seeks entry of an order from this Court recognizing and enforcing the Plan Sanction Order, and any extensions or amendments thereof, pursuant to section 105(a), 1507, and 1521 of the Bankruptcy Code and granting such other and further relief as is appropriate under the circumstances.

BASIS FOR RELIEF

56. For the reasons more fully discussed in the Memorandum of Law filed contemporaneously herewith, the Monitor is entitled to recognition and enforcement of the Plan Sanction Order, and any extensions or amendments thereof authorized by the Québec Court, in the United States under sections 105(a), 1507, and 1521 of the Bankruptcy Code.

57. Among other reasons, in the Plan Sanction Order, the Québec Court expressly authorized and directed the Monitor to seek such relief in this Court as necessary to give effect to the order. Moreover, the Québec Court expressly requested the assistance of courts in the United States in giving effect to the Plan Sanction Order. The Monitor believes that enforcement of the Plan Sanction Order in connection with the Chapter 15 Petition is necessary to give effect to such orders in the United States. Thus, in addition to the reasons set forth above, this Court should give full force and effect in the United States to the Plan Sanction Order under well-established

principles of international comity, as embodied and expressed in section 1501, 1509, and 1525 of the Bankruptcy Code.

NOTICE

58. The Monitor requests a finding that service of this Motion and notice of hearing on this Motion given in the following manner to the following persons be approved as adequate and sufficient pursuant to Bankruptcy Rules 2002(q), 2002(m), 9007, and 9008: service by United States mail and/or Canadian mail (as appropriate), first-class postage prepaid or by overnight courier, or by e-mail if authorized by the relevant creditor or party and by publication of notice in *The Wall Street Journal* (National Edition) and *The Globe and Mail* (Canada), upon (a) all known U.S.-based creditors or their counsel, (b) the Office of the United States Trustee for the District of Maine, (c) counsel to the Creditors' Committee in the Chapter 11 Case, (d) all parties (or their counsel) to any litigation pending in the United States or Canada to which MMA or MMA Canada is a party or has been a party at any time since August 6, 2013, including without limitation counsel in the PITWD Cases and counsel in the Québec Class Action, (e) all parties that request or have requested notice pursuant to Bankruptcy Rule 2002, (f) all Released Parties, and (g) all known Canadian-based creditors, or their counsel. The Monitor requests that the foregoing be approved as adequate and sufficient notice of this Motion under Bankruptcy Rules 2002, 9007, and 9008.

CONCLUSION

WHEREFORE, the Monitor requests that the Court enter an order (a) recognizing and enforcing the Plan Sanction Order of the Québec Court dated July 13, 2015, including any extensions or amendments thereof; and (b) granting such other and further relief as is appropriate under the circumstances.

Dated: July 20, 2015

RICHTER ADVISORY GROUP INC., MONITOR AND FOREIGN REPRESENTATIVE OF MONTREAL MAINE & ATLANTIC CANADA CO.

By its attorney:

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-_____

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER RECOGNIZING AND ENFORCING THE PLAN SANCTION ORDER OF THE QUÉBEC SUPERIOR COURT

Richter Advisory Group Inc. is the court-appointed monitor (the "Monitor") and authorized foreign representative of Montreal, Maine & Atlantic Canada Co. ("MMA Canada") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C 36, as amended (the "CCAA"), pending before the Québec Superior Court of Justice (Commercial Division) (the "Québec Court"). The Monitor has commenced a chapter 15 case ancillary to the Canadian Proceeding by filing the Verified Petition for Recognition of Foreign Proceeding and Related Relief (the "Chapter 15 Petition").

The Monitor filed a motion (the "Motion") contemporaneously herewith, pursuant to sections 105(a), 1507, and 1521 of title 11 of the United States Code (the "Bankruptcy Code"), for entry of an order recognizing and enforcing the Plan Sanction Order of the Québec Court dated July 13, 2015, including any extensions or amendments thereof (the "Plan Sanction Order") sanctioning MMA Canada's Amended Plan of Compromise and Arrangement dated June 8, 2015 (as the same may be amended, revised or supplemented in accordance with its

terms, the "CCAA Plan").[1] The Monitor respectfully files this Memorandum of Law in support of the Motion:

JURISDICTION AND VENUE

1. The United States District Court for the District of Maine (the "District Court") has original but not exclusive jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157 and Rule 83.6 of the District Court's local rules, the District Court has authority to refer and has referred this chapter 15 case to this Court.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

3. Venue over this chapter 15 case is proper in this district pursuant to 28 U.S.C. § 1410.

4. The statutory predicates for the relief requested herein are sections 105(a), 1507, and 1521 of the Bankruptcy Code.

PRELIMINARY STATEMENT

5. On July 6, 2013, an unmanned eastbound MMA/MMA Canada train with 72 carloads of crude oil and 5 locomotive units, derailed in Lac-Mégantic, Quebec (the "Derailment"). The transportation of the crude oil began in New Town, North Dakota, by the Canadian Pacific Railway Co. ("CP") and MMA Canada later accepted the rail cars from CP at CP's yards in Montreal, Quebec. The crude oil was to be transported via the Saint-Jean-Lac-Mégantic line through Maine to its ultimate destination in Saint John, New Brunswick.

6. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, resulting in the death of 47 people.[2] A large quantity of oil was released into the

[1] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the *Motion for Entry of an Order Recognizing and Enforcing the Plan Sanction Order of the Québec Superior Court*.

environment, necessitating an extensive cleanup effort which is still ongoing. As a result of the Derailment and the related injuries, deaths, and property damage, lawsuits were filed against MMA and MMA Canada both in the United States and Canada.

7. Accordingly, MMA Canada, along with MMA, faced significant claims for wrongful death, property and environmental damage, among other claims. Meanwhile, although MMA Canada deployed efforts to maintain railway transportation services where possible to its customers in Québec, its railway transportation services were greatly reduced in Québec, and were reduced by MMA in the United States, as a result of the unavailability to transit through Lac-Mégantic, greatly decreasing MMA and MMA Canada's cash flow.

8. Faced with significant claims resulting from the Derailment, and in light of the reduced service capacity of both MMA and MMA Canada as a result of the Derailment and the resulting decrease in cash flow, MMA Canada commenced the Canadian Proceeding to protect all stakeholders, including the individuals asserting claims related to the Derailment. MMA Canada filed the CCAA Plan for the purpose of maximizing the value of assets for all creditors and to create fair and efficient process for liquidating claims by and against MMA Canada. On June 9, 2015, the statutorily required meeting of creditors was held (the "Meeting of Creditors") in Lac-Mégantic, where the CCAA Plan was approved with 3,879 positive votes representing approximately (CDN) $694 million of claims. No negative votes were cast. The Plan Sanction Order was entered on July 13, 2015.

9. Once recognition of a foreign proceeding is granted, chapter 15 of the Bankruptcy Code authorizes this Court to, among other things, provide further assistance in the United States to a foreign representative with respect to a foreign proceeding. Such assistance is consistent

[2] A forty-eighth death resulted when a volunteer fireman who had worked in the post-Derailment recovery effort committed suicide. Accordingly, a total of 48 decedents' estates may hold claims, *inter alia*, for wrongful death.

with longstanding principles of comity and the statutory purposes of chapter 15 to facilitate and foster cooperation in cross-border insolvency proceedings by, *inter alia*, enforcing in the United States an order entered in the foreign proceeding.

10. As set forth below, enforcement of the Plan Sanction Order in the United States is authorized and warranted under section 105(a), 1507, and 1521 of the Bankruptcy Code. Granting the relief sought herein will best assure the fair and efficient administration of the Canadian Proceeding and the implementation of the CCAA Plan in accordance with the principles underlying chapter 15 of the Bankruptcy Code. Moreover, such relief is consistent with the relief afforded by the United States courts in other ancillary chapter 15 cases involving proceedings under the CCAA.

BACKGROUND

11. For a more complete description of MMA Canada's business and circumstances leading to the Canadian Proceeding and the entry of the Plan Sanction Order, the court is respectfully referred to the Chapter 15 Petition and the Motion and the documents cited therein. Additionally, the documents relating to the Canadian Proceeding are available on the Monitor's website at:

http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co.

ARGUMENT

A. Enforcement of the Plan Sanction Order is Warranted Because it Provides Relief Similar to and Consistent with the Relief Available under the Bankruptcy Code

12. In connection with the recognition of the Canadian Proceeding, the Monitor seeks enforcement in the United States of the Plan Sanction Order of the Québec Court.

13. The Plan Sanction Order provided MMA Canada with relief that is similar to and consistent with the relief that is available under the Bankruptcy Code and routinely approved in connection with confirmation of chapter 11 plans. Specifically, the Plan Sanction Order approved the terms of the CCAA Plan, which, as described in greater detail in the Motion, generally provides for, among other things:

(a) the Settlement Fund consisting of approximately CDN $182,300,000 and US $198,900,000 to be distributed to claims arising out of the Derailment;

(b) the creation of a cash reserve for future payment of approved administrative expenses;

(c) a claims procedure and reconciliation process for claims against MMA Canada;

(d) the release of certain claims against MMA Canada;

(e) the release of claims against certain named current or former directors and officers of MMA Canada, excluding therefrom claims of the type specified under Section 3.3 of the Plan; and

(f) the release and exculpation of the Monitor.

14. Additionally, the Plan provides a mechanism through which certain third parties that entered into settlement agreements with MMA Canada and the chapter 11 trustee in the Chapter 11 Case will obtain the benefit of global releases and injunctions.

15. Other terms of the Plan Sanction Order includes, among other things:

(a) authorization of the Monitor to take all steps and actions necessary or appropriate to implement the Plan;

(b) specific terms related to the compromise and releases of Affected Claims as set out in the CCAA Plan;

(c) a permanent stay and injunction related to all claims released under the CCAA Plan; and

(d) a request for foreign aid and recognition from other courts.

B. Sections 105(a), 1507, and 1521 Authorize and Warrant Enforcement of the Plan Sanction Order

16. Section 105(a) provides that a court "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" which, includes the purposes explicitly set forth in section 1501 of the Bankruptcy Code including fostering cooperation, greater legal certainty, fair and efficient administration, maximization of stakeholder value, and the rescue of financially distressed businesses in the context of cross-border insolvency cases. 11 U.S.C. §§ 105(a) and 1501(a).

17. Moreover, sections 1507 and 1521 of the Bankruptcy Code embody the principles of comity and provide a statutory basis for providing a foreign representative with relief, including the enforcement of orders issued by foreign courts staying legal actions or confirming insolvency plans.

18. Section 1507 provides that a court "may provide additional assistance to a foreign representative under this title or under other laws of the United States." 11 U.S.C. § 1507. Additionally, section 1521 provides a general grant of authority that "[u]pon recognition of a foreign proceeding . . . where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of any creditors, the court may grant any appropriate relief." 11 U.S.C. § 1521(a). Section 1521(a) also sets forth a non-exhaustive list of specific types of relief a court may grant a foreign representative such as staying the commencement or continuation of actions, staying execution against the debtor's assets, entrusting administration or realization of the debtor's assets within the United States, and granting any additional relief that is available to a trustee. Id. at 1521(a)(1)-(7). Once it is determined that the relief requested is available and warranted under section 1507 and/or 1521, the court should grant relief unless

doing so would be "manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

C. The Principles of Comity Embodied in Chapter 15 Strongly Favor Enforcement of the Plan Sanction Order

19. Once a foreign proceeding receives recognition under chapter 15 of the Bankruptcy Code, longstanding principles of international comity embodied in chapter 15 heavily weigh in favor of enforcing the Plan Sanction Order in the United States. "American courts have long recognized the need to extend comity to foreign bankruptcy proceedings." Victrix S.S., Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987). The definition of comity comes from a Supreme Court case granting enforcement to a judgment obtained by a foreign bankruptcy trustee:

> "Comity" . . . is recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-164 (1895).

20. Accordingly, granting comity to judgments in foreign proceedings is appropriate as long as parties are provided the fundamental protections assured to litigants in the United States. *See* id. at 202-03 (applying comity analysis to French judgment obtained by foreign liquidator against U.S. citizens, and finding it was "satisfied that [ ] there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries . . . .").

21. Furthermore, the importance of granting comity is heightened in the insolvency context because the collective nature of insolvency proceedings requires that "the assets of a debtor are dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities." Cunard S.S. Co., Ltd. v. Salen Reefer Services AB, 773 F.2d 452, 456-58 (2d Cir. 1985). Accordingly, in considering judgments rendered by foreign courts in insolvency matters, comity may be withheld only if its extension would cause American creditors to be "treated in some manner inimical to this country's policy of equality." Id. at 459.

22. Even prior to the enactment of the Bankruptcy Code, courts respected principles of comity as a matter of common law, enforcing foreign insolvency decisions in the United States if the foreign proceeding afforded due process and our most fundamental public policies were not undermined. *See e.g.*, Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 537 (1883) (enforcing Canadian restructuring of bonds over objection of United States bondholders, explaining that "every person who deals with a foreign corporation impliedly subjects himself to [the] laws of the foreign government[, and] anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."). With the enactment of the Bankruptcy Code, courts were provided with statutory authority to extend comity to foreign decisions in cross-border insolvency cases under former section 304 of the Bankruptcy Code, which Congress then repealed and replaced with chapter 15 in 2005.

23. The purpose of chapter 15 is to continue and enhance the United States' long history of granting comity in cross-border insolvency proceedings. *See* 11 U.S.C. § 1501; In re

Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) (chapter 15 "specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief."); 11 U.S.C. § 1525 ("[T]he [ancillary] court shall cooperate to the *maximum extent possible* with a foreign court") (emphasis added); 11 U.S.C. § 1509(b) ("If the court grants recognition under section 1517, and subject to limitations that the court may impose consistent with the policy of this chapter . . . (3) a court in the United States *shall* grant comity or cooperation to the foreign representative.") (emphasis added).

24. Comity is appropriate here because the Plan Sanction Order sought to be enforced was issued by a court of competent jurisdiction in Canada. United States courts consistently note that orders emanating from a common law jurisdiction akin to that of the United States are particularly deserving of comity. *See* In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd., Inc., 238 B.R. 25, 67 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) ("[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." (internal quotations and citations omitted)).

25. Accordingly, the principles of international comity embodied in chapter 15 weigh strongly in favor of enforcement of the Plan Sanction Order.

D. The Plan Sanction Order Should Be Enforced

26. Most, if not all, of the relief provided in the Plan Sanction Order are forms of relief plainly available and commonly approved in chapter 11 cases. For instance, cash reserves for administrative claims, global releases, injunctions, and claims procedures are all provisions commonly provided for in chapter 11 plans. Moreover, the terms of the CCAA Plan are

authorized under the general grant of authority under section 1521(a). [Under section 1522(a), a court may grant relief under section 1519 and 1521 as long as "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a). In light of the unanimous support for the CCAA Plan received from the 130 creditors who attended the Meeting of Creditors (resulting in 3,879 positive votes representing approximately $694 million of claims) MMA Canada's creditors, the CCAA Plan clearly provides "sufficient protection" of the interests of those parties in satisfaction of section 1522(a).

27. To the extent any relief provided in the Plan Sanction Order is not available under section 1521 of the Bankruptcy Code, including the provisions of the Plan Sanction Order releasing or limiting the liability of certain third parties, such relief is authorized under section 1507 of the Bankruptcy Code. *See* In re Vitro S.A.B. de CV, 701 F.3d 1031, 1059 (5th Cir. 2012) (concluding that enforcement of non-debtor releases in foreign plan is authorized by section 1507 but not section 1521) (citing In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y 2010)).

28. Several courts have enforced CCAA plans containing broad third party non-debtor releases and injunction provisions like the ones in the CCAA Plan. See e.g., Metcalfe, 421 B.R. 685, 697. In Metcalfe, the court enforced a CCAA plan containing non-debtor releases protecting participants in the Canadian commercial paper market that had been approved by the Canadian court as appropriate under applicable Canadian law. Id. at 698-700. See also In re Sino-Forest Corp., No. 13-10361 (MG) D.E. 16 (Bankr. S.D.N.Y April 15, 2013) (enforcing plan sanction order including entirety of plan injunction and release provisions).

29. Here, none of the creditors or stakeholders in the Canadian Proceeding that might otherwise have asserted claims against third parties with liability arising from the Derailment

objected to this aspect of the CCAA Plan.[3] Indeed, the CCAA Plan was approved at the Meeting of Creditors with 3,879 positive votes, representing approximately (CDN) $694 million claims. (No negative votes were cast). Further, the enforcement of non-debtor releases under section 1507 of the Bankruptcy Code is all the more appropriate where, as here, the CCAA Plan containing such releases received unanimous approval by affected creditors in the Canadian Proceeding. *Cf.* Vitro, 701 F.3d 1066-67 (distinguishing Metcalfe as a case involving "near unanimous approval" and refusing to enforce non-debtor releases in Mexican plan upon finding majority of affected creditors did not support plan).

30. Moreover, just as in Metcalfe and Sino-Forest, the CCAA Plan satisfied all of the factors that must be considered when granting relief under section 1507 of the Bankruptcy Code. Further weighing in favor of enforcement, comity is the overarching factor in section 1507. See e.g., In re Bd. of Directors of Telecom Argentina S.A., No. 05-17811 (BRL), 2006 WL 686867, at *23 (Bankr. S.D.N.Y Feb. 24, 2006) ("The importance of comity is well noted in the newly enacted chapter 15 of the Bankruptcy Code that has incorporated concepts of section 304(c)(2) with the major difference that comity is elevated as the prime consideration for the grant of ancillary relief to a foreign representative."), *aff'd sub nom.* Argo Fund Ltd. v. Bd. of Dirs. of Telecom Argentine, S.A. (In re Bd. of Dirs. of Telecom Argentina, S.A.), 528 F.3d 162, 171 (2d Cir. 2008) (describing comity as "ultimate consideration" under former section 304); In re Petition of Garcia Avila, 296 B.R. 95, 108 n.14 (Bankr. S.D.N.Y. 2003) (noting that draft proposals of chapter 15 eliminated comity as individual factor in lieu of including it in preamble of statute to emphasize its importance as primary consideration when granting additional assistance to foreign insolvency proceeding).

[3] CP objected to the CCAA Plan on other grounds, including an assertion that the Quebec Court lacked jurisdiction, which objection was overruled by the Quebec Court's Order dated July 13, 2015, a copy of which is annexed to the Clement Declaration.

31. Thus, when considering whether a foreign representative's request for relief is authorized under section 1507 of the Bankruptcy Code, a court must consider whether, consistent with the principles of international comity, granting such relief will reasonably ensure the: (a) just treatment of all holders of claims against or interests in the debtor's property; (b) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (c) prevention of preferential or fraudulent dispositions of property of the debtor; (d) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (e) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns. 11 U.S.C. § 1507(b).

32. Similar to Metcalfe and Sino-Forest, the CCAA Plan was the result of extensive negotiations between the Monitor, the chapter 11 trustee, MMA Canada and various third parties, ultimately receiving unanimous approval of all who voted and approval of the court. Further, prior to entry of the Plan Sanction Order, the Monitor and MMA Canada obtained the support of many of the other major parties in the Canadian Proceeding, including the federal government of Canada, the Province of Québec, the town of Lac-Mégantic, the representatives of the plaintiffs in the class action, counsel for the estates of the victims of the Derailment and all entities named as defendants (other than CP) in lawsuits arising out of the Derailment. There is similarly no suggestion by any party that the CCAA Plan facilitates a preferential or fraudulent disposition of MMA Canada's property.

33. Given the process by which the CCAA Plan was developed and the degree of support it has received, the only conclusion to be reached is that entry of the Plan Sanction Order was fair and impartial. Moreover, the CCAA Plan expressly provides that the Monitor may

commence a proceeding in the United States under chapter 15 of the Bankruptcy Code to seek recognition of the CCAA Plan and the Plan Sanction Order in order to confirm that both are binding and effective in the United States. See Plan Sanction Order, ¶ 125. The Monitor thus respectfully submits that the Court should enter an order giving full force and effect to the Plan Sanction Order, and thus the CCAA Plan, in the United States. Doing so is entirely consistent with long standing principles of international comity and cooperation, and the Plan Sanction Order was not entered in circumstances that could be considered fundamentally unfair.

E. The Relief Requested is not Manifestly Contrary to the Public Policy of the United States

34. The primary limitation on relief under chapter 15 is section 1506 of the Bankruptcy Code, which provides that a court may refuse to take an action governed by chapter 15 if such "action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. The legislative history of section 1506 makes clear that the public policy exception should be "narrowly interpreted" and is restricted to "the most fundamental policies of the United States." In re Ephedra Prods. Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y 2006) (citing H.R. REP. NO. 109-31(I), at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172).

35. Accordingly, consistent with longstanding comity case law in the United States, courts have held that the public policy exception "should be interpreted restrictively" and that "a foreign judgment should generally be accorded comity if its proceedings are . . . fair and impartial." Ephedra, 349 B.R. at 90-91 (internal citations omitted).

36. Analyzing section 1506 of the Bankruptcy Code in the context of a foreign representative's request to enforce a CCAA plan containing non-debtor releases, the court in Metcalfe explicitly found that enforcing such releases was not manifestly contrary to a

fundamental policy in the United States. *See* Metcalfe, 421 B.R. at 697 (noting that "this public policy exception is narrowly construed" and enforcing third-party releases in CCAA plan).

37. This Court should reach the same conclusion here. Creditors unanimously approved the CCAA Plan at the June 9, 2015 Meeting of Creditors. Pursuant to settlements with 25 "Released Parties," the estates of MMA Canada and MMA will receive approximately (CDN) $431 million[4] which will be used to pay claims. Those settlements are contingent on entry by this Court of an order recognizing and enforcing the Plan Sanction Order. Of the 26 parties named in various litigation as having potential liability for damages arising from the Derailments, all but one – CP – have agreed to settle. The $431 million to be paid pursuant to these settlements represents an extraordinary result for the estates of MMA Canada and MMA. Not surprisingly, at the Meeting of Creditors in Lac-Mégantic on June 9, 2015, 3,879 positive votes (and no negative votes) were cast in favor of the CCAA Plan. These votes represented (CDN) $694 million in claims. Under these facts, it cannot be said that enforcing the Plan Sanction Order in the United States runs afoul of section 1506 of the Bankruptcy Code.

CONCLUSION

WHEREFORE, the Monitor requests that the Court enter an order (a) recognizing and enforcing the Plan Sanction Order of the Québec Court dated July 13, 2015, including any extensions or amendments thereof; and (b) granting such other and further relief as is appropriate under the circumstances.

[4] Canadian funds are calculated using and exchange rate of approximately $1.25 Canadian to $1.00 U.S., which was the approximate rate as of June 8. 2015. The actual amount available for distribution will fluctuate along with the exchange rate.

Dated: July 20, 2015

RICHTER ADVISORY GROUP INC., MONITOR AND FOREIGN REPRESENTATIVE OF MONTREAL MAINE & ATLANTIC CANADA CO.

By its attorney:

/s/ *Roger A. Clement, Jr.*

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-_____

ORDER RECOGNIZING AND ENFORCING THE PLAN SANCTION ORDER OF THE QUÉBEC SUPERIOR COURT

This matter was brought before the Court upon the *Motion for Entry of an Order Recognizing and Enforcing the Plan Sanction Order of the Québec Superior Court* (the "Motion")[1] of Richter Advisory Group Inc., the court-appointed monitor (the "Monitor") and authorized foreign representative of Montreal, Maine & Atlantic Canada Co. ("MMA Canada") in a proceeding (the "Canadian Proceeding") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), pending before the Québec Superior Court of Justice (Commercial Division) (the "Québec Court"), seeking the entry of an order pursuant to sections 105(a), 1507, and 1521 of title 11 of the United States Code (the "Bankruptcy Code") giving full force and effect in the United States to the Plan Sanction Order of the Québec Court dated **July 13, 2015**, including any extensions or amendments thereof (the "Plan Sanction Order"), attached hereto as **Exhibit A**, which Plan Sanction Order sanctions MMA Canada's *Amended Plan of Compromise and Arrangement* dated June 8, 2015 (as the same may be amended, revised or supplemented in accordance with its terms, the "CCAA Plan"), attached hereto as **Exhibit B**. It appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this is a core proceeding pursuant

[1] Capitalized terms not defined herein have the meaning ascribed to them in the Motion.

to 28 U.S.C. § 157(b)(2)(P); and it appearing that venue is proper in this District pursuant to 28 U.S.C. § 1410; and the Court having considered and reviewed the *Memorandum of Law in Support of Motion for Entry of an Order Recognizing and Enforcing the Plan Sanction Order of the Québec Superior Court* (the "Memorandum of Law"); and the Court having held a hearing to consider the relief requested in the Motion on August 20, 2015 (the "Hearing"), at which time all parties-in-interest were given an opportunity to be heard; and it appearing that sufficient notice of the Motion and Hearing has been given to parties-in-interest and no other or further notice need be provided; and after due deliberation and sufficient cause appearing therefor; the Court hereby **FINDS** and **CONCLUDES** as follows:

A. On June 9, 2015, a meeting of creditors was held in Lac-Mégantic, Québec, where the CCAA Plan was approved by the requisite number and amount of creditors required for approval under the CCAA.

B. On June 17, 2015, a hearing was held before the Québec Court for the approval of the Plan.

C. On July 13, 2015, the Québec Court granted the Plan Sanction Order, and approved the Plan.

D. On July 20, 2015, the Monitor commenced a chapter 15 case in this Court and requested the relief set forth in *Verified Petition for Recognition of Foreign Proceeding and Related Relief*.

E. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and sections 105(a), 1507, and 1521 of the Bankruptcy Code.

F. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

G. Venue is proper in this District pursuant to 28 U.S.C. § 1410.

H. The relief granted herein is necessary and appropriate, in the interest of the public and international comity, consistent with the public policy of the United States, warranted pursuant to section 105(a), 1507, and 1521 of the Bankruptcy Code, and will not cause any hardship to any party in interest that is not outweighed by the benefits of granting that relief.

I. The relief granted herein is not manifestly contrary to the public policy of the United States, as prohibited by section 1506 of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY **ORDERED**, **ADJUDGED**, AND **DECREED**, AS FOLLOWS:

1. The form and manner of notice and service of the Motion and the notice of hearing described in the Motion is adequate and sufficient, and is hereby approved

2. The CCAA Plan and Plan Sanction Order, in their entirety, are hereby given full force and effect in the United States and are binding on all persons subject to this Court's jurisdiction pursuant to section 105(a), 1507, and 1521 of the Bankruptcy Code. All rights of creditors and parties-in-interest of MMA Canada with respect to the Canadian Proceeding, including without limitation, the allowance, disallowance, and dischargeability of claims under the CCAA Plan, shall be assessed, entered and/or resolved in accordance with the Plan and/or the relevant provisions of the CCAA, or as otherwise determined in the Canadian Proceeding, and each and every creditor or party-in-interest is permanently restricted, enjoined and barred from asserting such rights, except as may have been or may be asserted in the Canadian Proceeding with the CCAA Plan.

3. Without limitation as to the relief in the preceding paragraph, the following provisions of the Plan and Plan Sanction Order are hereby given full force and effect in the

United States and are binding on all persons subject to this Court's jurisdiction pursuant to sections 105(a), 1507, and 1521 of the Bankruptcy Code:[2]

ARTICLE 5
RELEASES AND INJUNCTIONS

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, with the exception of any claims preserved pursuant to Section 5.3 hereof 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, (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 financiére découlant du sinistre survenu dans la ville de*

[2] Capitalized terms in these provisions, unless defined herein, have the meaning ascribed to them in the CCAA Plan.

Lac-Megantic" 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.

5.2 Timing of Releases and Injunctions

All releases and injunctions set forth in this Article 5 shall become effective on the Plan Implementation Date at the Effective Time.

5.3 Claims against Third Party Defendants

Notwithstanding anything to the contrary herein, 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.

4. Within seven (7) days of entry of this Order, the Monitor shall cause it to be served on any of the following who have not otherwise constructively received it through participation in the CM/ECF system: (a) the office of the United States Trustee; (b) counsel to MMA Canada; (c) counsel to the Creditors' Committee in the Chapter 11 Case; (d) applicable federal and state taxing authorities in the United States and in Canada; (e) the holders of secured claims against the MMA Canada and MMA, or if applicable, the lawyers representing such holders; (f) counsel to the plaintiffs in the Québec Class Action; (g) counsel to each Released Party; and (h) counsel to the plaintiffs in the PITWD Cases.

5. Such service in accordance with this Order shall constitute adequate and sufficient service and notice of this Order.

6. Copies of the Plan Sanction Order shall be made available upon request at the offices of Verrill Dana LLP, One Portland Square, P.O. Box 586, Portland, ME 04112-0589, ATTN: Roger A. Clement, Jr., Esq., Telephone: (207) 774-4000, Email: rclement@verrilldana.com.

7. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order.

Dated: _____, 2015

_____
The Honorable Peter G. Cary
Chief Judge of the United States Bankruptcy Court
for the District of Maine

EXHIBIT LIST

Exhibit A - Plan Sanction Order of the Québec Court dated, July 13, 2015

Exhibit B - Amended Plan of Compromise and Arrangement, dated June 8, 2015

Notice: To eliminate waste and unnecessary expense, some or all of the Exhibits (and/or exhibits and schedules to the Exhibits) may not be attached. A copy of any Exhibit (including all exhibits and schedules) may be obtained by sending an e-mail request to mhenderson@verrilldana.com or pnoyes@verrilldana.com or by calling Marilyn Henderson or Pam Noyes at 207-774-4000.

Alternatively, most Exhibits may be found on the website of the Monitor – – Richter – – using the following link: http://www.richter.ca/en/folder/insolvency-cases/m/montreal-maine-and-atlantic-canada-co .

All pleadings, with Exhibits, may be viewed and are on file at the Clerk's office, United States Bankruptcy Court, 202 Harlow Street, Bangor, Maine.

EXHIBIT A – Part 1

COUR SUPÉRIEURE
(Chambre commerciale)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : **450-11-000167-134**

DATE : 13 juillet 2015

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

DANS L'AFFAIRE DU PLAN DE TRANSACTION OU D'ARRANGEMENT DE :

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

Débitrice

et

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

Contrôleur

et

COMPAGNIE DE CHEMIN DE FER CANADIEN PACIFIQUE

Opposante

JUGEMENT SUR REQUÊTE
EN APPROBATION DU PLAN D'ARRANGEMENT

JD 2364

[1] Le tribunal est saisi d'une requête en approbation d'un plan d'arrangement accepté à l'unanimité lors d'une assemblée des créanciers de la débitrice tenue à Lac-Mégantic le 9 juin 2015.

[2] Ce plan d'arrangement fait suite à la tragédie ferroviaire qui a coûté la vie à 48 personnes, et a dévasté le centre-ville de la ville de Lac-Mégantic le 6 juillet 2013.

[3] Après une ordonnance initiale prononcée par notre collègue, Martin Castonguay, j.c.s., en août 2013, le soussigné s'est vu assigner le présent dossier.

[4] Plus de 40 jugements et ordonnances ont été rendus par le soussigné dans le cadre du présent dossier.

[5] Comme le rappelait le soussigné dans un jugement rendu le 17 février 2014 :

> [26] Les procédures en vertu de la LACC avaient pour but de poursuivre, dans la mesure du possible, l'exploitation du chemin de fer afin de desservir les nombreuses municipalités et les nombreux clients situés le long de son parcours. Elles avaient également pour but de mettre en place un processus de vente afin de procéder à la vente des actifs de MMA et de MMAR en tant qu'entreprises en exploitation (*as a going concern*). Railroad Acquisition Holdings (RAH) a été la soumissionnaire gagnante pour la quasi-totalité des actifs des sociétés pour lesquelles le tribunal a autorisé la vente le 23 janvier 2014.
>
> [27] Les procédures en vertu de la LACC avaient également pour but de maintenir les emplois du personnel spécialisé qui travaille toujours chez la requérante, et ce, afin de maximiser la valeur des actifs de la requérante et idéalement pour assurer que les emplois soient maintenus après la vente.
>
> [28] Selon l'entente d'achat d'actifs, RAH devrait conserver le poste de la majorité des employés actuels de MMA.
>
> [29] Les procédures en vertu de la LACC avaient également pour but de mettre en place un processus de réclamation pour éviter que plusieurs recours judiciaires soient menés en parallèle et pour traiter efficacement les réclamations de toutes les parties intéressées, y compris les familles des victimes et les détenteurs de réclamations liées au déraillement.

[6] L'importance de conserver un chemin de fer pour les industries desservies n'a pas besoin de plus amples explications.

[7] Ce premier objectif a été atteint dès février 2014, soit moins de sept mois après la tragédie ferroviaire, par la vente des actifs de la débitrice avec les ordonnances

nécessaires pour pouvoir parfaire la vente des actifs. Il reste donc à compléter le deuxième but clairement exprimé dès le départ par la débitrice, à savoir d'indemniser les victimes de cette tragédie ferroviaire pour laquelle la débitrice a presque immédiatement reconnu sa responsabilité.

[8] Le tribunal ne reprendra pas ici l'historique complet du dossier, puisque tous les jugements rendus précédemment en font amplement état. Qu'il suffise de rappeler que le soussigné a rendu un jugement le 27 mai 2015 résumant les faits depuis le début du dossier ainsi que le jugement rendu par le soussigné par le 17 février 2014 qui faisait état de la situation à l'époque.

[9] Par contre, il est important de rappeler que dès février 2014, le soussigné s'est questionné sur l'obligation de déposer un plan d'arrangement viable pour la continuation du sursis d'exécution et sur la question de savoir si un plan d'arrangement pouvait prévoir la liquidation d'une compagnie, ou si le plan devait obligatoirement prévoir une restructuration complète de l'entreprise.

[10] Puisque le déroulement du dossier semble être la suite logique de ce qu'affirme le soussigné aux pages 8 à 30 du jugement du 17 février 2014, et puisque plus de 4 000 créanciers se fient à l'orientation donnée au dossier, il nous semble important de rappeler ce que mentionne le soussigné dans ce jugement, à savoir :

> **<u>Obligation de déposer un plan d'arrangement viable pour la continuation du sursis des procédures</u>**
>
> [57] Il existe depuis fort longtemps un débat sur l'obligation de déposer un plan d'arrangement si l'on désire bénéficier de la *LACC*.
>
> [58] Avant les amendements de 2009, il existait même un débat sur l'autorité des tribunaux d'autoriser la liquidation d'une compagnie sans l'acceptation d'un plan d'arrangement. L'article 36 *LACC* (L.C. 2007, c.36) adopté en 2007 prévoit :
>
> > « 36. (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce, malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.
> >
> > Avis aux créanciers
> >
> > *(2)* La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

> Facteurs à prendre en considération
>
> *(3)* Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :
>
> *a)* la justification des circonstances ayant mené au projet de disposition;
>
> *b)* l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
>
> *c)* le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;
>
> *d)* la suffisance des consultations menées auprès des créanciers;
>
> *e)* les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;
>
> *f)* le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande. »

[59] Avant cet amendement, aucune disposition de la loi ne permettait expressément la liquidation partielle ou totale des actifs d'une compagnie.

[60] Les tribunaux utilisaient leurs pouvoirs inhérents pour autoriser la vente des actifs hors du cours ordinaire des affaires.

[61] L'auteure Shelley C. Fitzpatrick[1] mentionnait que la flexibilité de la *LACC* permettait la liquidation d'actifs excédentaires. Le débat découlait plutôt du fait que plusieurs tribunaux ont autorisé la liquidation d'actifs qui n'entraient pas dans cette catégorie :

> « *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 redundant 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.»

[1] 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] L'auteur Bill Kaplan[2] abonde dans le même sens en précisant que les tribunaux provinciaux à travers le Canada s'accordent sur la possibilité d'autoriser la liquidation d'actifs sous la *LACC*, mais que la jurisprudence n'est pas constante en ce qui a trait à la façon dont on permet cette liquidation :

« *We will see later that there is no consensus among the Alberta Court of Appeal, the 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 Awry?*, dans *Annual Review of Insolvency Law 2008*, Janis P. Sarra, Toronto, Thomson/Carswell, 2008, p.79

[63] Il y avait donc un débat sur les circonstances dans lesquelles une liquidation d'actifs sous la *LACC* pouvait être autorisée tant en ce qui a trait aux actifs visés qu'à l'obligation ou non de soumettre la liquidation au vote des créanciers.

Arguments favorables à la liquidation

[64] Dans certains cas, la liquidation d'actifs par le biais de la *LACC* est préférable à la liquidation sous un autre régime d'insolvabilité et c'est pourquoi certains tribunaux l'ont permise. Le fait de poursuivre les activités de la compagnie peut avoir pour effet d'augmenter sa valeur lors d'une liquidation et ainsi améliorer le sort des créanciers et des diverses parties prenantes[3].

[3] *Ibid*, p.89.

[65] Selon l'auteure Fitzpatrick[4], ce courant jurisprudentiel a été enclenché par les affaires suivantes :

« *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 omises]

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

[66] Elle réfère également à d'autres décisions[5] qui ont justifié la liquidation d'actifs dans l'intérêt des créanciers. Il est à noter que ces décisions sont issues de tribunaux ontariens qui au fil du temps ont été autrement plus proactifs qu'ailleurs au Canada pour autoriser la liquidation d'actifs sous la *LACC*, nous y reviendrons :

> « *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 effect 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] Dans un deuxième temps, et c'est ici l'argument qui suscite le plus de controverse, les professionnels qui interviennent dans le cadre d'une liquidation encourent des risques moindres si la liquidation est faite sous la *LACC* que si elle procédait sous la *Loi sur la faillite et l'insolvabilité* (*LFI*). En effet, lorsqu'un administrateur est nommé sous la *LFI* et qu'il prend possession et administre les actifs de la compagnie, celui-ci engage sa responsabilité[6]. Sous la LACC, la compagnie demeure propriétaire de ses actifs et continue d'assurer ses opérations, ce qui n'engage pas la responsabilité d'un tiers, ce qui peut contribuer à rassurer les créanciers sur la gestion de l'entreprise.

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

<u>Arguments défavorables à la liquidation</u>

Utilisation contraire à l'objectif de la loi

[68] Le premier argument à l'encontre de la liquidation d'actifs autres qu'excédentaires est que l'objectif de la *LACC* n'est pas de permettre la liquidation d'une entreprise et qu'il existe d'autres régimes, comme la *LFI*, sous lesquels la liquidation devrait se dérouler. Dans l'affaire *Hongkong Bank of Canada* c. *Chef Ready Foods Ltd*[7], la Cour d'appel de la Colombie-Britannique définit l'objectif de la LACC et le rôle du tribunal comme suit :

> « *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] Cette interprétation est supportée par la décision de la Cour d'appel de la Colombie-Britannique dans *Cliffs Over Maple Bay Investments Ltd.* c. *Fisgard Capital Corp.*[8] dont nous discuterons plus loin.

[8] 2008 BCCA 327.

[70] Au Québec, la Cour d'appel sous la plume du juge Louis Lebel, abondait dans le même sens et établissait une distinction entre la *LACC* et la *LFI*. Elle mentionnait dans *Banque Laurentienne du Canada* c. *Groupe Bovac Ltée*[9] :

> *« 26 Plus que vers la liquidation de la compagnie, cette Loi est orientée vers la réorganisation de l'entreprise et sa protection pendant la période intermédiaire, au cours de laquelle l'on procédera à l'approbation et à la réalisation du plan de réorganisation. A l'inverse, la Loi sur la faillite (L.R.C. 1985, c. B-3) recherche la liquidation ordonée* **(sic)** *des biens du failli et la répartition du produit de cette liquidation entre les créanciers, suivant l'ordre de priorité définie par la Loi. La Loi sur les arrangements répond à un besoin et à un objectif distinct, du moins selon l'interprétation qui lui a été généralement donnée depuis son adoption. On veut soit prévenir la faillite, soit faire émerger l'entreprise de cette situation. »*

[9] EYB 1991-63766 (QC C.A.), par. 26.

[71] Toutefois, comme le soulève Shelley C. Fitzpatrick[10], la situation demeure non résolue, car aucune cour d'appel au Canada ne s'est récemment penchée sur la question à savoir si la liquidation d'actifs sous la *LACC* est conforme à son objectif.

[10] *Supra*, note 1.

Les créanciers garantis accomplissent indirectement ce qu'ils ne peuvent faire directement

[72] Comme mentionné un peu plus tôt, la liquidation d'actifs sous la *LACC* a l'avantage de réduire les risques qu'engagent les professionnels qui y sont impliqués. Dans le cas d'une liquidation sous la *LFI*, les créanciers garantis doivent verser une indemnité à ces professionnels pour pallier à ces risques. Bien qu'ils doivent faire de même lors d'une liquidation sous la *LACC*, l'indemnité est inévitablement moindre, car le risque encouru est diminué. Ainsi, avec l'accord de la compagnie débitrice, les créanciers garantis procèdent à une liquidation des actifs de la compagnie sous la *LACC* sans n'avoir jamais eu l'objectif de s'entendre sur un plan d'arrangement ou de voir la compagnie survivre, ce qui est contraire à l'objectif de la loi[11].

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

Iniquités envers les diverses parties prenantes

[73] Comme le rappelle la Cour d'appel de l'Ontario dans l'affaire *Metcalfe*[12], la *LACC* a été adoptée lors de la grande dépression des années 1930 et avait pour objectif de réduire le nombre de faillites d'entreprises et par le fait même le taux de chômage anormalement élevé. Au fil du temps, les tribunaux ont accordé une visée sociale à cette loi qui doit maintenant servir l'intérêt des investisseurs, créanciers, employés et autres parties prenantes impliquées dans une entreprise.

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

[74] Cette évolution a eu pour effet de pousser les tribunaux à prendre des positions plus politiques que judiciaires dans certains cas, et ce, dans l'intérêt plus large de la collectivité.

[75] Le fait d'inclure ces critères sociaux dans le processus décisionnel des tribunaux a parfois pour effet de créer certains traitements inégaux entre les diverses parties prenantes impliquées. En effet, il est rare que les intérêts des investisseurs, des créanciers, des employés et des autres parties prenantes se rejoignent dans une même solution. Cette situation s'est produite dans l'affaire *Re Pope &Talbot Ltd*[13] dans laquelle la Cour suprême de la Colombie-Britannique a autorisé la vente d'actifs de la compagnie non pas à celui qui présentait l'offre la plus lucrative, mais bien à une compagnie qui proposait de continuer les activités de l'entreprise, et ce, malgré l'existence d'une offre plus élevée. Essentiellement, le tribunal a déterminé que l'intérêt de la collectivité et du maintien des emplois dans cette entreprise devait primer sur l'obtention du meilleur prix et de la satisfaction des créanciers, ce que décrie l'auteure Fitzpatrick[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 mill 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] L'auteure soulève également un point intéressant dans ce passage en mentionnant que le tribunal prend une position législative. En effet, comme elle le soulève plus loin, ce type de position à caractère social devrait être laissé au pouvoir législatif et non aux tribunaux[15].

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

Impacts sur les droits des tiers

[77] Lorsqu'une compagnie est placée sous la protection de la *LACC*, ses fournisseurs n'ont pas à remplir leurs obligations contractuelles si la compagnie ne le souhaite pas ou si elle n'entend pas exécuter ses obligations corrélatives[16].

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

[78] Dans l'affaire *Pope & Talbot*, Canfor, un fournisseur de Pope & Talbot, s'est vu imposer de continuer à remplir ses obligations contractuelles envers Pope & Talbot par ordonnance du tribunal à l'occasion de la demande initiale. De plus, le tribunal a ordonné de surseoir au droit de Canfor de mettre fin au contrat la liant à Pope & Talbot, et ce, malgré les inexécutions contractuelles de cette dernière[17].

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

[79] Ainsi, Pope & Talbot, et par le fait même ses créanciers, pouvaient maintenir le contrat en vie sans remplir leurs obligations et éventuellement le transférer à un acheteur de l'entreprise. Cette situation a pour effet d'accorder plus de droits aux créanciers de la compagnie qui bénéficie de la protection de la *LACC* que la compagnie elle-même si elle ne bénéficiait pas de cette protection, et ce, aux dépens de fournisseurs tels Canfor[18]. Pour reprendre une métaphore employée dans le texte de Shelley C. Fitzpatrick, les créanciers utilisent la loi comme une épée leur permettant d'obtenir une meilleure position stratégique et donc un prix supérieur pour les actifs de la compagnie et non comme un bouclier permettant de maintenir le statu quo comme il se doit[19].

[18] *Supra*, note 1, p.73.
[19] *Supra*, note 2, p.67.

Circonstances et paramètres de la liquidation

[80] Le nouvel article 36 de la loi règle la question du pouvoir des tribunaux de permettre la liquidation. Par contre, il donne très peu d'indications quant à la façon dont le tribunal devra exercer ce pouvoir. Le nouvel article 36 prévoit tout de même que le tribunal pourra autoriser la liquidation sans l'accord des créanciers.

Diverses applications de la discrétion exercée par les tribunaux

Ontario

[81] Comme nous l'avons mentionné précédemment, les tribunaux ontariens sont significativement plus actifs qu'ailleurs au Canada dans l'exercice de leur discrétion d'autoriser la liquidation d'actifs sous la *LACC*. Ainsi, des liquidations ont été autorisées sans qu'un plan d'arrangement ait été préalablement approuvé.

[82] C'est le cas dans *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge*[20]. Alors que l'organisme faisait face à des poursuites de près de 8

milliards de dollars de victimes ayant contracté diverses maladies par des transfusions de sang contaminé, le tribunal a autorisé le transfert de ses actifs à d'autres organismes avant qu'un plan d'arrangement ait été proposé aux créanciers. Le juge Blair justifie sa décision par la flexibilité de la *LACC* qui lui permet d'agir de la sorte et par les circonstances en l'espèce qui en font la meilleure 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] *Ibid*, par.45, 47.

[83] L'auteur Bill Kaplan donne également l'exemple de l'affaire *Re Anvil Range Mining Corp.*[22] dans laquelle le tribunal a autorisé la liquidation des actifs de la compagnie suite à un plan d'arrangement qui n'avait été voté que par les créanciers garantis. Le plan prévoyait que seuls les créanciers garantis étaient autorisés à voter et que les créanciers non garantis ne recevraient aucun montant des suites de la liquidation. Le tribunal s'appuya sur le fait que ces derniers créanciers n'en souffriraient aucun préjudice, car, peu importe la solution retenue, la liquidation ne permettrait en aucun cas de leur verser une quelconque indemnité[23].

[22] 2001 CanLII 28449 (ON S.C.).
[23] *Ibid*, par.12.

[84] Bill Kaplan résume la position des tribunaux ontariens quant à la liquidation d'actifs sous la *LACC* comme suit, tout en précisant qu'elle s'éloigne de celle des autres 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.

Colombie-Britannique

[85] La situation en Colombie-Britannique est intéressante, car jusqu'à récemment les tribunaux de cette province emboîtaient le pas aux tribunaux ontariens lorsqu'il s'agissait d'autoriser la liquidation d'actifs sous la *LACC*. Toutefois, la situation a été diamétralement modifiée depuis la décision *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*[25]

[25] *Supra*, note 8.

[86] Dans cette décision, la Cour d'appel de la Colombie-Britannique conclut que, conformément à l'objectif de la *LACC*, elle ne peut octroyer la protection de la *LACC* lorsque la compagnie débitrice n'a pas l'intention de proposer un plan d'arrangement à ses créanciers. Comme l'explique Bill Kaplan[26] :

> « *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] La jurisprudence en Alberta est plus exigeante qu'ailleurs qu'au Canada lorsque vient le temps d'autoriser une liquidation d'actifs sous la *LACC*. L'affaire *Royal Bank c. Fracmaster Ltd.*[27] en est un bon exemple. En effet, la Cour d'appel de l'Alberta a profité de cette décision pour prendre position sur les conditions qui devraient guider le tribunal lors de l'autorisation d'une liquidation sous la *LACC*[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 [...] A sale of all or substantially all of the assets of the company to an entirely different entity with no continued involvement by former creditors and shareholders does not meet this requirement.* »
>
> **[citation provenant du texte *Liquidating CCAAs: Discretion Gone Awry?*]**

[27] (1999), 11 C.B.R. (4th) 204 (Alta. Q.A.).
[28] *Ibid*, par.16.

[88] En imposant la condition de la survie de l'entreprise pour qu'une liquidation des actifs sous la *LACC* soit autorisée, l'affaire *Fracmaster* a eu pour effet de rendre

cette procédure significativement plus difficile à obtenir en Alberta qu'ailleurs au Canada[29].

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

Québec

[89] Selon l'auteur Bill Kaplan, les tribunaux québécois exigent qu'il existe une preuve matérielle de la structure générale et du contenu d'un éventuel plan d'arrangement à être présenté aux créanciers avant d'octroyer la protection de la *LACC* à une compagnie[30].

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

[90] Au soutien de ses dires, il invoque la décision *Re Boutiques San Francisco Incorporées*[31]. Dans cette affaire, le tribunal refuse d'octroyer la protection de la loi sous l'article 11 *LACC* au motif que le plan présenté par la compagnie débitrice était incomplet[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] *Ibid*, par.20.

[91] Au soutien de cette décision, le tribunal réfère au jugement du juge LeBel de la Cour d'appel dans *Banque Laurentienne du Canada c. Groupe Bovac Ltée*[33] :

> *« 56 [...] Si les art.4 et 5 indiquent que l'ordre de convoquer les créanciers ou, le cas échéant, les actionnaires de la compagnie dépend de la discrétion du juge, l'exercice de celui-ci suppose l'existence d'un élément de base. Cet événement survient lorsqu'une transaction ou un arrangement "est proposé". Il faut que, matériellement, existe un projet d'arrangement. L'on ne peut se satisfaire d'une simple déclaration d'intention. Autrement, l'on transforme radicalement les mécanismes de la Loi. On fait de celle-ci une méthode pour obtenir un simple sursis, sans que l'on ait à établir qu'il existe un projet d'arrangement et sans que l'on puisse faire évaluer sa plausibilité. La Loi n'est pas formaliste. Elle n'exige pas que le projet d'arrangement soit incorporé dans le texte de la requête. Il peut se retrouver dans des documents annexes, dans des projets de lettres aux créanciers, pourvu que l'on puisse indiquer au juge, auquel on demande la convocation de l'assemblée, qu'il existe et que l'on puisse en décrire les éléments principaux.* [...]
>
> *57 Non seulement cette nécessité se dégage-t-elle du texte de Loi mais correspond-elle aussi aux exigences d'un exercice suffisamment éclairé de la discrétion du tribunal de convoquer les créanciers et actionnaires et, dans certains cas, d'émettre des ordres de sursis en vertu de l'art. 11.*

> *58 En l'absence d'une description du projet d'arrangement des éléments principaux, certaines des informations nécessaires pour permettre au tribunal d'exercer sa discrétion en connaissance de cause font défaut. Elles sont requises pour assurer la prise en compte des intérêts de tous les groupes concernés. En effet, les conséquences de la mise en oeuvre des mécanismes de la Loi sur les arrangements avec les créanciers des compagnies sont plus draconiennes, particulièrement pour les créanciers garantis et comportent, à l'inverse, moins de risques d'abord pour la débitrice, puisque le recours infructueux à la Loi ou le rejet de ces propositions n'entraîne pas la faillite. Par surcroît, l'on peut arrêter toutes les procédures de réalisation des créanciers, de quelque nature que ce soit, pour des périodes indéterminées.*
>
> *59 Le recours à la Loi suppose un contrôle judiciaire. Il appartient au juge de peser, au départ, l'intérêt pour l'entreprise de présenter une proposition, la plausibilité de sa réussite, les conséquences de cette proposition et des ordres de sursis qui sont demandés pour les créanciers, les risques qu'elle ferait courir pour ses créanciers garantis, le juge doit examiner ces intérêts divers avant d'autoriser la convocation des créanciers et de déclencher la mise en œuvre de la Loi. La Loi n'est pas une législation conçue pour accorder, sans conditions ni réserves, des termes de grâce à des débiteurs en difficulté. Elle se veut une loi de réorganisation d'entreprises en difficulté. À ce titre, saisi de la demande de convocation d'une assemblée et de sursis, le juge doit être en mesure d'apprécier, d'abord si l'entreprise est susceptible de survivre pendant la période intermédiaire jusqu'à l'approbation du compromis puis s'il est raisonnable d'estimer que l'accord projeté est réalisable. Pour savoir s'il est réalisable, l'une des conditions de base est d'en connaître les termes essentiels, quitte à ce que ceux-ci soient précisés ou modifiés par la suite.* [...] »
>
> [33] *Supra*, note 9, par.56-59 (EYB 1991-63766).

[92] Malgré les dires de l'auteur Kaplan, il ne semble pas que cette exigence de présenter des preuves matérielles suffisantes d'un éventuel plan d'arrangement ait été suivie uniformément par les tribunaux québécois. L'affaire *Re Papier Gaspésia Inc.*[34] en est un exemple alors que la protection de la loi a été accordée sans que des éléments d'un plan d'arrangement aient été présentés.

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

[93] Comme le mentionne la Cour d'appel dans cette même cause[35], le processus de vente d'actif en l'espèce devra être soumis à l'accord des créanciers :

> « *[14] Par ailleurs, l'appel d'offres permis à certaines conditions par le jugement de première instance n'équivaut pas à liquidation pure et simple, malgré qu'on puisse le considérer comme l'amorce d'un éventuel processus de liquidation, qui pourrait cependant ne pas avoir lieu si un acheteur se manifestait et se montrait intéressé à la relance de l'entreprise (quoique cela paraisse peu probable). En outre, afin d'assurer la protection de l'intérêt des créanciers (dont les requérantes), le premier juge ordonne que leur soient soumis les termes et conditions de cet appel d'offres, les recommandations*

> *d'acceptation ou de refus des soumissions reçues et le mode de distribution du prix de vente, le tout par le biais d'un amendement au plan d'arrangement déjà proposé (voir par. 101 du jugement de première instance). Non seulement ce plan d'arrangement doit-il être présenté aux créanciers, mais il doit en outre être homologué par la Cour supérieure. S'il y a lieu, les requérantes pourront s'assurer alors que leurs droits soient convenablement protégés (notamment en réclamant la constitution d'une classe particulière de créanciers) et elles pourront s'adresser au tribunal dans ce but. Les requérantes pourront aussi, ce qu'elles n'ont d'ailleurs pas manqué de faire valoir à plusieurs reprises lors de l'audition, voter contre le plan d'arrangement, s'il ne leur convient pas, ou en déférer au tribunal si elles estiment que leurs droits ne sont pas pris en considération ou sont bafoués.* »
>
> **[Citation omise]**
>
> [35] *Papier Gaspésia inc., Re*, 2004 CanLII 46685 (QC C.A.), par.14.

[94] Ainsi, bien que l'exigence d'un plan d'arrangement pour octroyer la protection de la loi ne soit pas automatique au Québec, on exige tout de même qu'un tel plan soit soumis au vote des créanciers.

La voie à suivre

[95] On se retrouve donc dans une situation où l'application et l'interprétation d'une loi de juridiction fédérale diffèrent de façon importante d'une province à l'autre. Malgré certaines décisions plus drastiques, telles *Fracmaster* ou *Cliffs Over Maple*, il semble faire l'unanimité que la liquidation d'actifs sous la *LACC* est possible, surtout depuis l'adoption de l'article 36 *LACC*. On peut être en désaccord avec cette situation, mais l'état du droit à ce jour est à cet effet.

[96] Il existe toutefois des divergences fondamentales dans l'application de cette discrétion à travers le Canada, et ce, tant en ce qui a trait aux actifs qui peuvent faire l'objet d'une telle liquidation qu'aux critères qui doivent guider le tribunal dans l'application de son pouvoir.

[97] Dans la recherche d'une solution, il faut garder à l'esprit les objectifs de la *LACC* qui doivent guider l'interprétation qu'on en fait et que Kaplan résume comme suit[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 proposées par Bill Kaplan

[98] L'auteur Bill Kaplan débute son appréciation de l'état de la jurisprudence en affirmant que les affaires *Fracmaster* et *Cliffs Over Maple* ne viennent pas condamner les liquidations sous la *LACC*. Selon lui, ces deux décisions d'importances viennent surtout prévenir contre un usage abusif de la *LACC* pour effectuer la liquidation des actifs d'une compagnie et mettre l'emphase sur les droits des créanciers qui sont brimés lorsque la liquidation est permise.

[99] Kaplan précise toutefois qu'il est d'avis que l'affaire *Fracmaster* est trop drastique lorsqu'on l'interprète comme posant l'exigence de la survie de l'affaire pour octroyer la protection de la loi. Kaplan voit toutefois une utilité dans la décision quand elle suggère qu'une partie qui requiert la protection de la *LACC,* alors que les objectifs commerciaux en jeu seraient remplis par une d'autres procédures d'insolvabilité, telles la *LFI* ou l'exécution de droits hypothécaires, doit démontrer pourquoi l'application de la *LACC* est nécessaire.

[100] Pour ce qui est du vote des créanciers avant de procéder à une liquidation d'actifs, Kaplan est d'avis que le vote n'est pas nécessaire en tout temps et qu'il revient au tribunal de déterminer lorsqu'il est nécessaire. Il souligne que l'accord du tribunal est nécessaire pour procéder à une telle liquidation, ce qui assure un certain contrôle, et qu'il serait néfaste de rendre le vote obligatoire peu importe la situation, car il s'agit d'un processus long et coûteux. Afin de déterminer s'il doit y avoir un vote, le tribunal devrait évaluer le degré d'opposition des créanciers à une telle liquidation et soupeser la valeur des alternatives à une liquidation sous la *LACC*. Il précise que le tribunal doit accorder une plus grande importance aux droits des créanciers qu'à ceux des autres parties prenantes lorsque vient le temps d'évaluer les bénéfices et les inconvénients d'une liquidation sous la *LACC* par rapport aux autres solutions proposées.

[101] Enfin, l'auteur propose de rendre obligatoire la présentation d'un plan d'arrangement aux créanciers dans tous les cas. Il ajoute que ledit plan devrait être présenté à tous les créanciers, incluant les créanciers ordinaires même dans les cas où ces derniers ne recevraient rien de la liquidation des actifs. Cette mesure irait davantage dans l'objectif de la loi qui demeure d'obtenir un arrangement avec les créanciers.

[102] Il est important de préciser que la position proposée dans l'affaire Fracmaster ne ferme pas complètement la porte à la liquidation d'actifs sous la *LACC*. En effet, et je suis également de cet avis, la liquidation d'actifs excédentaires peut et doit être possible sous la *LACC* afin d'assainir les finances de la compagnie. Le critère devrait donc revenir à déterminer si l'affaire, et pas nécessairement la compagnie elle-même, survivra suite au plan d'arrangement.

[103] La solution de Bill Kaplan est intéressante, mais elle a pour effet d'accorder une très grande latitude aux tribunaux, ce qui est à la base même du courant jurisprudentiel qui est aujourd'hui critiqué. L'approche de *Fracmaster* est plus draconienne et a pour effet de restreindre le large pouvoir d'interprétation des tribunaux, mais elle est nécessaire dans les circonstances.

[104] Bien que le soussigné aurait été porté à privilégier la thèse que la *LACC* et la *LFI* sont deux régimes distincts qui s'appliquent à deux types de situations distinctes et qui servent des objectifs distincts, les amendements apportés à la *LACC* et le cas particulier du présent dossier militent pour la possibilité de permettre la liquidation des actifs sous la *LACC*.

[105] Tous les facteurs à prendre en considération mentionnés à l'article 36(3) *LACC* militaient en faveur de l'autorisation d'une vente des actifs. Non seulement cela a permis une réalisation supérieure à ce qui aurait pu être obtenu de n'importe quelle autre façon, elle a aussi permis le maintien d'un chemin de fer indispensable à l'économie régionale.

[106] Le jugement rendu par le soussigné autorisant la vente des actifs a été rendu du consentement de toutes les parties impliquées. Il n'y a pas eu appel de ce jugement. Le jugement a donc l'autorité de la chose jugée sur l'opportunité de vendre les actifs de la compagnie.

[107] C'est également en tenant compte de l'intérêt de la collectivité et du maintien des emplois que le tribunal avait permis que la vente puisse se faire même si ce n'était pas au meilleur prix. Finalement, nous avons obtenu le meilleur prix mais il y avait possibilité que ce ne soit pas le cas.

[108] Cela étant dit, que faisons-nous pour la suite du dossier?

[109] Dans l'état actuel du dossier, il semble peu probable qu'un plan d'arrangement puisse être déposé. Il est donc inutile pour le moment de prévoir un processus coûteux de dépôt de preuves de réclamation puisqu'aucun vote ne sera nécessaire si aucun plan d'arrangement n'est proposé.

La seule possibilité de continuation du processus en vertu de la *LACC*

[110] Plusieurs pourraient être portés à penser qu'il n'y a plus de raison de continuer le présent dossier.

[111] Par contre, la seule lecture du *service list* et la présence des personnes représentées à chaque étape des procédures peuvent laisser penser qu'un arrangement est possible.

[112] Nous avons déjà mentionné qu'exceptionnellement, notre collègue Martin Castonguay avait ordonné le sursis des procédures contre *XL Insurance Company Limited*. Cela a été fait de façon exceptionnelle et pour éviter le chaos et la course aux jugements contre la compagnie d'assurance.

[113] Nous l'avons déjà dit, en principe, la *Loi sur les arrangements des créanciers et des compagnies* ne s'applique qu'aux compagnies débitrices. Par contre, exceptionnellement, des ordonnances peuvent être rendues pour libérer certains tiers qui participent au plan d'arrangement par une contribution monétaire, mais en échange d'une quittance.

[114] Le soussigné dans l'affaire du plan d'arrangement de la *Société industrielle de décolletage et d'outillage (SIDO)*[37] avait homologué un plan d'arrangement qui prévoyait la quittance à certains tiers en plus des administrateurs.

[37] 460-11-001833-097, 2009 QCCS 6121.

[115] La juge Marie-France Bich dans un jugement rejetant une requête pour permission d'appeler de ce jugement mentionnait[38] :

[38] 2010 QCCA 403.

> [32] **Les quittances.** L'article 7.2 du plan d'arrangement approuvé par le juge de première instance comporte les dispositions suivantes :
>
> **Article 7.2 Quittances**
>
> À la date de prise d'effet, la Débitrice et/ou les autres Personnes nommées ci-dessous bénéficieront des quittances et des renonciations suivantes, lesquelles prendront effet à l'Heure de prise d'effet :
>
> 7.2.1 Une quittance complète, finale et définitive des Créanciers quant à toute Réclamation contre la Débitrice et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard des Réclamations;
>
> 7.2.2 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation, autre qu'une réclamation visée au paragraphe 5.1(2) LACC, qu'ils ont ou pourraient avoir, directement ou indirectement, contre les administrateurs, dirigeants, employés ou autres représentants ou mandataires de la Débitrice en raison ou à l'égard d'une Réclamation Visée et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard de toute telle réclamation;
>
> 7.2.3 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre DCR et Fortin, de même que leurs dirigeants, administrateurs, directeurs, employés, conseillers financiers, conseillers

> juridiques, banquiers d'affaires, consultants, mandataires et comptables actuels et passés respectifs à l'égard de l'ensemble des demandes, réclamations, actions, causes d'action, demandes reconventionnelles, poursuites, dettes, sommes d'argent, comptes, engagements, dommages-intérêts, décisions, jugements, dépenses, saisies, charges et autres recouvrements au titre d'une créance, d'une obligation, d'une demande ou d'une cause d'action de quelque nature que ce soit qu'un Créancier pourrait avoir le droit de faire valoir à l'encontre de DCR ou Fortin;
>
> 7.2.4 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre la Débitrice ou le Contrôleur ou leurs administrateurs, dirigeants, employés ou autres représentants ou mandataires ainsi que leurs conseillers juridiques à l'égard de toute mesure prise ou omission faite de bonne foi dans le cadre des Procédures ou de la préparation et la mise en œuvre du Plan ou de tout contrat, effet, quittance ou autre convention ou document créé ou conclu, ou de toute autre mesure prise ou omise relativement aux Procédures ou au Plan, étant entendu qu'aucune disposition du présent paragraphe ne limite la responsabilité d'une Personne à l'égard d'une faute relativement à une obligation expressément formulée qu'elle a aux termes du Plan ou aux termes de toute convention ou autre document conclu par cette Personne après la Date de détermination ou conformément aux modalités du Plan, ni à l'égard du manquement à un devoir de prudence envers quelque autre Personne et survenant après la Date de prise d'effet. À tous égards, la Débitrice et le Contrôleur et leurs employés, dirigeants, administrateurs, mandataires et conseillers respectifs ont le droit de s'en remettre à l'avis de conseillers juridiques relativement à leurs obligations et responsabilités aux termes du Plan; et
>
> 7.2.5 Une quittance complète, finale et définitive de la Débitrice quant à toute réclamation qu'elle a ou pourrait avoir, directement ou indirectement, contre ses administrateurs, dirigeants et employés.

[...]

[37] Or, devant la Cour supérieure, se basant principalement sur l'arrêt de la Cour d'appel de l'Ontario dans *A.T.B. Financial* v. *Metcalfe & Mansfield Alternative Invesments II Corp.*, l'intimée faisait à cet égard valoir que la quittance en faveur de DCR était légale et appropriée en l'espèce, considérant que cette quittance a un lien raisonnable avec la réorganisation proposée. Dans l'argumentaire écrit remis au juge de première instance, l'intimée citait les passages suivants de l'arrêt *Metcalfe* :

> [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] Manifestement, le juge de première instance a estimé que la quittance dont DCR est bénéficiaire selon la clause 7.2.3 du plan d'arrangement répondait à ces exigences.

[39] Le plan d'argumentation produit par l'intimée devant la Cour supérieure et, de même, le plan d'argumentation déposé aux fins du présent débat citent aussi, entre autres, l'affaire *Muscletech Research and Development Inc.*, où l'on reconnaît la possibilité, dans le cadre d'un arrangement régi par la *L.a.c.c* de stipuler une quittance en faveur du tiers qui finance la restructuration de l'entreprise débitrice. Or, c'est précisément, en l'espèce, le cas de DCR, qui versera une somme considérable afin de soutenir la réorganisation des affaires de l'intimée dans le cadre du plan d'arrangement.

[40] Il n'est pas inutile de reproduire ici quelques-uns des passages de l'affaire *Muscletech* :

> [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.

[8] Moreover, it is not 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 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. 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.

[Soulignements ajoutés]

[41] Ultérieurement, la Cour supérieure de justice de l'Ontario, dans une décision rendue dans le même dossier en 2007, écrira que :

> [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 behalf 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 essential. There will be no funding and no Plan if the Third Party Releases are not provided. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim 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.

[...]

[Soulignements ajoutés]

> [42] Dans le même sens, on pourra consulter la décision de la Cour supérieure dans *Charles-Auguste Fortier inc. (Arrangement relatif à)*, qui fait une étude approfondie de la question et conclut à l'opportunité d'une quittance en faveur de la caution de la société débitrice, caution qui joue un rôle central dans la réorganisation des affaires de celle-ci et sans le concours de laquelle le plan échouera.
>
> [43] La situation de l'espèce est analogue : DCR injectera des sommes substantielles dans la réorganisation de l'intimée en vertu du plan d'arrangement, ce qu'elle ne fera pas si elle ne peut bénéficier de la quittance prévue par la clause 7.2.3. La requête pour permission d'appeler et les observations présentées à l'audience ne permettent pas de conclure que le requérant conteste ce fait ou conteste l'absence d'une autre source de financement, son argument étant plutôt que cette quittance est sans lien avec les activités de l'entreprise. Avec égards, cet argument ne peut être retenu et, à mon avis, il n'a pas de chance raisonnable de succès devant cette Cour. La permission d'appeler ne saurait donc, sur le fondement de ce moyen, être accordée.

[116] La débitrice ne s'en cache pas, elle désire continuer les procédures sous la *LACC* pour ultimement obtenir la libération des administrateurs.

[117] Divers recours collectifs ont été intentés contre la débitrice. Un des recours déposés au Québec et dont les requérants ont produit des requêtes qui ont été remises au 26 février implique non seulement la débitrice et ses administrateurs, mais aussi plus de 35 défendeurs.

[118] Ce sont ces défendeurs que la débitrice veut faire asseoir à la table pour tenter d'en venir à un règlement qui profiterait à tous. Plusieurs de ces défendeurs sont présents à toutes les étapes dans le présent dossier.

[119] Un règlement dans le présent dossier aurait l'avantage d'éviter, à tous ceux qui y participent, des recours judiciaires qui s'échelonneront sur plusieurs années.

[120] Dans l'état actuel du dossier, il est impossible pour un tribunal d'ordonner que les sommes que reconnaît devoir la Compagnie d'Assurance XL soient payées à un créancier plutôt qu'à un autre.

[121] La seule façon pratique, économique et juridiquement possible de régler le présent dossier est que des tiers participent à une proposition d'arrangement qui devra être soumise à la masse des créanciers.

[122] Rien n'empêchera les requérants au recours collectif de continuer les procédures contre les défendeurs qui n'y participeront pas, mais cela leur permettra de participer à la distribution de l'indemnité d'assurance totalisant 25 000 000 $.

[123] Évidemment, pour réussir, il faudra que des tiers participent pour des montants substantiels. Les requérants du recours collectif ne peuvent se voir attribuer les sommes des assurances, ils n'y ont pas droit. Il y a d'autres victimes, pas seulement les requérants en recours collectif. Ces autres victimes ont autant le droit au bénéfice de l'assurance que les requérants en recours collectif. Un autre facteur à tenir en considération est que le gouvernement du Québec par la voix de ses procureurs déclare depuis le début qu'il désire que le montant des assurances soit remis aux victimes. Ce souhait a été mentionné lors des différentes auditions, mais ne lie personne pour le moment. Le procureur du gouvernement a aussi déclaré que sa définition de victimes n'est pas la même que celle du tribunal. En effet, une compagnie d'assurance qui aurait indemnisé un commerçant pour la perte d'un immeuble ou pour perte de chiffres d'affaires est aussi une victime de la tragédie ferroviaire. Légalement cette compagnie d'assurance aurait parfaitement le droit de recevoir une part du 25 000 000 $ de XL Assurance.

[124] Le gouvernement du Québec peut bien vouloir préférer les victimes physiques, cela ne lie pas XL Assurance.

[125] Évidemment si la province de Québec a une réclamation de 200 000 000 $ et qu'elle réussit à récupérer des sommes, elle pourra en faire ce qu'elle veut.

[126] La somme de 200 000 000 $ mentionnée semble d'ailleurs conservatrice. Si la province récupère des sommes, elle est en droit d'en faire ce qu'elle veut.

[127] Mais pour le moment, nous sommes dans une situation où il n'y a aucun actif possiblement partageable entre les créanciers. Il est donc inutile d'établir un processus de réclamation très coûteux. D'ailleurs, qui financerait ce processus? Les requérants en recours collectif et le gouvernement du Québec ne peuvent non plus agir comme s'ils étaient les seuls créanciers de MMA. On peut facilement croire que la valeur des réclamations autres dépasse aussi la centaine de millions de dollars. Mais les créanciers entre eux sont souverains. S'ils décident qu'une catégorie de créanciers recevra des sommes alors que d'autres auraient été en droit d'en recevoir, mais y renoncent, ils en ont le droit. Ils en ont peut-être le droit, mais les moyens d'y arriver rapidement ne sont pas nombreux. Pour le moment, les procédures engagées pourraient mener à un tel règlement pourvu qu'un plan soit déposé et que les créanciers l'acceptent. Oublions une proposition concordataire en vertu de la *LFI*, le processus serait trop coûteux dans l'état actuel du dossier. La *LACC* a aussi l'avantage d'être plus flexible. La seule solution possible et rapide est donc celle proposée par la débitrice. Que des tiers participent à l'élaboration d'une proposition. Un apport monétaire est essentiel pour y participer. Si un plan acceptable est proposé, les créanciers pourront l'accepter et pourront décider de catégories de créanciers pouvant participer au partage. Ils pourraient également accepter que des tiers soient libérés.

> [128] Si le tribunal lève le sursis des procédures contre XL Compagnie d'Assurance, ce sera le chaos et la course aux jugements.
>
> [129] Le procureur de XL a déjà mentionné au tribunal que son interprétation du contrat lui permet d'affirmer que le contrat d'assurance oblige la compagnie à payer les indemnités en payant le premier arrivé.
>
> [130] D'innombrables recours pourraient donc être intentés contre la débitrice et la compagnie d'assurance et celle-ci n'aurait plus l'obligation de payer lorsqu'une somme de 25 000 000 $ aurait été déboursée.
>
> [131] Les chances d'obtenir un jugement suite à un recours collectif avant les recours intentés par la voie ordinaire seraient illusoires surtout lorsque les défendeurs admettent leur responsabilité.
>
> [132] Le tribunal ne voit pas comment les procédures devant d'autres instances pourraient être suspendues en attendant le résultat du recours collectif. Nul n'est tenu de participer à un tel recours.

[12] À la suite de ce jugement, un processus de négociation, avec les tiers potentiellement responsables, débute. C'est cette négociation qui permet la formation d'un fonds d'indemnisation de 430 millions de dollars pour indemniser les victimes de la tragédie ferroviaire qui, rappelons-le, sont toutes créancières de la débitrice.

[13] Tous les défendeurs poursuivis dans un recours collectif intenté au Québec ont accepté de participer au fonds d'indemnisation, à l'exception de l'opposante, la compagnie de chemin de fer Canadien Pacifique (CP).

[14] L'honorable Martin Bureau, j.c.s. a accordé la requête pour autorisation d'exercer un recours collectif contre le CP et World Fuel Services qui s'est par la suite jointe au groupe contribuant au fonds d'indemnisation.

[15] Le CP refuse de participer au fonds plaidant qu'elle n'est pas responsable de la tragédie ferroviaire. Cela est parfaitement son droit.

[16] Par contre, pour les motifs ci-après exposés, il est évident que la contestation de CP n'a pour seul but que de faire avorter le plan d'arrangement proposé ou de se donner un avantage stratégique de négociation qui lui créerait même plus de droits qu'elle n'en aurait, si les parties avaient tout simplement décidé de régler hors cour le recours collectif intenté. Nous y reviendrons.

[17] Dans son plan d'argumentation, CP soulève les questions suivantes :

a) L'article 4 de la LACC confère-t-il à un tribunal siégeant en vertu de la LACC la compétence d'homologuer un « plan » qui ne propose pas de transaction ni d'arrangement entre un débiteur en vertu de la LACC et ses créanciers?

b) Si le Tribunal répond à la question a) par l'affirmative, a-t-il compétence en vertu de la LACC pour homologuer une quittance en faveur d'un tiers solvable qui n'est pas « raisonnablement liée à la restructuration » du débiteur en vertu de la LACC?

c) Si le Tribunal répond à la question b) par l'affirmative, a-t-il compétence en vertu de la LACC pour homologuer un « plan » qui contient des quittances en faveur des tierces parties sans rapport avec la résolution de toutes les réclamations contre le débiteur insolvable, c'est-à-dire que les réclamations contre le débiteur ne sont pas visées par le plan et que ce plan ne confère aucun avantage à ce débiteur?

d) Une réponse affirmative à la question b) ou à la question c) constitue-t-elle une interprétation constitutionnelle valide de la compétence du Tribunal pour homologuer un plan d'arrangement ou de transaction en vertu de la LACC?

e) Si le Tribunal répond à toutes les questions précédentes par l'affirmative, le Plan et les conventions de règlement partielles qui en font partie intégrante sont-ils raisonnables, justes et équitables pour toutes les parties concernées, y compris les entités non parties au règlement?

[18] Le 31 mars 2015, MMAC dépose un plan de transaction et d'arrangement, dont l'article 2.1 stipule l'objet :

2.1 Objet

Le Plan vise :

a) à proposer un compromis, une quittance, une libération et une annulation complètes, finales et irrévocables de toutes les Réclamations Visées contre les Parties Quittancées;

b) à permettre la distribution des Fonds pour Distribution et le paiement des Réclamations Prouvées, tel qu'il est indiqué aux paragraphes 4.2 et 4.3;

Le Plan est présenté eu égard au fait que les Créanciers, lorsqu'ils sont considérés globalement, tireront un plus grand avantage de sa mise en œuvre que cela ne serait le cas dans l'éventualité d'une faillite de MMAC.

[19] Le *Dix-neuvième rapport du Contrôleur sur le plan d'arrangement de la requérante* du 14 mai 2015 indique le contexte dans lequel le plan a été mis de l'avant par MMAC, et plus précisément, son objectif sous-jacent.

- Les paragraphes 11 et 13 du Dix-neuvième rapport :

> « 11. Afin de compenser les créanciers pour les dommages subis en raison du Déraillement, il était clair dès le départ pour toutes les parties intéressées que cela ne pouvait être accompli qu'avec la contribution de tiers potentiellement responsables (les "Tiers"), en échange de quittances totales et finales à l'égard de tout litige pouvant découler du Déraillement.
>
> [...]
>
> 13. Le Plan est le résultat de plusieurs mois de discussions multilatérales entre le conseiller juridique de la Requérante, [...] le Syndic, les principales parties intéressées de la Requérante, soit la province de Québec (la "Province"), les Représentants d'un groupe de créanciers, les avocats des victimes du déraillement dans le cadre des procédures en vertu du Chapitre 11 (les "Conseillers juridiques américains") et l'avocat du Comité officiel des victimes dans le cadre des procédures en vertu du Chapitre 11 (le "Comité officiel") (collectivement les "Principales parties intéressées"), avec les Tiers, qui visaient à négocier des contributions à un Fonds de Règlement au profit des victimes du Déraillement. [...]
>
> [nos soulignés]

[20] CP plaide que l'objectif exclusif du plan est par conséquent irréfutable, à savoir le *règlement des réclamations des créanciers victimes contre des tiers potentiellement responsables*, et que le plan ne porte d'aucune façon sur la restructuration de MMAC.

[21] Cela est inexact. Si l'on suit la logique du CP, il faudrait obligatoirement que la restructuration de l'entreprise se fasse après l'approbation du plan par les créanciers.

[22] Or, il arrive fréquemment que la restructuration soit complétée avant l'approbation du plan par les créanciers. C'est ce qui s'est produit dans le présent dossier.

[23] En l'instance, le chemin de fer est sauvé, les emplois sont sauvés et toutes les industries et les municipalités bénéficiant du chemin de fer sont assurées de pouvoir continuer d'en bénéficier.

[24] Ce n'est pas parce qu'une partie des objectifs de départ sont atteints qu'il faut faire abstraction de cette réussite.

[25] Sans le bénéfice de la *LACC,* les rails de chemin de fer auraient bien pu être vendus à la ferraille. Cette deuxième catastrophe a été évitée.

[26] En contrepartie de leurs contributions respectives au Fonds d'indemnisation, les parties quittancées bénéficieront de « Quittances et Injonctions » ayant une portée très générale.

[27] MMAC n'est pas une partie quittancée aux termes du plan.

[28] Plus précisément, le paragraphe 5.1 du plan prévoit l'exécution (i) de quittances ayant une portée très large en faveur des parties quittancées, et (ii) des injonctions interdisant toute future réclamation contre les parties quittancées :

> **5.1 Quittances et Injonctions aux termes du Plan**
>
> Toutes les Réclamations Visées feront entièrement, définitivement, absolument, inconditionnellement, complètement, irrévocablement et à jamais, l'objet d'un compromis, d'une remise, d'une quittance, d'une libération, d'une annulation et seront proscrites à la Date de Mise en Œuvre du Plan contre les Parties Quittancées.
>
> Toutes les Personnes (peu importe si ces Personnes sont ou non des Créanciers ou des Réclamants) seront empêchées et il leur sera interdit, en permanence et à jamais, i) de poursuivre toute Réclamation, directement ou indirectement, contre les Parties Quittancées, ii) de poursuivre ou d'entreprendre, directement ou indirectement, toute action ou autre procédure à l'égard d'une Réclamation contre les Parties Quittancées ou de toute Réclamation qui pourrait donner lieu à une Réclamation contre les Parties Quittancées, au moyen d'une demande reconventionnelle, d'une réclamation de tiers, d'une réclamation au titre d'une garantie, d'une réclamation récursoire, d'une réclamation par subrogation, d'une intervention forcée ou autrement, iii) de tenter d'obtenir une exécution, une imposition, une saisie-arrêt, une perception, une contribution ou un recouvrement concernant un jugement, une sentence, un décret ou une ordonnance contre les Parties Quittancées ou leurs biens relativement à une Réclamation, iv) de créer, de parfaire ou de faire valoir autrement, de quelque manière que ce soit et directement ou indirectement, toute priorité ou charge de quelque nature que ce soit contre les Parties Quittancées ou leurs biens à l'égard d'une Réclamation, v) d'agir ou de procéder de quelque manière que ce soit et à tout endroit quel qu'il soit qui ne serait pas conforme aux dispositions des Ordonnances d'Approbation ou qui ne les respecteraient pas dans toute la mesure permise par les lois applicables, vi) de faire valoir tout droit de compensation, de dédommagement, de subrogation, de contribution, d'indemnisation, de réclamation ou d'action en garantie ou d'intervention forcée, de recouvrement ou en annulation de quelque nature que ce soit à l'égard des obligations dues aux Parties Quittancées relativement à une Réclamation ou de faire valoir un droit de cession ou de subrogation concernant une obligation due par l'une des Parties Quittancées relativement à une Réclamation et vii) de prendre toute mesure destinée à entraver la mise en œuvre ou la conclusion du présent Plan; il est toutefois entendu que les interdictions précitées ne s'appliqueront pas à l'exécution des obligations aux termes du Plan. Malgré ce qui précède, les Quittances et Injonctions en vertu du Plan prévues au présent paragraphe 5.1i) n'auront aucun effet sur les droits et obligations prévus dans l'Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic intervenue le 19 février 2014 entre le Canada et la Province, et ii) ne s'appliqueront pas aux Réclamations Non Visées ni ne seront interprétées comme s'y appliquant.
>
> Malgré ce qui précède, les Quittances et Injonctions en vertu du Plan prévues au présent paragraphe 5.1i) n'auront aucun effet sur les droits et obligations prévus dans l'Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-

> Mégantic intervenue le 19 février 2014 entre le Canada et la Province, et ii) ne s'appliqueront pas aux Réclamations Non Visées ni ne seront interprétées comme s'y appliquant.
>
> [nos soulignés]

[29] En plus de ce qui précède, le paragraphe 5.3 du plan stipule expressément que toute réclamation contre des tiers défendeurs :

> « a) n'est pas visée par le plan;
>
> b) n'est pas quittancée;
>
> c) pourra suivre son cours;
>
> d) ne sera pas limitée ni restreinte de quelque manière que ce soit quant au montant dans la mesure où il n'y a aucun double recouvrement; et
>
> e) ne constitue pas une réclamation visée. »

De plus, le paragraphe 5.3 du plan réitère qu'aucune personne ne peut faire valoir de réclamation contre l'une ou l'autre des parties quittancées.

> **5.3 Réclamations contre des Tiers Défendeurs**
>
> Toute Réclamation d'une Personne, y compris MMAC et MMA, contre les Tiers Défendeurs qui ne sont pas également des Parties Quittancées : a) n'est pas visée par le présent Plan; b) n'est pas libérée, quittancée, annulée ou exclue conformément au présent Plan; c) pourra suivre son cours contre lesdits Tiers Défendeurs; d) ne sera pas limitée ni restreinte par le présent Plan de quelque manière que ce soit quant au montant dans la mesure où il n'y a aucun double recouvrement par suite de l'indemnisation reçue par les Créanciers ou les Réclamants conformément au présent Plan; et e) ne constitue pas une Réclamation Visée aux termes du présent Plan. Pour plus de précision et malgré toute autre disposition des présentes, si une Personne, y compris MMAC et MMA, fait valoir une Réclamation contre un Tiers Défendeur qui n'est pas également une Partie Quittancée, tous les droits de ce Tiers Défendeur d'intenter une action récursoire, d'opposer une demande ou de faire ou de poursuivre autrement des droits ou une Réclamation contre l'une des Parties Quittancées à quelque moment que ce soit seront libérés, quittancés et proscrits à jamais selon les modalités du présent Plan et des Ordonnances d'Approbation.

[30] Enfin, le paragraphe 3.3 du plan stipule expressément que certaines réclamations ne sont pas visées par le plan :

> **3.3 Réclamations Non Visées**

Malgré toute disposition contraire aux présentes, le présent Plan ne compromet pas, ne quittance pas, ne libère pas, n'annule ou ne proscrit pas, ni n'a d'autre incidence concernant :

(a) les droits ou réclamations des Professionnels Canadiens et des Professionnels Américains pour les honoraires et débours engagés ou devant être engagés pour les services rendus dans le Dossier LACC ou le Dossier de Faillite ou s'y rapportant, y compris la mise en œuvre du présent Plan et du Plan Américain.

(b) dans la mesure où il existe ou peut exister une couverture d'assurance pour ces réclamations aux termes d'une police d'assurance émise par Great American ou un membre de son groupe, y compris, notamment, la Police de Great American, et seulement dans le mesure où une telle couverture d'assurance est réellement fournie, laquelle couverture d'assurance est cédée au Syndic et à MMAC, sans que les Parties Rail World ou les Parties A&D n'aient l'obligation de verser un paiement ou d'effectuer une contribution pour accroître ce que le Syndic ou MMAC obtient réellement aux termes de cette police d'assurance : i) les réclamations de MMAC ou du Syndic (et seulement du Syndic, de MMAC, de leur personne désignée ou, dans la mesure applicable, des Patrimoines) contre les Parties Rail World et(ou) les Parties A&D; et ii) les réclamations des détenteurs de Réclamations dans les Cas de Décès contre Rail World, Inc., à condition, de plus, que tout droit ou tout recouvrement par ces détenteurs d'un droit ou de recouvrement par les détenteurs de Réclamations dans les Cas de Décès par suite de la mesure autorisée au présent sous-paragraphe soit, à tous égards, subordonné aux réclamations du Syndic et de MMAC, ainsi que de leurs successeurs aux termes du Plan, aux termes des Polices précitées, et iii) les Réclamations de MMAC ou du Syndic contre les Parties A&D pour toute prétendue violation de l'obligation fiduciaire ou toute réclamation similaire fondée sur l'autorisation, par les Parties A&D, des paiements aux porteurs de billets et de bons de souscription émis conformément à une certaine convention d'achat de billets et de bons de souscription intervenue en date du 8 janvier 2003 entre MMA et certains porteurs de billets (telle qu'amendée de temps à autre), dans la mesure où de tels paiements résultent de la vente de certains biens de MMA à l'État du Maine.

c) les Réclamations de MMAC et du Syndic en vertu des lois, notamment celles relatives à la faillite et l'insolvabilité, destinées à annuler et(ou) à recouvrer les transferts de MMA, de MMAC ou de MMA Corporation aux porteurs de billets et de bons de souscription émis conformément à cette certaine convention d'achat de billets et de bons de souscription intervenue en date du 8 janvier 2003 entre MMA et certains porteurs de billets (telle qu'amendée de temps à autre), dans la mesure où de tels paiements résultent de la distribution du produit tiré de la vente de certains biens de MMA à l'État du Maine.

(d) les réclamations ou causes d'action de toute Personne, y compris MMAC, MMA et les Parties Quittancées (sous réserve des limitations contenues dans leur Convention de Règlement respective) contre des tiers autres que les Parties Quittancées (sous réserve du paragraphe 3.3 (e)).

(e) les Réclamations ou les autres droits préservés par l'une ou l'autre des Parties Quittancées, tel qu'il est indiqué à l'annexe A.

(f) les obligations de MMAC aux termes du Plan, des Conventions de Règlement et des Ordonnances d'Approbation;

(g) les Réclamations contre MMAC, sauf les Réclamations des Parties Quittancées autres que le procureur général du Canada. Toutefois, sous réserve du fait que les Ordonnances d'Approbation deviennent des ordonnances finales, le procureur général du Canada i) s'est engagé à retirer irrévocablement la Preuve de Réclamation produite pour le compte du ministère des Transports du Canada et la Preuve de Réclamation produite pour le compte du Department of Public Safety and Emergency Preparedness, ii) a consenti à une réaffectation en faveur des Créanciers de tous les dividendes payables aux termes du présent Plan ou du Plan Américain sur la Preuve de Réclamation produite pour le compte du Développement économique Canada pour les régions du Québec, tel qu'il est indiqué à la clause 4.3, et iii) a convenu de ne pas produire de Preuve de Réclamation additionnelle au dossier LACC ou au Dossier de Faillite;

(h) toute responsabilité ou obligation des Tiers Défendeurs et toute Réclamation contre ceux-ci, pour autant qu'ils ne soient pas des Parties Quittancées, de quelque nature que ce soit à l'égard du Déraillement ou s'y rapportant, y compris, notamment, le Recours Collectif et les Actions dans le Comté de Cook;

(i) toute Personne pour fraude ou des accusations criminelles ou quasi-criminelles qui sont ou peuvent être produites et, pour plus de précision, pour toute amende ou pénalité découlant de telles accusations;

(j) toute Réclamation que l'une des Parties Rail World ou des Parties A&D peut avoir pour tenter de recouvrer auprès de ses assureurs les dépenses, coûts et honoraires d'avocats qu'elle a engagés avant la Date d'Approbation.

(k) les Réclamations qui font partie de celles décrites au paragraphe 5.1 (2) de la LACC.

Tous les droits et Réclamations précités indiqués au présent paragraphe 3.3, inclusivement, sont collectivement appelés les « Réclamations Non Visées » et, individuellement, une « Réclamation Non Visée ».

[nos soulignés]

[31] C'est ce qui est fait dire à CP que :

Le plan « ne compromet pas, ne quittance pas, ne libère pas, n'annule ou ne proscrit pas, ni n'a d'autre incidence concernant » les réclamations contre MMAC, c'est-à-dire que les réclamations contre MMAC ne sont pas visées par le plan. MMAC ne fait pas l'objet d'une restructuration.

EXHIBIT A – Part 2

[32] Aussi le CP plaide que :

a) Les réclamations de toutes les « victimes » et même possiblement des parties quittancées pourront être poursuivies, ou de nouveaux recours pourront être intentés, tant au Canada qu'aux États-Unis, contre les entités non parties au règlement, y compris le CP;

b) Les demandeurs, aux termes du recours collectif peuvent continuer leur action en justice contre les défenderesses CP et World Fuel Services, avec le bénéfice supplémentaire que ces défenderesses « héritent » ainsi de la responsabilité de MMAC, alors que celles-ci se voient empêchées de réclamer toute contribution ou indemnité des parties quittancées!

[33] C'est d'ailleurs là le principal argument du CP. Ce qu'elle reproche au plan d'arrangement est que CP se retrouve maintenant seule poursuivie dans le recours collectif. Elle se plaint également que, puisqu'elle n'est pas quittancée en vertu du plan, elle pourrait être poursuivie par toutes personnes ayant subi des dommages à la suite du déraillement. Elle se plaint également qu'elle devrait supporter la part qui reviendrait à MMA. Nous y reviendrons.

[34] CP résume bien les critères d'exercice du pouvoir discrétionnaire du tribunal dans l'approbation d'un plan, lorsqu'elle mentionne :

a) Le plan doit être strictement conforme à toutes les exigences prévues par les lois et aux ordonnances antérieures du Tribunal;

b) Tous les documents déposés et les procédures entreprises doivent être examinés pour déterminer si toute mesure prise ou supposée avoir été prise est interdite en vertu de la *LACC*;

c) Le plan doit être juste et équitable.[1]

[35] CP plaide que le plan est illégal et dépasse la portée autorisée par la *LACC*.

[36] Il est vrai qu'au stade de l'audition sur l'homologation, le tribunal doit s'assurer que le processus en vertu de la *LACC* a été suivi sans enfreindre celle-ci et que rien dans le plan proposé n'y soit contraire[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; *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, paragr. 64.

[37] CP plaide qu'une transaction ou un arrangement implique nécessairement la réorganisation des affaires du débiteur.

[38] Or, CP fait abstraction du fait que, comme déjà mentionné, la réorganisation des affaires de la débitrice a eu lieu, il y a déjà plus d'un an.

[39] D'autre part, le CP allègue :

> « Dans tous les cas, au moment de la vente de tous les éléments d'actifs de MMAC à RAH, l'« objectif secondaire » consistant à maximiser la valeur des actifs de MMAC avait été accompli et l'application de la LACC ne pouvait donc plus accomplir un objectif légitime; en effet, toutes les affaires de MMAC, à l'exception de ses passifs, avaient été complètement et définitivement liquidées. »

[40] Encore une fois, CP semble plaider que, puisque les éléments d'actifs sont vendus, le tribunal devrait mettre fin au processus en vertu de la *LACC*.

[41] Cette prétention n'a aucune assise juridique, et a d'ailleurs déjà fait l'objet d'un jugement[3] par le soussigné dans le présent dossier dont personne ne s'est plaint.

[42] Il faut rappeler que les représentants de CP ont participé à toutes les auditions présidées par le soussigné.

[43] CP plaide à titre subsidiaire que le tribunal n'a pas compétence pour sanctionner les quittances et injonctions prévues en faveur des parties quittancées.

[44] En plus d'avoir déjà fait l'objet d'une décision du soussigné dans le présent dossier, le tribunal croit qu'il est maintenant bien établi que les tribunaux peuvent, en vertu de la *LACC*, homologuer des plans d'arrangement qui prévoient des quittances en faveur de tierces parties.

[45] Dans l'affaire *Metcalfe*[4], la Cour d'appel de l'Ontario énonce les critères d'analyse à appliquer afin de déterminer si l'octroi de quittances en faveur de tiers peut être approuvé :

> [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 Voir jugement du 17 février 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] Dans cette affaire, le juge Blair en est venu à la conclusion que les quittances recherchées en faveur des tierces parties sont justifiées. Il conclut également que les quittances doivent être raisonnablement liées au 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 claim 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] Dans l'affaire *Muscletech*[5], la Cour supérieure de l'Ontario approuve également l'octroi de quittances à des tiers ayant financé un plan de liquidation. Bien qu'il juge que l'opposition aux quittances envisagées est prématurée (cette opposition devant plutôt se faire lors d'une éventuelle requête pour homologation), l'honorable juge Ground conclut néanmoins que la *LACC* permet ce type de quittances :

> [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**

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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] En l'espèce, les quittances recherchées sont une condition essentielle pour la viabilité du plan puisque les parties quittancées sont les seules qui financent celui-ci. Cet élément militant fortement en faveur du caractère juste et raisonnable des quittances recherchées :

> [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.**[6]

[49] À titre subsidiaire, CP plaide également que le plan ne peut servir d'outil pour régler des différends entre des tiers solvables, sans octroyer une quittance à MMAC. Cet argument subsidiaire rejoint l'argument du CP qui plaide que le plan a une incidence négative sur les droits du CP.

[50] En effet, CP plaide :

> Puisque la responsabilité du CP est, entre autres choses, recherchée sur une base solidaire dans le cadre du recours collectif, et puisque le CP n'est pas une partie quittancée aux termes du plan, ses droits seront directement et considérablement touchés.

[51] CP plaide entre autres que le règlement partiel d'un litige multipartite doit être, à tout le moins, un évènement neutre pour les défendeurs non parties au règlement.

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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] Elle plaide que le plan ne confère pas au CP le titre de protection ordinaire qu'elle pourrait recevoir au terme d'un règlement partiel d'un recours collectif en droit civil.

[53] Comme déjà mentionné, rien n'empêchera CP de se défendre à toute action intentée contre elle. Si elle n'est pas responsable, l'action sera rejetée.

[54] Si elle prétend que les dommages ont été causés par la faute d'un tiers, elle peut le plaider sans que ce tiers soit partie aux procédures.

[55] En fait, cela donnera même un avantage au CP, qui pourra continuer de plaider que la tragédie est la faute de tous, sauf elle.

[56] D'ailleurs, la Cour suprême nous rappelait très récemment que[7] :

> [138] À notre avis, la Cour d'appel a aussi eu raison d'intervenir sur la question des dommages. L'analyse de la juge du procès était entachée d'une erreur déterminante. Elle a fait défaut de tenir compte de la solidarité et de fixer les montants accordés en fonction de la responsabilité respective de chacun des débiteurs solidaires. Comme le souligne la Cour d'appel, « dans toute la mesure où des postes de réclamation pouvaient relever de la responsabilité de plus d'un débiteur solidaire, les remises consenties par M. Hinse rendaient nécessaires l'examen des fautes causales et le partage des parts de responsabilité » : par. 189. M. Hinse aurait dû supporter la part des débiteurs solidaires qu'il a libérés : art. 1526 et 1690 *C.c.Q.*
>
> [139] La juge de première instance a abordé la question des dommages comme si le Ministre était le seul fautif et que le préjudice de M. Hinse ne découlait que de son « inertie institutionnelle » : par. 75-77. De fait, au lieu de déterminer les montants des dommages-intérêts précisément imputables au PGC, la juge s'en est simplement remise aux revendications de M. Hinse :
>
> Comme, de plus, à la suite de la transaction conclue entre le PGQ et Hinse, ce dernier a amendé sa procédure afin de ne réclamer au PGC que la portion qu'il lui attribue selon les différents chefs de dommages qu'il invoque, pour les fins du présent débat, respectant les dispositions plus haut citées, le Tribunal n'analysera que les demandes adaptées à cette nouvelle réalité et qui ne concernent que le PGC. [par. 22]
>
> [140] À l'exception des dommages-intérêts punitifs, elle a ainsi accordé les sommes réclamées en supposant que M. Hinse les avait correctement limitées à ce qui concerne le PGC uniquement. Or, la part de responsabilité des divers

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

> codébiteurs de M. Hinse devait s'évaluer en fonction de la gravité de leur faute respective : art. 1478 *C.c.Q.* La juge ne pouvait pas s'en tenir simplement à la répartition suggérée par M. Hinse; son rôle d'arbitre des dommages-intérêts exigeait qu'elle fixe elle-même la part de responsabilité de chacun.
>
> [141] Au-delà de cette erreur déterminante, qui fausse tous les chefs de dommages accordés, les fondements à l'appui de chacun étaient en outre déficients.
>
> (1) Dommages pécuniaires
>
> [142] La juge Poulin a condamné le PGC à verser un total de 855 229,61 $ au titre des dommages pécuniaires. Ce montant paraît démesuré compte tenu de la somme de 1 100 000 $ déjà versée à ce chapitre par le PGQ aux termes de la transaction intervenue entre ce dernier et M. Hinse. Au minimum, il appartenait à M. Hinse de démontrer que les sommes visaient des compensations distinctes. Il ne l'a pas fait. La ventilation des sommes accordées révèle d'ailleurs que rien ne justifiait les montants réclamés.

[57] Bref, si CP n'est pas responsable, l'action sera rejetée contre elle.

[58] Si elle est responsable, et que des tiers également responsables ont été quittancés, CP sera libérée de la part des débiteurs solidaires qui ont été libérés.

[59] En fait, ce qui serait injuste, serait que CP bénéficie d'une quittance alors qu'elle n'a pas contribué financièrement au plan, contrairement aux autres codéfendeurs.

[60] CP plaide également qu'elle devrait être libérée de sa quote-part de la part de responsabilité avec MMA.

[61] Il ne relève certainement pas de la juridiction du juge soussigné d'en décider.

[62] Le juge saisi du recours contre CP en décidera.

[63] Quant à la question constitutionnelle soulevée dans le plan d'argumentation de CP et pour lequel des avis en vertu de l'article 95 *Cpc* ont été expédiés, le tribunal prend acte du peu d'insistance du CP à plaider cet argument lors de l'audition.

[64] Le tribunal fait siens les arguments proposés par le Procureur général du Canada lorsqu'il affirme :

> 4. Le 15 mai 2015, le PGC recevait un avis de la part de la Compagnie de Chemin de fer Canadien Pacifique (CP) en vertu de l'article 95 du *Code de procédure civile* (*Cpc*).

5. CP ne conteste pas la constitutionnalité de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») ni aucune de ses dispositions.

    - *Plan d'argumentation au soutien de la contestation par la Compagnie de Chemin de Fer Canadien Pacifique du Plan de transaction et d'arrangement*, paragr. 110.

6. CP soutient plutôt que l'homologation par le tribunal, sous l'égide de la *LACC*, du Plan de MMAC, empièterait de manière massive et illégitime sur la compétence des législatures provinciales en matière de propriété et de droits civils.

7. En l'absence d'argument de la part de CP quant à l'applicabilité constitutionnelle, la validité ou l'opérabilité de la *LACC*, l'avis en vertu de l'article *CPC* n'était pas requis.

8. Il faut par ailleurs rappeler que la validité constitutionnelle d'une loi est fonction de son caractère véritable et du fait que celui-ci se rattache à une matière relevant de la compétence de la législature qui l'a adoptée. Le caractère véritable de la loi est déterminé en fonction du but de la loi et de ses effets juridiques. Or, la validité constitutionnelle d'une loi ne dépend pas des effets qu'elle peut produire dans un cas en particulier.

    - *Canadian Western Bank* c. *Alberta,* [2007] 2 S.C.R. 3, paragr. 25-27 (autorités de MMAC, onglet 44).

9. De même, et bien que ce ne soit pas le cas en l'espèce, l'existence d'un conflit entre une loi fédérale et une loi provinciale n'est pas pertinente quant à la validité constitutionnelle de la loi. L'existence d'un conflit de lois pourrait être pertinente en vertu de la doctrine de la prépondérance fédérale – mais cette doctrine aurait pour effet de rendre inopérante la loi provinciale dans la mesure de son incompatibilité avec la loi fédérale.

    - Peter HOGG, *Constitutional Law of Canada*, 5e éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 16-1 - 16-3 (autorités du PGC, onglet 1)

10. La *LACC* porte en son caractère dominant et véritable sur l'insolvabilité. Son objet et ses effets favorisent la conclusion de compromis et d'arrangements justes et raisonnables en tenant compte des intérêts des compagnies débitrices, de leurs créanciers, des autres parties intéressées et de l'intérêt public.

    - *Century Services Inc.* c. *Canada (Attorney General),* [2010] 3 SCR 379, 2010 CSC 60, paragr. 60 (autorités de MMAC, onglet 14)

11. Ainsi, la *LACC* relève manifestement du domaine de la faillite et de l'insolvabilité, un champ de compétence attribué au Parlement par le paragraphe 91(21) de la *Loi constitutionnelle* de 1867.

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

12. Il ne fait pas aucun doute que *LACC* n'est pas inconstitutionnelle du seul fait que l'exercice, par les tribunaux, des pouvoirs qui leurs (**sic**) sont conférés produise des effets sur la propriété et les droits civils des parties impliquées, compétence autrement réservée à la législature des provinces

    - *Canadian Western Bank* c. *Alberta,* [2007] 2 S.C.R. 3, paragr. 28 (autorités de MMAC, onglet 44)

    « Le corollaire fondamental de cette méthode d'analyse constitutionnelle est qu'une législation dont le caractère véritable relève de la compétence du législateur qui l'a adoptée pourra, au moins dans une certaine mesure, toucher les matières qui ne sont pas de la compétence sans nécessairement toucher sa validité constitutionnelle. »

13. Autrement, l'efficacité de la *LACC* serait complètement paralysée.

    - Peter HOGG *Constitutional Law of Canada*, 5e éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 25-3 (autorités de MMAC, onglet 45)

14. La *LACC* est constitutionnelle même dans la mesure où les pouvoirs qu'elle octroie aux tribunaux leur permettent d'approuver des plans accordant des quittances à des tiers.

    - *Metcalfe & Mansfield Alternative Investments II Corp.,* (Re), 2008 ONCA 587, paragr. 104 (autorités de MMAC, onglet 24)

15. Par ailleurs, le Conseil Privé a confirmé la validité constitutionnelle d'une loi du Parlement, découlant de sa compétence en matière de faillite et d'insolvabilité, permettant à des agriculteurs de conclure des plans d'arrangements avec leurs créanciers sans que ces agriculteurs soient pour autant libérés de leurs dettes.

    - *Farmers' Creditors Arrangement Act (FCAA)*, [1937] A.C. 391, p. 403-404 (autorités de MMAC, onglet 49), confirmant *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 (autorités de MMAC, onglet 48)

16. Par le fait même, dans la mesure où la *LACC* permet aux tribunaux d'homologuer un plan d'arrangement par lequel la compagnie débitrice n'est pas libérée, cette loi est également *intra vires* du pouvoir du Parlement.

17. La nature réparatrice et flexible de cette loi permet aux tribunaux de rendre des ordonnances innovatrices dans la mesure où elles sont faites en conformité avec la loi, ce qui est le cas en l'espèce.

18. D'ailleurs, un plan d'arrangement octroyant des quittances à des tiers mais non à la débitrice principale a déjà été entériné par la Cour fédérale d'Australie.

    - *Lehman Brother Australia Ltd. In the matter of Lehman Brothers Australia Ltd ((in liq) No2),* [2013] FCA 965, paragr. 34-57 (Australie) (autorités de MMAC, onglet 52)

19. Notons également que les doctrines constitutionnelles reconnaissent que, concrètement, « le maintien de l'équilibre des compétences relève avant tout des gouvernements, et doivent faciliter et non miner ce que la Cour [suprême] a appelé un 'fédéralisme coopératif' ».

    - *Canadian Western Bank* c. *Alberta,* [2007] 2 S.C.R. 3, paragr. 24 (autorités de MMAC, onglet 44)

20. Dans les circonstances, l'avis de question constitutionnelle signifiée par CP aux procureurs généraux, n'a pas sa raison d'être et doit donc être rejeté.

[65] Bref, non seulement le soussigné croit que le plan proposé est juste et raisonnable, mais retenir les arguments présentés par le CP déconsidérait la confiance du public envers les tribunaux.

[66] En effet, depuis plus de deux ans, les victimes de la terrible tragédie de Lac-Mégantic s'en sont remises au processus judiciaire. Depuis deux ans, toutes les actions faites dans le présent dossier étaient orientées vers la présentation du plan d'arrangement qui fut voté à l'unanimité par les créanciers de la débitrice.

[67] Malgré que les ressources judiciaires soient limitées, des ressources considérables ont été mises à contribution pour pouvoir faire en sorte que les victimes de Lac-Mégantic obtiennent justice.

[68] Les procureurs et les justiciables des districts de Mégantic, Saint-François et Bedford étaient conscients que les ressources judiciaires utilisées dans le dossier de Lac-Mégantic ne pouvaient être utilisées par eux.

[69] L'utilisation de ces ressources judiciaires a eu pour effet de retarder d'autres dossiers.

[70] Faire avorter aujourd'hui ce plan d'arrangement pour le seul bénéfice d'un tiers contre qui un recours collectif a été autorisé, alors que ce tiers est partie aux procédures depuis le début, serait injuste et déraisonnable.

[71] Une dernière remarque s'impose. La requérante a déposé sous scellé les quittances et transactions intervenues entre les tiers responsables dans ce dossier. Un jugement du soussigné a été rendu sur la possibilité pour CP de prendre connaissance de ces quittances.

[72] CP a été autorisée à prendre connaissance des quittances caviardées. Elle ne connaît donc pas les montants pour lesquels les tiers responsables ont contribués, sauf en ce qui concerne Irving Oil et World Fuel Services qui ont rendu public le montant de leur contribution.

[73] Le tribunal s'est interrogé, séance tenante, sur la possibilité pour lui de prendre connaissance de la contribution de chaque tiers qui contribue au fonds d'indemnisation sans que le CP en ait connaissance.

[74] En effet, la règle *audi alteram partem* et la règle de la publicité des débats pourraient ne pas être respectées si le tribunal prend en considération une preuve dont n'a pas bénéficié une des parties opposantes.

[75] C'est pourquoi, le tribunal n'a pas pris connaissance de la contribution de chaque partie ayant cotisé au fonds d'indemnisation.

[76] Le tribunal peut apprécier que la contribution totale de 430 M$ est raisonnable en l'espèce.

[77] De plus, le tribunal a été informé tout au long du processus des démarches faites par MMA. Le tribunal a nommé des procureurs pour représenter les victimes de la tragédie de Lac-Mégantic qui ont participé à la négociation pour la constitution du fonds d'indemnisation. Le Gouvernement du Québec a également participé à cette négociation.

[78] Puisque le tribunal connaît la somme finale qui sera payée à même le fonds d'indemnisation, il n'est pas nécessaire de savoir le montant exact de participation de chacune des parties. Le tribunal considère raisonnable le règlement intervenu qui a été voté à l'unanimité par les créanciers.

POUR CES MOTIFS, LE TRIBUNAL :

[79] **ACCUEILLE** la requête en approbation du plan d'arrangement amendé;

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 personal 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 all 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 after 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 fulfillment 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 all 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 after 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 after 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 insolvency 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 result 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 reviewable 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 the

Petitioner 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 Monitor's 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. All 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 after 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] **LE TOUT** avec dépens contre la compagnie de chemin de fer Canadien Pacifique.

(s) *Gaétan Dumas*

GAÉTAN DUMAS, J.C.S.

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

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

Me Alain Riendeau
Me Enrico Forlini
Me André Durocher
Me Brandon Farber
Fasken Martineau Dumoulin
Pour Compagnie de chemin de fer Canadien Pacifique

Date d'audience : 17 juin 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

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
(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. All 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:

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL, MAINE & ATLANTIC CANADA CO., Foreign Applicant in Foreign Proceeding.	Chapter 15 Case No. 15-_____

NOTICE OF FILING AND HEARING ON MOTION FOR ENTRY OF AN ORDER RECOGNIZING AND ENFORCING THE PLAN SANCTION ORDER OF THE QUÉBEC SUPERIOR COURT, AND MOTION SEEKING APPROVAL OF FORM AND MANNER OF NOTICE

Please take notice that on July 20 2015, Richter Advisory Group Inc., the court-appointed monitor (the "Monitor") and authorized foreign representative of Montreal, Maine & Atlantic Canada Co. in a proceeding under Canada's *Companies' Creditors Arrangement Act*, pending before the Québec Superior Court of Justice filed a Motion for Entry of an Order Recognizing and Enforcing the Plan Sanction Order of the Québec Superior Court (the "Enforcement Motion").

If you do not want the Court to approve the Enforcement Motion, then on or before **August 13, 2015 at 4:00 p.m. (ET)**, you or your attorney must file with the Court a response or objection explaining your position. If you are not able to access the CM/ECF Filing System, then your response should be served upon the Court at:

Alec Leddy, Clerk
U.S. Bankruptcy Court
District of Maine
202 Harlow Street
Bangor, ME 04401

Any response mailed to the Court for filing must be mailed early enough so that the court will receive it on or before **August 13, 2015 at 4:00 p.m. (ET).**

A hearing has been scheduled in the Bankruptcy Court, 537 Congress St., 2nd Floor, Portland, Maine for **August 20, 2015 at 9:00 a.m. (ET)**, to consider the Enforcement Motion. You may attend the hearing. If no objections are timely filed and served, then the Court may enter a final order granting the Enforcement Motion without any further hearing.

Please take further notice that on July 20, 2015, the Monitor filed with the Bankruptcy Court a Motion for Order Specifying Form and manner of Service of Notice (Enforcement of Sanction Order) (the "Notice Motion"). The Monitor has requested the Bankruptcy Court to grant the Notice Motion without a hearing. If you oppose the Notice Motion, then you should file an objection with the Bankruptcy Court no later than **August 13, 2015 at 4:00 p.m. (ET)**. If an

objection to the Notice Motion is filed, then the Bankruptcy Court will conduct a hearing thereon at 537 Congress Street, 2nd Floor, Portland Maine on **August 20, 2015 at 9:00 a.m. (ET)**.

If you or your attorney do not take these steps, the Court may decide that you are not opposed the relief sought, and may enter an order granting the requested relief without further notice or hearing.

Dated: July 20, 2015

RICHTER ADVISORY GROUP INC.,
MONITOR AND FOREIGN REPRESENTATIVE
OF MONTREAL MAINE & CANADA CO.

By its attorneys:

/s/ *Roger A. Clement, Jr.*

Roger A. Clement, Jr., Esq
Nathaniel Hull, Esq.
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REMAIN SUBJECT TO FURTHER REVIEW

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

---

[1] The Court is seized with a motion to approve a Plan of Arrangement unanimously accepted at a meeting of the creditors of the Debtors 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 had the objective to maintain, to the extent possible, 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 which sale the court authorized on January 23, 2014.
>
> [27] The CCAA proceedings also had the goal of maintaining 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 assure that these jobs would be maintained after the sale.
>
> [28] According to the Asset Purchase Agreement, RAH will conserve most of the current employees of MMA.
>
> [29] The CCAA proceedings also had the goal of putting in place 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 that judgment provided to this case, it seems 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 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 law 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 redundant 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 of creditors.

Arguments in favor of liquidation

[64] In some cases, the liquidation of assets through the *CCAA* is preferable to a liquidation under another insolvency system 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 author, 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 decisions5 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* rather 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 More than on the liquidation of the company, such Act is focused on the reorganization of the business and its protection during the interim period when 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 Arrangements 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 to take more political than judicial positions in some cases in the broader interest.

[75] The inclusion of social criteria in the courts 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. The author, Fitzpatrick, disagree:[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 except 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 creditors' agreement.

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 which 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 amount following the liquidation. The Court relied on the fact that such last 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 liquidation of assets under the *CCAA* as follows, but stating that it departs from that 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's courts when came the time to authorize the liquidation of assets under the *CCAA*. However, the situation was dramatically different 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 intention of the *CCAA*, it may not grant 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 the elsewhere in Canada when comes the time to authorize 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 which 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] When imposing the condition of survival of the business for a liquidation of assets unde the *CCAA* to be authorized, the *Fracmaster* case had the effect to make such proceeding considerably more difficult to obtain in Alberta than elsewhere in Canada[29].

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

Québec

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

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

[90] In support of its view, he states 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 incomplet[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 summon 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 project of arrangement must physically exist. A simple statement of intention is not enough. Otherwise, the mechanisms provided at law are fundamentally transformed. It is used as a method to obtain a simple stay, without the obligation to establish that a project of arrangement does exist and without the possibility to assess its plausibility. The law is not formalistic. It does not require that the project of 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 grant the calling of the meeting that it exists and that the main elements thereof may be described. [...]*
>
> *57 Not only such necessity emerges from the text of the Act, but it also corresponds to the requirements of a sufficiently informed exercise of the Court's discretion to summon the creditors and shareholders and, in some cases, to issue staying orders under section 11.*

> *58 In the absence of a description of a project of arrangement from the main elements, certain information required to allow the Court to exercise its discretion on an informed basis are missing. It is required to ensure that 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 risks first for the debtor, since unsuccessfully resorting to the Act or rejecting such proposals does not entail bankruptcy. Moreover, all creditors' realization proceedings of any nature can be stopped for undetermined periods.*
>
> *59 Resorting to the Act implies a judicial review. It is for the judge to weigh from the start the interest for the business to submit a proposal, the plausibility of its success, the consequences of such proposal and of the staying orders required by the creditors, the risks they have for the secured creditors, the judge must examine such various interests before authorizing the summon of the creditors and set into motion the application of the Act. The Act is not a legislation 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 assess first if the business is liable to survive during the interim periods until approval of the compromise, then if 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 author Kaplan says, such requirement to submit sufficient material proofs of a future plan of arrangement does not seem to have been uniformly followed by the Québec Courts. In the *Re Papier Gaspésia Inc.*[34] case is an example where the protection of the Act was granted without the element of 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 to the creditors' agreement:

> *"[14] Moreover, the call for tenders allowed subject to certain conditions by the trial judgment is not equal to a cure and simple liquidation, although it could be considered as the start of the future liquidation process, which could not however take place if a purchaser would come forward and show an interest in revitalizing the business (although this seems unlikely). In addition, to ensure the protection of the creditors' interest (including the petitioners), the trial judge orders that the terms and conditions of such 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 such plan of arrangement has to be submitted to the creditors, but it also must 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 rieghts 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 the requirements for a Plan of Arrangement to grant the protection of the Act is not automatic 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 the state of the law to this day is to that effect.

[96] There are however fundamental differences in the application of such discretion throughout Canada, both with respect to assets which may be so liquidated than to criteria which must guide the Courts in the application of its power.

[97] In finding a solution, we must keep in mind the purposes of the *CCAA* which must guide the interpretation thereof and which Kaplan summarizes 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 refusing the *CCAA* to liquidate assets of a company and emphasize the creditors' rights which 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 however sees a usefulness in the decision when it suggests that a party requiring 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 which degree the creditors are opposed to such a 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 to 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 those 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 redundant assets may and must be possible under the *CCAA* in order to improve the company's finances. The test should therefore come down to determine 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 which 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 manner, 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 has therefore 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 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] This having been said, what do we do now with respect to the continuation of 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.

<u>The only possibility for continuing the CCAA proceedings</u>

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

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

[112] We have already mentioned that on an exception basis, our colleague Martin Castonguay 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 contribution in exchange for such release.

[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 mentioned[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 or 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 complete, 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 counsels 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 regulated by the QCCA to state a release in favor of a third party financing the restructuring of the debtor company. However, it is precisely here 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 worth to reproduce here some paragraphs of the *Muscletech* case*:*

[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.

[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 that a release in favor of the guarantor for the debtor company, which plays a central role in the reorganisation of the business thereof and without whose help the Plan will fail.
>
> [43] The situation in this case is similar: DCR will inject substantial amounts in 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 such fact or disputes the absence of another source of financing, its argument being rather that such release has no connection with the oppression of the business. With respect, such argument cannot stand and, in my opinion, it has no reasonable chance of success before this Court. The Application for leave to appeal could not therefore be granted on this basis.

[116] The Debtor admits it, 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 recourses filed in Québec and in which Petitioners filed motions were postponed to February 26 involves not only the Debtor and its directors, but also more the 35 Defendants.

[118] These are the Defendants that Debtor would like to see at the table to try and reach a settlement which would be beneficial for all. Several of such Defendants are present in all stages of this case.

[119] A settlement in this case would have the benefit of avoiding, for all parties thereto, the remedies which will take 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 proposal which shall be submitted to all creditors.

[122] Nothing will prevent Petitioners in the class action to continue the proceedings against the Defendants who will not participate therein, but this will 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 participate for substantial amounts. Petitoners in the class action cannot be allocated any insurance amounts since there are not entitled thereto. There are other victims, not only the Petitioners in the class action. Those other victims have as much right to the benefit of the insurance as the Petitioners in the class action. Another fact to be considered is that the Government of Québec, through its attorneys, declares since the start that it wishes that the insurance amount be given to the victims. Such 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 one as that of the Court. Indeed, an insurnace company which would have indemnified a merchant for the loss of 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 of XL Assurance.

[124] The Gouvernment of Québec may very well prefer the physical victims, but that does not bind XL Assurance.

[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 deems fit.

[126] The mentioned amount of $200,000,000 in fact appears conservative. If the Province recover amounts, it may use them as it deems fit.

[127] But for the time being, we are in a situation where there are not assets that may be shared between the creditors. It is therefore useless to establish a very expensive claims process. Indeed, who would finance such process? The Petitioners in the class action and the Government 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 souverain between them. 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 such objective are not that many, for the time being, the proceedings under way could leak to such a settlement, provided that a plan be filed and accepted by the creditors. Let's forget a proposal in bankruptcy under the *BIA*, 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 Compagnie d'Assurance, there will be chaos and a race to obtain judgments.

> [129] The attorney for XL already mentioned to the Court that his interpretation of the contract allows him to state that the insurance contract requires that the company to pay the indemnities by paying the first to arrive.
>
> [130] Numerous recourses could then be brought against Debtor and the insurance company, which would no longer be required to pay when an amount of $25,000,000 would have been disbursed.
>
> [131] The chances to obtain a judgment following a class action before the recourses brought in the ordinary fashion would be meaning risk, especially when Defendants are conceding there 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 which allow the creation of an indemnity fund of 430 million dollars to indemnify the victims of the railway tragedy which, let's not 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 favor 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 such 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, of which section 2.1 states the following:

> **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 underlined purpose.

> - Paragraphs 11 and 13 of the Nineteenth Report:
>
> 11. <u>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</u> contributions <u>from potentially liable third parties ("Third Parties") in exchange for full and final releases in respect of all litigation relating to the Derailment..</u>

> [—]
>
> 13. 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 victim creditors' claims againt 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 favor 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) Petitioners, pursuant to the class action, 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 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 the scope authorized by the CCAA.

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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.

[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].

[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:

---

2 *Olympia & York Developments Ltd. (Re),* (1993) 17 C.B.R. (3d) 1 (Ont. Gen. Div.), paragr. 23-26;
3 See judgment dated February 17, 2014, p. 22-29, paragr.113-123.
4 *Metcalfe & Mansfield Alternative Investments II Corp.,* 2008 ONCA 587

> [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.**

[46] In that case, Justice Blair came to the conclusion that the releases sought in favour of third Parties are 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 such type of releases:

> [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:

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

> "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 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 **:**

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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

> 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.

[52] It submits that the Plan does not grant CP the ordinary protections it could 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 through a third party's fault, 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

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

> 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]
>
> [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 with 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 constitutionnality 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 which 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 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, to the extent that the *CCAA 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 arrangements 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 unanimously voted 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 wold have no knowledge of those amounts.

[74] Indeed, the rules of *audi alteram partem* and of public hearings may not be resepcted 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,

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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: