

Using the CCAA to Achieve a Global Resolution of Complex Litigation “To Infinity and Beyond!” (*Buzz Lightyear, Toy Story*)

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I. INTRODUCTION

Traditionally, the *Companies' Creditors Arrangement Act* (CCAA)¹ provided a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.² The CCAA is first and foremost a remedial statute that is intended to benefit the debtor company by keeping the debtor in business, preserving its goodwill, preserving jobs, and maintaining a higher value than if in bankruptcy or liquidation.³ The CCAA proceeding was therefore initially intended to provide a forum in which a debtor is able to continue in business and avoid the devastating social and economic consequences of bankruptcy.⁴ A plan of

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1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [CCAA].

2 *Triton Électronique Inc (Arrangement relatif à)*, 2009 QCCS 1202 (CS Que) at paras 22, 24-26.

3 Frank Bennett, *Bennett on Bankruptcy*, 14th ed (Toronto: CCH Canadian Limited, 2012) at 1521.

4 *AbitibiBowater Inc (Arrangement relatif à)*, 2010 QCCS 1261 (CS Que) at para 140; *ATB Financial v Metcalfe & Mansfield Alternative Investment II Corp*, 2008 ONCA 587 (Ont CA) at paras 44-61 [Metcalfe]; *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327 (BCCA) at paras 27-29; *Chef Ready Foods Ltd v Hongkong Bank of Canada*, 1990 CanLII 529, 51 BCLR (2d)

arrangement or compromise traditionally presupposed that a compromise or arrangement would be proposed by the debtor to its creditors, which would permit the debtor, in some form, to continue as a viable entity.⁵

Over time, the CCAA proceeding has evolved and it is now quite common for there to be “liquidating” CCAA proceedings in which there is no successful restructuring of the business, but rather, a sale of substantially all of the debtors’ assets and a distribution of the proceeds to the creditors of the business.⁶ In the *Nortel Networks CCAA* proceeding, Justice Morawetz’s rationale for authorizing the sale of substantially all the debtors’ assets in the context of the CCAA proceeding was the following:

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.⁷

In the *Nortel Networks* matter, the sale of the debtors’ assets was therefore directly in line with the primary objective of the

84 (BCCA) at para 5; *Re Stelco Inc* (2005), 78 OR (3d) 241, [2005] OJ No 4883 (Ont CA) at para 36; Janis P Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Carswell, 2013) at 13.

5 *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 (BCCA) at para 30; *1474-5467 Québec inc v Roynat inc*, JE 94-543 (CS Que) at paras 4-5; *Re Ursel Investments Ltd*, [1990] SJ No 228, 2 CBR (3d) 260 (Sask QB) at paras 9, 18, 19, reversed 1992 CarswellSask 19 (Sask CA) (for other reasons); *Banque commerciale du Canada c Station du Mont-Tremblant Inc*, JE 85-378 (CS Que) at paras 12-15.

6 *Re Nortel Networks Corporation*, 2009 CanLII 39492 (Ont SCJ [Commercial List]) at paras 47-49 [*Nortel Networks* 2009]; *Re Nortel Networks Corporation et al*, 2014 ONSC 4777 (Ont SCJ [Commercial List]) at para 23 [*Nortel Networks* 2014]; *In re Lehndorff General Partners Ltd* (1993), 17 CBR (3d) 24 (Ont Gen Div [Commercial List]) at para 7.

7 *Nortel Networks* 2009, *supra* note 6 at para 47.

CCAA, which is to preserve the debtors' business as a going concern.

In the past few years, the “broad and liberal” and “flexible” interpretation of the *CCAA* has expanded even further. Indeed, the *CCAA* proceeding has become the privileged forum for some insolvency practitioners to settle complex, multi-party and even multi-jurisdictional litigation between the debtor, its creditors and even third parties.⁸

Recently, in the context of the Lac-Mégantic tragedy in Québec, the use of the *CCAA* proceeding to settle complex litigation progressed even further. Indeed, in the Lac-Mégantic case, the *CCAA* plan of arrangement and compromise was used to effect a settlement between creditors and third parties, without having any impact on the insolvent debtor. In other words, the insolvent debtor was unaffected by the plan that it put forward to its creditors. The appropriateness of using the *CCAA* for settling litigation involving solvent parties, without compromising the insolvent debtor's own liabilities, was questioned during the plan of arrangement and compromise sanction hearing before the Superior Court of Québec.

In this article, the outcome of the Lac-Mégantic *CCAA* proceeding is examined due to its impact on both Canadian insolvency and bankruptcy law and generally on complex litigation involving multiple parties and at least one insolvent party. Specifically, the article covers the following topics:

- an overview of the history of releases and discharges in bankruptcy and insolvency law;
- a commentary on the Lac-Mégantic *CCAA* proceeding and its particularities;

⁸ *Re Muscletech Research and Development Inc*, 2007 CanLII 5146 (Ont SCJ [Commercial List]) [*Muscletech*]; *Re Sino-Forest Corp*, 2012 ONSC 7050 (Ont SCJ [Commercial List]) [*Sino-Forest*]; *Re 4519922 Canada Inc*, 2015 ONSC 4648 (Ont SCJ [Commercial List]) [*Re 4519922 Canada Inc*].

- a discussion of the new paradigm of *CCAA* proceeding established in the Lac-Mégantic case, which may lead to the use of the *CCAA* proceeding as a “one-stop shop” to settle complex multi-party litigation; and
- a discussion of how this new paradigm of *CCAA* proceeding was used to achieve a global resolution of the 20-year litigation in the Castor Holdings matter.

II. HISTORY OF RELEASES AND DISCHARGES IN BANKRUPTCY AND INSOLVENCY LAW

1. Overview

As has often been, and will continue to be, repeated by courts across Canada, the *CCAA* is intended to be flexible and must be given a broad and liberal interpretation.⁹ Courts enjoy significant discretionary powers to make orders that help achieve the objectives of the *CCAA*.¹⁰ This broad interpretation of the *CCAA* is what allows insolvency practitioners to explore innovative solutions to crises and financial challenges that may be facing their clients. Indeed, insolvency law is advanced by insolvency practitioners tasked with finding exceptional measures to deal with extraordinary circumstances, particularly in the absence of any specific legislative authority. The *CCAA* has been used to address several high-profile crises.¹¹

9 *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge*, 1998 CanLII 14907 (Ont Gen Div [Commercial List]) at para 45 [*Red Cross*]; *Re Kerr Interior Systems Ltd*, 2011 ABQB 214 (Alta QB) at para 25.

10 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 (SCC) at paras 58, 61 and 62 [*Century Services*]; *Re NTW Management Group Ltd*, 1994 CarswellOnt 325 (Ont Bkcty) at para 13; *Re Nortel Networks Corp*, 2010 ONSC 1708 (Ont SCJ [Commercial List]) at paras 66-70; *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078 (Ont SCJ [Commercial List]) at para 44 [*Eastern Forest*].

11 *Re Muscletech Research and Development Inc*, 2006 CarswellOnt

Some examples of exceptional measures that have made their way into *CCAA* practice as a result of extraordinary circumstances include:

- stay of proceedings against non-debtors, including directors, related parties and even insurance companies;
- implementing a claims process with a bar date in order to liquidate creditors' claims against a debtor in a timely manner;
- interim financing, colloquially known as "debtor in possession financings", which grants a super-priority charge to the interim financing lender over the debtor's assets;
- asset sales with a vesting order, which allow for a debtor's assets to be sold free and clear of any charges; and
- third-party releases.

The sanctioning by the courts of arrangements and compromises, which include broad releases in favour of third parties, has been a game changer for the insolvency practice. Much has already been said and written about the use and appropriateness of third-party releases in *CCAA* proceedings. However, since these releases are at the heart of what makes the *CCAA* proceeding such an appealing forum for the settlement of complex multi-party and multi-jurisdictional litigation, it is useful to provide a history of their use in the present article.

264 (Ont SCJ [Commercial List]); *Muscletech*, *supra* note 8; *Metcalfe*, *supra* note 4; *Red Cross*, *supra* note 9; *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge*, 2000 CanLII 22488 (Ont SCJ); *Nortel Networks* 2009, *supra* note 6 at paras 47-49; *Nortel Networks* 2014, *supra* note 6.

2. The Evolution of the Release and Discharge Provision in Bankruptcy and Insolvency Law

If, for many, the concept of releasing or discharging an insolvent debtor is obvious, this phenomenon is relatively new in the history of the world. Indeed, the concept of a discharge has been viewed as a privilege granted to rehabilitate an insolvent debtor. Even more fascinating is the remarkable evolution of the privilege granted to an insolvent debtor in certain circumstances to a right that is now granted to solvent third parties, if they are prepared to pay the right price.

i. The Old Testament — the first known release and discharge of debt

The first known “statute” dealing with forgiveness of debt is found in the Bible. In Deuteronomy, it was mandated that debts are to be forgiven every seven years, regardless of a person’s circumstances. Indeed, the first verses of Deuteronomy 15 describe the operation of law that ensured that everyone would have a fresh start every seven years:

1 At the end of every seven years you shall grant a release of debts.

2 And this is the form of the release: Every creditor who has lent anything to his neighbor shall release it; he shall not require it of his neighbor or his brother, because it is called the Lord’s release.¹²

A release of debt was not only permitted under the Bible, but it was also obligatory and continuously recurring. The principle of forgiveness of debt in biblical times was not a principle that was adopted by the rulers and creditors in classical antiquity and the Middle Ages.

ii. Classical antiquity and the middle ages

This notion of debt forgiveness did not exist in Ancient Greece, where debtors were enslaved to their creditors until

¹² Deuteronomy 15:1-2, New King James Version, online: <<http://www.biblestudytools.com/nkjv/>>.

their debts were paid off.¹³ Debt slavery is thought to have eventually been abolished in Athens by the Athenian statesman, lawmaker and poet, Solon.¹⁴

Ancient Roman times appear to have followed the Ancient Greek models. Debtors were enslaved, imprisoned, abused, tortured, and even executed.¹⁵ Debtors carried their debts with them to the grave.¹⁶

In the Middle Ages, the phenomenon of debt slavery was extremely rare and likely limited to certain barbaric kingdoms.¹⁷ However, the infamous “debtors’ prison” in England came into existence;¹⁸ and in 1641, it was estimated that 10,000 people were imprisoned for debt in England and Wales.¹⁹ Debtors were imprisoned indefinitely, side by side with hardened criminals in horrendous conditions.²⁰

It was not until 1869 that debtors’ prisons were finally abolished and the *Debtors Act* of 1869 was adopted to address the creditor/debtor relationship.²¹

iii. The origins of the bankruptcy discharge

The concept of the discharge was first introduced by legislation passed in England in 1705.²² Prior to the introduction of this legislation, a bankrupt remained liable for amount remaining unpaid to the creditors following the

13 A Testart, “The Extent and Significance of Debt Slavery”, *Revue française de sociologie* (Supplement: Annual English Edition) 43 (2002): 173-204 [Testart].

14 *Ibid* at 189.

15 *Ibid* at 190.

16 J Dalhuisin, *Roman Law of Creditors Remedies*, in ABA Section of International Law, *European Bankruptcy Laws*, at 3 (1974).

17 Testart, *supra* note 13 at 191.

18 Lucinda Cory, “A Historical Perspective on Bankruptcy”, On the Docket, Volume 2, Issue 2, US Bankruptcy Court, District of Rhode Island, April/May/June 2000.

19 *Ibid*.

20 *Ibid*.

21 *Ibid*, *Debtors Act, 1869* (UK), c 62, Part I, s 4, Part I.

22 *The Bankruptcy Act 1705* (UK), 4 & 5 Anne, c 17.

bankruptcy. The discharge was introduced into bankruptcy law as an incentive for cooperation on the part of the bankrupt.²³ The introduction of the discharge could be considered as one of the most significant features of the practice of bankruptcy and insolvency law as we know it today.

iv. The evolution of the discharge in Canadian bankruptcy law

English bankruptcy law did not immediately take root in Canada. Indeed, the *Insolvency Act of 1875*²⁴ sought to give creditors increased control over insolvency proceedings and restricted the possibility for a debtor to obtain a discharge, which had been available until 1880 with the consent of creditors.²⁵ In the 19th century, it was not widely accepted in Canada that bankruptcy should provide a debtor with a fresh start.²⁶ As a result of the debate over the “morality of the discharge”, between 1880 and 1919, no bankruptcy law existed in Canada.²⁷ Provincial legislation was enacted to fill the void; however, such legislation did not offer the possibility of a discharge.²⁸

After 39 years without a bankruptcy law, the First World War, and a significant downturn in the economy, Canada enacted the *Bankruptcy Act* in 1919 (“1919 Act”) out of necessity.²⁹ The 1919 Act was based heavily on the English *Bankruptcy Act*³⁰ of 1883. The 1919 Act was a “very radical

23 Roderick J Wood *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2015) at 31.

24 *Insolvency Act of 1875*, SC 1875, c 16.

25 *Ibid* at 33.

26 Thomas G W Telfer, “Reconstructing bankruptcy law in Canada, 1867 to 1919, from an evil to a commercial necessity”, National Library of Canada/Bibliothèque nationale du Canada, 1999 [Telfer].

27 *Ibid* at 34.

28 *Ibid* at 19.

29 *Bankruptcy Act*, SC 1919, c 36.

30 *Bankruptcy Act 1883* (UK), 46 & 47 Vict, c 52.

change in the relationship of debtors and creditors”.³¹ It allowed debtors to apply for a discharge and obtain a release of their debts.³² However, such reform had little to do with the rehabilitation of the debtor, but rather, it was a necessary means for creditors to improve the conduct of the debtor and to increase their collection efforts.³³ Indeed, the prior lack of any discharge forced debtors to attempt to escape from the disastrous and permanent effects of a bankruptcy through deceptive or fraudulent practices, which included changing their names or their companies’ names or even leaving the country.³⁴

Under the 1919 *Act*, in deciding whether to grant a discharge or a conditional discharge, the courts would ultimately be called on to decide the extent to which the debtor had been responsible for his or her misfortune. Generally, where there was no dishonesty or wilful negligence, it was a matter of public policy that the court would grant a discharge.³⁵

It has been said that a discharge is “the very soul of a bankruptcy Act, and in cases where a debtor has been obliged to go through the insolvency courts through misfortune, the law ought to give him the opportunity of obtaining a clean bill of health, without interference by creditors...”.³⁶

No provision existed for an automatic discharge under the 1919 *Act*. If a debtor did not make an application, he or she remained a bankrupt indefinitely. The automatic procedure was not added until 1949, which provided that an assignment in bankruptcy automatically triggered an application for discharge.³⁷

31 FGT Lucas, “The New ‘Bankruptcy Act’” (1920) 40 *Can L T* 668.

32 Telfer, *supra* note 26 at 330.

33 *Ibid* at 331.

34 *Ibid* at 334.

35 *Ibid* at 347.

36 SW Jacobs, “A Canadian Bankruptcy Law — Is It a Necessity?”, (1917) 37 *Can L T* 604, 608.

37 *Bankruptcy Act*, SC 1949 (2nd Sess), c 7, s 127; the application for discharge was heard between 3 and 12 months after the assignment.

Eventually, in the 1992 amendments to the *Bankruptcy and Insolvency Act (BIA)*,³⁸ a provision was added allowing a first time bankrupt to be automatically discharged nine months after the assignment unless, before the expiration of this period, the trustee, the Superintendent in bankruptcy or a creditor filed an objection.³⁹ The possibility for the automatic discharge remains enshrined in the *BIA* today.

Although the initial purpose of the discharge may have been different, it has now become clear that an important purpose of bankruptcy legislation is to encourage the rehabilitation of an honest but unfortunate debtor, and to permit his or her reintegration into society — subject to reasonable conditions — by obtaining a discharge from the continued burden of crushing financial obligations which cannot be met.⁴⁰

3. Third-party Releases in CCAA and BIA Restructurings

Releases and discharges in favour of parties other than the debtor were not contemplated by early bankruptcy legislation, and in Canada, such practice began emerging under the *CCAA* in the 1990s. Indeed, such releases were not contemplated for the simple reason that if a third party is solvent; it should pay its debts in full. In other words, there is no reason to compromise debts of third parties that have the capacity to pay their debts in full.

The inclusion of releases and discharges in favour of third parties in arrangements or compromises was initially met

³⁸ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [*BIA*].

³⁹ *BIA*, *supra* note 38, s 168(1)(f).

⁴⁰ *Simone v Daley*, 1999 CanLII 3208 (Ont CA); *Re Newsome* (1927), 32 OWN 292, 8 CBR 279 (Ont SC); *Canadian Bankers' Assn v Saskatchewan (Attorney General)*, 1955 CanLII 78, [1956] SCR 31, 35 CBR 135 (SCC); *Cleve's Sporting Goods Ltd v JG Touchie & Associates Ltd* (1986), 74 NSR (2d) 86, 58 CBR (NS) 304 (NSCA); *Ironwood Investments Joint Venture v Leggett Estate (Trustee of)*, 1996 CanLII 8252, 38 CBR (3d) 256 (Ont Gen Div) at 264; *Jerrard v Peacock*, 1985 CanLII 1148, 57 CBR (NS) 54, 37 Alta LR (2d) 197 (Alta Master).

with skepticism. The practice eventually became acceptable in respect of releases in favour of directors of the debtor. However, a new paradigm was created when releases were stipulated in favour of solvent third parties having no relationship to the insolvent debtors.

i. Third-party releases under the BIA

The courts have previously held that a proposal under the *BIA* can only provide for the compromise of claims against the debtor. It cannot require creditors to compromise their claims against third parties.⁴¹ In the 2010 case of *Re CFG Construction Inc*, the Superior Court of Québec refused to approve a proposal that contained releases in favour of two sureties of the debtor.⁴² The Superior Court of Québec held that the *BIA* does not permit third-party releases except those in favour of directors under section 50(13). The court's rationale for its refusal stemmed from a strict interpretation of section 62(3) of the *BIA*, which provides that "the acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor".⁴³ In other words, only the debtor can be released by a proposal.

This strict approach was not followed in a subsequent judgment rendered in 2012 by the Ontario Superior Court of Justice (Commercial List) in the matter of *Re Kitchener Frame Limited*.⁴⁴ In this case, the Court adopted a flexible, purposive interpretation of the *BIA*, stemming from the principle that there is no express prohibition in the *BIA* against third-party releases in a proposal. Since there is no

41 Lloyd W Houlden, Geoffrey B Morawetz and Janis P Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson Carswell, 2010) at 238; *Re Cosmic Adventures Halifax Inc* (1999), 13 CBR (4th) 22 (NSSC); *Re Kern Agencies Ltd, (No 2)*, [1931] 2 WWR 633 (Sask CA).

42 *CFG Construction Inc (Proposition de)*, 2010 QCCS 4643 (CS Que).

43 *BIA*, *supra* note 38, s 63(3).

44 *Re Kitchener Frame Limited*, 2012 ONSC 234 (Ont SCJ [Commercial List]).

express prohibition, the Court held that such releases should be permissible as they are under the *CCAA*. In the Court's view, at most, there are limited constraints on the scope of releases, such as in section 179 of the *BIA* and the provision dealing specifically with the release of directors. The *Re CFG Construction Inc* case was distinguished as it dealt with releases of sureties.

ii. Overview of releases of third parties under the CCAA

A successful restructuring under the *CCAA* generally concludes with the emergence of the debtor from the *CCAA* proceeding with a clean bill of health or with a sale of the debtor's assets free and clear of the majority of the claims and encumbrances against them. In order for the debtor to emerge as a viable entity, it requires a "release" from any pre-filing claims and liability through a plan of arrangement or compromise with its creditors.

The *CCAA* does not contain any express provisions either permitting or prohibiting the granting of releases in favour of third parties, other than to the directors and officers of the debtor.⁴⁵ Courts were initially reluctant to sanction third-party releases in the absence of any express legislative authority. Indeed, in *Steinberg Inc c Michaud*,⁴⁶ the Québec Court of Appeal refused to sanction a *CCAA* plan because it contained broad releases in favour of directors, officers, employees, and advisors of the debtor company. The Court of Appeal held that the releases were too broad and outside the scope of the *CCAA* plan:

The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

[...]

⁴⁵ *Re Bul River Mineral Corporation*, 2015 BCSC 113 (BCSC) at para 77 [*Bul River*].

⁴⁶ *Steinberg Inc c Michaud* (1993), 42 CBR (5th) 1 (CA Que).

The Act and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is.⁴⁷

Subsequent to this decision by the Québec Court of Appeal, section 5.1 of the *CCAA* was enacted in 1997, which expressly allows the release of claims against directors, subject to the express exception in section 5.1(2) of the *CCAA*.

In *Re Canadian Airlines Corp.*,⁴⁸ the Court of Queen's Bench of Alberta sanctioned a plan containing releases of officers, employees and advisors of the debtor company, despite the fact that only directors were contemplated under section 5.1 of the *CCAA*. Undoubtedly, the logic behind the court's decision to approve these releases is that these individuals were essential to the rehabilitation of the insolvent company and to maintain and create value for all stakeholders, including business partners, employees and suppliers of the insolvent debtor.

iii. The point of no return? Third-party releases in Muscletech

The elastic boundaries of the third-party release were stretched even further in *Re Muscletech Research and Development Inc.*⁴⁹ Muscletech Research and Development Inc and its affiliates ("Muscletech") were facing 33 product liability class actions relating to the diet supplement, ephedrine, as well as certain prohormone products alleged to build muscles. In January 2006, Muscletech filed for protection under the *CCAA* in Ontario. The initial *CCAA* order contained a stay of proceedings against Muscletech and certain related and unrelated non-debtor defendants, including retailers who had sold the impugned products. Parallel Chapter 15 United States *Bankruptcy Code* proceedings were instituted in the Bankruptcy Court for the Southern District of New York.⁵⁰

47 *Ibid* at 13 and 14.

48 *Re Canadian Airlines Corp.*, [2000] 10 WWR 269 (Alta QB).

49 *Re Muscletech Research and Development Inc* (2006), 25 CBR (5th) 231 (Ont SCJ).

50 *Ibid* at para 3.

CCAA protection was sought principally as a means of achieving a global resolution of the product liability class actions commenced against Muscletech and other non-related third parties. The liability of the third parties, which included marketing affiliates, research entities and independent vendors, was linked to the liability of Muscletech. Ultimately, the Ontario Superior Court of Justice sanctioned a plan that provided broad releases in favour of Muscletech *and* the third party co-defendants. Such co-defendants had no affiliation with Muscletech. Two key factors appear to have influenced the court's decision to approve the plan: (i) the significant financial contributions that the third parties would make to fund the plan and (ii) the third parties would lose their right to seek indemnity from Muscletech as a result of the compromise. Indeed, the Court provided the following rationale:

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.

[...]

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.⁵¹

Other decisions provided further authority to the effect that the court may approve releases in favour of third parties found in a plan of compromise or arrangement while exercising its statutory jurisdiction under the CCAA.⁵²

⁵¹ *Ibid* at paras 7-9.

⁵² *Metcalfe, supra* note 4; *Re Canwest Global Communications Corp*,

Third-party releases have therefore become a tool to facilitate the restructuring in many complex *CCAA* matters. However, the use of third-party releases in *CCAA* proceedings is not without controversy. Questions have been raised as to the appropriateness of the inclusion of such releases in a plan⁵³ and the scope of the releases.⁵⁴

iv. The ABCP case — to infinity?

In the *ABCP* matter, the entire \$32 billion asset-backed commercial paper (“*ABCP*”) market experienced an overnight, sudden and complete seizure as a result of a liquidity crisis. This seizure of the *ABCP* market resulted in the entire *ABCP* market being frozen pending an attempt to resolve the crisis through a restructuring of the entire market under the *CCAA*. Ultimately, with the collaboration of almost all of the stakeholders in the industry, a plan of compromise and arrangement was put forward. The alternative to sanctioning the plan in *Metcalfe* would likely have been a total and permanent collapse of the *ABCP* market.

Certain holders of *ABCP* notes opposed the *Metcalfe* plan primarily on the basis that the third-party releases were impermissible under the *CCAA* and not within the jurisdiction of the Court.

The Court of Appeal for Ontario upheld the decision of the motion judge, which found that the proposed plan in *Metcalfe* affected the entire segment of the *ABCP* market and the financial markets as a whole. The restructuring in the

2010 ONSC 4209 (Ont SCJ [Commercial List]) [*Canwest*]; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403 (CA Que) [*SIDO*]; *Re Cline Mining Corp*, 2015 ONSC 622, [2015] OJ No 1202 (Ont SCJ) [*Cline Mining*]; *Sino-Forest*, *supra* note 8.

53 *Montreal, Maine & Atlantic Canada Co/(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235 (Que Bkcty) [*MM&A*].

54 *Metcalfe*, *supra* note 4.

Metcalf case was essential to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. The beneficiaries of the releases were essential to the restructuring of the debtors in particular and the ABCP market as a whole. As emphasized in the *Canwest* matter, “[t]he *Metcalf* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring.”⁵⁵

v. *The ABCP test*

The inclusion and sanctioning of third-party releases in a CCAA plan are the exception, and are not granted as a matter of course.⁵⁶ However, in certain cases, the court may exercise its discretion to sanction third-party releases, but only if there is “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.”⁵⁷ This “required nexus” test was applied by the Court of Appeal for Ontario in the ABCP CCAA proceeding, and subsequently in every other CCAA matter dealing with third-party releases.⁵⁸

In the *ABCP* matter, the Court of Appeal for Ontario set out the factors to be considered by the court to justify the inclusion of third-party releases in a plan:

- the parties to be released are necessary and essential to the restructuring of the debtor;
- the claims to be released are rationally related to the purpose of the plan and necessary for it;
- the plan cannot succeed without the releases;

55 *Canwest*, *supra* note 52 at para 28.

56 *Ibid* at paras 28-29; *Bul River*, *supra* note 45 at para 78.

57 *Metcalf*, *supra* note 4 at para 70.

58 *SIDO*, *supra* note 52 at paras 37-39; *Bul River*, *supra* note 45 at para 77; *Cline Mining*, *supra* note 52 at paras 22-24; *Eastern Forest*, *supra* note 10 at para 68.

- the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan; and
- the plan will benefit not only the debtor companies but creditors generally.⁵⁹

III. THE LAC-MÉGANTIC CASE — BEYOND INFINITY?

In the recent Lac-Mégantic *CCAA* proceeding, releases in favour of potentially liable third parties were sanctioned by the Superior Court of Québec in the absence of any release or discharge of the insolvent debtor. The Lac-Mégantic case is likely to trigger a new paradigm of *CCAA* proceedings across Canada. In this new era, it would hardly be surprising to see the *CCAA* proceeding become a preferred forum for settling litigation that involves at least one insolvent party. To fully understand the potential implications of the Lac-Mégantic *CCAA* proceeding, a thorough examination of the case is required.

1. The Tragedy

On 6 July 2013, a train carrying crude oil operated by Montreal Maine and Atlantic Railway (“MMAR”) and/or its subsidiary Montreal, Maine and Atlantic Canada Co (“MMAC”) derailed and exploded in Lac-Mégantic, Québec (“the derailment”) on a section of railway line owned by MMAC. The derailment was one of the worst railway accidents in Canadian history. Forty-seven people lost their lives as a result of this terrible tragedy. Damage to the downtown core of the city of Lac-Mégantic’s downtown was also extensive, with over 30 buildings burned to the ground.

⁵⁹ *Metcalfe, supra* note 4 at para 71.

2. The Legal Proceedings

The derailment triggered a plethora of legal proceedings and a flood of claims involving multiple parties, in multiple jurisdictions, including:

- a motion for the authorization to institute a class action was filed before the Superior Court of Québec one week after the derailment on behalf of a class of persons and entities residing in, owning or leasing property in, operating a business in or physically present in Lac-Mégantic against 37 defendants for alleged damages caused by the derailment including for wrongful deaths, personal injuries, and property damages (“the Québec class action”);⁶⁰
- wrongful death, personal injury and property damage lawsuits were instituted in Texas, Illinois and Maine;
- the Minister of Sustainable Development, Environment, Wildlife and Parks of Québec issued an order directing certain named parties to recover the contaminants and to clean up and decontaminate the derailment site, the order being contested before the *Tribunal administratif du Québec*;
- a lawsuit instituted by the Province of Québec before the Superior Court of Québec to recover cleanup costs in which it is claiming \$409 million;
- subrogated insurers have also instituted proceedings before the Superior Court of Québec to recover insurance indemnities that they paid out following the derailment;

⁶⁰ The Québec class action was eventually authorized by the Superior Court of Québec in a judgment rendered on 8 May 2015; see *Ouellet c Rail World Inc*, 2015 QCCS 2002 (CS Que).

- MMAC filed for *CCAA* protection in Canada;
- MMAR filed for Chapter 11 *Bankruptcy Code* (“Chapter 11”) bankruptcy protection in the United States (“US”);⁶¹ and
- in the context of the *CCAA* and Chapter 11 bankruptcy, more than 5,000 claims were filed.⁶²

3. The *CCAA* Proceeding

Against the backdrop of the derailment and in the face of a plethora of litigation, on 8 August 2013, the Superior Court of Québec granted MMAC’s motion for protection from its creditors under the *CCAA*.⁶³ In parallel to the *CCAA*, MMAR filed for protection under Chapter 11 of the US *Bankruptcy Code* in Maine (“the Chapter 11 proceedings”).

i. The stay of proceedings

In the context of its initial order application, MMAC also sought a stay of proceedings, which extended to its liability insurer, a non-filing and solvent third party. While it had previously been recognized that a stay of proceedings could extend to third parties if important to the process or reasonable,⁶⁴ often such parties have been related to the debtor, such as its directors or affiliate. The novelty in the MMAC *CCAA* proceeding is that the stay of proceedings extended to a non-related third party. Justice Castonguay found that allowing the stay to extend to the liability insurer was

61 *In re Montreal Maine & Atlantic Railway, Ltd*, Bk No 13-10670, Chapter 11, US Bankruptcy Court District of Maine.

62 Twenty-First Report of the Monitor, dated 24 November 2015, SCJ No 450-11-000167-134.

63 It should be noted that *CCAA* protection was granted notwithstanding the specific exclusion of “railway companies” in the definition of “company” provided for in s 2 of the *CCAA*.

64 *Re Tamerlane Ventures Inc and Pine Point Holding Corp*, 2013 ONSC 5461 (Ont SCJ [Commercial List]).

necessary in order to avoid “judicial chaos” that would result from the onslaught of claims against the liability insurer.⁶⁵ The liability insurer had also agreed to tender the entire amount of its insurance policy into the *CCAA* proceeding.

In retrospect, this unique stay of proceedings was the first brick of the structure that would ultimately be built into the plan of compromise and arrangement put forward by MMAC.

ii. The liquidation of MMAC’s assets

One of the primary purposes of both the *CCAA* proceeding and the Chapter 11 proceedings was to facilitate the sale of MMAC and MMAR. This objective was achieved on 23 January 2014 when the courts in both Québec and Maine authorized the sale of MMAR and MMAC to Railroad Acquisition Holdings LLC (“the purchaser”) for a total purchase price of US \$14,250,000.⁶⁶ The sale closed on 15 May 2014 in respect of MMAR’s assets and 30 June 2014 in respect of MMAC’s assets. The proceeds of the sale were used to pay certain professional fees and employees, and were designated for the eventual distribution to MMAC’s and MMAR’s secured creditors, the US Federal Railroad Administration and the Government of Québec.

At that point, it appeared that the *CCAA* could no longer serve any proper purpose — all of MMAC’s affairs, with the exception of its liabilities, had been fully and finally wound up. In other words, from the moment MMAC’s assets were sold and there was no longer any value to extract therefrom, it could be argued that the Court exhausted its jurisdiction to sanction a potential plan of arrangement or compromise. Indeed, under no circumstances could MMAC ever continue as a going concern, restructure and, as evidenced by the eventual plan,

⁶⁵ *Montréal, Maine & Atlantique Canada Co (Arrangement relatif à)*, 2013 QCCS 4039 (CS Que) at paras 55, 60 and 66.

⁶⁶ Approval and Vesting Order, dated 23 January 2014, CS 450-11-000167-134; Motion for issuance of (i) an order authorizing the sale of the assets of the Petitioner and of (ii) vesting order, dated 19 January 2014, CS 450-11-000167-134.

even compromise its own liabilities. As stated by at least one author and as argued during the plan sanction hearing, “if there remains nothing to be restructured, the propriety of the *CCAA* proceedings is questionable”:⁶⁷

The *CCAA* is intended to provide for a disciplined, court-supervised process, for a limited period of time, permitting the stakeholders to negotiate and address their interests with the ultimate goal to restructure the business and enable it to continue as a going concern. If there remains nothing to be restructured, the propriety of *CCAA* proceedings is questionable. If the primary goal is liquidation, other insolvency proceedings outside of the *CCAA* may offer a fairer or more efficient solution. If the focus of a *CCAA* proceeding becomes the pursuit of damages for contingent liabilities while certain defendants are shielded or some claimants are positioned in a more advantageous position than others, the purposes of the *CCAA* will be defeated.

The ultimate goal of a *CCAA* proceeding is properly to produce a negotiated plan of arrangement and compromise. If a *CCAA* plan is unworkable, or it cannot address all pending claims, the respective claimants should be allowed to pursue their claims in the appropriate fora. The stay of proceedings and the potential for providing releases are tools that may be employed in furtherance of an amicable resolution that is agreeable to all affected stakeholders. These tools are not intended to be used as a bar to the pursuit of otherwise viable and meritorious claims.⁶⁸

iii. The claims process

On 4 April 2014, the Superior Court of Québec issued a claims procedure order, which established the procedure for the filing of claims in the *CCAA* proceeding and a bar date.⁶⁹ The process for review and determination of the claims was only

⁶⁷ Dimitri Lascaris, Sajjad Nematollahi and Serge Kalloghlian, “The Interaction between Class Actions and Proceedings under the *Companies’ Creditors Arrangement Act*; Recent Developments and Questions for the Future”, Colloque national sur les recours collectifs - développements récents au Québec, au Canada et aux États-Unis, Service de la Formation Continue Barreau du Québec, (Montréal: Édition Yvon Blais, 2015) at 134.

⁶⁸ *Ibid.*

⁶⁹ Claims Procedure Order, dated 4 April 2014, CS 450-11-000167-134.

established through a subsequent order issued almost one year later.⁷⁰

Given the varied nature and scope of the claims, which obviously extended far beyond the trade claims that often make up the majority of unsecured claims, the claims process provided the following categories of claims:

- claims for economic material or other damages resulting from the death of a person;
- claims for economic, material or other damages resulting from bodily injuries suffered by the creditor;
- claim for economic, material or other damages resulting from bodily injuries (not resulting in death) of another person;
- claim for economic, material or other damages suffered by an individual (not a business) not resulting from bodily injuries or death of a person;
- claim for economic, material or other damages suffered by a business not resulting from bodily injuries or death of a person;
- subrogated insurer claims directly related to damages sustained as a result of the derailment;
- contribution or indemnity claim; and
- non-derailments claims.⁷¹

These categories of claims ultimately became the categories for distribution under the plan of arrangement.

⁷⁰ Claims Resolution Order, 15 April 2015, CS 450-11-000167-134.

⁷¹ MMAC's *Motion for an order approving a process to solicit claims and for the establishment of a claims bar date*, dated 13 December 2013, CS 450-11-000167-134; proof of claim forms used in the MMAC CCAA proceeding.

In the context of the claims process, the *CCAA* monitor received approximately 5,000 claims with a value in excess of \$1.8 billion.⁷² Eventually, the value of the claims filed in the *CCAA* proceeding was reduced to \$900 million to account for duplication among the claims filed.⁷³

4. The Plan of Arrangement and Compromise

i. The settlement fund

Initially, it appeared that the only funds available for distribution to the victims of the derailment were the \$25 million insurance indemnity that had been deposited by MMAC's liability insurer.⁷⁴ In *obiter* in a judgment rendered on 17 February 2014 in respect of the joint status conference, Justice Dumas questioned the viability of a plan of arrangement without contributions from third parties.⁷⁵ Justice Dumas characterized the chances that a plan of arrangement would be proposed as "slim" if nothing happened in the short term.⁷⁶ In this same judgment, Justice Dumas set the table for what would ultimately become the plan of arrangement: "The only practical, economical and legal way to settle the present matter is for third parties to participate in an arrangement that would be submitted to the creditors" [translation].⁷⁷

At first, very few parties believed that there was any reasonable chance of reaching a global settlement of the

72 Eleventh Report of the Monitor on the State of Petitioner's Financial Affairs, dated 27 June 2014, CS 450-11-000167-134.

73 Sixteenth Report of the Monitor on the State of Petitioner's Financial Affairs, dated 13 April 2015, CS 450-11-000167-134.

74 The proceeds of the sale to Railroad Acquisition Holdings were earmarked for payment of certain professional fees, employee wages and secured creditors.

75 *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co (MMA)) (Arrangement relatif à)*, 2014 QCCS 737 (Que Bkcty).

76 *Ibid* at paras 53 and 56.

77 *Ibid* at para 121.

claims related to the derailment. Recognizing that the only possibility for proposing a viable plan to the creditors lay in the hands of third parties, the insolvency professionals in both Canada and the US began a large scale solicitation process. The insolvency professionals began engaging confidential settlement discussions with third parties, namely those parties that were named defendants in the numerous lawsuits filed in connection with the derailment. Discussions were also held with the major stakeholders, namely, the Province of Québec, the class representatives in the Québec class action, and the wrongful death victims. Since each of these major stakeholders would ultimately hold a veto right in any plan of arrangement, no settlement could be reached without their approval.⁷⁸

The settlement discussions with third parties were reported by MMAC for the first time in February 2014. These discussions intensified following the holding of the joint status conference between the stakeholders in the MMAC and the stakeholders in the Chapter 11 proceedings in Bangor, Maine. Finally, on 19 September 2014, a plan term sheet was filed in support of MMAC's motion for a ninth extension of the stay period.⁷⁹ At that time, MMAC indicated that it had received \$16,500,000 in commitments from third parties, in addition to the \$25,000,000 from its liability insurer.⁸⁰

The plan term sheet set out the structure of the eventual plan of arrangement that would ultimately be proposed to the creditors.⁸¹ The basis for the eventual plan was clear: the plan would be funded by potentially liable third parties in exchange of releases barring any litigation against such third parties arising from the derailment.

78 Each of the major stakeholders potentially controlled at least one of the two CCAA statutory majorities for plan approval.

79 Exhibit R-1 filed in support of MMAC'S *Motion for Ninth Order extending the Stay Period*, dated 19 September 2014, CS 450-11-000167-134 [Exhibit R-1, *Ninth Order*].

80 MMAC'S *Motion for Ninth Order extending the Stay Period*, dated 19 September 2014, CS 450-11-000167-134 at para 15.

81 Exhibit R-1, *Ninth Order*, *supra* note 79.

After further negotiations with third parties in the fall of 2014, MMAC had received firm commitments in an amount totalling \$207,800,000.⁸² A draft plan was filed by MMAC on 9 January 2015.⁸³ On 31 March 2015, MMAC filed a plan of compromise and arrangement, the purpose of which was to achieve a global resolution of all claims related to the derailment. On 8 June 2015, MMAC filed an amended plan (“the amended plan”), with a settlement fund totalling approximately \$430 million.⁸⁴ The settlement fund would ultimately reach the impressive amount of \$452 million as a result of the settlements being reached in US dollars.⁸⁵

The amended plan was approved unanimously by the creditors at a meeting held on 9 June 2015.⁸⁶ The amended plan was sanctioned by the Superior Court of Québec in July 2015 (“the *CCAA* sanction order”).⁸⁷

Pursuant to the amended plan, MMAC reached settlements with 25 distinct entities or groups of affiliated entities. Indeed, all third parties with a connection to the derailment participated in the amended plan, with the exception of Canadian Pacific Railway (“CP”).⁸⁸

The *CCAA* sanction order was also recognized by the US Bankruptcy Court sitting in the District of Maine by way of a Chapter 15 proceeding.⁸⁹ A plan of liquidation filed in the

82 MMAC’s *Motion for an Eleventh Order extending the Stay Period*, dated 9 January 2015, CS 450-11-000167-134 at para 13.

83 Exhibit R-1 filed in support of MMAC’s *Motion for an Eleventh Order extending the Stay Period*, dated 9 January 2015, CS 450-11-000167-134.

84 MMAC’s Amended Plan of Compromise and Arrangement, dated 8 June 2015, CS 450-11-000167-134 [.

85 MMAC’s *Motion for the Approval of Professional Fees*, dated 25 November 2015, CS 450-11-000167-134 at para 78.

86 MMAC’s *Motion for the Approval of the Amended Plan of Compromise and Arrangement*, 11 June 2015, CS 450-11-000167-134 at para 22.

87 *MM&A*, *supra* note 53.

88 MMAC, *Approval of Professional Fees*, *supra* note 85 at paras 42 and 45.

89 Order recognizing and enforcing the plan sanction order of the

Chapter 11 proceedings was also approved by the creditors in the US and sanctioned by the US Bankruptcy Court sitting in the District of Maine.⁹⁰ The Chapter 11 plan of liquidation mirrors the features of the amended plan, namely the release and injunction provisions.

ii. The releases and injunctions provided for under the amended plan

The amended plan provides for broadly worded third-party releases and injunctions that prevent all claims of any kind whatsoever and in any jurisdiction against settling parties. Specifically, section 5.1 of the amended plan provides for the execution of (i) very broad releases in favour of the settling parties and (ii) injunctions barring any future claims against the settling parties.⁹¹

Québec Superior Court, dated 26 August 2015, US Bankruptcy Court, District of Maine, Case No 15-10518; Order supplementing order recognizing and enforcing the plan sanction order of the Québec Superior Court - dated 21 October 2015, US Bankruptcy Court, District of Maine, Case No 15-10518.

90 Order confirming the trustee's revised first amended plan of liquidation dated 15 July 2015 and authorizing and directing certain actions in connection therewith, dated 11 October 2015.

91 The amended plan of compromise and arrangement, dated 8 June 2015, CS 450-11-000167-134 at s 5.1:

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

As stipulated in section 5.1 of the amended plan, the releases and injunctions do not extend to “unaffected claims”. The amended plan specifically provides that claims against MMAC are deemed to be “unaffected claims”.⁹² Claims against non-settling parties were also deemed unaffected by the amended plan.⁹³

The effects of the amended plan can be summarized as follows:

- in exchange for contributions to the settlement fund, the settling parties received full and final releases from *all litigation* relating to the derailment in Canada and the US;
- the amended plan does not “compromise, release, discharge, cancel, bar or otherwise affect” claims against MMAC, *ie*, claims against MMAC are unaffected by the plan;
- all persons are forever barred from asserting any claims against the settling parties;

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 19 February 2014 between Canada and the Province, (ii) shall not extend to and shall not be construed as extending to any unaffected claims.

92 *Ibid*, s 3.3.

93 *Ibid*.

- contractual indemnity rights between third parties are extinguished.

iii. CP's contestation of the amended plan

CP, a non-settling defendant, contested the sanctioning of the amended plan by the Court at the sanction hearing, on the basis that the plan unfairly prejudiced non-settling parties. CP's contestation was based on the following:

- the CCAA court sitting under the CCAA does not have the jurisdiction to sanction a "plan" that does not propose a compromise or arrangement between a CCAA debtor and its creditors;
- alternatively, the CCAA court does not have jurisdiction under the CCAA to sanction a release in favour of a solvent third party that is not "reasonably related to the restructuring" of the CCAA debtor;
- alternatively, the CCAA court does not have jurisdiction to sanction a "plan" containing releases in favour of third parties not related to the resolution of claims against the insolvent debtor, *ie* claims against the debtor are not contemplated by the plan, and such plan confers no benefit to the debtor;
- the amended plan is unreasonable, unfair and inequitable to non-settling parties, namely that non-settling parties' substantive rights would be stripped by the amended plan. Indeed, the amended plan would extinguish contractual rights between solvent third parties who have nothing to do with the insolvent debtor.⁹⁴

⁹⁴ Argumentation Plan pursuant to the Objection of Canadian Pacific Railway Company to the Plan of Arrangement, 5 June 2015, SC 450-11-000167-134; certain arguments were also raised separately at the sanction hearing.

At the heart of CP's arguments was the fact that MMAC, the insolvent debtor, was unaffected by the amended plan. Indeed, the *CCA* was used to settle litigation related to the derailment and to issue injunctions, which were in no way related to the restructuring of MMAC. It was argued that the third-party releases included in the amended plan did not satisfy the required nexus test that had been applied by every Canadian *CCA* court since the *ABCP* decision.

In CP's view, sanctioning such a plan would have constituted an improper use of the *CCA* to settle disputes between third parties and MMAC's creditors, which are not "inextricably connected to the restructuring process". In other words, CP argued that the release in favour of the third party must be a *means* to the *end* purpose of a compromise or arrangement between the insolvent *CCA* debtor and its creditors. The Court was called upon to ask itself the following question: to what plan are the releases contributing? In order to sanction such releases, it was argued that the court would have to answer that the plan would either allow the business activities to continue or its value to be maintained through an asset sale.

With the amended plan, if the releases and injunctions were removed, what would be left? It was argued that the releases must necessarily be a means to an end and not an end in itself.

iv. The plan sanction judgment

In a 53-page ruling dated 13 July 2015, Justice Dumas sanctioned the amended plan ("the plan sanction judgment").⁹⁵ Overall, the judgment deals briefly with the arguments raised in CP's contestation. There is little direct analysis dealing with the requirement for a *CCA* plan of arrangement to provide a release for the insolvent debtor.

A significant portion of the plan sanction judgment focuses on the possibility of using the *CCA* exclusively to liquidate a company. The appropriateness of using the *CCA* to liquidate

⁹⁵ *MM&A*, *supra* note 53.

a business was not, however, contested. Instead, it had been argued that it was not proper to use a plan to settle disputes between solvent parties, notably when the liquidation of MMAC had already been completed. At paragraphs 21 and 22 of the plan sanction judgment, Justice Dumas dismissed this argument, stating that “it is often the case that the restructuring is completed prior to the approval of the plan by the creditors.”

Apart from stating that the amended plan provides for “very broad releases”, the plan sanction judgment does not specifically address whether such broad releases are fair and reasonable. On the issue of the releases, the Court found that it has jurisdiction to grant such releases. However, there is little detail on how the releases in question are “reasonably related to the restructuring” of MMAC.

The crux of the plan sanction judgment lays at paragraphs 65 to 70, which reads as follows:

[65] In short, not only does the undersigned believe that the proposed plan is fair and reasonable, but retaining the arguments presented by CP would disrepute the public’s confidence towards the courts.

[66] In effect, for more than two years, the victims of the terrible Lac-Mégantic tragedy have deferred to the judicial process. For two years, all of the actions taken in the present file have been oriented towards the presentation of a plan of arrangement, which has been unanimously voted by the debtor’s creditors.

[67] Despite the limited judicial resources available, considerable resources were put to use in order to ensure that the victims of Lac-Mégantic obtain justice.

[68] The attorneys and the citizens of the districts of Mégantic, Saint-François and Bedford were aware of the judicial resources used in the Lac-Mégantic file could not be used by them.

[69] The use of these judicial resources had the effect of delaying other files.

[70] To frustrate the plan of arrangement today, for the sole benefit of a third party against which a class action has been authorized, while such

third party has been a part of the proceedings since the beginning, would be unfair and unreasonable.⁹⁶

v. *The motion for leave to appeal*

On 27 July 2015, CP filed a *Motion for leave to appeal* (“the leave motion”) from the plan sanction judgment.⁹⁷ In the leave motion, the following questions were raised as being central to the appeal:

- To what extent can the *CCAA* be used for the primary purpose of extinguishing the civil liability of solvent persons? The first question raises two subsidiary questions:
 - Can the court approve an arrangement that does not propose a “compromise or arrangement” between the debtor company and its creditors within the meaning of sections 4 and 5 of the *CCAA*?
 - Can the court approve an arrangement that releases third parties from civil and contractual liabilities without that release being necessary or even related to the restructuring of the “debtor company” within the meaning of the *CCAA*?
- To what extent can an arrangement under the *CCAA* affect the contractual rights between two solvent persons, and more specifically the obligation of one of those persons to indemnify the other person?⁹⁸

The following grounds were raised in the leave motion:

⁹⁶ *Ibid* at paras 65-70.

⁹⁷ *Motion for leave to appeal the Judgment of the Superior Court approving the Plan of Compromise and Arrangement*, dated 27 July 2015, CAM 500-09-025480-153.

⁹⁸ *Ibid* at 58.

- The *CCAA* court does not have jurisdiction to sanction a plan that does not propose a compromise or an arrangement between an insolvent person and its creditors.
- The *CCAA* court does not have jurisdiction to grant third-party releases that are not reasonably connected to the restructuring of the insolvent debtor.
- Releases and injunctions cannot extinguish the contractual rights between solvent third parties that have nothing to do with the debtor.⁹⁹

Subsequent to the filing of the leave motion, discussions took place between the interested parties. These discussions ultimately culminated in the withdrawal of the leave motion prior to it being heard by the Court of Appeal, in exchange for a variation of the plan sanction judgment. MMAC filed a *Motion to vary the Order approving the amended Plan of Compromise and Arrangement*, which was granted by the Justice Dumas.¹⁰⁰ Specifically, a number of judgment reduction provisions were inserted into the plan sanction judgment in order to neutralize the prejudice suffered by non-settling parties as a result of the releases and injunctions contained in the amended plan.¹⁰¹

vi. The judgment reduction provisions

In exchange for the withdrawal of the leave motion and CP's contestation in general, MMAC and the trustee in the Chapter 11 proceedings agreed to insert judgment reduction provisions into both the *CCAA* plan sanction judgment and the Chapter 11 plan of liquidation sanction order. The judgment reduction

⁹⁹ *Ibid* at 57.

¹⁰⁰ *Motion to vary the Order approving the amended Plan of Compromise and Arrangement*, dated 6 October 2015, CS 450-11-000167-134; *Order varying the Order approving the amended Plan of Compromise and Arrangement*, 9 October 2015, SC 450-11-000167-134 at paras 101.1 to 101.8.

¹⁰¹ *Ibid*.

provisions minimize the prejudicial effects that the plans may have on non-settling third parties' substantive rights.

Pursuant to these provisions, in the event of a judgment against a non-settling party in a case arising from the derailment, a non-settling party would receive a credit for the greater of:

- the settlement monies received by the plaintiff(s) for the claim; or
- the amount which, but for the third party non-debtor injunctions, a non-settling party would have been entitled to obtain from third parties other than MMAR and MMAC through contribution or indemnification.

The judgment reduction provisions were sanctioned by the Superior Court of Québec on 9 October 2015 in an *Order varying the Order approving the amended Plan of Compromise and Arrangement*.

5. The Takeaway

The MMAC *CCAA* proceeding will surely have an impact on how complex litigation involving multiple parties, proceedings, fora, and jurisdictions are dealt with by insolvency practitioners and the courts exercising their jurisdiction under the *CCAA*.

A direct consequence of the MMAC *CCAA* proceeding is that the *CCAA* may become a one-stop shop, offering all the tools to resolve complex litigation efficiently in a single forum. This “newfangled” characterization of the *CCAA* proceeding may be particularly true considering that the insolvency of the *CCAA* debtor is seemingly irrelevant and has taken a back-seat to maximizing recovery for creditors. Indeed, it now appears that a plan of arrangement or compromise need not actually procure any benefit to the insolvent debtor.

It is clear that the flexible nature of the *CCAA* and the broad discretion of the *CCAA* courts offer many advantages that are simply unavailable in other fora.

IV. BENEFITS OF CHOOSING THE *CCAA* AS A ONE-STOP SHOP

The recovery achieved by insolvency professionals for creditors in the MMAC *CCAA* proceeding is unprecedented. This result almost certainly could not have been achieved outside of an insolvency context. Indeed, the flexibility of the *CCAA* and the tools available are simply not available in any other forum. These tools include: (i) broad releases; (ii) injunctions and bar orders; (iii) stay of proceedings in favour of third parties; (iv) claims process with a bar date; and, (v) no opt-outs, *ie*, the ability to impose a settlement of all claims if the required voting threshold is attained and to impose a settlement on parties that would not be included in the defined class of plaintiffs.

1. Broad Releases in Favour of Third Parties

As evidenced by the MMAC plan of arrangement, as well as other arrangements across Canada, the scope of releases in favour of third parties can be extremely broad. In the MMAC matter, settling third parties have been released from all claims of any kind whatsoever, in any jurisdiction, which are related to a specific event, the derailment. This release was also granted and sanctioned in the context of the US Chapter 11 proceedings and the Chapter 15 proceedings.

Concretely, the release contained in the *CCAA* plan simultaneously released a settling party from any potential liability stemming from (i) the Québec class action; (ii) all litigation in the US related to the derailment; and, (iii) any cost recovery claim by the Québec government in respect to the clean-up of the derailment. Therefore, instead of having to settle multiple proceedings in multiple jurisdictions, the *CCAA*

plan allowed for the matter to be settled in a single forum. As discussed above, the scope of the release included in the amended plan is so broad that it even extends to contractual indemnities between solvent third parties. To achieve the same result through traditional litigation avenues, a settling party would be required to reach settlements in various fora with multiple parties.

The extensive releases available in the *CCAA* are simply not available in other fora. For example, the release granted in the context of a class action would only include a release from the members of the class. Therefore, any “opt-outs” from the settlement or non-members of the class could potentially assert claims against the settling party following a settlement reached in the class action context.

The broad, singular and all-encompassing release available in the context of the *CCAA* proceeding will surely be attractive to many insolvency and dispute resolution professionals seeking to achieve a global resolution to complex litigation.

2. Injunction/Bar Orders

The Lac-Mégantic *CCAA* proceeding appears, at least until the question is put before an appellate court, to quell any concern that a bar order cannot be granted in Québec. Bar orders have now become part of regular practice in the *CCAA* proceedings that involve the settlement of litigation. Indeed, in addition to the broad releases, the amended plan also features injunctions or bar orders that prohibit any present and future claims relating in any way whatsoever from being made against third parties benefitting from a release under the amended plan. These injunctions or bar orders are indispensable to the settling parties as they immediately eliminate the threat of any future litigation stemming from claims for which they received a release. In the MMAC matter, all future litigation related in any way whatsoever to the derailment was prohibited by the injunctions contained in the amended plan.

There are two major advantages to the injunctions available in the *CCAA*, when compared to those available in the context of a class action: (i) the scope of the injunctions and (ii) the availability of the injunctions in Québec.

The concept of a bar order stems from the type of order typically issued in the context of the settlement of a multi-party class action in which a partial settlement is reached between the plaintiff and one or several co-defendants.¹⁰² The purpose of the bar order for the settling party is to ensure that it will not be sued again in the context of the same class action.¹⁰³ The bar order is usually a necessary consideration for settling party, otherwise there would be no interest in settling.¹⁰⁴

However, the current state of the law in Québec in civil proceedings is that bar orders, at least to the same extent that they are issued in the common law provinces,¹⁰⁵ are not permitted.¹⁰⁶ The legal basis for this difference in Québec is that the Québec *Code of Civil Procedure*¹⁰⁷ specifically prohibits the granting of an injunction (or bar order) to restrain legal proceedings:

513. An injunction cannot be granted to restrain judicial proceedings or the exercise of an office within a legal person established in the public interest or for a private interest, except in the cases described in article 329 of the *Civil Code*.

The Québec cases¹⁰⁸ that stand for the proposition that bar orders are not permitted seem to indicate, however, that bar orders in Québec may not always be needed given the provisions contained in the *Civil Code of Québec* that deal

102 *Roy c Cadbury Adams Inc*, 2010 QCCS 4454 (CS Que) at para 46 [Cadbury].

103 *Ibid* at para 47.

104 *Ibid*.

105 *Osmun v Cadbury Adams Canada Inc*, 2010 ONCA 841 (Ont CA); *Main v The Hershey Company*, 2011 BCCA 21 (BCCA).

106 *Cadbury*, *supra* note 102; *Johnson c Bayer Inc*, 2008 QCCS 4957 (CS Que).

107 *Code of Civil Procedure*, CQLR, c C-25.01.

108 *Supra* note 108.

with joint and several liability, which have been interpreted as precluding plaintiffs from claiming from the non-settling defendants damages that are attributable to the settling defendants' conduct.

The Court in the *Cadbury* matter actually accepted a *quasi* bar order in its approval of the partial settlement, which included the following conclusion: “DECLARES that any action in warranty or impleaded action, for contribution or indemnity from the Defendant Cadbury or Cadbury Releases, or relating to the Released Claims, is inadmissible and void under this class action” [translation].¹⁰⁹

These conclusions do not *per se* prohibit any action against the settling defendants, but instead, provide for the outcome of any future action that may be instituted against them in the context of the class action, *ie*, dismissal of such an action. The rationale is that these conclusions simply are declaratory of the existing legal rights of the parties as provided for under Québec law.

In light of the injunctions contained in the amended plan, which were subsequently sanctioned in the plan sanction judgment, the “bar order” appears to be permissible in the context of *CCA* proceedings in Québec.

3. Stay of Proceedings Can Be Extended to Third Parties

A key feature of the Lac-Mégantic *CCA* proceeding was the extension of the stay of proceedings to MMAC's liability insurer. The stay was granted in order to avoid judicial chaos that could result from claimants potentially asserting individual claims against the liability insurer. A stay of this nature is simply not available outside of the insolvency context.

¹⁰⁹ *Cadbury*, *supra* note 102 at para 36: “*DÉCLARE que tout recours en garantie ou autre mise en cause pour obtenir une contribution ou une indemnité de l'intimée Cadbury ou des parties Cadbury Quittancées/ Cadbury Releasees, ou se rapportant aux Réclamations quittancées/ Released Claims, est irrecevable et non avenu dans le cadre du présent recours collectif.*”

Relying on the Lac-Mégantic *CCAA* precedent, the Court in the Castor Holdings *CCAA* proceeding also extended the stay of proceedings to third party liability insurers.¹¹⁰

4. Claims Process with a Bar Date

Another considerable advantage to resolving a complex dispute through the *CCAA* is the implementation of a claims process with a bar date. Indeed, the claims process is a powerful tool that allows a debtor to put in place an efficient mechanism to ascertain the nature, extent and scope of the claims against it in a timely manner.

A “drop-dead” date, otherwise known as a bar date, forces creditors to come forward immediately and assert their claims. The *CCAA* therefore allows for the drastic shortening of prescribed limitation or prescription periods under various provincial laws. Such limitation or prescription periods may range between one and ten years.

5. No Opt-Outs

Finally, maybe the most significant advantage of the *CCAA* is that all creditors must participate. In other words, there are no “opt-outs” in the *CCAA*. In the Sino-Forest case, Justice Morawetz of the Superior Court of Justice of Ontario confirmed that no opt-outs are available under the *CCAA*:

[36] The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no “opt-outs” in the CCAA.¹¹¹

A settlement or global resolution can therefore be forced on all creditors as long as the statutory majority of votes are

¹¹⁰ *Re 4519922 Canada Inc*, 2015 ONSC 124 (Ont SCJ [Commercial List]) at paras 71-72 [4519922 Canada].

¹¹¹ *Eastern Forest*, *supra* note 10 at para 36.

obtained. A creditor who votes “no” in the context of a plan that is approved by the statutory majority of creditors remains bound by the plan.

The “no opt-out” in the *CCAA* contrasts greatly with the opt-out or “opt-in” provisions in the context of class action proceedings in Canada.¹¹² Indeed, claimants in the context of class actions are never forced to remain part of a class and can elect to be excluded from a settlement.

The new paradigm established by the Lac-Mégantic *CCAA* matter is already reverberating throughout the insolvency world. Indeed, the Lac-Mégantic settlement model was used by insolvency practitioners to bring a swift end to the litigation relating to Castor Holdings Limited (“Castor”) that embroiled Coopers & Lybrand Chartered Accountants (“CLCA”) and individual partners for over 20 years (“the Castor litigation”). In the CLCA *CCAA* matter, the ability to “force” a settlement upon dissenting creditors was front and centre. Ultimately, like in the Lac-Mégantic *CCAA* matter, the dissenting voices of individual creditors were simply not enough to overcome the collective economic and social benefits resulting from a global resolution of over 20 years’ worth of litigation.

V. THE NEW PARADIGM — THE END TO THE CASTOR HOLDINGS SAGA

1. Overview of the Castor Litigation

The Castor litigation dated back to 1993, when 96 plaintiffs commenced negligence actions against CLCA and 311 individual partners, claiming approximately CAD \$1 billion in damages.¹¹³ The claims stemmed from financial statements prepared and audited by CLCA, as well as certain share

112 See for example: *Code of Civil Procedure* (Québec), C-25.01, article 580; *Class Proceedings Act* (British Columbia), RSBC 1996, c 50, s 16(1)(2); *Class Proceedings Act* (Ontario), 1992, SO 1992, c 6, s 6; *Class Proceedings Act* (Alberta), SA 2003, C 16.5, s 17 and s 17.1.

113 4519922 *Canada*, *supra* note 109 at para 10.

valuation letters and certificates for “legal for life” opinions.¹¹⁴ The claims were for losses relating to investments in or loans made to Castor in the period 1988 to 1991.¹¹⁵ A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

As a result of the commonality of the negligence issues raised in the various actions, it was decided that a single test case, the action brought by Peter Widdrington (“the Widdrington action”), would proceed to trial and all other actions in the Castor litigation would be stayed pending the outcome of the trial.¹¹⁶ The determination of the issues of negligence and applicable law in the Widdrington action was to be binding on all other cases.¹¹⁷

In April 2011, Madam Justice St-Pierre of the Superior Court of Québec ruled that Castor’s audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to Castor during that period.¹¹⁸ Madam Justice St-Pierre found that the overwhelmingly majority of CLCA’s partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.¹¹⁹

The Québec Court of Appeal upheld the Superior Court ruling in large part, except in respect of the nature of CLCA’s individual partners’ potential liability. The Québec Court of Appeal held that under Québec law, the individual partners were severally liable.¹²⁰

The Widdrington action resulted in a judgment in the amount of \$4,978,897.51, inclusive of interest, a cost award in

114 *Ibid* at para 12.

115 *Ibid*.

116 *Ibid*.

117 *Ibid*.

118 *Ibid* at para 13.

119 *Ibid*.

120 *Ibid*.

the amount of \$15,896,297.26 plus interest, a special fee cost award in the amount of \$2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.¹²¹

Following the ruling on the Widdrington action, 26 separate actions representing 40 claims remained outstanding, which were claiming more than \$1.5 billion in damages.¹²² The Castor litigation also gave rise to the following proceedings:¹²³

- a challenge by Castor's trustee in bankruptcy to the transfer of CLCA's business to PwC;
- action brought against 51 insurers of CLCA; and
- eight Paulian actions brought in Québec, challenging transactions made by certain partners with related parties.

The fees incurred in defence of the Widdrington action exceeded CAD \$70 million and the total spent by all parties amounted to at least CAD \$150 million.¹²⁴

2. The Mediation

As a result of the ruling by Québec Court of Appeal, the potential liability of partners of CLCA became a real possibility.¹²⁵ Between September and October 2014, various parties involved in the Castor litigation attended mediation sessions.¹²⁶ While a settlement was not reached during the mediation, the negotiations with certain parties were fruitful.¹²⁷ The table was therefore set for what would

121 *Ibid* at para 16.

122 *Ibid* at para 17.

123 *Ibid* at para 18.

124 *Ibid* at para 20.

125 *Ibid* at para 50.

126 *Ibid* at para 51.

127 *Ibid* at para 52.

become the *CCAA* proceeding aimed at achieving a global resolution of the Castor litigation.

3. The *CCAA* Proceedings

On 7 January 2015, Justice Newbould of the Superior Court of Justice of Ontario, Commercial List, granted 4519922 Canada Inc's ("451") application for an initial order under the *CCAA*.¹²⁸ CLCA is a partnership governed by the *Partnerships Act* (Ontario) and 451 is one of two partners of CLCA.¹²⁹ Pursuant to the initial order, a stay of the Castor litigation was ordered, which extended to 451's partner, CLCA and to CLCA's insurers.¹³⁰ The requested relief under the *CCAA* was supported by Canadian and German banks, which were plaintiffs in the Québec proceedings, by the Widdrington estate, by the insurers of CLCA, and by 22 former CLCA partners.

There was little doubt in respect of the exclusive purpose of the *CCAA* proceeding: a global resolution of all the outstanding Castor litigation. Indeed, a plan of arrangement term sheet filed in support of the application for an initial order stipulated that a settlement fund would be funded by potentially liable third parties and, in exchange for their contributions, such third parties would receive a court-approved full and final release from and bar order against any and all claims related to the Castor litigation. It was also clear from the outset that this "pre-packaged" *CCAA* proceeding had the required statutory majorities of creditor approval.

As in the Lac-Mégantic case, the intended use of the *CCAA* plan of arrangement was as a tool to achieve the global

128 It should be noted that the judgment granting the initial order predates the plan sanction judgment in the Lac-Mégantic *CCAA* proceeding.

129 *4519922 Canada*, *supra* note 109 at para 5.

130 *4519922 Canada*, *supra* note 109 at para 71. Justice Newbould relied on precedent established in the Lac-Mégantic *CCAA* matter.

resolution of the complex litigation involving multiple parties in multiple fora.¹³¹

Chrysler Canada (“Chrysler”), a significant creditor of CLCA, opposed the requested relief and was provided with an opportunity to make submissions in support of its contestation. Chrysler argued that 451 had not established that it was insolvent. Chrysler also argued that even if the technical requirements of the *CCAA* were met, the Court should have refused the application since neither 451 nor CLCA were carrying on any business and there was no need for a *CCAA* proceeding to effect a sale of any assets as a going concern.¹³² As was argued by CP in the Lac-Mégantic case, Chrysler argued that the *CCAA* was being used for an improper purpose as there would be no restructuring of a business. In rejecting the arguments raised by Chrysler, Justice Newbould stated the following:

[40] Cases under the *CCAA* have progressed since the earlier cases such as *Hongkong Bank v Chef Ready Foods* (1990), 1990 CanLII 529 (BC CA), 4 CBR (3d) 311 which expressed the purpose of the *CCAA* to be to permit insolvent companies to emerge and continue in business. The *CCAA* is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc, Re*, 2012 ONSC 1299 (CanLII) at para 33 (per Brown J as he then was). There are numerous cases in which *CCAA* proceedings were permitted without any business being conducted.

[41] To cite a few, in *Muscletech Research and Development Inc (Re)* (2006), 2006 CanLII 1020 (ON SC), 19 CBR (5th) 54 the applicants sought relief under the *CCAA* principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the *CCAA* application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Re)*, 2013 QCCS 3777 (CanLII) arising out of the Lac-Mégantic train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the *CCAA* proceedings. The *CCAA* proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp.*

131 One significant difference between the Lac-Mégantic *CCAA* plan is that the debtor 451 did, in fact, benefit from a release in the context of the plan.

132 *4519922 Canada*, *supra* note 109 at para 39.

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(*Re*) 2011 ONSC 7701 (CanLII), 2011 ONSC 7701 (Comm. List) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

[...]

[54] The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It is also intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Without a stay, such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan would succeed. See *Re Lehndorff General Partner Ltd* (1993), 17 CBR (3d) 24 per Farley J.

[55] In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a possibility is the case of *Re Montreal, Maine & Atlantique Canada Co* which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc, Re*.

[...]

[65] Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

1 Time has come to put an end to the longest running judicial saga in the legal history of Québec and Canada.

[66] At the conclusion of her decision, she stated:

3637 Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to remember that litigating all the other files is only one of multiple options. Now that the

litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

[67] In my view the *CCAA* is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the *CCAA* application is dismissed.¹³³

Ultimately, the plan of arrangement and compromise was approved by the creditors and sanctioned by Justice Newbould, thereby bringing an end to the Castor Holdings saga.¹³⁴

VI. CONCLUSION

The most important takeaway from the present article is that it is now abundantly clear that new paradigm is available in the use of *CCAA* proceedings, which has allowed for some proceedings that have little connection with the insolvency of the *CCAA* debtor. Instead, the *CCAA* proceeding is being used as a forum and the plan of arrangement or compromise as a tool to achieve global resolutions of litigation involving multiple parties, in multiple fora and across various jurisdictions.

The *CCAA* proceeding may become the preferred forum because it offers advantages and protections that do not exist or are illegal in other, more traditional fora. Such advantages are available for both plaintiff/creditors and potentially liable third-party defendants. Indeed, as long as one group of creditors can garner enough support to attain the statutory majorities, it can “force” a settlement on those creditors that are opposed to such a settlement. In other words, a creditor cannot opt-out of the settlement in the *CCAA* forum. As explained hereinabove, defendants notably benefit from the comprehensive releases and all-encompassing bar orders.

Sitting at the cross-roads between the interests of individual stakeholders and the collective interests of a majority of

¹³³ *Ibid* at paras 40, 41, 54, 55, 66, and 67.

¹³⁴ *Re 4519922 Canada Inc*, *supra* note 8.

stakeholders, courts sitting under the *CCAA* have almost universally favoured the interests of the latter group. Courts are certainly cognizant that achieving a similar global resolution outside of the *CCAA* proceeding is simply not possible. Until there is another forum or tool available that could deliver similar, immediate and all-encompassing collective, economic and social advantages to the majority of stakeholders, without the consent of all stakeholders involved, it is likely that courts across the country will continue to sanction *CCAA* plans, which bring an immediate global resolution to complex multi-party litigation.

In the Supreme Court of Canada decision in *Century Services*, Canada's highest Court stated that the "the single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt".¹³⁵ In the pursuit of the same efficiency and order praised by the Supreme Court of Canada, it now appears possible to use the *CCAA* single proceeding model to resolve complex multi-jurisdictional litigation and to avoid this potential chaos and inefficiency even if it requires ignoring

135 *Century Services*, *supra* note 10 at para 22:

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*: "They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors." The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

the primary purpose of the *CCAA*. In other words, the word “insolvency” could be removed from the above Supreme Court citation to instead read “the single proceeding model avoids the inefficiency and chaos that would attend... if each creditor initiated proceedings to recover its debt”.

Without any intervention from either the courts or Parliament, it would not be surprising to see *CCAA* proceedings continue to replace the traditional methods of settlements of major class actions involving multiple defendants. The tools available and the discretion of the courts in the traditional fora simply cannot compete with those available under the *CCAA*. It appears that the only downside to proceeding by way of the *CCAA* is the additional delays and costs that may be involved. However, such an investment in time and costs will likely be worth it given the broad protection a settling defendant will receive from a settlement reached in the *CCAA* context.

Given the current state of the law, in the context of significant or “bet the farm” litigation that involves at least one insolvent party, the new *CCAA* resolution paradigm will most likely be the low-hanging fruit on the insolvency practitioner’s decision tree.¹³⁶ The creativity of insolvency professionals in recent *CCAA* proceedings and the overwhelmingly approval of such creativity by *CCAA* courts

136 The authors of this article are currently involved in the settlement of a significant class action in Québec in which the pre-packaged *CCAA* settlement method is being used. Indeed, on 1 December 2016, Justice Jean-François Buffoni issued (i) an initial order under the *CCAA*, (ii) an order approving the filing of a plan of arrangement, and (iii) a representation order in *In the Matter of the Plan of Compromise or Arrangement of Mount Real Corporation et al*, SC 500-11-0517410169. The sole purpose of the *CCAA* proceeding in this matter was to effect a settlement of all potential claims against potentially liable third parties stemming from a Ponzi scheme perpetrated by the *CCAA* debtors, including claims in the class action instituted in the Superior Court of Québec, file no 500-06-000453-080.

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across Canada indicate that the use of the *CCAA* has already and will likely continue to extend “beyond infinity”.