Whose Restructuring is it Anyway?

The Disconnect Between Third-Party Releases and the *CCAA*'s Restructuring Purpose

INSOLVENCY INSTITUTE OF CANADA

LAW STUDENT WRITING AWARD PROGRAM 2017

Dylan Gibbs
University of Alberta

I. OVERVIEW **1**

II. THIRD-PARTY RELEASES: RATIONALE, JURISDICTION, AND CONCERNS **1**

III. DISTANCING FROM THE *CCAA*'S RESTRUCTURING PURPOSE **5**

A. Global resolution of litigation in *Muscletech* **6**

B. The Montreal, Maine & Atlantic restructuring **7**

C. Further expansion of third-party releases in *Re 4519922 Canada Inc* **9**

IV. CONCLUSION **10**

V. BIBLIOGRAPHY OF AUTHORITIES **12**

I. OVERVIEW

When sanctioning a plan of arrangement under the *Companies' Creditors Arrangement Act*,[1] courts have jurisdiction to release claims that creditors hold against persons other than the insolvent debtor.[2] These releases are typically granted in exchange for a third party's financial contribution to the plan, resulting in a larger pool of assets to distribute among creditors. Though the Ontario Court of Appeal's leading test for sanctioning such releases contemplates their use only where it will facilitate a successful restructuring,[3] several cases have, without acknowledgment, departed from this restructuring focus. Courts have sanctioned plans of arrangement under the *CCAA* solely to resolve complex litigation by releasing third-party claims.

Given that the *CCAA*'s tools and procedures were designed to rescue insolvent debtors, using those same mechanisms to resolve claims against solvent defendants raises unique considerations that have yet to be fully considered. This paper argues that plans of arrangement designed to resolve complex litigation are inconsistent with the jurisdiction to grant third-party releases described by the Ontario Court of Appeal in *Metcalfe*, and, consequently, with the purposes and objectives of the *CCAA*.

What follows in Part II is a discussion of courts' jurisdiction to grant third-party releases under the *CCAA*, as well as the need for third-party releases and concerns arising from their use. Cases where courts have granted third-party releases with no clear restructuring purpose are discussed in Part III, and Part IV concludes by commenting on this development.

II. THIRD-PARTY RELEASES: RATIONALE, JURISDICTION, AND CONCERNS

The primary purpose of the *CCAA* is to allow insolvent companies to restructure and survive insolvency.[4] By enabling companies to continue business operations, the *CCAA* is intended to

---

[1] RSC 1985, c C-36 [*CCAA*].

[2] These types of releases have also been granted through restructuring proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3: see *Re Kitchener Frame Ltd*, 2012 ONSC 234. This paper focuses on particularly exceptional cases which have taken place under the *CCAA*.

[3] *Metcalfe & Mansfield Alternative Investments II Corp* 2008 ONCA 587 [*Metcalfe*]. The link between *Metcalfe*'s test and a debtor's restructuring is set out in Part II, below.

[4] See *Reference Re Companies' Creditors Arrangement Act*, [1934] SCR 659 at 661 [*Reference Re CCAA*] ("the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company"). See also Dr Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 13-14 [Sarra, "Rescue"]; Roderick J Wood, *Bankruptcy & Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 337-38 [Wood, "Bankruptcy"]; Alfonso Nocilla, "The History of the

avoid both the social and economic consequences of liquidation.[5] Concurrently, the *CCAA* looks to maximize value for creditors and protect the public interest, recognizing that proceedings under the *CCAA* can have substantial benefits over its alternatives, for various stakeholders.[6]

To accomplish these objectives, it is necessary to reach compromises under which creditors agree to give up their existing claims against debtor corporations. More controversially, some plans of arrangement will seek to release claims that creditors hold against non-debtor third parties.[7] The Ontario Court of Appeal's decision in *Metcalfe* largely settled this controversy, by outlining a framework that links the use of third-party releases to the scheme and purpose of the *CCAA*. The Court's decision acknowledges that such releases can be used as a valuable tool to facilitate effective restructurings.

The Court in *Metcalfe* held that jurisdiction to grant third-party releases originates from the flexible nature and remedial purpose of the *CCAA*.[8] The Court held that the words "compromise" and "arrangement", found in the full title of the Act, are broad enough to encompass plans that release non-debtor third parties.[9] The Court also stated, however, that not all such releases are justifiable. Third-party releases are appropriate where there is a "reasonable connection," or nexus, "between the third-party claim being compromised in the plan and the restructuring achieved by the plan."[10] According to the Court, the existence of the required nexus is established by assessing whether:

> (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;

Companies' Creditors Arrangement Act and the Future of Restructuring Law in Canada" (2014) 56:1 Can Bus LJ 73 at 86-88.

[5] *Century Services v Canada (AG)*, 2010 SCC 60 at para 15. However, and though it remains somewhat controversial, the *CCAA* has been used increasingly for liquidation: see Wood, "Bankruptcy" *ibid* at 337, 341-43; Roderick J Wood, "Rescue and Liquidation in Restructuring Law" (2013) 53:3 Can Bus LJ 407 at 413-14 [Wood, "Rescue and Liquidation"]; Nocilla, *ibid* at 86-88, 90-91.

[6] Sarra, "Rescue", *supra* note 4 at 13-14; Wood, "Bankruptcy", *supra* note 4 at 339-41.

[7] At one time, it was unclear whether courts had jurisdiction to sanction plans of arrangement containing third-party releases. Some courts held that such arrangements were permitted because the *CCAA* does not expressly prohibit them (see e.g. *Re Canadian Airlines Corp*, 2000 ABQB 442 at para 92), while other courts held that granting such releases would require express legislative authorization (see e.g. *Michaud v Steinberg*, [1993] RJQ 1684 (CA)).

[8] *Metcalfe*, *supra* note 3 at para 43.

[9] *Ibid* at para 61.

[10] *Ibid* at para 70.

> (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan; and
> (e) the plan will benefit not only the debtor companies but [creditors] generally.[11]

These considerations stress that third-party releases are justified only where they are necessary to facilitate the successful restructuring of an insolvent debtor. In other words, where releasing a third party is necessary either to rescue the debtor company, or to successfully sell the debtor's business as a going concern.[12] Circumstances where third-party releases may facilitate restructuring include: where the released parties have significant claims against the debtor's assets;[13] and where claims against a third party are linked to claims against the debtor through contribution or indemnity.[14]

Requiring third-party releases to facilitate the debtor's restructuring links their use to the *CCAA*'s purpose of addressing insolvency. This requirement also aligns with section 5.1 of the *CCAA*, which expressly allows courts to release certain claims held against directors of a debtor company.[15] This provision was enacted to incentivize directors to stay with their insolvent company throughout restructuring proceedings, increasing the likelihood of a successful restructuring effort.[16]

Metcalfe was exceptional in that the insolvency to be restructured was the entire Canadian Asset-Backed Commercial Paper (ABCP) Market.[17] The restructuring objective was to preserve the value of ABCP notes as a going-concern, avoiding a wholesale liquidation of the underlying assets at

---

[11] *Ibid* at para 113.

[12] Though at one time "restructuring" in the context of *CCAA* proceedings exclusively meant preserving the debtor as a legal entity, the *CCAA* has increasingly been used to sell the debtor's business as a going concern: see *supra* note 5. This expansion of the *CCAA*'s applications blurs the distinction between rescuing an insolvent company and achieving realization for creditors from the debtor's assets; both objectives are now commonly referred to as forms of "restructuring": see Nocilla, *supra* note 4 at 91-92 citing David Bish, "The Plight of Receiverships in a CCAA World" (2013) 2 J Insolvency Institute Can 221.

[13] See e.g., *Metcalfe*, *supra* note 3 at para 55.

[14] See e.g., *Re Cline Mining Corp*, 2015 ONSC 622 at para 23.

[15] *CCAA*, *supra* note 1, s 5.1.

[16] Dr Janis P Sarra, ''Examining the Insolvency Toolkit: Report of the Public Meetings of the Canadian Commercial Insolvency Law System" (July 2012), online: <https://cairp.blob.core.windows.net/media/36354/04-file_Sarra_Examining_the_Insolvency_Toolkit_Report_Submitted.pdf> at 90 [Sarra, "Report"] citing Jean-Daniel Breton, "Reorganizations: Objectives Contemplated and Achieved by Legislative Changes Since 1992" in Dr Janis P Sarra, ed, *Annual Review of Insolvency Law 2003* (Toronto: Carswell, 2003) at 317-21.

[17] *Metcalfe*, *supra* note 3 at paras 53-55. For a detailed discussion of the *Metcalfe* restructuring, see Fred Myers & Alexa Abiscott, "Asset Backed Commercial Paper: Why the Courts Got It Right" (2009) 25:1 BFLR 5.

depressed prices.[18] The only way to accomplish this goal was for the contributing parties to forego their claims against the assets in exchange for releases.[19]

Though third-party releases will, in some cases, facilitate the *CCAA*'s objectives, their use also raises concerns. One of these concerns is the potential for abuse, given that third-party releases prejudice creditors' rights and can be forced on a dissenting minority under the *CCAA*.[20] As Justice Blair stated in *Metcalfe*, the dissenting minority is protected not only by the *CCAA*'s required "double majority" vote, but also by the court's assessment of whether a proposed plan is fair and reasonable.[21] For third-party releases, this assessment minimizes potential prejudice using the factors set out in *Metcalfe*, namely whether the released parties have made tangible contributions to the plan, and whether the plan benefits creditors generally. Courts have also considered whether releases are overly broad or offensive to public policy.[22]

Another concern with third-party releases, which has received less attention, is that they have the potential to stretch the *CCAA*'s applications beyond its intended purpose of restructuring an insolvent debtor.[23] This expansion is problematic, given that the extraordinary features of restructuring law, including the ability to bind dissenting creditors and the process for summarily determining claims, were designed to rescue an insolvent company.[24] The same mechanisms would not be available to solvent defendants in the ordinary course of litigation.[25]

---

[18] *Metcalfe, ibid* at paras 20, 72.

[19] *Ibid* at para 55.

[20] Sarra, "Rescue", *supra* note 4 at 148, 153-54; Adam C Maerov, Tushara Weerasooriya & Ahsan Mirza, "The Use of Releases in CCAA Restructuring Proceedings: How Wide is the Net?" (Paper delivered at the OBA Institute of Continuing Professional Development, 3-5 February 2011), online: <http://www.mcmillan.ca/The-Use-of-Releases-in-CCAA-Restructuring-Proceedings-How-Wide-is-the-Net> at 23-24.

[21] *Metcalfe, supra* note 3 at para 68.

[22] *Re Nortel Networks Corporation*, 2010 ONSC 1708 at para 79; *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078 at para 65 [*Sino-Forest*].

[23] This same concern has been raised in relation to liquidating *CCAA* proceedings: see Nocilla, *supra* note 4 at 88; Wood, "Rescue and Liquidation", *supra* note 5 at 413-414. It is worth noting, however, that liquidating *CCAA*s and traditional restructuring proceedings both focus on the debtor's assets and existing state of insolvency. As discussed in Part III, below, the *CCAA* has been expanded even further by cases which use its protections to resolve complex litigation against solvent defendants.

[24] Wood, "Rescue and Liquidation", *supra* note 5 at 413.

[25] As Wood notes, the flexibility of the *CCAA* comes, in part, from the diminution of the private law rights of third parties (*ibid*). See also Alain Riendeau & Brandon Farber, "Using the CCAA to Achieve a Global Resolution of Complex Litigation 'To Infinity and Beyond!' - Buzz Lightyear, Toy Story" in Dr Janis P Sarra & Barbara Romaine, eds, Annual Review of Insolvency Law 2016 (Toronto: Carswell, 2016) 763 at 800-81 ("[t]he '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.").

This concern, like the first, is guarded against by *Metcalfe*'s nexus test. Based on *Metcalfe*, jurisdiction to grant third-party releases exists only where there is a rational connection between the "claim being compromised in the plan and the *restructuring achieved by the plan*."[26] As outlined below, however, some cases have disregarded *Metcalfe*'s emphasis on the debtor's restructuring. Instead, *CCAA* proceedings have been used for the express purpose of resolving litigation against solvent defendants.[27]

III. DISTANCING FROM THE *CCAA*'S RESTRUCTURING PURPOSE

Some have expressed concerns, since *Metcalfe*, over the widespread use of third-party releases. Justice Pepall stated in *Re Canwest Global Communications Corp.* that third-party releases "should not be requested or granted as a matter of course."[28] Janis Sarra suggests, however, that courts are too quick to approve third-party releases by finding that they are necessary to the success of a plan.[29] One explanation for this willingness to approve third-party releases is a shift in focus from *Metcalfe's* nexus test.

While referring to *Metcalfe*, some cases have focused only on whether releases are necessary to the purposes of the plan, rather than determining whether they are necessary to the debtor's restructuring.[30] To conclude that releases are necessary to the plan, these cases emphasize that the

---

[26] *Supra* note 3 at para 70 [emphasis added].

[27] See Riendeau & Farber, *supra* note 25 at 808 ("it now appears possible to use the *CCAA* single proceeding model to resolve complex multi-jurisdictional litigation … even if it requires ignoring the primary purpose of the *CCAA*"). Riendeau and Farber conclude that it is "now abundantly clear that [this] new paradigm is available in the use of *CCAA* proceedings" (at 807). As long as *Metcalfe* continues to be adopted as the leading test for approving third-party releases, however, it is important to consider whether this new paradigm is consistent with the test. As set out below, the decided cases have yet to provide any detailed discussion of whether courts have jurisdiction to sanction plans when there is no restructuring purpose.

[28] 2010 ONSC 4209 at para 29.

[29] Sarra, "Report", *supra* note 16 at 92-93.

[30] *Re 4519922 Canada Inc*, 2015 ONSC 4648 at paras 36-37 [*4519922*]; *Re Montreal Maine & Atlantic City Co*, 2015 QCCS 3235 at para 48 [*MMA*]. Perhaps coincidentally, some courts have provided an incomplete list of factors when citing *Metcalfe*, omitting any consideration of whether the parties to be released are necessary to the restructuring: see e.g. *Sino-Forest*, *supra* note 22 at para 50 citing *Metcalfe*, *supra* note 3 at para 70 ("[a]pplying [the] 'nexus test' requires consideration of the following factors: (a) Are the claims to be released rationally related to the *purpose of the plan*? (b) Are the claims to be released necessary for the plan of arrangement? (c) Are the parties who have claims released against them contributing in a tangible and realistic way? and (d) Will the plan benefit the debtor and the creditors generally?" [emphasis added]); *Re The Cash Store Financial Services Inc*, 2015 ONSC 7538 at para 15; *4519922* at para 36.

purpose of the plan is to fund a settlement in exchange for releases.[31] Not only does this result in a circular analysis which will always lead to a finding of necessity, it is also inconsistent with *Metcalfe*'s requirement that third-party releases be rationally connected to a plan which *achieves* a restructuring.[32]

The cases discussed below place a primary emphasis on whether the released parties have contributed in a way that increases the amount creditors would receive through bankruptcy proceedings.[33] This form of analysis changes the objective of *CCAA* proceedings from resolving the debtor's insolvency to achieving immediate realization for creditors.[34]

A. Global resolution of litigation in *Muscletech*

In *Muscletech*, *CCAA* protection was sought "principally as a means of achieving a global resolution of the large number of product liability and other lawsuits" relating to products marketed by the Muscletech group of companies ("Muscletech").[35] In addition to Muscletech, the litigation involved other solvent defendants outside of the Muscletech corporate family. At the time of the initial order, Muscletech had no assets, no employees, and no ongoing business.[36] As the debtor had no assets to contribute, the funds to be distributed in the plan were contributed by the solvent defendants in exchange for releases from all claims relating to "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by [Muscletech]."[37]

Though *Muscletech* predated *Metcalfe*, the Court, in approving the requested releases, focused on the contributions provided by the released parties and the necessity of the releases to the success

---

[31] *4519922*, *ibid* at para 37 ("release of the defendants or potential defendants in the … litigation is the whole purpose of the Plan."); *MMA*, *ibid* at para 19.

[32] *Metcalfe*, *supra* note 3 at para 70.

[33] *Re Muscletech Research and Development Inc*, 30 CBR (5th) 59 (Ont SC) at para 19 [*Muscletech*]; *MMA*, *supra* note 30 at para 76; *4519922*, *supra* note 30 at para 37.

[34] While maximizing value for creditors is one of the *CCAA*'s objectives, this has traditionally referred to the value obtained from the debtor's assets. Even liquidating *CCAA* proceedings, which are not concerned with preserving the debtor entity, seek to maximize the value of the *debtor's* assets by liquidating in the most efficient forum: see Wood, "Bankruptcy", *supra* note 4 at 339-41. In contrast, cases discussed below, which use the *CCAA* to resolve litigation, compare the amount that creditors would obtain from the debtor's assets in bankruptcy to the amount that creditors can obtain from third-party assets through the *CCAA*.

[35] *Re Muscletech Research and Development Inc*, 25 CBR (5th) 231 at para 1 (Ont SC) [*Muscletech* Interim Order].

[36] *Ibid*.

[37] *Muscletech*, *supra* note 33 at para 23.

of the plan.[38] This has caused some commentators to suggest that *Muscletech* is consistent with *Metcalfe*'s nexus test.[39] Based on *Metcalfe*, however, third-party releases should receive approval only where they are necessary and essential to debtor's restructuring. This consideration focuses the analysis on whether the releases are required to address the debtor's state of insolvency. When a debtor company has sold all of its assets prior to presenting its plan of arrangement, the restructuring effort has already been completed, and third-party release are no longer essential to the restructuring. It is therefore difficult to reconcile *Metcalfe* with the outcome in *Muscletech*.

Subsequent cases, notwithstanding the nexus considerations in *Metcalfe*, have held that *Muscletech* demonstrates the availability of third-party releases where a company has no ongoing business and is using the *CCAA* primarily to resolve multi-party litigation.[40]

B. The Montreal, Maine & Atlantic restructuring

The restructuring of Montreal, Maine & Atlantic Co. Canada (MMA) provides a post-*Metcalfe* example of the *CCAA* being used to resolve complex litigation, rather than to restructure an insolvent debtor. The proceedings arose from a railway disaster on July 6, 2013, which took multiple lives and devastated the town of Lac-Mégantic, Quebec.[41] Those impacted by the accident had significant claims for damages against MMA and other solvent third-party defendants. MMA's $25 million insurance coverage was dwarfed in comparison to the company's liabilities.[42] Consequently, MMA sought protection under the *CCAA* and sold its business assets. Despite this asset sale, the Court allowed the *CCAA* proceedings to continue so that the parties could attempt to reach a comprehensive settlement of claims relating to the disaster.[43]

The result of the negotiations was a total settlement of $430 million for the accident's victims – far more than what would have been available through the insurance policy.[44] In comparison to

---

[38] *Muscletech*, *supra* note 33 at paras 20-21.
[39] See e.g., Kevin P McElcheran, *Commercial Insolvency in Canada*, 2nd ed (Markham, Ont: LexisNexis Canada, 2011) at para 5.390 (QL).
[40] *Re 4519922 Canada Inc*, 2015 ONSC 124 at para 40 [*4519922* Approval].
[41] *Re Montreal, Maine & Atlantic Canada Co*, 2014 QCCS 737 [*MMA* Stay Extension].
[42] In fact, the insurance would have been fully claimed by MMA's secured creditors: see *ibid* at paras 17, 42, 55. This would have left nothing for individuals with claims relating to wrongful death, personal injuries, and property damage.
[43] *Ibid* at paras 110-156.
[44] *MMA*, *supra* note 30 at para 12.

the amount of time it would have taken for the victims to see compensation through litigation against the solvent third-party defendants, the resolution was also achieved very quickly.

While the Court cited *Metcalfe*'s list of factors prior to sanctioning the plan, no substantial analysis was performed linking the facts of the case to the individual considerations.[45] Citing *Muscletech*, the Court stated that the releases were essential to the plan because the third-parties were the only source of funding.[46] The Court also stressed the importance of obtaining justice for the victims of the Lac-Mégantic disaster, and the impact on public confidence in the courts that would come from denying a settlement at the final stage of a two-year process.[47]

Canadian Pacific Railway (CP), who challenged the releases, argued that the *CCAA* does not allow for plans of arrangement designed entirely to release third parties.[48] Despite its alignment with *Metcalfe*'s nexus test, the Court rejected this argument. The Court stated that MMA had already completed its restructuring by selling its assets under the protection of the *CCAA*, satisfying the restructuring requirement.[49] It is unclear, however, how third-party releases can be necessary and essential, as required by *Metcalfe*, to a restructuring that has already occurred. Much like the decision in *Muscletech*, the absence of any ongoing restructuring objective at the time of the arrangement makes it difficult to fit this decision within the nexus test.

The Court was also concerned with the timing of CP's objection. The only purpose for continuing *CCAA* proceedings after MMA sold its assets was to reach a comprehensive settlement.[50] Though CP was involved throughout, it did not challenge the extension of proceedings in response to the asset sale.[51] Significant resources were then invested in generating the plan.[52] Consequently, the Court held that it would be unreasonable to allow CP's challenge at the sanctioning stage.[53]

In *Muscletech*, the Court reached an opposite conclusion, stating that plans should be challenged at the sanction hearing once the provisions are fully developed.[54] This conclusion more closely

---

[45] *Ibid* at paras 45-48. See also Riendeau & Farber, *supra* note 25 at 791-92.
[46] *Ibid* at para 48.
[47] *Ibid* at paras 65-70.
[48] *Ibid* at para 20.
[49] *Ibid* at paras 21-25, 35-38.
[50] *MMA* Stay Extension, *supra* note 41 at paras 116-20.
[51] *MMA*, *supra* note 30 at paras 40-42.
[52] *Ibid* at paras 66-70.
[53] *Ibid* at paras 40-42, 70.
[54] *Muscletech* Interim Order, *supra* note 35 at para 11.

aligns with the view that the *CCAA* does not provide jurisdiction to sanction plans containing third-party releases, unless the required nexus exists within the fully developed plan.

While courts should be cautious of abandoning the third-party release analysis altogether, the Court's concern in *MMA* over wasted resources was justified, as was its decision to deny CP's challenge at the sanctioning stage. Regardless of whether the *CCAA* contemplates arrangements used to resolve ongoing litigation, the purpose of the *MMA* proceedings was clear when the Court extended the stay of proceedings.[55] Allowing parties to have the best of both worlds, by challenging a plan only after settlement negotiations break down, is not a realistic solution.

C. Further expansion of third-party releases in *Re 4519922 Canada Inc*

In the most recent approval of a *CCAA* plan created to achieve a global resolution of litigation claims, the Court cited *Muscletech* and *MMA* for the proposition that *CCAA* proceedings can take place when the debtor is not conducting any business.[56] *4519922* involved twenty years of drawn out litigation over the involvement of Coopers Lybrand Chartered Accountants (CLCA) in a real estate lender's collapse.[57] The litigation claims totaled $1.5 billion and were targeted at both CLCA and its former partners.[58] Soon after the incident that resulted in the litigation claims, all of the business assets of Coopers Lybrand were sold to Price Waterhouse, forming what is now Pricewaterhouse Coopers.[59]

At the time restructuring proceedings commenced under the *CCAA*, the only remaining partners in CLCA were two corporate entities tasked with winding up the litigation and CLCA's affairs.[60] One of those corporations was the *CCAA* applicant, 4519922 Canada Inc. (451). 451 was liable as a partner for costs of the ongoing litigation and the contingent $1.5 billion in claims, but its only asset was its $100 investment in CLCA.[61] The *CCAA* was used to resolve the outstanding litigation and "put an end to the longest running judicial saga in the legal history of Quebec and Canada."[62]

---

[55] *MMA* Stay Extension, *supra* note 41 at paras 116-20.
[56] *4519922* Approval, *supra* note 40 at para 41.
[57] *Ibid* at para 47.
[58] *Ibid* at paras 10-11.
[59] *Ibid* at para 8.
[60] *Ibid* at paras 8-9.
[61] *Ibid* at paras 33-34.
[62] *4519922*, *supra* note 30 at para 39.

As was the case in *MMA*, the Court in *4519922* focused on whether the releases were essential to the purpose of the plan. Stating that the parties receiving releases were making significant contributions to the plan, and that "[t]he release of the defendants or potential defendants … [was] the whole purpose of the Plan," the Court approved the releases.[63] Like the reasoning in *Muscletech* and *MMA*, this statement directly conflicts with *Metcalfe*'s assertion that third-party releases must be rationally connected to the "restructuring achieved by the plan."

4519922 expanded the use of third-party releases even further than the *MMA* restructuring. 451 was created for the express purpose of winding up CLCA and shouldering the costs of its ongoing litigation.[64] The liabilities incurred as a result then allowed it to use the *CCAA* to resolve claims against CLCA and CLCA's former partners. Moreover, a significant amount of time had already been spent attempting to resolve the litigation in question.[65] This is unlike *MMA*, where, without a compromise, victims of the disaster would have been in the early stages of attempting to receive compensation. Finally, while the litigation in *4519922* involved misconduct and significant claims for damages, there was nothing close to the amount of public interest that surrounded the Lac-Mégantic disaster, which played a role in sanctioning the *MMA* releases.

IV. CONCLUSION

Using the *CCAA* to resolve claims against third-parties can provide a significant benefit for the parties involved. The *MMA* restructuring provides an example of generating substantial payouts and preventing creditors from enduring years of litigation to obtain compensation. In that case, the *CCAA* allowed for a flexible resolution in response to an exceptional set of circumstances. As Jean-Daniel Breton has said about the *CCAA*'s flexibility, however, "[t]he solution obtained in a specific case is not the problem but rather the subsequent use, in different circumstances, of practices developed for resolving an exceptional situation."[66]

Resolving litigation against solvent defendants pushes the *CCAA* towards a primary goal of immediate realization for creditors, and away from its original purpose of "[dealing] with the

[63] *Ibid* at paras 37-38.
[64] *Ibid* at paras 8-9.
[65] *Ibid* at paras 2, 39.
[66] Breton, *supra* note 16.

existing condition of insolvency."[67] Though maximizing value for creditors is an objective of the *CCAA*, the value the Act seeks to maximize is that of the debtor's assets.[68] When the debtor has no assets to contribute to the plan of arrangement, creditors receive no value from the debtor regardless of whether bankruptcy or *CCAA* proceedings are undertaken. Creditors simply obtain compensation from third parties sooner than they would have through ordinary litigation.

The driving force behind this shift appears to be a desire to find an expedient solution and avoid the expense of ongoing litigation.[69] It is not clear that using a restructuring regime is the best way to address concerns over litigation inefficiencies. Using the *CCAA* to resolve such inefficiencies significantly alters the purpose of the Act, which, if desirable, should be addressed through legislative reform rather than judicial innovation.

Metcalfe's leading test for approving third-party releases clearly ties courts' jurisdiction to approve such releases to the *CCAA*'s restructuring purpose. The nexus test states that third-party releases must be necessary and essential to an insolvent debtor's restructuring, not merely necessary to achieve a global settlement of litigation. This test is sensible, given that the extraordinary powers and processes available under the *CCAA* were designed for restructuring. Determining claims summarily and forcing compromises on dissenting creditors are essential tools for restructuring an insolvent company, but they are not necessarily appropriate for settling claims against solvent third-parties. Courts should be wary of continuing to approve third-party releases without any restructuring purpose, particularly without providing a compelling justification that links such releases to the scheme and purpose of the *CCAA*.

[67] *Reference Re CCAA*, *supra* note 4 at 661.
[68] See Wood, "Bankruptcy", *supra* note 4 at 339-41.
[69] See e.g., *4519922*, *supra* note 30 at para 39 ("If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation."); *MMA* Stay Extension, *supra* note 41 at para 119.

V. BIBLIOGRAPHY OF AUTHORITIES

Legislation

Bankruptcy and Insolvency Act, RSC 1985, c B-3.

Companies Creditors Arrangement Act, RSC 1985, c C-36.

Jurisprudence

Century Services v Canada (AG), 2010 SCC 60.

Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation, 2013 ONSC 1078.

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

Michaud v Steinberg, [1993] RJQ 1684 (CA).

Re 4519922 Canada Inc, 2015 ONSC 4648.

Re 4519922 Canada Inc, 2015 ONSC 124.

Re Canadian Airlines Corp, 2000 ABQB 442.

Re Canwest Global Communications Corp, 2010 ONSC 4209.

Re Cline Mining Corp, 2015 ONSC 622.

Re Kitchener Frame Ltd, 2012 ONSC 234.

Re Montreal Maine & Atlantic City Co, 2015 QCCS 3235.

Re Montreal, Maine & Atlantic Canada Co, 2014 QCCS 737.

Re Muscletech Research and Development Inc, 25 CBR (5th) 231 (Ont SC).

Re Muscletech Research and Development Inc, 30 CBR (5th) 59 (Ont SC).

Re Nortel Networks Corporation, 2010 ONSC 1708.

Re The Cash Store Financial Services Inc, 2015 ONSC 7538.

Secondary Sources

Adam C Maerov, Tushara Weerasooriya & Ahsan Mirza, "The Use of Releases in CCAA Restructuring Proceedings: How Wide is the Net?" (Paper delivered at the OBA Institute of Continuing Professional Development, 3-5 February 2011), online: <http://www.mcmillan.ca/The-Use-of-Releases-in-CCAA-Restructuring-Proceedings-How-Wide-is-the-Net>.

Alain Riendeau & Brandon Farber, "Using the CCAA to Achieve a Global Resolution of Complex Litigation 'To Infinity and Beyond!' - Buzz Lightyear, Toy Story" in Dr Janis P Sarra & Barbara Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2016) 763.

Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Restructuring Law in Canada" (2014) 56:1 Can Bus LJ 73.

David Bish, “The Plight of Receiverships in a CCAA World” (2013) 2 J Insolvency Institute Can 221

Fred Myers & Alexa Abiscott, “Asset Backed Commercial Paper: Why the Courts Got It Right” (2009) 25:1 BFLR 5.

Dr. Janis P Sarra, ‘‘Examining the Insolvency Toolkit: Report of the Public Meetings of the Canadian Commercial Insolvency Law System” (July 2012), online: <https://cairp.blob.core.windows.net/media/36354/04-file_Sarra_Examining_the_Insolvency_Toolkit_Report_Submitted.pdf>.

Dr Janis P Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013).

Jean-Daniel Breton, “Reorganizations: Objectives Contemplated and Achieved by Legislative Changes Since 1992” in Dr Janis P Sarra, ed, *Annual Review of Insolvency Law 2003* (Toronto: Carswell, 2003).

Kevin P McElcheran, *Commercial Insolvency in Canada*, 2nd ed (Markham, Ont: LexisNexis Canada, 2011) (QL).

Roderick J Wood, *Bankruptcy & Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015).

Roderick J Wood, “Rescue and Liquidation in Restructuring Law” (2013) 53:3 Can Bus LJ 407.