

CANADA

**SUPERIOR COURT**  
(Commercial Division)

PROVINCE OF QUEBEC  
DISTRICT OF ST-FRANÇOIS

(Sitting as a court designated pursuant to the  
*Companies' Creditors Arrangement Act*, R.S.C.  
c. C-36, as amended)

N°: 450-11-000167-134

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

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

*Debtor*

and

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

*Monitor*

and

**GUY OUELLET, SERGE JACQUES and  
LOUIS-SERGES PARENT**

*Court Appointed Representatives  
of the Class Members-PETITIONERS*

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**PLAN OF ARGUMENT OF THE COURT APPOINTED REPRESENTATIVES  
OF CLASS MEMBERS ON THEIR MOTION FOR AN ORDER AUTHORIZING THE  
FILING OF ADDITIONAL CLAIMS**  
(Sections 10 and 19 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.  
C-36)

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## PART I. OVERVIEW

1. In this motion, Guy Ouellet, Serge Jacques and Louis-Serges Parent, the Court Appointed Representatives of the Class Members (the “**Class Representatives**”) seek an order:
  - (a) allowing the further June 2014 Claims (both those of the minor claimants identified in EXHIBIT R-1 and the 12 claimants whose executed affidavits were received after the May 27 Judgment, as identified in EXHIBIT R-2);  
and
  - (b) authorizing the filing of the further additional claims (“Further Additional Claims”) described in Exhibits R-3, R-4, R-5, R-6, R-7 and R-8 to this motion.
2. The Class Representatives brought a motion to authorize the filing of additional claims. By judgment issued by this Honourable Court on May 27, 2015 (“the May 27 Judgment”), 127 of the June 2014 Claims were allowed to be filed for those claimants who had filed explanatory affidavits.
3. At that motion, counsel for the Class Representatives informed the Court that approximately 400-500 class members had registered on the class action website. As such, in an interest to protect such class members, class counsel sent out a letter and questionnaire seeking more information. At all times, counsel represented that they would make best efforts but made no guarantees that these claims would be authorized to be filed by the court.

4. In the present motion, there are now, 366 affidavits filed on this motion relating to 445 class members (including 79 claims of minor class members whose circumstances are addressed in their parents'/guardians' affidavits) and who seek to have their late claims allowed. This is in addition to the claims of 40 minor children relating to the previous motion and those affidavits received after the previous motion was heard.
5. The vast majority of the Additional Claims herein fall within the category of "Moral Damages Claims", with a limited number seeking recovery under "Property and Economic Damages Claims". The structure of the Plan of Arrangement is such that there is no possibility of dilution of the claims of creditors having claims in the other categories of claimants, although the filing of the Additional Claims will result in some diluted recoveries in the categories in which they are filed.
6. The additional claims appear to be meritorious in the sense that they satisfy the eligibility criteria for the receipt of a distribution under the Amended Plan of Arrangement and Compromise, but they remain subject to rejection under the terms of the Plan by the Monitor in the event that they do not.
7. The affidavits filed in support of this motion have provided good faith evidence on behalf of these class members as to their specific reasons for not having filed prior to the Claims Bar Date.
8. As such, counsel for the Class Representatives respectfully submits that these claims should be authorized to be filed notwithstanding the passing of the Claims

Bar Date, on the same basis as the 127 affidavits filed on the previous motion were authorized.

9. Finally, this is the last late claims motion contemplated by Class Counsel. The class action website has been closed and no further late claims are anticipated.

## **PART II. FACTS**

### ***A. Procedural background to the motion***

10. On March 31, 2014, this Court rendered judgment granting a motion by Montreal, Maine & Atlantic Canada Co. (“MM&A” or “Debtor”) for an order approving a process to solicit claims and requiring claims to be filed by June 13, 2014, unless otherwise authorized by this Court.
11. On April 4, 2014, the Honourable Mr. Justice Gaétan Dumas J.S.C. made the following orders:
  - a) an order requiring claims to be filed by June 13, 2014 (the “Claims Bar Date”), unless otherwise authorized by this Court (the “Claims Procedure Order”);
  - b) an order appointing the Petitioners and their counsel as representatives (the “Class Representatives”) in these proceedings of Class Members (as defined in the Representation Order).
12. The Claims Procedure Order established June 13, 2014 as the Claims Bar Date<sup>1</sup> and expressly contemplated that this Court would retain jurisdiction over the process as a whole, including claims filed after the Claims Bar Date (see para. 6

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<sup>1</sup> An Amended Claims Procedure Order dated June 13, 2014 extended the Claims Bar Date for Wrongful Death Claims to July 14, 2014.

of the Claims Procedure Order, as well as para. 34 of the related March 31, 2014 Judgment).

13. The Representation Order appointed the Class Representatives as representatives of the Class Members (as defined in Appendix “A” attached to the Representation Order) which, among other things, authorized the Class Representatives to:
  - c) assist Class Members and their representatives with the completion of their individual proofs of claim;
  - d) deal, on behalf of the Class Members, with any government ministry, department or agency;
  - e) file such proof of claim (in addition to the representative claim on behalf of wrongful death victims) as may be permitted by further order of the Court; and,
  - f) seek advice and direction of the Court in respect of the discharge of their powers, responsibilities and duties.
14. Subsequent to the Claims Bar Date, the Class Representatives brought a motion, seeking authorization to file certain claims which had not been submitted prior to the Claims Bar Date (the “**June 2014 Claims**”) and seeking directions with respect to a further group of potential additional claims which had not been filed prior to the Claims Bar Date (the “**Additional Claims**”).
15. This motion was heard on May 20, 2015. At the motion, counsel for the Class Representatives presented this Honourable Court with individual affidavits sworn by 127 claimants seeking to have their late claims filed.

16. By judgment issued by this Honourable Court on May 27, 2015 (“the May 27 Judgment), 127 of the June 2014 Claims were allowed to be filed for those claimants who had filed explanatory affidavits.
17. With respect to the relief requested in relation to the Additional Claims, this Court determined that it could not rule on the admissibility of any such future-filed claims, nor could it delegate its discretion in this matter to the Monitor, as the discretion at issue was a non-delegable judicial discretion.
18. Nonetheless, this Court indicated that if such further claims were submitted, they would be reviewed by the Court according to the relevant criteria.
19. In its Conclusions section of the Judgment, this Court Stated:

[113] **ACCUEILLE** les requêtes pour être autorisé à déposer une preuve de réclamation hors délai des requérantes Royal & Sun Alliance du Canada, société d’assurance, Groupe Ledor inc. mutuelle d’assurance, Société d’assurance général Northbridge, l’Unique assurances générales inc., La Garantie compagnie d’assurance de l’Amérique du Nord et La Capitale, assurances générales inc.;

[114] **DÉCLARE** que ces preuves de réclamations devront être comptabilisées et traitées dans la catégorie des dommages matériels et économiques;

[115] **ACCUEILLE** la requête pour autorisation de produire des preuves de réclamations additionnelles des représentants des membres du groupe;

[116] **DÉCLARE** que les 127 preuves de réclamations produites dans les volumes 1 à 5 des représentants des membres devront être acceptées par le contrôleur comme ayant été produites valablement;

[117] **DÉCLARE** que le présent jugement ne doit pas être interprété comme signifiant que ces preuves de réclamations ont été analysées et acceptées par le contrôleur;

[118] **RETOURNE** les preuves de réclamations au contrôleur pour qu’il les analyse sur la même base que toutes les autres preuves de réclamations reçues;

[119] **DÉCLARE** que les preuves de réclamations faisant double emploi ne devront évidemment pas être comptabilisées plus d'une fois;

[120] **DÉCLARE** que si un créancier ayant été payé par une compagnie d'assurance a produit une preuve de réclamation incluant les sommes reçues par la compagnie d'assurance, le montant reçu devra être réduit pour le créancier, mais ajouté à la compagnie d'assurance si celle-ci produit une preuve de réclamation tardive;

[121] Le tout **SANS FRAIS**.

20. By correspondence to this Court dated June 3, 2015, counsel for the Class Representatives, Mr. Joel P. Rochon, advised of certain matters arising from the May 27, 2015 Judgment and which required clarification (and possibly a future motion) including, *inter alia*, that:

- a) there were minors whose late-filed claims were identified and addressed by their parents/guardians amongst the 127 affidavits related to the June 2014 Claims, however, the May 27, 2015 Judgment did not expressly permit these claims to be allowed and, as such, the Class Representatives sought to have the claims of those minor claimants allowed;
- b) a further 12 affidavits of previously identified June 2014 Claims, which had not been executed prior to the May 27, 2015 Judgment, had now been signed and the Class Representatives sought to have these claims allowed on the same basis as the other June 2014 Claims; and
- c) advising the Court that counsel for the Class Representatives had been following up with the further additional claimants, obtaining information about their circumstances and, where advisable, preparing and having affidavits executed.

21. In response, this Court indicated that a formal motion should be brought.

22. In the earlier motion to this Court dated April 27, 2015, the Class Representatives set out an extensive list of facts and circumstances relevant to these criteria, relating both to the group of June 2014 claims and to the additional claims which arose prior to the date of that motion which are the subject of the within motion.

The relevant facts and circumstances included both the steps taken by counsel to the Class Representatives to inform the citizens of Lac-Megantic and the reasons why some of the residents of Lac-Megantic failed to advance their claims prior to the Claims Bar Date.

23. Well prior to the Claims Bar Date being announced, counsel for the class representatives made significant efforts to advise the citizens of Lac-Megantic of the claims bar date and to assist claimants in filing claims.
24. The results of these efforts were very positive: approximately 3,800 claims were filed in a town having a population of less than 6,000 residents.
25. However, in spite of the diligent efforts of the Class Representatives to advise of the Claims Process, a number of claimants did not file claims with the Monitor prior to June 13, 2014.
26. Counsel for the Class Representatives advised the Court at the hearing of the motion on May 20, 2015 that they had been contacted by an additional 300-400 individuals, who had signed up on the class action website, but had not, as of then, provided sworn affidavits nor had they completed claim forms.
27. In an effort to understand the nature of these potential claims, the Class Representatives delivered a letter and questionnaire to class members to complete. The questionnaire asked that each individual describe the nature of their claims and the reason why they had not submitted a claim prior to the

Claims Bar Date. This letter and questionnaire was sent out to approximately 650 individual class members.

28. The Class Representatives made no guarantee to these class members that they would be able to obtain permission from the Court to file the Additional Claims, but that they would make best efforts to do so and would bring a motion to present their request to file late claims.
29. Following receipt of the detailed questionnaires, draft affidavits were completed. Telephone interviews were also conducted to gather any missing information. In total, telephone and in-person interviews were conducted of 575 individual class members in order to determine the circumstances of their claims and the reason why their claims had not been submitted in a timely fashion prior to the Claims Bar Date.
30. Draft affidavits were then prepared reflecting the information provided in the questionnaires and the interviews. Appointments were then made for these individual class members to meet with someone at Daniel Larochelle's office who reviewed, in person, the details and circumstances set out in the draft affidavit (including the finalization of the Proof of Claim where applicable) and the affidavit was finalized and sworn at Me. Larochelle's office.
31. In the case of approximately a dozen class members residing a substantial distance from Lac Megantic, a similar process was undertaken. The class member would fill out a claim form which would then be reviewed by counsel for

accuracy and completeness. Then, an affidavit would be drafted for each class member which was to be sworn in front of a commissioner of oaths.

32. Based on the information provided by these class members in their questionnaires and in follow-up interviews, the 445 Further Additional Claims can be divided into five main categories as regards to the reason why claims were not filed in a timely fashion in advance of the Claims Bar Date:

- a. **New June 2014 Claims.** These **45 claimants believed their claims were filed prior to the Claims Bar Date** as shown in **Exhibit R-3**. These claims relate to economic loss and moral damages and are claimants who registered prior to the Claims Bar Date on the class action websites through either Me. Larochelle or Me. Orenstein, however, on account of a possibly technical error and/or inadvertence on the part of Class Counsel or agents, were not filed with the Monitor prior to the Claims Bar Date, or for claimants who believed they had registered before the deadline, including cases of minor children where it was previously assumed their claims were filed with those of their parents.
- b. **Claimants who were unaware of the Claims Bar Date or did not Understand the Process.** Despite the Class Representatives' best efforts to publicize the class action, the CCAA proceeding and the Claims Bar Date, **187 claimants did not file claims** prior to the Claims Bar Date because they were unaware of the Claims Bar Date or did not understand how to file a claim as shown in **Exhibit R-4**.
- c. **Claimants who Suffered Significant Psychological Trauma.** Due to the nature of the psychological injuries suffered after the derailment, **56 claimants** did not file claims prior to the Claims Bar Date either because they were suffering extreme psychological effects, or because the extent of their psychological and economic losses did not become apparent under after the Claims Bar Date as shown in **Exhibit R-5**.
- d. **Claimants Who Mistakenly Believed that They were Not Eligible to File a Claim.** Despite the best efforts of all parties to inform the citizens of Lac-Megantic, **121 claimants mistakenly believed that they** were not entitled to file a claim or participate in the recovery under the CCAA procedure as shown in **Exhibit R-6**;
- e. **Other Reasons.** An additional **36 claims** were not filed on time because claimants were occupied with other health concerns, or due to other

personal commitments most often arising from and being associated with personal and/or economic complications caused by the derailment. As a result these individuals were not able to file their claims prior to the Claims Bar Date as shown in **Exhibit R-7**;

- f. **Minor Claimants: 79 minor claimants**, whose parents are seeking to file additional claims as set out in the above categories, are shown in **Exhibit R-8** for the Court's ease of reference.
33. In summary, there are now, 366 affidavits filed on this motion relating to 445 class members (including 79 claims of minor class members whose circumstances are addressed in their parents'/guardians' affidavits) and who seek to have their late claims allowed. This is in addition to the claims of 40 minor children relating to the previous motion and those 12 affidavits received after the previous motion was heard, as set out in Exhibits R-1 and R-2.
34. A further 56 class members sworn affidavits relating to 68 claims (14 of which are minor class members), as is set out in R-1 of the Supplementary Motion.
- a. **New June 2014 Claims.** There are **11** claimants who have asserted that their claims were filed prior to the Claims Bar Date. These claims relate to economic loss and moral damages and are claimants who registered prior to the Claims Bar Date on the class action websites through either Me. Larochelle or Me. Orenstein, however, on account of a possibly technical error and/or inadvertence on the part of Class Counsel or agents, were not filed with the Monitor prior to the Claims Bar Date, or for claimants who believed they had registered before the deadline, including cases of minor children where it was previously assumed their claims were filed with those of their parents;
  - b. **Claimants who were unaware of the Claims Bar Date or did not Understand the Process.** Despite the Class Representatives' best efforts to publicize the class action, the CCAA proceeding and the Claims Bar Date, **27 claimants did not file claims** prior to the Claims Bar Date because they were unaware of the Claims Bar Date or did not understand how to file a claim;
  - c. **Claimants who Suffered Significant Psychological Trauma.** Due to the nature of the psychological injuries suffered after the derailment, 5 claimants did not file claims prior to the Claims Bar Date either because they were suffering extreme psychological effects, or because the extent of their psychological losses they did not become aware of the Claims Bar Date;

- d. **Claimants Who Mistakenly Believed that They were Not Eligible to File a Claim.** Despite the best efforts of all parties to inform the citizens of Lac-Mégantic, **16 claimants mistakenly believed that they** were not entitled to file a claim or participate in the recovery under the CCAA procedure;
  - e. **Other Reasons.** An additional **9 claims** were not filed on time because claimants were occupied with other health concerns, or due to other personal commitments most often arising from and being associated with personal and/or economic complications caused by the derailment. As a result these individuals were not able to file their claims prior to the Claims Bar Date.
35. The Plan of Arrangement contemplates distinct categories for distribution, such as “Wrongful Death Claims”, “Bodily Injury and Moral Damages Claims”, and “Property and Economic Damages Claims”, among others.
36. The vast majority of the Additional Claims herein fall within the category of “Moral Damages Claims”, with a limited number seeking recovery under “Property and Economic Damages Claims”. The structure of the Plan of Arrangement is such that there is no possibility of dilution of the claims of creditors having claims in the other categories of claimants, although the filing of the Additional Claims will result in some diluted recoveries in the categories in which they are filed.
37. The additional claims appear to be meritorious in the sense that they satisfy the eligibility criteria for the receipt of a distribution under the Amended Plan of Arrangement and Compromise, but they remain subject to rejection under the terms of the Plan by the Monitor in the event that they do not.
38. The affidavits filed in support of this motion have provided good faith evidence on behalf of these class members as to their reasons for not having filed prior to the Claims Bar Date.

39. Class Counsel, in consultation with the Monitor and Debtor's Counsel, have as of Thursday November 19, 2015 taken down the web site for the Lac Mégantic Class Action. Further, Class Counsel will not be accepting any further requests to file late claims on the go forward nearly a year and a half following the Claims Bar Date of June 2014. To do otherwise would not be fair, nor in the best interests of the existing Class Members.

### **PART III. ISSUES AND ARGUMENT**

#### **A. *Issues***

40. The issues to be decided on this motion are:
- (a) Should the Court authorize the filing of the further June 2014 Claims (both those of the minor claimants and the 12 claimants whose executed affidavits were received after the May 27 Judgment?)
  - (b) Should the Court authorize the filing of the Further Additional Claims as identified in Exhibits R-3, R-4, R-5, R-6, R-7 and R-8 to this motion?

#### **B. *The principles applicable to granting leave to file late claims***

41. A CCAA court is entitled to exercise its discretion to authorize late-filed claims, provided it is in the interest of overall fairness and the underlying purpose of the CCAA to do so and provided that various established criteria have been satisfied.
42. As noted in the May 27, 2015 Judgment, there are a number of established criteria to be considered in deciding whether to allow late-filed claims including, inter alia:

- a) Was the delay caused by inadvertence and if so, did the claimant act in good faith?
  - b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
  - c) If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
  - d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
43. The factors highlighted in the May 27 Judgment, are not exhaustive and that the consideration of these factors is always a fact-specific exercise of judicial discretion.
44. First among the factors to be considered in allowing late claims is the good faith of the claimants and the absence of prejudice to other interested parties.
45. The CCAA affords courts the authority to fix a deadline for creditors to file claims.<sup>2</sup> The purpose of a claims bar order is “to enable creditors to meaningfully assess and vote on a plan of arrangement and to ensure a timely and orderly completion of the CCAA proceedings.”<sup>3</sup> Even when courts fix a claims bar date, however, courts retain discretion to extend the time for creditors to file their claims or to permit the filing of late claims.<sup>4</sup>
46. Courts have recognized that a CCAA court has the authority to permit the filing of late claims. *Re Blue Range Resource Corp.*, a case from the Court of Appeal of

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<sup>2</sup> Lloyd W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Analysis (Companies' Creditors Arrangement Act)* at N§143(1) (“Houlden”).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

Alberta, is widely cited as the governing jurisprudential authority for the exercise of a court's discretion to grant permission for the late filing of claims.<sup>5</sup> In *Blue Range*, the court considered creditors who filed their claims in time but sought to have them amended, and creditors who did not file their claims prior to the claims bar date.<sup>6</sup> Justice Wittmann, having canvassed jurisprudence under the *Bankruptcy and Insolvency Act*, as well as U.S. case law and legislation, elaborated the following criteria to apply in determining whether to grant permission for the late filing of claims:

- (a) **Was the delay caused by inadvertence and if so, did the claimant act in good faith?** Inadvertence includes carelessness, negligence and accident, and is unintentional. The claimant must have acted in good faith and not to circumvent the process, delay or avoid participation, or “lie in the weeds” to gain advantage unavailable to other creditors. Considerations under this factor include length of the delay, the reason for the delay and whether it was within the control of the claimant, corrective measures brought by the claimant upon discovering its tardiness and whether these measures were brought in a timely manner, and the original intent of the claimant to pursue its claim.
- (b) **What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?** Did the creditor(s) by reason of the late filings lose a realistic opportunity to do

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<sup>5</sup> *Blue Range Resource Corp., Re.*, 2000 ABCA 285 (CanLII) (“*Blue Range*”); Houlden at N§143(1).

<sup>6</sup> *Blue Range* at para 4.

anything that they otherwise might have done? Materiality is relevant to the issue of prejudice. The fact that creditors will receive less money as a result of allowing the late filing (that is, their claims will be diluted) does not constitute prejudice. The nature and stage of the CCAA proceedings are key elements in determining the existence of any relevant prejudice.

- (c) **If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?**
- (d) **If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?**<sup>7</sup>

- 47. Justice Wittmann described his approach as “blended” in that it integrated the requirement that the claimant show inadvertence and good faith according to the *BIA* jurisprudence, but also an explanation for the delay and the lack of relevant prejudice according to the U.S. jurisprudence and the (U.S.) Bankruptcy Rules.<sup>8</sup>
- 48. Justice Wittmann ultimately allowed the late filing of the claims, notwithstanding the fact that the meeting to vote on the Plan of Arrangement had already taken place, finding that there would be no prejudice to the other creditors or to the debtor company.<sup>9</sup>

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<sup>7</sup> *Blue Range* at para 26; Vern DaRe, “The Treatment of Late Claims under the CCAA” *Canadian Bankruptcy Reports* 26 CBR (4<sup>th</sup>) 142.

<sup>8</sup> *Blue Range* at paras 14, 19.

<sup>9</sup> *Blue Range* at para 42.

49. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, a case stemming from the tainted blood scandal, the trustee brought a motion for advice and directions regarding late-filed or otherwise irregular applications for a determination of damages by the referee.<sup>10</sup> Pursuant to the CCAA Plan, which had been approved eight years earlier, a trust was established to distribute funds to persons who were infected with HIV (the “**HIV Trust**”).<sup>11</sup> Distributions from the HIV Trust had not been made in the eight years since the approval of the CCAA Plan.<sup>12</sup> The reasons for the delay in filing applications included not having received notice of the HIV Trust and not discovering the claim until after the claims bar date.<sup>13</sup> Importantly, the court commented on the circumstances of the claimants:

[t]he circumstances of the HIV Claimants are very different to those of commercial creditors affected by CCAA proceedings. While, as a general rule, the latter can be presumed to be knowledgeable, and ready and willing to assert their claims, the same cannot be said of the HIV Claimants who did not personally retain lawyers and did not participate in the CCAA proceeding.<sup>14</sup>

50. The court ultimately allowed the late claims where they were made within a reasonable time after notice was acquired, where there were circumstances beyond the control of the claimants and where notice was inadequate. Late applications were not allowed for claims stemming from persons who could not establish their eligibility as HIV

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<sup>10</sup> *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 2008 CarswellOnt 6105, [2008] O.J. No. 4114 at para 2 (“*Canadian Red Cross*”).

<sup>11</sup> *Canadian Red Cross* at paras 2-3.

<sup>12</sup> *Canadian Red Cross* at para 5.

<sup>13</sup> *Canadian Red Cross* at paras 14-15.

<sup>14</sup> *Canadian Red Cross* at para 23.

claimants prior to the deadline, finding that it was part of the compromise affected by the Plan of Arrangement.<sup>15</sup>

51. More recently, in *Pangeo Pharma Inc., Re*, Justice Journet of the Superior Court of Quebec cited the *Blue Range* criteria approvingly, noting that “la bonne foi se présume et qu’aucune preuve de mauvaise foi n’a été faite” and that “le seul effet de la permission de produire tardivement la preuve de réclamation sera d’ajouter une goutte d’eau dans la mer de réclamations contre la débitrice.”<sup>16</sup>

52. In the absence of evidence of bad faith, the good faith of all of the claimants is presumed (art. 2805 C.c.Q.).

### **1. Reason for the Delay and Good Faith**

53. The first criterion emanating from *Blue Range* and subsequent jurisprudence is the cause of the delay and whether or not the claimants were acting in good faith.

54. Regarding the New June 2014 claims, these 45 claimants believed their claims were filed prior to the Claims Bar Date. These claimants who registered prior to the Claims Bar Date on the class action websites through either Me. Larochelle or Me. Orenstein, however, on account of a possibly technical error and/or inadvertence on the part of Class Counsel or agents, were not filed with the Monitor prior to the Claims Bar Date, or for claimants who believed they had registered before the deadline, including cases of minor children where it was previously assumed their claims were filed with those of their parents.

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<sup>15</sup> *Canadian Red Cross* at para 40, Appendix.

<sup>16</sup> *Pangeo Pharma Inc., Re*, 2004 CarswellQue 292 at paras 22, 24.

55. The delay with respect to the New June 2014 Claims was not in the control of the claimants, as they believed that they were filed in accordance with the Claims Process. In *Royal Bank v. Cow Harbour Construction Ltd.*, the creditor Hertz did not file its claim due the inadvertence of its solicitors until six months after the claims bar date. The court accepted that this constituted inadvertence on the part of Hertz.<sup>17</sup>

56. At all times the original intent of the claimants with New June 2014 Claims was to participate fully in the CCAA process.

57. The other claims were not filed prior to the Claims Bar Date for good faith reasons. For instance, **187 claimants did not file claims** prior to the Claims Bar Date because they were unaware of the Claims Bar Date or did not understand how to file a claim. In addition, **121 claimants mistakenly believed that they** were not entitled to file a claim or participate in the recovery under the CCAA procedure.

58. Further, 56 claimants **56 claimants** did not file claims prior to the Claims Bar Date either because they were suffering extreme psychological effects, or because the extent of their psychological and economic losses did not become apparent until after the Claims Bar Date.

59. While the original intent of some of these claimants was perhaps not to file their claims, the claims may be valid and there may be mitigating factors, such as a misunderstanding of the process or a misapprehension of facts, questions regarding the mental capacity of the decision maker, and/or their awareness of their claim or the extent of their claim.

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<sup>17</sup> *Royal Bank v. Cow Harbour Construction Ltd.*, 2011 ABQB 223, 2011 CarswellAlta 533 at para 33.

60. There is no indication that the claimants sought to “lie in the weeds” or gain some advantage unavailable to other creditors.

## **2. The absence of prejudice**

61. The second criterion requires the court to consider the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay.

62. As noted above, the dilution of creditor recoveries by the admission of the additional claims does not constitute prejudice.<sup>18</sup> The Class Representatives are not aware of any cases where the dilution of funds available to creditors was considered as prejudice in the CCAA or analogous context.

63. The test for prejudice is: “did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done?”<sup>19</sup>

64. In this case, the Plan of Arrangement contemplates distinct categories for distribution based on agreed claims valuations. The vast majority of the Additional Claims fall within the category of “Moral Damages Claims”, while some fall under “Economic Loss Claims”. The Plan is structured such that the claims of creditors in any of the other categories will not be diluted by the addition of the Additional Claims.

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<sup>18</sup> *Blue Range* at para 40.

<sup>19</sup> *Blue Range* at para 24.

### **3. The nature of the claims and the proceedings may warrant an order for late filing**

65. Even in the event that this Court determines that relevant prejudice is caused by the late filing of the Further Additional Claims, it may still order their filing. A number of considerations militate in favour of the Court exercising its residual discretion to allow the filing of the Further Additional Claims.

66. The claimants are by and large unsophisticated individuals with little legal knowledge and experience and no individual legal representation. As the Court stated in *Canadian Red Cross*, individuals, unlike commercial creditors, cannot be presumed to be knowledgeable and ready and willing to assert their claims.<sup>20</sup> The lack of sophistication of the claimants militates in favour of greater lenience, both with regard to the length and reason for the delay.

67. It is not surprising that the “take-up” rate is low in light of the nature of the claims, the sophistication of the claimants, and the widely-held view [until MMA’s announcement in December 2014] that there would not be funds available for distribution. Indeed, in the class actions context, an important criticism leveled at “opt-in” processes is that only a small percentage of the total class will participate. As stated by Justice Perell in *McSherry v. Zimmer GMBH*:

The major problem with an opt-in regime is that it is inconsistent with the access to justice rationale that was the basic justification for class action legislation. Class members, particular those with small claims that were not economical to litigate, might not know that they had the opportunity to participate and thus they would not take the positive step of opting-in. Moreover, class members with notice of the class action option might not participate (to quote the

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<sup>20</sup> *Canadian Red Cross* at para 23.

Report at p. 468) because of "the operation of the ... social and psychological factors that inhibit persons from taking action to redress their injuries."<sup>21</sup>

68. Given that the CCAA process is an analogous "opt-in" process, it is unsurprising that a number of the creditors did not submit claims until some time after the claims bar date, particularly given the lack of funds available for distribution.

#### **PART IV. RELIEF REQUESTED**

69. The Class Representatives respectfully request that this Court make an order:

- (a) allowing the further June 2014 Claims (both those of the minor claimants identified in EXHIBIT R-1 and the 12 claimants whose executed affidavits were received after the May 27 Judgment, as identified in EXHIBIT R-2);  
and
- (b) authorizing the filing of the further additional claims ("Further Additional Claims") described in Exhibits R-3, R-4, R-5, R-6, R-7 and R-8 to this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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<sup>21</sup> *McSherry v. Zimmer GMBH*, 2012 CarswellOnt 17147 para 113.

**LAC-MÉGANTIC, November 23, 2015**

(S) Daniel E. Larochelle

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