CANADA

SUPERIOR COURT
(Commercial Division)

PROVINCE OF QUEBEC
DISTRICT OF ST-FRANÇOIS

N°: 450-11-000167-134

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

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

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

Debtor
Petitioner / Respondent by Cross-Motion

and

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

Monitor

and

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

Class Action Plaintiffs
Respondents / Petitioners by Cross-Motion

PLAN OF ARGUMENT OF THE CLASS ACTION PLAINTIFFS ON THE DEBTOR'S CLAIMS PROCEDURE MOTION AND ON THEIR REVISED CLAIMS PROCEDURE CROSS-MOTION

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PART I. OVERVIEW

1. Yannick Gagné, Guy Ouellet, Serge Jacques and Louis-Serges Parent (the "Class Action Plaintiffs"), who hold the proxies of over 1,500 victims of the Lac-Mégantic train derailment (the "Derailment"), oppose the claims procedure proposed by the Debtor and propose, in its stead, a revised claims procedure as set out in their Cross-Motion.

2. In almost every CCAA case in which the Class Action Plaintiffs' counsel have participated, including *Sino-Forest*, *Nortel*, *Algoma No. 1*, *Algoma No. 2*, *Air Canada*, *Stelco*, *Hamilton Specialty Bar*, *Collins & Aikman*, and many others, representative proofs have been filed in accordance with applicable provincial legislation, to prevent claims from being barred and/or to promote efficiency in the claims process.

3. In this case in which forty-seven Quebeckers died as a result of MMA's gross negligence, local businesses have been lost, and an entire town in Quebec has suffered, the entrenched management of the Debtor and entrenched intermediaries (and perhaps the Chapter 11 Trustee) are trying to leverage off of Chapter 11 proceedings commenced by MMA's shell parent-company, to persuade this court to approve a process that would force 6,000 townspeople, including infants, the disabled, the mentally challenged, the aged, the grieving, the impecunious and the dead to file claims, knowing that only a meagre percentage will do so.

4. The offending railroad, which has no assets beyond the XL Insurance Policy to contribute to the damages suffered by the victims, wishes to simply ignore the class proceeding that is pending before this court, and to prevent certain class wide claims

from ever being made. The Debtor would require each individual with a claim to make an individual proof, notwithstanding that there are many people who are similarly, if not, identically, situated and that there are obvious economies to be had from the filing of class claims, and that Quebec legislation and public policy favours the making of such class claims.

5. The process designed by the Debtor creates an obvious and troubling disincentive to the filing of claims. The proof of claim forms (which are 78 pages long) are far too detailed and complex—the information being required is completely disproportionate to the amounts currently available for distribution. As a further and obvious disincentive to the filing of a claim, the Notice to Creditors actually states that despite the efforts that they are being asked to undertake to prove their claims, there may be little or no money available for them. The forms and warnings will have the effect of dissuading claimants to file a claim at all.

6. Other problems with the Debtor's Claims Procedure include the following:

(a) all individual claims are to be filed by May 31, 2014, notwithstanding that the Monitor's report contemplates that its Notice program may not even be implemented until late-February, leaving many victims with 12 weeks or less to file a claim. Under no scenario will this amount of time be sufficient to file claims. Six months is much more realistic given, among other things, the vulnerable position of these claimants, and the time needed to gather information and retain experts;

(b) the notice to creditors makes no mention of the availability of the Representative Plaintiffs and their counsel to assist individuals in completing the claims form, should they desire such assistance;

(c) the Debtor's process refers to information sessions provided by the Monitor and suggests that the Monitor will be available to answer questions about the proof of claim forms and the filing of claims, as if the Monitor, who cannot be an advocate for any creditor, will provide legal advice to the derailment victims.

7. The function of a claims process is to determine the universe of claims. In that context, the Debtor can dispute a claim, but it cannot prevent someone from filing a claim in accordance with applicable laws.

8. The Class Action Plaintiffs have proposed by Cross-Motion a revised claims process (the "Revised Claims Process"), which would ensure that rights are preserved, while providing a much simpler, less burdensome and less expensive form of proof at this early stage. The Revised Claims Process would facilitate negotiation among stakeholders and be followed-up on and particularized, if necessary, once the parties better understand the quantum of funds available in these proceedings.

PART II. FACTS

A. Facts Underlying the CCAA and Class Proceedings

9. The Class Action Plaintiffs repeat and rely upon the facts contained in their Plan of Argument for their *Motion for an Order Appointing the Petitioners as Representatives of the Class* (the "Representation Order Motion").[1]

10. Since the filing of the Representation Order Motion, the Class Action Plaintiffs have obtained the proxies of over 1,500 victims of the Lac-Mégantic train derailment (the "Derailment").[2] The proxies authorize the Class Action Plaintiffs to represent the interest of the registered victims in these insolvency proceedings and the Chapter 11 Proceedings.

B. The Debtor's Motion

11. At 5:30 p.m. on Friday, December 13, 2013, Montreal, Maine & Atlantic Canada Co. (the "Debtor"), served a motion for an order approving a process to solicit claims and for the establishment of a claims bar date ("the Debtor's Claims Procedure"), to be heard by the Court on only 4 days' notice on December 19, 2013. By agreement between the parties, the Debtor's Motion was adjourned to February 11, 2014, to allow the Class Action Plaintiffs to propose their Revised Claims Procedure.

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[1] *Re Montreal, Maine & Atlantic Canada Co*., Argument Plan for the Motion for an Order Appointing the Petitioners as Representatives of the Class at paras. 6-31.

[2] Affidavit de Yannick Gagné, sworn February 1, 2014 (the "Gagné Affidavit").

C. The Debtor's Claims Procedure is Highly Probing, Complex and Onerous

12. The Debtor's Claims Procedure proposes to bar the claims of every Derailment victim who does not separately file an extremely detailed proof of claim by no later than May 31, 2014.[3]

13. The Debtors' Claims Procedure leaves no room for the proof of damages by a representative on behalf of a class and/or in the aggregate. The Debtor's proposed order expressly states:

> The filing of a Proof of Claim on behalf of a class or group of creditors is forbidden and the filing of any such class or group proof of claims shall be deemed invalid in the present case for all legal intents and purposes;[4]

14. Instead the Debtor purports to insist that each Derailment victim work through a 78-page proof of claim form made up of nine schedules.[5]

15. The Debtor's forms, which are akin to a written examination for discovery, require each and every Derailment victim to provide extensive information, including, among other things:

(a) details of the pre-existing medical condition of persons who died as a result of the Derailment;[6]

(b) a description of the educational history, employment history and financial information about deceased persons;[7]

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[3] Debtor's Motion for an Order Approving a Process to Solicit Claims and for the Establishment of a Claims Bar Date [the "Debtor's Motion"] at para. 10.

[4] Debtor's Draft Order Approving a Process to Solicit Claims and for the Establishment of a Claims Bar Date [the "Debtor's Draft Order"] at para. 6.

[5] Debtor's Proof of Claim Form

[6] Debtor's Proof of Claim Form, Schedule 1, p. 3.

(c) copies of all insurance policies of the claimant that were in effect at the time of the Derailment;[8]

(d) details of the bodily injuries, hospitalization, and expected treatments of the claimant;[9] and

(e) full details on how a claimant's property was destroyed or damaged, the value of immovable and movable property affected by the Derailment, and cost of repair incurred or to be incurred.[10]

16. Claimants are further required to append all supporting documents associated with their claims, *and* they must not only sign the claim but attend before a Commissioner of Oaths to swear to it.[11]

17. Despite the highly probing and granular detail required of the proof of claim form, nothing in the appended forms or instructions indicates what amounts, if any, are available for distribution. Indeed, the 'Creditors' Instructions' to the proof of claim form state:

> We will not be able, at this stage, to comment or provide any indication on what amounts, if any, will be paid pursuant to the claims that have been received.[12]

18. The proof of claim form makes no mention of the availability of the Representative Plaintiffs and their counsel to assist individuals in completing the claims

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[7] Debtor's Proof of Claim Form, Schedule 1, p. 4.
[8] Debtor's Proof of Claim Form, Schedule 1, p. 12.
[9] Debtor's Proof of Claim Form, Schedule 2A, pp. 1-3.
[10] Debtor's Proof of Claim Form, Schedule 3A, pp. 1-16.
[11] Debtor's Proof of Claim Form, p. 2
[12] Creditors' Instructions to the Debtor's Proof of Claim Form, p. 1 (emphasis added).

form. Derailment victims who do not already have independent counsel are not advised that there are people available to help them with their claims.

19. The proof of claim form makes no mention of the base amounts that will be claimed by the Class Action Plaintiffs on behalf of the 1,500 derailment victims whose proxies they hold.

20. The proof of claim form indicates that "information sessions" will be held in Lac-Mégantic by representatives of the Monitor in order to "answer questions creditors may have about the Proof of claim forms or the filing of their claims".[13] The forms leave the impression that the Monitor is there to advocate for and assist creditors, when, in fact, the Monitor cannot act as an advocate, it cannot enter into a solicitor-client relationship with the victims or provide them with legal advice, and privilege would not ordinarily attach to statements made by victims to the Monitor.

21. The Debtor's Claims Procedure establishes a claims bar date of May 31, 2014 at 5:00 p.m. (the "Claims Bar Date"), after which persons with Derailment Claims would be precluded from participating in the CCAA proceeding or from receiving any distribution under any plan of arrangement.[14]

22. In practice, under the Debtor's Claims Procedure, Derailment victims will have 12 weeks or less to (i) be notified of the claims procedure, (ii) retain legal counsel, (iii) review, complete and swear the 78-page proof of claim form, and (iv) gather and

[13] Creditors' Instructions to the Debtor's Proof of Claim Form, p. 1.
[14] Debtor's Draft Order at para. 2(f) and 6.

append all relevant documentation – all without any indication of what amounts, if any, are available to satisfy their claims.

23. Yannick Gagné, one of the four representative Class Action Plaintiffs, confirms in his affidavit that the Debtor's proof of claim form will be "difficile à comprendre et onéreux à completer pour la plupart des victimes du Déraillement" given the legal terminology used in the form and the significant amount of detail and supporting documentation required.[15] Mr. Gagné confirms that given the time, effort and cost required of the Debtor's proof of claim form, weighed against the uncertain and limited amounts available to be disbursed in these proceedings, that many Derailment victims will not participate in the Debtor's Claims Procedure.[16]

24. The Debtor purports to justify its Claims Procedure based on the assertion that: the filing of a group or class claim would not be acceptable to the Chapter 11 Trustee.[17]. In turn, the Chapter 11 Trustee asserts that he cannot agree to the deemed filing of proofs if class-wide claims are filed in these CCAA proceeding.[18] He asserts that:

> Class proof of claims may only be filed in a chapter 11 case under the Bankruptcy Code with the express prior permission of the US Court, and only if certain standards are satisfied by an evidentiary showing to the US Court. In the opinion of the US Trustee, the US Court would be unlikely to allow a class proof of claim on behalf of all holders of Derailment Claims.[19]

[15] Gagné Affidavit at para. 6.
[16] *Ibid*. at para. 11.
[17] Debtor's Motion, para. 33.
[18] Contestation of Petitioners' "Motion for an Order Appointing the Petitioners as Representatives of the Class…" [the "US Trustee Motion Contestation"] at para. 10.
[19] US Trustee Motion Contestation at para. 10.

25. The Debtor and the Chapter 11 Trustee do not refer to any authority for their conclusion or provide any explanation as to why this court could not accept a class claim for the purpose of this proceeding, even if the class claim will not be recognized in the U.S. proceeding.

D. The Revised Claims Procedure

26. By way of cross-motion, the Class Action Plaintiffs propose a Revised Claims Procedure that addresses many of the deficiencies in the Debtor's Claims Procedure. In particular, the Revised Claims Procedure is designed in such a way as to safeguard the exceptional direct interest that Derailment victims have in these proceedings and to address their particular vulnerabilities and limitations in asserting their claims.

27. The Revised Claims Procedure contains the following features:

(a) Proof of claim forms are targeted by type of creditor, with the result that the forms are simple, and streamlined so as to make them more accessible to individual Derailment victims;

(b) The amount of information sought from individual Derailment victims (Proof of Claims Form A) is limited to what is actually necessary to gain an appreciation of the universe of claims, with the expectation that representative counsel will formulate a discovery plan and follow-up with claimants for additional information as is necessary and appropriate having regard to the amounts available for distribution;

(c) The forms for individual Derailment victims provide for base claims for specific categories of damages, consistent with those that will be advanced by the Class Action Plaintiffs on behalf of those persons whom they represent, so as to ensure consistency in treatment of creditors; and

(d) In addition to individual claims forms, the Revised Claims Procedure allows the filing of class-wide representative claims seeking aggregate damages on behalf of the Derailment victims (Proof of Claims Form B). The representative claim will ensure that the interests of Derailment victims are preserved and that the objectives of provincial class action legislation is not frustrated at this early stage, by ensuring that meritorious claims are not barred or defeated because of a victim's lack of time, resources or expertise in navigating an individual claims process.

28. The Revised Claims Process aims to ensure a proportionate, efficient and fair process to register creditor claims that will benefit not only the Debtor but its creditors as a whole.

PART III. ISSUES AND ARGUMENT

A. Issue

29. The issue to be decided on this motion is whether the Court should:

(a) approve the Debtor's Claims Procedure; or

(b) approve the Revised Claims Procedure proposed by the Class Action Plaintiffs.

30. The Class Action Plaintiffs respectfully submit that the Debtor's Claims Procedure should not be approved because it is not consistent with Canadian and Quebec law *and* because it is not fair or reasonable:

(a) the Debtor's Claims Procedure improperly purports to bar, without support, the filing of claims on a class-wide basis, and purports to exclude class-wide claims, contrary to Quebec's class action legislation contained in Book IX of the *Code of Civil Procedure* ("C.C.P.") ("Book IX"); and

(b) the Debtor's Claims Procedure obstructs access to justice to individual claimants by requiring disproportionately burdensome and detailed proof of claim forms, when measured against the amounts available for distribution.

31. Instead, the Class Action Plaintiffs ask that this Court approve the Revised Claims Procedure because it furthers the objectives of Quebec's class action legislation and the objectives of the CCAA, by putting into place a simple, streamlined, proportionate, orderly and fair process that safeguards the

extraordinary interests of Derailment victims, while allowing the Debtor a speedy process to determine the universe of claims ahead of a potential plan of arrangement or compromise.

B. The Claims Procedure Should Allow the Filing of Class-Wide Representative Claims

32. The Debtor has no authority to exclude class-wide claims through its design of a claims procedure within these proceedings. While the Debtor may eventually challenge the claim made on behalf of the Class Action Plaintiffs either procedurally or on the merits, it is not appropriate to foreclose outright the possibility of filing a representative claim in the design of the claims procedure.

33. The CCAA does not prescribe a particular claims procedure.[20] Rather, under the CCAA, a Court has broad authority to fashion orders that it considers appropriate in the circumstances.

34. Section 11 of the CCAA provides:

> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.[21]

35. However, in exercising its discretion under s. 11 of the CCAA, this Court must be guided by the underlying objectives that inform both the CCAA and Book IX – both of

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[20] *Re ScoZinc Ltd*., 2009 CarswellNS 229 at paras. 21, 22 and 28 [Brief of Authorities of the Class Action Plaintiffs ("BoA"), Vol. 1, Tab 1] ; Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2nd Ed (Markham: Lexis Nexis, 2011) at p. 311 [BoA, Vol. 1, Tab 2].

[21] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ["*CCAA*"], s. 11.

which militate in favour of allowing the filing of a representative claim within the claims process designed for these proceedings.

36. As explained by the Plan of Argument filed by the Class Action Plaintiffs in support of their motion for a representation order, the CCAA and Book IX are mutually reinforcing statutes that share common overarching objectives: namely, to serve the public interest by encouraging and facilitating efficient economic behaviour and encouraging access to justice.

37. Further, representative claims based on aggregate damages would be in keeping with Quebec law and jurisprudence on collective recovery, as well as the growing trend towards representative proof of claims ordered by CCAA courts.

1. Objectives of Book IX

38. Book IX has specific policy objectives which guide this Court's discretion in determining this motion.

39. The Quebec Court of Appeal has reiterated on numerous occasions that class proceedings have a social dimension in that they facilitate access to justice to citizens who would otherwise be unable to advance claims before the Court. In *Nadon c. Anjou*, Justice Rousseau-Houle writing for the Court stated:

> Avant d'aborder ces conditions, il n'est pas inutile de rappeler que le recours collectif a une portée sociale et vise à fournir l'accès à la justice à des citoyens qui ont des problèmes communs dont la valeur pécuniaire peut souvent être d'une modicité relative et qui n'oseraient ou ne pourraient pas de façon appropriée mettre en marche le processus judiciaire [citations omitted].[22]

[22] *Nadon c. Anjou (Ville)*, 1994 CarswellQue 294 (C.A.) at para. 10 [BoA, Vol. 1, Tab 3].

40. The Supreme Court of Canada, in its decision in *Western Canadian Shopping Centres Inc. v. Dutton*, outlined three broad policy objectives which animate class proceedings legislation like Book IX: (i) access to justice, by "making economical the prosecution of claims that would otherwise be too costly to prosecute individually"; (ii) judicial economy by "avoiding unnecessary duplication in fact-finding and legal analysis"; and (iii) behaviour modification, "by ensuring that actual and potential wrongdoers do not ignore their obligations to the public" and take full account of the harm they are or have caused.[23]

41. Having regard to the public interest served by class actions, Book IX (much like the CCAA) gives Quebec courts significant supervisory powers to safeguard and to ensure that the interests of class members are protected.[24] It is well settled that from the commencement of a class action, the courts have significant responsibilities to the class.

42. In the context of product liability or major accident class actions, numerous courts have held that class actions are the preferable procedure through which to bring forward claims in situations where the personal injury or wrongful death caused to class members arose as a result of common issues such as a common catastrophic event such as the Derailment in these proceedings. The Supreme Court of Canada in *Hollick v. Toronto (City)* expressly stated that cases involving mass torts are generally well-suited to proceed as class actions since the scope of the class is generally not in dispute. Chief Justice McLachlin noted:

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[23] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 27-29 [BoA, Vol. 1, Tab 4].
[24] *Schmidt c. Depuy International Ltd*., 2012 CarswellQue 12745 (C.A.) at para. 47 [BoA, Vol. 1, Tab 5]

> In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock).[25]

43. Representative and aggregate claims would provide the Derailment victims an economical and effective vehicle to ensure that actual and potential wrongdoers do not ignore their obligations to the public. To allow a claims procedure to bar outright the filing of a representative and aggregate claims would allow the Debtor to circumvent the application of Book IX and strip Derailment victims of a collective means to effectively and efficiently address this mass case of civil irresponsibility.

44. There is no jurisprudential support for the proposition that representative and aggregate claims cannot be pursued in the context of CCAA proceedings by virtue of their aggregate or class-based nature alone.

45. On the contrary, as elaborated below, courts have repeatedly recognized the appropriateness of representative proofs of claim in the context of CCAA proceedings and the aggregate assessment of damages, in order to facilitate an organized and efficient resolution of outstanding claims.

2. Collective Recovery and Aggregate Damages under Quebec Law

46. The propriety of allowing damages to be recovered collectively and to be assessed on an aggregated basis is well settled in Quebec jurisprudence. In many cases collective recovery and the assessment of damages in the aggregate is the only practicable manner of proceeding.

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[25] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 20 [BoA, Vol. 1, Tab 6].

47. Arts. 1028, 1029 and 1031 of the C.C.P. empower courts in Quebec to allow class plaintiffs to recover collectively and to have their damages assessed on an aggregate basis. The articles provide:

> **1028.** Every final judgment condemning to damages or to the reimbursement of an amount of money orders that the claims of the members be recovered collectively or be the object of individual claims.
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> **1029.** The court may, *ex officio* or upon application of the parties, provide measures designed to simplify the execution of the final judgment.
>
> […]
>
> **1031.** The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established. [26]

48. Courts have held that collective recovery is to be preferred over individual recovery in class proceedings, because it advances the societal objective of ensuring that the defendant is held fully responsible for its actions causing harm. As Justice Gascon stated in *Adams v. Amex Bank of Canada* ("*Amex*"), relying on Professor Pierre-Claude Lafond:

> Il convient désormais d'orienter l'indemnisation non plus à partir du dommage subi, mais à partir du dommage causé. C'est précisément ce que préconise la formule québécoise du recouvrement collectif. […]
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> Cette conception nouvelle de la réparation du préjudice obéit à d'autres règles qu'uniquement à celle de la mesure du préjudice subi; les notions d'accès à la justice, de justice corrective, de prévention, de respect volontaire du droit et d'effet dissuasif sont tout aussi présentes dans la recherche d'une compensation globale.[27]

49. As Justice Gascon (as he then was) noted in *Amex*, individual recovery, when compared to collective recovery, is "less efficient, entails fewer claims and leaves more

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[26] *Code of Civil Procedure*, R.S.Q., c. C-25 ["C.C.P."], arts. 1028-1029, 1031.

[27] *Adams v. Amex Bank of Canada*, 2009 QCCS 2695 at para. 440 [BoA, Vol. 1, Tab 7].

members without compensation."[28] Given those concerns, collective recovery is the favoured remedy in class proceedings despite the fact that claims from one member to another may vary.[29]

50. The corollary to collective recovery is the assessment of damages based on aggregate amounts. It is settled law in Quebec that damages may be assessed on an aggregate basis where aggregate estimates are reasonable approximations of reality, and particularly where individual calculations would otherwise be costly and inefficient.[30]

51. For instance, in *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.* ["*JTI-MacDonald*"], Justice Riordan considered motions brought by tobacco companies to dismiss a class action alleging harm from cigarette-smoking. The companies alleged that the plaintiffs had to prove "each and every element of liability with respect to each and every class member".[31] Justice Riordan dismissed the companies' motions to dismiss, holding that Quebec's class action legislation required that courts adopt a creative and flexible approach to collective recovery to respond to the legislation's public policy objectives.

52. Citing the flexible approach adopted by Quebec courts, Justice Riordan confirmed the propriety in using average-based damages:

> Judges have calculated collective damages using averages over the class. They have also employed compensation grids in order to permit a class to be divided into

[28] *Ibid.* at para. 464
[29] *Ibid*. at para. 461.
[30] See for e.g. *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 1924 [*JTI-MacDonald*] [BoA, Tab 8]; *Barette c. Ciment du St-Laurent inc*., 2008 SCC 64 ["*Barette*"] [BoA, Vol. 1, Tab 9].
[31] *JTI-MacDonald*, *supra* at para. 27 [BoA, Vol. 1, Tab 8].

> appropriate subclasses to take account of differing levels of damages according to the particular circumstances of groups of individual class members.[32]

53. In *JTI-MacDonald*, the plaintiffs sought to use epidemiological statistics in order to establish the total amount of their claims for the purposes of collective recovery.[33] The Court saw "no insurmountable obstacle" with this approach.[34] Indeed, Justice Riordan was of the opinion that the use of statistics in assessing damages in the aggregate was perfectly appropriate:

> Epidemiological estimates indicate and take into account degrees of probability and confidence intervals. As well, a judge, assisted by the defendants' experts, could adjust by those factors in order to determine the amount of collective recovery. The resulting number could well demonstrate « sufficient accuracy », remembering that the Code stops well short of requiring mathematical perfection on this point, notwithstanding the Companies' urgings.[35]

54. Moreover, the Court found that an aggregate assessment, in that case, would cause no prejudice to the defendants and would ultimately lead to a far more efficient process:

> In light of the high reliability of statistical estimates at the macro level, the estimate of collective damages should be acceptably close to the « reality », assuming that it was humanly possible to calculate that. Thus, proceeding in this manner should cause no real prejudice or injustice to a defendant with respect to the total number of dollars assessed by way of collective recovery. To the contrary, it would spare him the expense of repeated and costly contestations on the individual level that would in all statistical likelihood come out to about the same figure.[36]

55. Similarly, in *Barette c. Ciment du St-Laurent inc*., the Supreme Court confirmed the appropriateness of assessing damages on the basis of averages. The Court held:

> [114] The question that remains is whether it was appropriate for Dutil J. to use average amounts to determine the compensation in this case. It must be recognized that the

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[32] *Ibid.* at para. 24.
[33] *Ibid.* at para. 29.
[34] *Ibid.*
[35] *Ibid.* at para. 30 (emphasis added).
[36] *Ibid.* at para. 31.

> annoyances suffered by victims of environmental injury are difficult to assess. In *Domfer*, 4,000 residents of Ville-Émard suffered damage and annoyances caused mainly by dust, noise and odours from Domfer's plants. Forget J.A. rightly noted that it was difficult to put a dollar amount on the problems and annoyances the residents had suffered (para. 162). In that case, too, the Court of Appeal used average amounts and based the plaintiffs' compensation on the zones in which they resided, although its reasoning was grounded in fault-based liability (para. 164). Thus, the Court of Appeal's approach was analogous to the one taken by Dutil J. in the instant case.
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> [115] An average amount was also used to determine compensation for moral injury in *St-Ferdinand*. In that case, the trial judge had expressed the opinion that [TRANSLATION] "[w]here all members of the group have suffered the same kind of prejudice, the prejudice can be assessed on the basis of an average without increasing the debtor's liability" [citation omitted]. L'Heureux-Dubé J., writing for this Court, noted that "because of the nature of the prejudice, the quantum of moral damages cannot be determined exactly" (para. 85).
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> [116] Given the trial judge's discretion and the difficulty of assessing environmental problems and annoyances, we consider Dutil J.'s use of average amounts to have been reasonable and appropriate in the circumstances. […][37]

3. Objectives of the CCAA

56. The purpose underlying the CCAA reflects society's interest in efficient economic markets. In *Century Services Inc. v. Canada*, Justice Deschamps held for the majority that the purpose of the CCAA "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[38]

57. As noted by Justice Deschamps after reviewing the history of the CCAA:

> Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (ibid., at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.[39]

58. Broadly speaking, in a world characterized by "a complex web of interdependent economic relationships", CCAA proceedings provide a forum for stakeholders in

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[37] *Barette, supra* at paras. 114-116 (emphasis added) [BoA, Vol. 1, Tab 9].

[38] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 15 [BoA, Vol. 1, Tab 10]

[39] *Ibid*. at para. 18 (emphasis added).

insolvent businesses to negotiate solutions that are more economically advantageous than the outcome that would otherwise ensue in a bankruptcy.[40] Importantly, however, it is not within the purpose of the CCAA to impair the ability to advance stakeholder claims; or, put differently, to facilitate the externalization of costs so as to encourage inefficient behaviour. As recently observed by Justice Cromwell, writing for the majority of the Supreme Court of Canada in *Sun Indalex Finance, LLC v. United Steelworkers*, CCAA proceedings should not be used as a vehicle to degrade the position of a set of stakeholders:

> First, it is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent.[41]

4. Representative Proofs of Claims are Ordered in CCAA Proceedings

59. Court-ordered claims procedures allowing representatives to file proofs of claim on behalf of the classes that they represent have become increasingly commonplace in CCAA proceedings. To illustrate this trend:

(a) In the *Sino-Forest Corp*. CCAA proceedings, the Court allowed representative plaintiffs in two uncertified class actions against the debtor company, and its directors and officers, to file proofs of claim on behalf their respective class members in relation to negligence and statutory secondary market liability claims. The Claims Procedure Order explicitly allowed class members in each of the respective class actions to rely on the single proof of claim filed by representative counsel on their behalf,

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[40] *Ibid*.

[41] *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6 at para. 205 [BoA, Vol. 1, Tab 11].

without the need of filing individual proofs of claim. In his Claims Procedure Order, Justice Morawetz of the Superior Court of Ontario ordered:

> THIS COURT ORDERS that the Quebec Plaintiffs are, collectively, authorized to file, on or before the Claims Bar Date, one Proof of Claim and, if applicable, one D&O Proof of Claim, in respect of the substance of the matters set out in the Quebec Class Action, notwithstanding that leave to make a secondary market liability claim has not be [sic] granted and that the Quebec Class has not yet been certified, and that members of the Class may rely on the one Proof of Claim and/or one D&O Proof of Claim filed by the counsel for the Quebec Plaintiffs and are not required to file individual Proofs of Claim or D&O Proofs of Claim in respect of the Claims forming the subject matter of the Quebec Class Action.[42]

As a result of that claim and the zealous advocacy of the class representatives in that case, the class members should soon receive their appropriate share of a $117 Million settlement negotiated with Sino-Forest's auditor after the claim was filed.

(b) In accordance with provincial collective bargaining legislation, unions have always filed representative claims on behalf of their members. Thus, for example, in the CCAA proceedings of *AbitibiBowater Inc*., the Court made an order allowing 12 unions to represent their respective members in the claim process in respect of all outstanding employer obligations. Justice Gascon's Claims Procedure Order provided:

> [15] ORDERS that, in the event that any Former Employee Grievance is subject to compromised under the CCAA and the Plan, <u>each Union shall hereby authorized to exercise any voting rights in respect of all such Former Employee Grievances as agents for their affected members</u> for the purposes of the Plan. […]

[42] *Re Sino-Forest Corp*., Claims Procedure Order (May 14, 2012) (Ont. S.C.J.) at para. 28 [BoA, Vol. 2, Tab 12]. See also para. 27 dealing with a National Class.

> [17] ORDERS that, subject to (i) the Claims Bar Date; (ii) paragraph 5 hereof; and (iii) the Cross-Border Claims Protocol, the following procedure shall apply to Grievance Proofs of Claim filed against any of the Canadian Petitioners or the Partnerships: […]
>
> (b) where applicable, the Monitor shall send the Union a Notice of Revision or Disallowance in accordance with paragraph 27 below;
>
> (c) the Union who receives a Notice of Revision or Disallowance and wishes to dispute it shall, within ten (10) Business Days of the Notice of Revision or Disallowance, send by registered mail or courier a Notice of Dispute to the Monitor setting out the basis for the dispute; […][43]

(c) Similarly, in the CCAA proceedings of Nortel Networks Corporation, the court-appointed representatives of Nortel's former unionized and non-unionized employees worked collaboratively with the Monitor to agree on claims in advance of putting a process in place to permit the alternate proof and contestation of those claims by individual former employees.[44]

5. Class-Wide Representative Claims are Appropriate in these Circumstances

60. The particular circumstances of the present case plainly militate in favour of allowing the Class Action Plaintiffs to file representative and aggregate claims. The relevant factors include the following:

(a) There are nearly 6,000 Class Members, all of whom may have material claims arising out a single common incident – the Derailment;

(b) The circumstances are such that many of the Class Members' damages cannot be determined exactly, but Class Members can be grouped

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[43] *Re AbitibiBowater Inc*., Claims Procedure Order (January 18, 2010) (Que. S.C.) at paras. 15, 17 [BoA, Vol. 2, Tab 13].

[44] *Re Nortel Networks Ltd*., Compensation Claims Procedure Order (October 6, 2011) (Ont. S.C.J.) [BoA, Vol. 2, Tab 14].

according to the kinds of prejudice suffered and damages assessed on the basis of an average or common assessment;

(c) Individual victims will have less incentive to file their claims at this stage because it is uncertain what funds, if any, are available to compensate the victims of the Derailment, and due to the complex nature of the claims forms being proposed by the Debtor;

(d) Many and perhaps most victims will not have the expertise required to properly assess and document their claim and will have to retain legal counsel or other experts to do so;

(e) In the absence of a representative claim, a large proportion of Derailment victims might be inadvertently barred from the claims process, as a result of:

(i) failing to receive notice of the Debtors' Claims Procedure;

(ii) failing to understand the consequences of not completing a proof of claim form;

(iii) the exhaustiveness and complexity of the Debtor's Claims Procedure;

(iv) the financial cost of hiring legal counsel and other professionals to navigate the Debtor's Claims Procedure; and/or

(v) failing to understand their rights.

(f) A representative claim will provide a fair, accessible and economical way of safeguarding the claims of the Class Members at this stage in the CCAA proceedings. In doing so, it will advance the public interest objectives undergirding both the CCAA and Book IX.

6. This Court Should Take No Stock in the Chapter 11 Trustee's Submissions

61. The arguments made by the Debtor and the Chapter 11 Trustee that the CCAA process should conform to U.S. law are ill-founded and ill-conceived for at least four reasons.

62. First, several decisions from the U.S. Court of Appeals explicitly confirm that the filing of a representative proof of claim *is permitted* under U.S. bankruptcy law[45], including the First Circuit U.S. Court of Appeals, which contains the judicial District of Maine: the site of the Chapter 11 proceedings. In *In re Trebol Motors Distributor Corp*., the First Circuit held:

> The First Circuit has not addressed the issue of class claims in bankruptcy, but all of the circuit courts which have spoken have held that they are permitted [citations omitted]. We agree that class proofs of claim are permissible in cases under the Bankruptcy Code.[46]

63. The permissibility of class proofs of claim in bankruptcy proceedings was confirmed most recently by the Fourth Circuit U.S. Court of Appeals in its 2012 decision in *Gentry v. Siegel* ("*Gentry*"), in which that Court held:

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[45] See for e.g. *Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012) ["*Gentry*"] at 88-9 [BoA, Vol. 2, Tab 15]; *In re Birting Fisheries, Inc*., 92 F.3d 939 (9th Cir. 1996) at 939-40 [BoA, Vol. 2, Tab 16]; *In re Charter Co*., 876 F.2d 866 (11th Cir. 1989) at 873 [BoA, Vol. 2, Tab 17]; *Reid v. White Motor Corporation*, 886 F.2d 1462 (6th Cir. 1989) at 1469 [BoA, Vol. 2, Tab 18]; *In the Matter of American Reserve Corp*., 840 F.2d 487 (7th Cir. 1988) at 492-3 [BoA, Vol. 2, Tab 19]; *In re Trebol Motors Distributor Corp*., 220 B.R. 500 (1st Cir. 1998) ["*Trebol Motors*"] at 502 [BoA, Vol. 2, Tab 20].

[46] *Trebol Motors*, *supra*, at 502 (emphasis added).

> We agree with the Seventh Circuit's conclusion that the authorization for the filing of proofs of claim should not be construed strictly [citation removed]. Thus if a proofs of claim may be filed by agents of creditors, they may also be filed by putative agents on a conditional basis. Reaching such a conclusion serves the same procedural goal that is served by allowing agents to file proofs of claims on behalf of creditors. We thus conclude that creditors may file proofs of claims for themselves and as putative agents for members of a class who are similarly situated.
>
> […]
>
> In construing the Bankruptcy Rules to permit the filing of a class proofs of claim, we join the vast majority of other courts that have considered the issue [citations removed].
>
> […]
>
> Recognizing class proofs of claim has the salutary effect of putting trustees and other parties on notice of the representative claimants' intent to pursue a class action in the bankruptcy case, allowing them to agree or disagree through objections.[47]

64. Second, the U.S. case law also supports the proposition that it is premature to bar the filing of a class proof of claim at this time. Until the U.S. Court decides whether a class action can proceed in the context of Chapter 11 proceedings, a representative proof of claim is valid. As the Court in *Gentry* noted:

> Stated otherwise, by recognizing class actions, the Bankruptcy Rules also recognize that putative class representatives can keep the class action process alive until the court decides the issue. Thus we conclude that Rule 3001 should be construed to allow class proofs of claim, at least on a tentative basis, until the court rejects the class-action process.[48]

65. Third, it is fundamental to the jurisdictional analysis that when it comes to any litigation of the Derailment victims' claims:

(a) the Quebec court has jurisdiction *simpliciter* with respect to any claim brought in connection with the Derailment;

(b) in the event of a dispute over whether claims against the U.S. Debtor should be proven in Maine or in Quebec, Quebec is obviously the most

[47] *Gentry*, *supra* at 89 [BoA, Vol. 2, Tab 15].
[48] *Ibid*.

convenient forum for the trial of such claims given that the explosion occurred in Quebec, all the victims are located in Quebec, the damages were sustained in Quebec, and we presume that the U.S. Debtor will say that Quebec law applies to the assessment of such damages; and,

(c) Quebec courts apply Quebec procedure (the *lex fori*) to the proof of claims before the Quebec courts, and so it is Canadian law that should govern the procedural treatment of claims.

66. In any event, regardless of what the process might be for the proof of claims against the Chapter 11 Debtor, this court must be concerned with the proof of claims against a Canadian Debtor. Canadian claims against a Canadian Debtor should receive every advantage of Canadian law; if those claims ultimately are not recognized against a U.S. Debtor, that matters little, or not at all.

67. As noted by one senior bankruptcy jurist of the Ontario Superior Court:

> It is inappropriate to import concepts and tests from other jurisdictions; Canadian problems are to be resolved by Canadian concepts and tests. At the most one may very carefully examine general analytical approaches while being fully cognizant of the foreign jurisdictions' different problems and different legislative and judicial solutions to those different problems.[49]

68. Finally, the Chapter 11 Trustee's argument is especially weak and self-serving given that we do not know if there will be any assets allocated for distribution out of the U.S. estate. It may be that the assets available to the Derailment victims are entirely or mostly allocable to the Canadian debtor, or that the allocation exercise is made irrelevant through a restructuring plan.

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[49] *Re Royal Oak Mines*, 1999 CarswellOnt 792 (Gen. Div.) at para. 5(6) [BoA, Vol. 2, Tab 21].

C. The Debtor's Claims Procedure Obstructs Access to Justice; The Court Should Approve the Revised Claims Procedure

69. The Debtor's Claims Procedure – the length, complexity and detail of the proof of claim forms – is wholly disproportionate to the amount available for distribution and impedes the ability of potential victims from exercising their recourse before this Court.

70. As articulated above, the Debtor's Claims Procedure impedes access to justice in the following ways:

(a) the proof of claim forms are 78-pages long, with nine separate appendices;

(b) the forms must be completed on an individual basis;

(c) the claims proceed on an opt-in basis;

(d) the forms require the derailment victims to exercise their judgment in respect of complex legal issues, such as the quantification of unliquidated damages, and to indicate whether they are claiming from the Canadian Debtor, the U.S. Debtor or both;

(e) the forms require claimants to provide very specific details of their claims against the Debtor and all supporting documents giving rise to their claims – effectively, to the extent of information only otherwise available on discovery;

(f) the forms make no mention of the availability of the Representative Plaintiffs and Counsel to assist individuals completing the form;

(g) the “information sessions” planned by the Debtor will not provide claimants with legal advice or a legal advocate;

(h) the forms make clear that no funds have been allocated to satisfy the claims filed with the Monitor;

(i) the forms must be obtained, reviewed (presumably with legal counsel) and completed in 12 weeks or less.

71. Instead the Revised Claims Procedure would further access to justice by:

(a) significantly simplifying the individual proof of claim form to ensure that the information sought from Derailment victims is limited to what is necessary to gain an appreciation of the universe of claims; and

(b) stipulating base claim amounts to ensure consistency in the claims made by and ultimate treatment of Derailment victims;

(c) providing for a representative claims mechanism that will ensure that meritorious claims are not barred or defeated because of a victim’s lack of time, resources or expertise in navigating an individual claims process

1. Court Processes Must be Guided by Principles of Proportionality

72. Proportionality is a codified principle in Quebec’s civil procedure. Art 4.2 of the C.C.P. provides:

> 4.2. In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose

> of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.[50]

73. Proportionality is a bedrock principle that governs all stages of civil procedure in Quebec (and many other jurisdictions in Canada) to ensure that litigation is – as Justice Lebel explained in *Marcotte v. Longueuil* – "consistent with the principles of good faith and of balance between the litigants".[51]

74. The principle of proportionality empowers judges to intervene as active case managers, including at the discovery and documentary production stages of litigation[52], to ensure a balance between, on the one hand, the time and resources expended for a particular procedure, and on the other, the scope and complexity of the matter at issue.[53]

75. In the circumstances of this CCAA proceeding, the information requested of the Derailment victims in the Debtor's proof of claim form is disproportionately probing and onerous in light of the fact that no amount, at this time, has been earmarked to satisfy any of the individually submitted claims.

76. It is possible that the parties may ultimately only need to focus on a small subset of claims asserting particular types of damages, in order to properly distribute the funds

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[50] C.C.P., art. 4.2.

[51] *Marcotte v. Longueuil (City)*, 2009 SCC 43 at para. 43 [BoA, Vol. 2, Tab 22]

[52] *Geysens c. Gonder*, 2010 QCCA 2301 at paras. 14-15 [BoA, Vol. 2, Tab 23]

[53] Indeed, the Comité de révision de la procédure civile confirmed this public policy objective when recommending the addition of art. 4.2 to the C.C.P.:

> Pour que la justice civile demeure un service public accessible, il y a lieu de veiller à ce que les coûts et les délais en soient raisonnables. Dans la poursuite de cet objectif, il importe que les dispositions du Code de même que l'action des parties et des tribunaux soient inspirées par une même préoccupation de proportionnalité entre, d'une part, les procédures prises, le temps employé les coûts engagés et, d'autre part, la nature, la complexité et la finalité des recours. Ce principe permet de mieux établir l'autorité du juge lorsqu'il intervient dans la gestion de l'instance et de guide l'action des parties et de leurs procureurs. (Québec, Comité de révision de la procédure civile, *Une nouvelle culture judiciaire* (Québec, 2001) at pp.38-39) [BoA, Vol. 2, Tab 24].

available. The Revised Claims Procedure may very well avoid unnecessary, significant and disproportionate administrative costs.

77. The Revised Claims Procedure demonstrates the sort of flexibility inherent in the CCAA process "where there are no fixed rules that must apply in all cases" – a flexibility which is the CCAA's "genius", as noted by Justice Blair of the Ontario Court of Appeal.[54]

78. This Court is empowered, on the basis of proportionality alone, to decline to approve the Debtor's Claims Procedure, and approve the Revised Claims Procedure.

2. The Impact of the Claims Bar and any determinations must be limited to these CCAA Proceedings and only in the event of the acceptance of a Plan

79. The claims process approved under the CCAA is to a purpose: the formulation and consideration of a plan of arrangement with the Debtor. The Debtor's Claims Procedure is not clear with respect to its effect in the event that a CCAA Plan is not accepted by creditors or its impact on Derailment victims' claims against third parties. (For e.g.: Is the quantification of damages in respect of a claim in these proceedings binding for the purpose of the class action? Are persons who fail to make a claim in these proceedings prejudiced in their ability to make that claim against third parties?).

80. The Class Action Plaintiffs submit that to limit the potential prejudice that the summary CCAA claims process may cause to class members as well as to solvent third-party defendants to the class action, the claims procedure order should be expressly without prejudice to the position of the parties in other litigation arising from the Derailment.

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[54] *Re Stelco Inc*., 2005 CarswellOnt 6818 (C.A.) at para. 22 [BoA, Vol. 2, Tab 25].

PART IV. RELIEF REQUESTED

81. The Class Action Plaintiffs respectfully request that this Court:

(a) GRANT the Class Action Plaintiffs' Cross-Motion for an Order Approving a Process to Solicit Claims and for the Establishment of a Claims Bar Date;

(b) DISMISS the Debtor's Motion for an Order Approving a Process to Solicit Claims and for the Establishment of a Claims Bar Date;

(c) ENTER into an order the Claims Process Order substantially in the form of the proposed order attached to the Motion as Exhibit R-1; and

(d) THE WHOLE, without costs, unless contested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Lac-Mégantic, February 4, 2013

_____
ME DANIEL E. LAROCHELLE
Attorney for the Petitioners

Montréal, February 4, 2013

_____
CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein
Attorneys for the Petitioners Plaintiffs