

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

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

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:
 - (a) an order authorizing the filing of certain additional claims produced as Exhibit R-1 to the Initial Plan of Argument (as defined below) (the “**June 2014 Claims**”) , and
 - (b) advice and direction of the court in respect of the treatment of the claims produced as appended as Exhibit R-2 to the Initial Plan of Argument (the “**January 2015 Claims**” and the “ **April 2015 Claims**”) [collectively with the June 2014 Claims, the “**Additional Claims**”].
2. In this Supplementary Plan of Argument, capitalized terms not otherwise defined herein have the same meaning as in the Plan of Argument dated April 23, 2015 (the “**Initial Plan of Argument**”).
3. This Supplementary Plan of Argument is submitted to complement the Initial Plan of Argument submitted in support of the Fresh as Amended Motion for an Order Authorizing the Filing of Additional /Late Claims (the “**Late Claims Motion**”).
4. On April 27, 2015, this Court heard the Late Claims Motion. The Court delivered oral reasons on April 27, 2015 (delivered in written form on April 29, 2015) adjourning the Late Claims Motion to May 11, 2015.

5. At the request of the Class Representatives, the Court adjourned the motion in order to allow the Class Representatives to present a fulsome evidentiary record.

6. Since April 27, 2015, the Class Representatives have worked diligently to contact the Class Members with Additional Claims.

7. This Plan of Argument provides an overview of the evidence gathered by the Class Representatives since April 27, 2015.

PART II. FACTS

A. *The Efforts of the Class Representatives*

8. On July 15, 2013, the Class Representatives filed a Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative pursuant to ss. 1002 and following of the *Code of Civil Procedure of Quebec*, R.S.Q., c. C-25 (the “**C.C.P.**”) against MM&A and certain third parties, bearing Quebec Superior Court file no. 480-06-000001-132 (the “**Class Action**”);

9. Shortly after the commencement of the Class Action, a website and Facebook page (the “Sites”) were established in respect of the Class Actions. Members of the putative class (the “Class Members”) were encouraged to register themselves on these Sites and to provide details as to their particular circumstances and to describe the damages that they suffered. This is typical in class actions, as it is important to be able to communicate with the class for the purpose of, among other things, ensuring that

class members are kept well informed as to the important steps in the proceeding, gathering evidence as may be necessary from individual class members, identifying and assessing damages, and to provide information as to the claims filing process;

10. Subsequent to the start of the Class Action, MM&A then commenced these proceedings pursuant to the CCAA (the “CCAA Proceedings”);

11. Relatively early in the CCAA Proceedings, various stakeholders questioned the authority of the Class Representatives to represent the interests of the Class Members. To resolve that issue, the Class Representatives obtained proxies from a large number of Class Members. The Class Members who executed these proxies authorized the Class Representatives to represent their interests in the CCAA Proceedings, including, among other things, by filing a claim on their behalf as part of the CCAA process;

12. Once the Claims Process Order was made by this Court, the Class Representatives, through Class Counsel, made very substantial efforts to inform Class Members of the requirements of the CCAA Claims Process, by personalized letters to all known Class Members, media and social media so as to gather as much information as possible to facilitate the filing of claims by Class Members. Many Class Members had mistakenly concluded that, having registered on the Class Action Sites and/or delivered a proxy, nothing further was required to be done so as to complete the claim form process;

13. In terms of completing the claim forms, wherever possible, Class Counsel met with individual Class Members for the purpose of assisting with the individual preparation of proofs of claim, describing the type of damages sustained, and attaching supporting documentation where available. Class Counsel also did their utmost to ensure that whenever a Class Member had executed a proxy, or had registered on the Class Action website that a proof of claim was also prepared and filed well before the Bar Date.

14. Indeed, over 3,700 individual claim forms were prepared and filed by individuals with the assistance of Class Counsel through the authority of the proxy.

15. Counsel for the Class Representatives have spent considerable time conducting detailed telephone interviews with individuals representing the bulk of the Additional Claimants since April 27.¹ There are fewer affidavits than the total number of Additional Claimants due to the existence of separate claims made by parents of children with claims.

16. Despite their best efforts, Class Counsel were not able to reach 24 claimants in the time available. These 24 claimants either did not respond to emails or voicemail messages, failed to answer the phone, or did not provide Class Counsel with valid contact information or new contact information (some of the phone numbers were no

¹ Supplementary Affidavit of Daniel Larochelle sworn May 8, 2015 ("Supplementary Larochelle Affidavit") at para 2.

longer in service). Richters has also advised that some of the late claims were, in fact, timely filed previously with the Monitor.²

B. The Additional Claims

17. There are three categories of Additional Claims that Class Counsel seeks to file, as outlined in the Initial Plan of Argument:

a. The **June 2014** Claims: there are approximately 80 claims that fall into one or more of the following three subcategories:

i. **Claims that were not filed due to technical problems with the Sites.** The CCAA claims generation process was linked to the Class Action web site. Individuals who provided information and registered on the Class Action website were automatically added to a database, and the information that they provided was used to populate draft CCAA claim forms. A technical error prevented this process from occurring in some isolated cases. Thus, in a limited number of cases, although these class members had registered and would have filed a claim, this technicality prevented a number of legitimate corresponding CCAA claims from being available for finalization and filing;

² Supplementary Larochelle Affidavit at para 8.

ii. **Claims that were not filed due to a last minute surge in claims.**

The second reason for some individuals' claims not being filed has to do with the fact that Me Larochelle's office was overwhelmed by the dozens and dozens of claimants seeking assistance to file their claims in the final days leading up to the claims Bar Date. Notwithstanding Me Larochelle's best efforts, as detailed in his April 20 Affidavit, to inform Class Members of the claims process and the deadline to file claims, and to file such claims in advance of the claims bar date, many Class Members waited until a day or two before the deadline. As such, Me Larochelle's office and staff encountered many challenges dealing with the late surge of claims and were simply not able to timely process and file a number of claims. These claims were either not delivered to Me Larochelle's office prior to the Bar Date, or alternatively were not brought to his attention prior to June 13, 2014 and are dated between June 18 and 30, 2014. Once Me Larochelle became aware of these claims, he made every effort to ensure these claims were completed, and prepared to be filed, within approximately two weeks of the claims Bar Date. Richters advised Me Larochelle on April 13, 2015 that a number of these claims were rejected due to lateness.

iii. **Claims that were not filed by mistake.** Finally, a number of claims were received by Me Larochelle's office in advance of the Claims Bar Date, but which were not filed on time due to inadvertence.

In all of the cases described above, there was a clear intention on behalf of the claimants to timely file their claims.³

b. The **January 2015 Claims:** Approximately 81 claims were advanced contemporaneously with MMA's disclosure of the existence of a sizeable settlement fund. A small number of these claims had been received by Me Larochelle's office between July 2014 and January 2015.⁴

c. The **April 2015 Claims:** Approximately 25 claims in respect of moral damages (including certain evacuation claims) were advanced immediately following MMA's presentation of potential distributions under the plan.⁵

C. *The Claimants' Evidence*

18. The claimants' evidence reflects the following:

³ Larochelle Supplementary Affidavit at para 7(a).

⁴ Larochelle Supplementary Affidavit at para 7(b).

⁵ Supplementary Larochelle Affidavit at para 7(c).

- (a) 16 of the 208 claims initially identified were in fact filed with the Monitor on time and are therefore no longer part of this motion;⁶
- (b) The claimants with June 2014 Claims all assert a clear intention to file their claims before the bar date. In fact, these claimants all believed that their claims were filed prior to the claims Bar Date by virtue of the fact that they had signed up online and had spoken directly with Me Larochelle.⁷
- (c) A number of the January 2015 Claims and April 2015 Claims assert that they suffer from significant traumatic stress, depression or similar emotional challenges as a result of the tragedy, and that their behaviour was affected by this condition. The majority of these claimants also had an intention to file claims throughout the process.⁸

D. The Timing of this Motion

19. This motion was not brought earlier for three reasons:

- (a) First, there was uncertainty as to how to proceed while the settlement fund and the Plan remained in a state of flux. Class Counsel have always been sensitive to the fact that the Claims Process would not capture the claims of all Class Members, either as a result of inadvertence, mistake, misinformation and/or on account of the Class Members' psychological

⁶ Larochelle Supplementary Affidavit at para 9(a).

⁷ Larochelle Supplementary Affidavit at para 9(b).

⁸ Larochelle Supplementary Affidavit at para 9(c).

state. The Class Representatives had initially sought to address this concern through the filing of a representative claim for all Class Members, as was done in the *Sino Forest* and *Poseidon* cases. Ultimately, the Claims Procedure Order required individual claims to be filed for all but the wrongful death victims. However, it also reserved the Court's discretion to admit other claims, and, in the course of negotiating the Claims Procedure Order, the parties discussed the possibility of permitting a representative claim to be filed at a later stage, in the event of the creation of a settlement fund substantially in excess of the \$25 million available at the time when the original Claims Procedure Order was made.⁹

- (b) Second, Class Counsel did not (and still do not) perceive any prejudice caused by the Additional Claims to the formulation of the Plan. As observed by the Monitor in its Seventeenth report, the Additional Claims represent, in their totality, only a 2% dilution of the moral damage category. The Class Representatives would not have approached the moral damages negotiations any differently had these Additional Claims been filed before June 13, 2014. In fact, the value and treatment of the claims in the moral damage and economic loss categories has fluctuated widely throughout the negotiations, and is still not fully settled. For instance:

⁹ Larochelle Supplementary Affidavit at para 10(a).

- (i) in the economic loss category: claims were initially estimated and capped at \$100 million; that amount was then reduced to \$75 million; and it may be further reduced through the claims adjudication process recently approved by this Court, with the result that the creditors are still negotiating how any “surplus” should be applied—as noted by the Monitor in its Seventeenth Report to the court: “[a]t this stage it is not possible to quantify the impact of these late claims on the distribution to the Property and Economic Damages category” since the latter have not been fully quantified nor adjudicated; and,

- (ii) in the moral damage category: over the course of the negotiations between creditors the moral damages claims were initially capped for the purposes of the Plan at \$75 million; that amount was later increased to \$100 million, and the Class Representatives are proposing that this cap be increased further in the event of any “surplus” Economic Loss; negotiations are also ongoing to determine whether grandparents and grandchildren of the deceased derailment victims should be excluded from the wrongful death claims category and forced into the moral damages category; finally, the MM&A Plan incorporates a “buffer” in respect of the

traumatic stress sub-category precisely because of the ongoing uncertainty in respect of those claims.¹⁰

- (c) Finally, inasmuch as the major creditors having claims in these proceedings did not (and do not) appear to be opposed to the admission of the Additional Claims (or, at least, the June 2014 Claims), it earlier appeared to Class Counsel to be more efficient to deal with the Additional Claims by including a provision in the MM&A Plan providing for payment on account of those claims (subject to their validation for the purposes of receiving a distribution). Class Counsel attempted to negotiate for the inclusion of such a clause in the MM&A Plan. When it became apparent that MM&A would not include a clause to that effect in its plan and would be scheduling a meeting, Class Counsel advised that it would bring the Motion (although, given the prospect of future late claims, Class Counsel continue to be concerned by the efficiency and practicality of dealing with late claims by way of individualized formal motions to the Court of this kind).¹¹

20. At the conclusion of the Seventeenth Report, the Monitor expresses concern that a significant number of other late claims could be filed. To this point, individuals are on their own still “signing up” on the Class Action Sites. It appears as though a further 300 to 400 individuals have registered on the Class Action web site. Class Counsel has not

¹⁰ Larochelle Supplementary Affidavit at para 10(b).

¹¹ Larochelle Supplementary Affidavit at para 10(c).

yet had the opportunity to cross-reference these registrants against the Monitor's claims register or to interview them in order to determine whether they filed a claim in these proceedings, and, if not, the circumstances surrounding their failure to do so.¹²

PART III. LAW AND ARGUMENT

21. The Class Representatives rely on the legal argument advanced in the Initial Plan of Argument.

PART IV. RELIEF REQUESTED

22. The Class Representatives seek the relief enumerated in the Initial Plan of Argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

¹² Larochelle Supplementary Affidavit at para 11.

LAC-MÉGANTIC, May 8, 2015

(S) Daniel E. Larochelle

ME DANIEL E. LAROCHELLE
Attorney for the Court Appointed
Representatives

MONTRÉAL, May 8, 2015

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein
Attorneys for the Court Appointed
Representatives