UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re	)	
	)	CHAPTER 11
MONTREAL MAINE & ATLANTIC RAILWAY, LTD.	)	CASE NO. 13-10670-LHK
	)	
Debtor	)	

WRONGFUL DEATH CLAIMANTS' OBJECTION TO MOTION OF "INFORMAL COMMITTEE OF QUEBEC CLAIMANTS" FOR APPOINTMENT OF CREDITORS' COMMITTEE

The representatives of the probate estates[1] of 18 victims[2] (the "Wrongful Death Claimants") of the massive explosion in Lac-Mégantic, Quebec, from the derailment of a train operated by the Debtor (the "Disaster") object to the motion of the Informal Committee of Quebec Claimants (the "Informal Committee") for appointment of an official creditors' committee to represent the types of creditors on the Informal Committee. While offering no specificity regarding the constituencies that should be represented by the Informal Committee's proposed official committee, the Informal Committee appears to seek a committee comprised of three principal categories of claimants: (a) wrongful death and personal injury claimants holding administrative claims under § 1171(a) of the Bankruptcy Code, (b) Canadian governmental

[1] The estate representatives are Marie Precieuse Salomon, Milliana Alliance, Lisette Fortin-Bolduc, Genevieve Dube, Mylaine Dube, Laurie Dube, Louise Boulet, Jean Boulet, Colette Boulet, Champagne Ghislain, Danielle Lachance, Germaine Faucher, Maude Faucher, Tristan Lecours,Sandy Bedard, William Guertin, Arianne Guertin, Clermont Pepin, Marie-Eve Lapierre, Dave Lapierre, Nancy Valler, Diane Belanger, France Picard, Christiane Mercier, Elie Rodrique, Maxime Roy, Carol-Anne Roy, Lise Doyon, Sherley Roy, Rejean Roy, Louise Breton, Mario Sévigny, Marc-Antoine Sévigny, Michel Sirois, Solange Belanger, Richard Turcotte, Christine Pulin, Suzanne Bizier, Annick Roy and Sophie Veilleux.

[2] The victims are Marie Semie Alliance, Stephanie Bolduc, Yannick Bouchard, Marie France Boulet, Karine Champagne, Marie-Noelle Faucher, Michael Guertin, Jr., Stephanie Lapierre, Joannie Lapointe, Marianne Poulin, Martin Rodrique, Jean Pierre Roy, Kevin Roy, Melissa Roy, Andree-Anne Sevigny, Jimmy Sirios, Elodie Turcotte and Joanie Turmel.

entities of the Province of Quebec and the City of Lac Megantic holding environmental damage and subrogation claims, and (c) non-governmental property damage claimants holding general unsecured claims.

The appointment of such a committee should be denied for several reasons. First, the competing rights and priorities of the varying classes of claimants would result in irreconcilable conflicts precluding adequate representation of any of the committee's constituents. Second, the Bankruptcy Code's bar against governmental units from serving on official creditors' committees precludes the Province of Quebec and the City of Lac Megantic (together referred to as the "Canadian Governmental Entities") from membership on the official committee. Third, even if governmental entities were permitted to serve on official committees, the Canadian Governmental Entities by their very nature (and without an express waiver of sovereign immunity) would be unable to undertake the fiduciary obligations to other claimants that are inherent in committee service. Finally, whereas the wrongful death and personal injury claimants are individuals of limited means for whom individual participation in the American bankruptcy process is impractical, the Canadian Governmental Entities are entirely capable of representing their interests without the need for representation through a committee.

For the foregoing reasons, as more thoroughly explained below, the Wrongful Death Claimants request that the Court deny the Informal Committee's motion, and instead grant the Wrongful Death Claimants' motion to direct formation of an unconflicted committee representing solely wrongful death and personal injury claimants.

1. ***The interests of the committee proposed by the Informal Committee would be hopelessly conflicted thus precluding adequate representation of any of its members***. Section 1102(a)(2) of the Bankruptcy Code provides for appointment of official committees in Chapter

11 cases "if necessary to assure adequate representation of creditors . . . ." 11 U.S.C. § 1102(a)(2). Although the Bankruptcy Code provides no framework to determine "adequate representation," courts have generally applied these factors: (a) the ability of the committee to function; (b) the nature of the case; and (c) the standing and desires of the various constituencies. In re Enron Corp., 279 B.R. 671, 684 (Bankr. S.D.N.Y. 2002). Each of these factors weighs against formation of the multi-constituency committee requested by the Informal Committee.

2. Concerning the ability of the committee to function, the conflicting interests and priorities of the constituents of the committee proposed by the Informal Committee would utterly and hopelessly preclude the committee's ability to function. "A strong indicator of whether a committee is able to adequately represent its constituents is its ability to function. A committee that is hopelessly divided, unable to take a position on important matters and ineffective would clearly support an argument for a separate committee." Id. at 686, citing In re Hills Stores Co., 137 B.R. 4, 6 (Bankr. S.D.N.Y. 1992) (holding that a court may be inclined to appoint separate committees where "the creditors of separate debtors had vastly conflicting aims and entitlement and had shown themselves unable to function on a single committee…").

3. Under Section 1171(a), wrongful death and personal injury claimants receive administrative priority for their claims. No one has suggested that private property damage claimants are other than general unsecured creditors. A committee cannot effective represent administrative and general unsecured claims, any more than a committee could represent both secured and unsecured creditors (In re Fas Mart Convenience Stores, Inc., 265 B.R. 427 (Bankr. E.D. Va. 2001) (U.S. Trustee abused discretion in appointing to unsecured creditors' committee a member who aggressively sought secured claim status)), or both general unsecured creditors

and equity holders (Bodenstein v. Lentz (In re Mercury Fin., Corp.), 240 B.R. 270 (N.D. Ill. 1999) (district court affirmed bankruptcy court order dissolving combined committee of creditors and equity holders and requiring U.S. States Trustee to appoint separate committees to represent each constituency).

4. The interests of the Canadian Governmental Entities also conflict with both wrongful death/personal injury claimants and with private property damage claimants. Under Canadian law, the Canadian Governmental Entities likely have the right to assert a first priority lien on the Canadian debtor's real estate to secure environmental clean-up costs.[3] Thus, the Canadian government may be a secured creditor at least with respect to certain Canadian assets, and may also have something akin to administrative expense priority in the pending CCAA proceeding. In this Chapter 11 case, however, it is unlikely that the Canadian Governmental Entities can establish administrative priority for the cost of cleaning up a foreign debtor's property in another country, and the Canadian Governmental Entities certainly have no basis for asserting a lien on assets of the Debtor.

5. These are not just hypothetical or potential differences in legal rights. Every action proposed by the Trustee – ranging from sale of the railroad to potential settlements with insurers to decisions on whether, where and how to assert claims against third parties – can be

[3] Section 11.8(8) of Canada's *Companies' Creditors Arrangement Act* provides:

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(*a*) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(*b*) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

expected to have dramatically different economic and perhaps legal effects for the three constituencies (wrongful death/personal injury, governmental, and private property claims). And the three constituencies will have starkly different interests under a Chapter 11 plan. For almost every key decision, the weighing of risk, cost and delay versus likely benefit will be different for each constituency. A committee charged with representing all three constituencies will be dysfunctional by definition. For example, how can committee professionals advise the committee on a deal that may benefit one constituency but place another constituency at significant cost or risk? If the committee deadlocks because members representing each constituency are evenly balanced, is either constituency being adequately represented? If the U.S. Trustee appoints a committee with one constituency in the majority, is the minority constituency being adequately represented? If it turns out that members of all three constituencies are appointed to the committee,[4] how can it be fair – never mind beneficial from the standpoint of case administration – for the "committee position" to be determined by whatever two constituencies happen to be aligned against the third on any particular issue? And what of the fiduciary duties of each committee member to the multiple constituencies represented by the committee? Do committee members place themselves in legal jeopardy if they vote the interests of their own constituency?

6. Committees under the Bankruptcy Code, consistent with the American legal system as a whole, are meant to represent particular interests rather than "the situation." It would not be correct to suggest that divergent interests should be resolved by negotiations *within* a multi-constituency committee. The statutory requirement of "adequate representation" refers to representation *by a committee*. If members of a committee are constantly looking to their own

[4] This would pre-suppose that the Canadian Governmental Entities, or someone else representing government environmental claims, can and would be appointed by the U.S. Trustee – a matter subject to considerable doubt, as discussed below.

separate counsel for unconflicted advice, or worse yet in the case of unsophisticated individuals such as the Wrongful Death Claimants are trying to figure it out on their own, they are not being adequately represented by a committee within the meaning of Section 1102 of the Bankruptcy Code.

7. The second factor reviewed by the courts – the nature of this case – also argues against the everyone-under-one-tent committee sought by the Informal Committee. Unlike the typical Chapter 11 case dominated by commercial interests, this case results from and involves large claims by individuals who have suffered a horrific loss and, through no fault of their own, are enmeshed in a legal process with which they are totally unfamiliar. The situation cries out for the Wrongful Death Claimants to have a committee that can adequately represent them.

8. Assuming that considerations of practicality may trump the statutory scheme, no such considerations require formation of a multi-constituency committee. The Canadian Governmental Entities have no need for a committee; they can, and because of their unique interests should, be represented by their own counsel. Private property damage claimants, at this moment, are an out-of-the-money constituency. Whether a second committee should be appointed to represent their interests (as is done in the typical mass tort case) is not before this Court at this time. If the issue is raised, it should be analyzed similarly to how courts consider whether an equity committee is appropriate in an insolvent-debtor case. Courts typically refuse to order appointment of committees to serve out-of-the-money equity holders. Sometimes such committees are appointed, but subject to limitations or conditions on compensation of their professionals. Whatever the outcome of that analysis, if a separate committee of private property damage claimants were to be requested, it is completely unfair to the Wrongful Death Claimants to "solve" the issue of whether and how property damage claimants will participate in this case

by putting them on a committee with Wrongful Death Claimants, whose rights are vastly different and senior to those of property damage creditors.

9. The nature of this case has no parallel with the multi-debtor cases in which it has become standard practice to form a single committee representing general unsecured creditors of all of the affiliated companies. Such committees are formed not because anyone thinks that it is the right way for the bankruptcy system to function but because there is no other practical choice, since it would be unworkable to appoint five, ten or fifty different committees. Moreover, the typical multi-debtor case is a commercial case in which the committee members are bankers, fund managers and credit managers familiar with the bankruptcy system and who have served on such committees before – some comfort, perhaps, to courts and U.S. Trustees who regret departing from the statutory scheme but feel they have no workable alternative. The necessity, and consequent prevalence, of departure from the statutory scheme in multi-debtor cases should not spill over to this Court's consideration of "adequate representation" issues in this case, where necessity does not dictate a multi-constituency committee and where the Wrongful Death Claimants are not sophisticated players in the bankruptcy system.

10. The third factor considered by courts on the issue of adequate representation consists of the desires of the affected constituencies. Here, a clear majority of the wrongful death claimants are opposed to a multi-constituency committee. It is not clear that the Informal Committee constitutes the authentic spokesperson for any constituency. Absent a clear consensus in favor of a multi-constituency committee from the affected claimants, this Court should not direct the appointment of such a committee.

11. In sum, the three factors considered by courts demonstrate that the multi-constituency committee proposed by the Informal Committee would not provide adequate representation to the Wrongful Death Claimants, or, for that matter, any other constituency.

12. ***The Canadian Governmental Entities are statutorily barred from serving on the creditors' committee***. Under the plain language of Section 1102(b): "A committee of creditors appointed under subsection (a) of this section *shall ordinarily consist of the persons*, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of members of a committee organized by creditors before the order for relief under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented." (emphasis added). "Person" is defined in 11 U.S.C. § 101(30) to mean an "individual, partnership, and corporation, but does not include governmental units" with certain exceptions not applicable in this case. Under 11 U.S.C. 101(27) the definition of "governmental unit" includes "a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." Thus, by referring only to the "persons" that may serve on the committee, the plain language of Section 1102(b) clearly excludes governmental entities from being able to serve on official committees. The legislative history of Section 1102 supports that view. The Notes of the Committee on the Judiciary, House Report No. 95-595, explain the congressional intent behind 11 U.S.C. § 1102(b)(1): "Subsection (b) contains precatory language directing the court to appoint the persons holding the seven largest claims against the debtor of the kinds represented on the creditors' committee, or the members of a prepetition committee organized by creditors before the order for relief under Chapter 11. The court may continue prepetition committee members only if the committee was fairly chosen and is representative of the different kinds of claims to be represented. *The court is*

restricted to the appointment of persons in order to exclude governmental holders of claims or interests." (emphasis added).

13. With the exception of In re Lion Capital Group, 44 B.R. 684 (Bankr. S.D.N.Y. 1984), every reported decision on this issue has held that the Bankruptcy Code bars governmental claimants from serving on creditors' committees. See, e.g., In re VTN, Inc., 65 B.R. 278 (Bankr. S.D. Fla. 1986) (barring quasi-governmental public works agency from membership on creditors' committee; In re Mansfield Tire & Rubber Co., 39 B.R. 974 (N.D. Ohio 1983) (excluding wholly owned government corporation from serving on committee); In re American Atomics Corp., 2 B.R. 526 (Bankr. D. Ariz. 1980) (denying request of school district for membership on unsecured creditors' committee).

14. In re Lion Capital Group, 44 B.R. 684 (Bankr. S.D.N.Y. 1984), the only case relied upon by the Informal Committee in support of potential committee membership for the Canadian Government Entities, is both poorly reasoned and distinguishable from this case. In Lion Capital, the bankruptcy court considered a motion to employ counsel filed by an official committee of municipal entities and school districts. The bankruptcy court decided that "the municipalities and school district claimants in this case could so serve because, *inter alia*, the provision of Section 1102(b)(1) that only 'persons' could 'ordinarily' serve was not an absolute bar and because the claims of municipalities and school districts were not tax claims entitled to priority." Id. at 68. The court offered no additional explanation for its interpretation of Section 1102(b)(1) or basis for its conclusion about how priority tax claims of governmental entity could affect whether such entities could serve on creditors' committees. The court went on to note, however, the unique considerations that led to its appointment of the committee: "the great need for creditor representation in this case, the inability of the United States Trustee to form an

official creditors' committee and the heavy preponderance of the claims of municipalities and school districts (over 90%) in the calculus of unsecured debt commanded the appointment of an official special committee." Id. These unique circumstances are not present in this case. Indeed, given that the wrongful death and personal injury claimants hold the heavy preponderance of claims in this case, Lion Capital more closely supports the Wrongful Death Claimants' motion for appointment of a committee exclusively representative of their interests.

15. In sum, Section 1102(b) bars governmental units from serving on creditors' committees and the Informal Committee has offered no reasonable basis for disregarding that prohibition. Thus, the Informal Committee's motion for the formation of an official committee including Canadian Governmental Entities should be denied.

16. ***Additional considerations preclude the Canadian Governmental Entities from service on the creditors' committee.***

Even if the statutory prohibition against governmental entities in Section 1102(b) did not apply, there are other compelling reasons why the Canadian Governmental Entities should not be permitted to serve on an official committee. As committee representatives, the Canadian Governmental Entities would have a fiduciary obligation to ensure that the interests of all of the committee's constituents (who may or may not all be Canadian residents) in addition to its own are adequately represented. In re Dow Corning Corp., 255 B.R. 445, 485 (E.D. Mich. 2000). Like any other committee member, the Canadian Governmental Entities would need to submit themselves to the jurisdiction of this Court concerning their committee service. The Informal Committee's motion should not even be considered, as it relates to the Canadian Government

Entities, without an express waiver of sovereign immunity by the Canadian Government Entities relating to service on an official committee.[5]

WHEREFORE, for the reasons set forth above, the Wrongful Death Claimants pray that the Court deny the Informal Committee's motion for appointment of a multi-constituency committee and instead grant the Wrongful Death Claimants' motion to direct formation of an unconflicted committee representing solely wrongful death and personal injury claimants.

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By their attorneys,

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[5] The Wrongful Death Claimants take no position on whether any such waiver or implied waiver would need to be broader, *e.g.*, for all matters related to the Debtor.