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*

and

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

*Monitor*

and

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

*Court Appointed Representatives of the Class Members*-PETITIONERS

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**PLAN OF ARGUMENT OF THE COURT APPOINTED REPRESENTATIVES OF CLASS MEMBERS FOR AN ORDER ACCEPTING THE FILING OF AN AMENDED PLAN AND FOR ADVICE AND DIRECTIONS**

**(Sections 4 and 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36)**

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## PART I. OVERVIEW

1. On April 10, 2015, Montreal, Maine & Atlantic Canada Co. ("**MM&A**") brought a motion for an order for the convening, holding and conduct of a creditors' meeting (the "**Meeting**") to vote on a Plan of Compromise and Arrangement (the "**MM&A Plan**") and for a twelfth extension of the stay period.

2. The representatives of the class members (the "**Class Representatives**") are concerned that the MM&A Plan will not be approved by the creditors at the Meeting.

3. The Class Representatives bring this motion for an order:

   (a) accepting the filing of the Amended Plan of Compromise and Arrangement (the "**Class Representatives' Plan**"), already produced as **Exhibit R-1**; and,

   (b) providing advice and directions to the Class Representatives regarding the dissemination of the Class Representatives' Plan to the creditors and the holding of the meeting of creditors to vote in respect of the Class Representatives' Plan in coordination with the meeting and vote on the MM&A Plan (e.g., substantially in accordance with the revised form of Meeting Order already produced as **Exhibit R-2**).

## PART II. FACTS

4. Since this Court's order granting MM&A's motion for an eleventh order extending the stay period, the Class Representatives' counsel have been involved in negotiations with respect to the content and terms of the MM&A Plan.

5. While a number of the changes proposed by the Class Representatives' counsel were accepted by MM&A, some important proposed changes have been rejected.

6. Among the changes proposed by the Class Representatives that have not been included in the final version of the MM&A Plan are:

(a) the recognition of grandparents and grandchildren as persons having wrongful death claims, with the result that these claims are unfairly diluting amounts available to other persons having claims in the "Moral Damages" category;

(b) a greater distribution to parents, siblings, grandparents and grandchildren from the amounts allocated by the MM&A Plan to the payment of Wrongful Death Claims, on the basis that the claims of these persons are being treated disproportionately under the Plan; and,

(c) a different reallocation of the surplus (if any) in the amounts allocated by the MM&A Plan to the payment of Economic Loss Claims (the "Surplus") on the basis that the *pro rata* distribution to *all* categories of claims as proposed by the MM&A Plan, effectively denies Class Members the benefits of the share of the settlement fund negotiated for them by the Class Representatives.

7. Accordingly, in the event that the MM&A Plan is not approved by the creditors, the Class Representatives seek to put the Class Representatives' Plan before the creditors for approval.

8. The Class Representatives propose that the Class Representatives' Meeting take place at the same location as the Meeting to vote on an MM&A Plan, namely at the Centre-Sportif Mégantic in the City of Lac-Mégantic, immediately following a negative vote on the MM&A Plan.

9. The Petitioners seek to put the Class Representatives' Plan before the creditors following a vote on the MM&A Plan, in the event that the MM&A Plan is not approved. To that end, they would have the Monitor include a copy of the Class Representatives' Plan (in English and in French) in its mailing to all known creditors and parties on the service list, and to include in its report to creditors a description of the differences between the MM&A Plan and the Class Representatives' Plan.

## PART III. ISSUES AND ARGUMENT

### *A. Issues*

10. The Court has raised the issue as to whether there is jurisdiction for a creditor-initiated plan to be put to creditors. The Class Representatives submit that there is authority for such jurisdiction, as described below.

11. The second issue is whether the Court should exercise its discretion to authorize the Class Representative to file the Class Representatives' Plan and put it to a vote of creditors in the event that creditors reject the MM&A Plan. The Class Representatives submit that it should.

## *B. The CCAA permits creditors to submit a plan of compromise or arrangement*

### 1. The provisions of the CCAA

12. The relevant provisions governing compromises and arrangements in the *CCAA* provide as follows:

> *Compromise with unsecured creditors*
>
> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> *Transaction avec les créanciers chirographaires*
>
> 4. Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers chirographaires ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

13. This provision is generally understood to permit the filing of a plan of compromise or arrangement by creditors:

(a) In their commentary to art. 4 of the CCAA, Houlden & Morawetz state that while in general, the application for permission to submit a plan of compromise or arrangement is made by the debtor company, creditors (or a group thereof) can also submit a plan:

> An application for permission to submit a plan of compromise or arrangement to a meeting of creditors may be made by the debtor company, by a creditor, or by a trustee in bankruptcy or liquidator of the company. In most cases, the application is made by the debtor company.

However, it is possible for a creditor or a trustee in bankruptcy to make an application under the *CCAA*.[1]

(b) Similarly, David Baird, Q.C., "an application under [sections 4 and 5 of] the CCAA may be brought by the debtor company, *a creditor of the debtor company*, or a trustee in bankruptcy or liquidator of a debtor company."[2]

14. These conclusions are supported by case law, as referred to below.

15. The Class Representatives have identified the following instances where courts have tacitly or expressly acknowledged the authority of creditors to file a plan of arrangement:

(a) *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*: the Court of Appeal for Ontario considered the creditor-initiated plan submitted in response to the liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("*ABCP*");[3]

(b) *1078385 Ontario Ltd., Re:* The Court of Appeal for Ontario dismissed a motion for leave to appeal the approval of a secured-creditor-led-plan that excluded unsecured creditors.[4]

(c) *Re Doman Industries Ltd.*: the court ultimately refused to allow the filing of the creditors' plan, but not for lack of authority; rather, the court concluded

[1] Lloyd W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Analysis (Companies' Creditors Arrangement Act*) at N§33 ("Houlden").
[2] David E. Baird, *Baird's Practical Guide to the Companies' Creditors Arrangement Act* (Toronto: Carswell, 2009) at *p*. 79.
[3] 2008 ONCA 587 (CanLII) (Ont. C.A.) ["*Metcalfe*"] at para. 2, 23..
[4] 2004 CanLII 55041 (Ont. C.A.) at para. 1, 14 30.

that the creditors' plan purported to amend contractual rights in a way that effectively gave them a veto in respect of the restructuring of the debtor;[5]

(d) *Re Crystallex International Corporation*: the issue has arisen at least twice:

*(i)* At the start of the proceedings, in December 2011, the court considered competing applications: one by the debtor, and the other by noteholders who wished to file a plan of arrangement that would have the effect of terminating shareholders' interest in the debtor. The court dismissed the noteholders' application, but not because they lacked authority to file a plan—rather the court concluded that "to cancel the shares of the existing shareholders at this stage is premature"[6] and,

(ii) Approximately one year later, the noteholders brought a motion seeking to file another plan. The court dismissed the motion "without prejudice to the Noteholders to later bring it back on if so advised." The court "declined to deal with the issue raised by Crystallex as to whether a plan would require the consent of Crystallex." The court observed that the parties' "positions are not so far apart as to be insurmountable and that the entrenchment of the parties may be softening. There is evidence that the parties are still willing to negotiate." In the result, the court ordered the parties

[5] 2003 CarswellBC 538, 2003 BCSC 376 at para 1, 31-33.
[6] 2011 ONSC 7701 (CanLII), at para. 1, 21-23, 26-27.

to mediation, and directed that neither side should be permitted to bring any motion without the court's approval.[7]

16. The ability of creditors to file a restructuring plan is also supported by a plain reading of the text of the statute. Section 4 is passive ("is proposed"/ "est proposé"), indicating that the authority to submit a plan of arrangement and compromise to the creditors is not limited to a particular stakeholder. If the intention of the legislature had been to expressly limit the ability to submit a plan of arrangement to a closed list of persons, it would have clearly said so. The text of the provisions is expressly open-ended to permit various stakeholders to submit plans of arrangement or compromise.

17. In addition, the Court may also have recourse to a broad statutory discretion under s. 11 of the CCAA:

> **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.

18. The Class Representatives are not aware of any statement of the law, judicial or doctrinal, proclaiming that creditors do not have the authority to submit a plan to creditors.

[7] 2013 ONSC 823 (Ont. S.C.) at paras. 1-4, 6, 8-9, 10-11, 13-17, 22.

### *C. The court should authorize the filing of the Class Representatives' Plan*

19. The issue is therefore not whether the Class Representatives *can* file a Plan, but how to deal with the Class Representatives' Plan. Specifically: should it be put before creditors at the meeting planned for May 27, 2015, or should the treatment of the Class Representatives' Plan await the outcome of the vote on the MM&A Plan?

20. The Class Representatives submit that in the context of this unique case, their plan should be put before the creditors on May 27, 2015, but only in the event that the MM&A Plan is voted on and has not received the required support of creditors. The Class Representatives make this submission for the following three reasons.

#### 1. MMA has no economic interest

21. First, although MM&A may have some interest in the outcome of the vote, the matter in issue is not the global amount of the settlement fund, but its allocation between creditors; that is a matter in which MM&A has little or no economic interest. This is not a case where the plan is intended to preserve shareholder value or even MM&A's going concern. MM&A is simply a defendant that has assembled a settlement fund (the majority of which is coming from third parties); and, like any defendant, it should be largely or entirely indifferent to the allocation of that fund between plaintiffs.

22. Thus, for example, in the *Sino Forest* case, it was the court appointed class representatives who proposed the plan for the distribution for the proceeds of the Ernst & Young Settlement among the stakeholders in the CCAA proceedings.[8]

[8] *Labourers' Pension Fund of Central and Eastern Canada* v. Sino-Forest Corporation, 2014 ONSC 62 (Ont. S.C.) at para. 8-12

23. Similarly, in the ABCP case, where the debtors were merely conduits of funds, the restructuring was led by the committee of creditors having the greatest economic interest in the assets being restructured.

24. The Class Representatives' Plan does not require any greater contribution from the contributors to the settlement fund or any further commitment by MM&A, but rather proposes a different allocation of the settlement fund amongst the creditors. In these circumstances, MM&A should not be permitted to block the presentation of the Class Representatives' Plan, in the event that the MM&A Plan does not find support with creditors.

### 2. Presenting the Class Representatives' Plan Avoids Delay and Expense

25. The proposed approach will avoid the delay and expense of having to give notice of and convene a further meeting of creditors. The Court has been informed that if the creditors' meeting does not take place on May 27th, then it may have to wait until the fall of 2015. Creditors should not have to tolerate delay of this nature unnecessarily.

### 3. Consistency with the Objectives of the CCAA

26. The CCAA has as its objective the facilitation of a Plan of compromise or arrangement with creditors.[9] The presentation of the Class Representatives' Plan together with the MM&A Plan better serves this purpose by maintaining dynamic bargaining tension and encouraging focused negotiations between stakeholders in the lead-up to the meeting of creditors. Conversely, the deferral of the vote on the Class

[9] *Metcalfe* at para 50.

Representatives' Plan is more likely to encourage certain stakeholders to take the position that the MM&A Plan is an "all or nothing / take-it-or-leave-it" proposition.

## PART IV. RELIEF REQUESTED

27. The Class Representatives respectfully request that this Court:

(a) accept the filing of the Class Representatives' Plan; and

(b) provide advice and directions regarding the dissemination of the Class Representatives' Plan to the creditors and the holding of the meeting of creditors to vote in respect of the Class Representatives' Plan, in coordination with the meeting and vote on the MM&A Plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

LAC-MÉGANTIC, April 24, 2015

(S) Daniel E. Larochelle

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ME DANIEL E. LAROCHELLE
Attorney for the Court Appointed
Representatives

MONTRÉAL, April 24, 2015

(S) Jeff Orenstein

_____

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

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## LIST OF AUTHORITIES
## COURT APPOINTED REPRESENTATIVES OF CLASS MEMBERS

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| *Doman Industries Ltd., Re,* 2003 BCSC 376, 2003 CarswellBC 538 | **5** |
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| *Re Crystallex International Corporation,* 2011 ONSC 7701 (CanLII) | **6** |
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| *Re Crystallex International Corporation,* 2013 ONSC 823 | **7** |
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| *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation,* 2014 ONSC 62 (CanLII) | **8** |

**LAC-MÉGANTIC, April 24, 2015**

(S) Daniel E. Larochelle

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