C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF MÉGANTIC

(Class Action)
SUPERIOR COURT

File N° : **480-06-000001-132**

GUY OUELLET

and

SERGE JACQUES

and

LOUIS-SERGE PARENT

Plaintiffs

v.

MONTREAL MAINE & ATLANTIC CANADA COMPANY

and

THOMAS HARDING

and

CANADIAN PACIFIC RAILWAY COMPANY

Defendants

DEFENCE OF CANADIAN PACIFIC RAILWAY COMPANY

IN DEFENCE TO PLAINTIFFS' AMENDED APPLICATION TO INSTITUTE PROCEEDINGS, DEFENDANT CANADIAN PACIFIC RAILWAY COMPANY RESPECTFULLY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. Canadian Pacific Railway Company ("**CP**") is not responsible for the train derailment which occurred in Lac-Mégantic on July 6, 2013 (the "**Derailment**") and the ensuing damages suffered by the victims of the Derailment. The faults which caused this tragedy are well-known and none of these faults, even remotely, implicates CP.

2. No CP locomotive or tank cars, no CP crew and no CP tracks were involved in the Derailment.

3. The sole cause of the Derailment is the extreme negligence of Defendant Montreal, Maine & Atlantic Canada Company ("**MMAC**"), its employee, Defendant Thomas Harding ("**Harding**") and its parent company, Montreal, Maine & Atlantic Railway ("**MMAR**", collectively referred to with MMAC as "**MMA**"). MMAR effectively controlled MMAC, including day-to-day affairs. MMAR admitted in U.S. proceedings that MMAR is liable for MMAC's faults.

4. CP and MMA are completely separate and distinct railway companies and legal entities and CP cannot be held responsible for MMA's faults. MMA was, at all material times, independently authorized to operate a railway under the regulatory oversight of Transport Canada ("**TC**") and the Canadian Transportation Agency (the "**Agency**").

5. More specifically, CP denies the allegations that it is responsible for any of the following unsafe practices: failure to properly classify and identify petroleum crude oil as packing group III (PG-III); failure to use safe tank cars for the transportation of petroleum crude oil; failure to hire a safe and qualified railway company; failure to inspect the train and/or the equipment and/or the track prior to the transfer of the train to MMAC; failure to identify the risk of a train derailment; and any and all other alleged faults or breaches of duties and obligations, as alleged against CP in the *Plaintiffs' Amended Application to Institute Proceedings* (the "**Application**").

6. CP was obligated by law to transport the dangerous goods in the tank cars provided to it, which are expressly permitted for such transport by both U.S. and Canadian authorities, and did so in a safe manner without incident. No damage to persons or property occurred until MMA, after taking over the transport, left the train unattended and unsecured (with an insufficient number of hand brakes being applied) on a descending grade towards Lac-Mégantic. Criminal proceedings and penal charges under federal statutes are pending against MMAC, Harding, and MMAR due to their reckless disregard for the safety of the train and the people of Lac-Mégantic. No such proceedings were ever instituted against CP.

7. CP had no choice but to interchange with MMAC, as this was required by law, given the transportation route selected by the shipper. Indeed, after the Derailment, CP attempted to embargo the interchange of dangerous goods, which included petroleum crude oil shipments, with MMAC but the Agency ordered CP to lift its embargo.

II. RESPONSE TO PLAINTIFFS' ALLEGATIONS

8. CP denies as drafted the allegations contained in paragraph 1 of the Application, adding that the Superior Court, in its judgment rendered on May 8, 2015, authorized the bringing of a class action lawsuit against the respondents World

Fuel Services Corporation ("**WFSC**"), World Fuel Services Inc., World Fuel Services Canada Inc., Western Petroleum Company ("**WPC**") (collectively the "**World Fuel Entities**") and CP, as set out in paragraph 101 of the judgment rendered by the Honourable Martin Bureau.

9. CP adds that, as reflected in the Court record, on October 7, 2016, the Honourable Martin Bureau granted Plaintiffs' *de bene esse* motion demanding the dismissal of the class action against the respondents or defendants that had benefitted from releases under MMAC's Amended Compromise and Arrangement Plan. This plan was approved by the Honourable Gaétan Dumas' judgment dated July 13, 2015 (as amended on August 3, 2015), in the Montreal, Maine & Atlantic City Canada Co./ (Montreal, Maine & Atlantique Canada Cie) (Arrangement related to) Superior Court file no. 450-11-000167-134.

10. A copy of MMAC's Amended Compromise and Arrangement Plan, of the judgment dated July 13, 2015 sanctioning the Amended Compromise and Arrangement Plan, of the judgment dated August 3, 2015 correcting the Canadian Approval Order and of the Order dated October 9, 2015 varying the Order approving the Amended Plan Compromise and Arrangement Plan are communicated herewith *en liasse* as **Exhibit CP-1**. For the sake of completeness, CP also includes *en liasse* to Exhibit CP-1 a copy of the Order confirming the Trustee's Chapter 11 Plan of Liquidation entered by the United States Bankruptcy Court, District of Maine, on October 9, 2015 in the Chapter 11 of the Bankruptcy Code case of MMAR ("**U.S. Confirmation Order**").

11. Finally, CP adds that, as reflected in the Court record, on October 24, 2016, the Honourable Martin Bureau authorized the present class action against the Defendants MMAC and Harding.

12. With respect to paragraph 1.1, CP refers to the Court's judgment dated October 24, 2016.

13. CP admits the allegations contained in paragraph 2, inasmuch as they refer to CP. CP operates a railway primarily in Canada. Distinct American CP subsidiaries, which are in fact separately incorporated United States entities, including Soo Line Railroad Company ("**SOO**"), operate railroads primarily in the United States. Unless otherwise specifically stated, all references to CP relating to acts performed in or events occurring in the United States are to SOO.

14. CP denies as drafted the allegations contained in paragraph 2.2 and states that CP has no corporate relationship whatsoever with the "MMA Entities".

15. CP admits the allegations contained in paragraph 2.3. CP specifies that the Defendant Harding was an employee of MMAC and that he was the locomotive engineer of the train.

16. CP denies as drafted the allegations contained in paragraph 3 and refers the Court to paragraphs 9 and 10 of the present Defence. CP reserves all its rights

resulting from MMAC's Amended Compromise and Arrangement Plan (Exhibit CP-1), including with respect to the Order dated October 9, 2015 and its settlement credit, insurance credit and contribution/indemnity credit, as defined therein, should it be held liable, which is denied. CP similarly reserves all its rights resulting from the U.S. Confirmation Order, including its substantially similar settlement credit, insurance credit and contribution/indemnity credit, as defined therein, should CP be held liable, which is denied.

17. With respect to paragraph 4, CP's position is that the allegation stating that "*CP Rail was responsible for subcontracting the transport of shale liquids to MMA Canada*" is irregularly submitted, since the claim that there is a subcontract between CP and MMAC had already been advanced by the Plaintiffs at the hearing of the motion for authorization to institute a class action and was dismissed by the Court in the reasons and conclusions set out in the judgment dated May 8, 2015, in particular at paragraphs 64-73 and 104. It is therefore not part of the main questions to be dealt with in the present proceedings.

18. Under reserve of the above objection, CP denies the allegation stating that "*CP Rail was responsible for subcontracting the transport of shale liquids to MMA Canada*" as this allegation is factually and legally false. CP adds that the train that derailed on July 6, 2013 in Lac-Mégantic was operated by MMAC using MMA's locomotives, on tracks owned and maintained by MMAC and controlled by a locomotive engineer, the Defendant Harding, who was an employee of MMAC over whom CP had no control whatsoever.

19. CP denies as drafted the allegations that follow at paragraph 4, adding that (i) the correct shipping name for the dangerous goods in question is "petroleum crude oil", not "shale liquids", and (ii) the shipper of the petroleum crude oil was WPC and not MMAR as alleged by the Plaintiffs.

20. CP denies as drafted the allegations contained in paragraph 5. It adds that the article from the National Post (Exhibit P-1) is inadmissible on the basis of hearsay and CP objects to it being introduced into evidence.

21. CP denies the allegations contained in paragraph 6:

    a) With respect to the first sentence in this paragraph, i.e. "*In order to deliver the Shale Liquids to their purchaser, WFS contracted with CP Rail to transfer the Shale Liquids from New Town, North Dakota to Montreal, Quebec*", CP refers to the bill of lading for the train 606-282, the uniform straight bill of lading (49 CFR Part 1035, Appendix B), the terms and conditions of all applicable CP's tariffs, including CP's Tariffs 1 to 10 and to Tariff Number 2248, all communicated herewith *en liasse* as **Exhibit CP-2**, which collectively form the contract of carriage.

b) With respect to the second sentence in this paragraph, i.e. "*CP Rail subcontracted with Montreal, Maine & Atlantic Railway ("MMAR") to transport the Shale Liquids from Montreal, Quebec to a rail company in New Brunswick owned by Irving Oil, which would then transport the Shale Liquids to Irving Oil's refinery in Saint John, New Brunswick.*", CP reiterates for the reasons set out at paragraphs 17 and 18 that not only is this allegation false, but it is irregularly submitted given that this claim was dismissed by the Court in the reasons and conclusions set out in the judgment dated May 8, 2015.

22. CP admits the allegations contained in paragraph 7, stating that CP operates a rail yard in Côte Saint-Luc and the train was interchanged to MMAC at the Côte Saint-Luc yard rather than at the Saint-Jean-sur-Richelieu train station because the siding at the point of interchange at Saint-Jean-sur-Richelieu was too short to facilitate the efficient interchange of traffic to MMA given historical traffic volume. CP stresses that as a common carrier, it had the obligation to interchange by law as it did, following the instructions received from the shipper, WPC, as appears from the bill of lading for the train 606-282 (Exhibit CP-2).

23. CP denies as drafted the allegations contained in paragraph 8. CP states that the Superior Court, in its judgment dated October 24, 2016, made additions and adjustments to the main questions of fact and law to be determined on a collective basis and the Plaintiffs should instead refer to this most recent judgment of the Court. CP refers in particular to paragraphs 34 and 35 of the conclusions of the Court's judgment dated October 24, 2016, as they appear from the Court record.

24. With respect to paragraph 8.1, CP refers to the Court's judgment dated October 24, 2016.

25. CP denies as drafted the allegations contained in paragraph 9, reiterating that the expression "shale liquids" is inaccurate. As previously noted in paragraph 19, the correct shipping name of the dangerous goods in question is "petroleum crude oil."

26. CP denies as drafted the allegations contained in paragraphs 10 and 11, adding that these allegations and Exhibit P-2 are irrelevant.

27. CP denies the allegations contained in paragraph 12. It adds that they are not relevant, because it was legal to ship petroleum crude oil by rail in July 2013. Additionally, the exhibit referred to in support of the allegations in this paragraph is a newspaper article, Exhibit P-3, which constitutes hearsay and is inadmissible for that reason. CP objects to the introduction of this exhibit into evidence.

28. CP denies the allegations contained in paragraph 13, adding that they are very general and that the illustration inserted as support does not provide any

indication regarding its origin and that it cannot be used as an exhibit. Consequently, CP objects to this illustration being part of the record.

29. CP denies the allegations contained in paragraph 14, adding that CP is a railway company and not an oil producer.

30. With respect to paragraph 15, CP refers to the text of the *Transportation of Dangerous Goods Regulations*, Part 2, as applicable in Canada at the relevant times, for the classification standards.

31. CP denies the allegations contained in paragraph 16. It adds that they are irrelevant, as they relate to what other parties would have done at a different time, under different circumstances and CP therefore objects on this basis to Exhibits P-4 and P-5.

32. CP denies as drafted the first part of the allegations contained in paragraph 17, adding that it is irrelevant and, for the remaining part of this paragraph, adds that the proper classification and identification of the petroleum crude oil was the responsibility of the shipper, WPC, by law and contract, and that of the consignor, Irving Oil Ltd, under the *Transportation of Dangerous Goods Regulations*[1]. CP adds that as appears from the bill of lading for train 606-282 (Exhibit CP-2), the classification of the dangerous goods was PG-III. WPC, through its agent, warranted the correctness of this classification in the bill of lading and pursuant to the terms of CP's Tariffs, WPC has an obligation to indemnify CP with respect to any liability imposed upon CP as a result of the incorrectness of this classification.

33. CP has no knowledge of the allegations contained in paragraphs 18 to 22, and reiterates that CP is a railway company and not an oil producer.

34. CP denies the allegations contained in paragraph 23. In relation to the allegations that CP was aware of the "*mislabelling of the tank cars*" containing the petroleum crude oil, the tank cars were properly marked. Additionally, it was not part of CP's duties and obligations to mark the tank cars (that is, affixing the proper placard) in accordance with the cargo's content nor to provide for the classification of the cargo's content.

35. CP admits the allegations contained in paragraph 23.1 and prays act of the admissions of liability contained in Exhibits P-10 and P-11, adding that they are binding upon MMA.

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[1] Under section 2.2 of the *Transportation of Dangerous Goods Regulations*, the "consignor" is responsible for determining the classification of dangerous goods. According to section 1.4 of the *Transportation of Dangerous Goods Regulations*, "consignor" means a person in Canada who "*imports or who will import dangerous goods into Canada*". Thus, Irving Oil Ltd was both a consignee (because the shipment was being consigned to it) and, at least for purposes of the *Transportation of Dangerous Goods Regulations*, a consignor.

36. CP admits the allegations contained in paragraph 24, adding that the locomotive engineer who was operating the train on July 5, 2013 was Defendant Harding, an employee of MMAC.

37. CP denies the allegations contained in paragraph 25, adding that on the morning of July 5, 2013, the train weighed about 10 290 tons and the average descending grade on the main track where the train was parked in Nantes is 0.94%.

38. With respect to paragraph 26, CP admits that Defendant Harding left the engine of the lead locomotive #MMA 5017 running and that he failed to secure the train by failing to apply a sufficient number of hand brakes.

39. CP admits the allegations contained in paragraph 26.1 and specifies that these are facts that CP learned after the Derailment. According to the Transport Safety Board of Canada's report ("**TSB Report**", Exhibit P-25), Defendant Harding knew that excessive black and white smoke was coming from the lead locomotive's smoke stack and the taxi driver who had picked Defendant Harding up in Nantes at about 11:30 P.M. on July 5th, 2013, had noticed the smoke, mentioned that oil droplets were landing on the taxi's windshield and even questioned Defendant Harding as to whether the locomotive should be left in this condition.

40. CP admits the allegations contained in paragraphs 27 to 32, adding that it learned about these facts after the Derailment through the TSB Report.

41. CP denies as drafted the allegations contained in paragraph 33, adding that Plaintiffs are referring to an article from the Toronto-based newspaper "The National Post" (Exhibit P-12) in support of these allegations, which exhibit constitutes hearsay and is therefore inadmissible.

42. CP has no knowledge of the specific allegations contained in paragraph 34 although it recognizes that buildings were in fact destroyed in downtown Lac-Mégantic.

43. CP admits the allegations contained in paragraphs 34.1 and 34.2 and further states that they contain admissions binding upon MMA.

44. With respect to paragraph 34.3, CP refers to the completed TSB Report (Exhibit P-25), inasmuch as it refers to facts which were established during the investigation.

45. With respect to paragraph 34.4, CP admits that MMA Entities had a duty to ensure that MMAC operated safely and that each train operated by MMAC was adequately crewed to ensure the safety of all goods transported and that it failed in these duties. CP learned, after the Derailment, that TC was well aware of the fact that MMAC was operating single-person train operations ("**SPTO**") at least since May 2010 and that, as of July 12, 2012, MMAC began operating SPTO between Farnham and Lac-Mégantic, the whole as appears from facts stated in the TSB Report (Exhibit P-25) and from a letter sent to the U.S. Federal Railroad

Administration by Mr. Robert C. Grindrod, President & CEO of MMAR, on August 22, 2013, a copy of which is communicated herewith as **Exhibit CP-3**.

46. CP has no knowledge of the allegations contained in paragraphs 34.5 to 34.7.

47. With respect to paragraph 34.8, CP takes notice of the fact that MMA had been involved in numerous violations of section 112 of the *Canadian Railway Operating Rules* ("**CROR**") for failing to properly secure its trains.

48. With respect to paragraph 34.9, CP takes notice of these violations as enumerated in Exhibit P-26, adding that the origin and completeness of Exhibit P-26 are unclear.

49. CP has no knowledge of the allegations contained in paragraph 34.10.

50. CP denies as drafted the allegations contained in paragraph 34.11, but admits that the train involved in the Derailment operated by MMAC was conducted by a single locomotive engineer. TC was aware that MMAC was operating SPTO at least since May 2010 and that, as of July 12, 2012, MMAC began operating SPTO between Farnham and Lac-Mégantic. CP admits that it had one locomotive engineer and one conductor operating the train prior to the interchange which occurred in Côte Saint-Luc, when MMAC took control of the cargo and used its own locomotives and crew.

51. CP has no knowledge of the allegations contained in paragraphs 34.12 and 34.13.

52. CP has no knowledge of the allegations contained in paragraph 34.14, adding that the newspaper articles (Exhibits P-27 and P-28) constitute hearsay and are therefore inadmissible.

53. CP denies as drafted the allegations contained in paragraphs 35 and 36.

54. CP denies as drafted the allegations contained in paragraph 37, adding that the extent of business of petroleum crude oil transportation is of no relevance to this case. CP further adds that under the *Railway Safety Act*, TC is the authority responsible, *inter alia*, to oversee the safety of federally-regulated railways in Canada, to develop regulations, rules and engineering standards, to monitor industry compliance with rules, regulations and standards through audits and inspections and to take enforcement action, as required, the whole as appears from TC's Website entitled "Rail Safety", a copy of which is communicated herewith as **Exhibit CP-4.** The Agency is responsible for the issuance of a Certificate of Fitness ("**COF**") for each federal railway. The Agency, for its part, issues such certificates if it is satisfied that there will be, among other things, adequate third party liability insurance coverage for the proposed operation.

55. CP denies the allegations contained in paragraphs 38 and 39 for the reasons more fully explained in the Further Plea section of this Defence.

56. CP has no knowledge of the allegations contained in paragraph 40 that Irving Oil Ltd conducted an analysis of the petroleum crude oil from one of the oil wells located in the Bakken region, adding that the *Dénonciation en vue d'obtenir un mandat de perquisition* (Exhibit P-13) constitutes hearsay and is inadmissible. CP also states that as consignor under the *Transportation of Dangerous Goods Act* Irving Oil Ltd, had an obligation to ensure the proper classification of the petroleum crude oil when it was imported into Canada, and that the packing group classification provided by WPC for the product in question was verified or corrected. CP had a right to rely on this classification.

57. CP denies the allegations contained in paragraph 41 for the reasons more fully explained in the Further Plea section of this Defence.

58. CP denies the allegations contained in paragraph 42. With respect to the specific allegation that CP was a "*major partner in the North Dakota transloading facility,*" CP states that there was no partnership agreement or arrangement among CP and MMA, Dakota Plains and/or of the World Fuel Entities.

59. CP denies the allegations contained in paragraphs 43 and 44.

60. CP denies the allegations contained in paragraph 45. CP further states that the shipper, WPC, was solely responsible for the selection of the tank cars and World Fuel Entities leased the tank cars used in the transport of petroleum crude oil from tank cars lessors. At all material times, CP's freight rate did not vary with the different types of tank car chosen by WPC. These tank cars were approved for use in transportation of petroleum crude oil as per the applicable legislation and regulations in force at all relevant times in Canada and the United States.

61. CP denies the allegations contained in paragraphs 46 and 47, reiterating that there was no such partnership agreement.

62. CP denies the allegations contained in paragraph 48. As a common carrier, CP was obligated to accept shipments tendered for transport on reasonable terms and conditions. CP did not own or have any interest in the petroleum crude oil that was tendered for transport by WPC. The responsibility for testing, classifying, and identifying the dangerous goods and marking the tank cars rests upon the shipper and the importer, i.e. the consignor as per section 2.2(2) of the *Transportation of Dangerous Goods Regulations*.

63. CP denies the allegations contained in paragraph 49. CP adds that it sold tracks between Brookport and Sherbrooke to Québec Southern Railway in 1996, and tracks between Sherbrooke and Lac-Mégantic to Canadian American Railroad in 1997, i.e. some 16 years prior to the Derailment. In 2003, CP only sold to MMA (i) tracks between Saint-Jean-sur-Richelieu and Brookport, (ii) tracks between Farnham and Sainte-Rosalie, (iii) tracks between Farhnam and Stanbridge and (iv) tracks between Brookport and Abercorn. The Derailment did not occur on tracks sold by CP to MMA in 2003.

64. Still in relation to paragraph 49, CP further denies the allegations that it had a "*close partnership relationship*" with MMAC and that it acted as a "*main interchange partner*" with MMAC. As noted previously, there was no partnership of any kind between CP and MMA. Further, the fact is that the CP railway line terminated at Saint-Jean-sur-Richelieu, and MMAC's lines began at Saint-Jean-sur-Richelieu, which meant that there was a point of interchange between CP and MMA in order to reach Irving Oil Ltd in Saint John, New Brunswick. For clarity, there were other points of interchange available to WPC, depending on the route chosen by it.

65. CP denies the allegations contained in paragraph 50, adding that Plaintiffs refer to two documents, the bill of lading for the train 606-282 (Exhibit P-14) and the "Interchange Trackage Rights Agreement" (Exhibit P-15), pursuant to which the parties had agreed to stage the tank cars containing the petroleum crude oil destined for delivery to Irving Oil Ltd at the Côte St-Luc rail yard for interchange at Saint-Jean-sur-Richelieu. These documents do not create or amount to any form of partnership.

66. Under the Interchange Trackage Rights Agreement (Exhibit P-15), which is common in the railway industry, MMAC was granted the right to operate its trains, with MMA's locomotives and MMAC's crews, over CP's tracks. The COF issued to MMA by the Agency, a copy of which is communicated herewith as **Exhibit CP-5**, authorized MMAC to operate a railway, *inter alia*, on the CP's Adirondack Subdivision between Saint-Jean-sur-Richelieu and Côte Saint-Luc, by virtue of the Interchange Trackage Rights Agreement (Exhibit P-15).

67. CP denies the allegations contained in paragraphs 51 and 52, for the reasons set out under the Further Plea section of this Defence, adding that Exhibits P-16 and P-17, which do not prove these allegations, were both produced after the Derailment. CP also reiterates that the Agency is the sole authority responsible for issuing a COF and that TC has the responsibility, *inter alia*, to oversee the safety of federally-regulated railways and to take any required enforcement action (Exhibit CP-4). CP further states that even with the knowledge that CP gained after the Derailment, CP was not permitted by law to embargo the interchange of dangerous goods, which included petroleum crude oil shipments, with MMA and was ordered by the Agency to lift the embargo so as to continue to interchange all traffic with MMA.

68. CP denies as drafted the allegations contained in paragraph 53. In any event, the responsibility of overseeing the condition of MMAC's tracks and their operations thereon rests with TC. CP adds that on the morning of July 5, 2013, the tank cars of train MMA-002 underwent a mechanical inspection by TC at Farnham prior to its departure for Nantes. Furthermore, it was the shipper, WPC, which selected the route for the petroleum crude oil that involved the interchange with MMAC and thus would necessitate the use of MMAC's tracks.

69. CP denies the allegations contained in paragraph 54, adding that many facts concerning MMA were learned after the Derailment. CP reiterates that TC is the authority responsible for overseeing railway safety in Canada and the Agency is responsible for issuing a COF allowing companies to construct and operate a railway over the declared network. TC has the power to inspect railway operations, including track infrastructure and equipment, and to issue necessary and appropriate orders, directives, and impose other requirements to ensure a railway is operating safely. Meanwhile, the Agency has the power and discretion to suspend or revoke such COF, if deemed appropriate. Together, TC and the Agency regulate each individual railway, and more specifically MMA.

70. CP denies the allegations contained in paragraphs 55 and 56, adding that the claims contained therein, despite at times using quotes, are not supported by any exhibit or other references.

71. CP denies the allegations contained in paragraph 57, for the reasons more fully explained in the Further Plea section of this Defence. CP adds that it could not have foreseen that Defendant Harding, an employee of MMAC, would fail to comply with applicable railway operating rules, would not apply a sufficient number of hand brakes to the tank cars, would not perform a proper brake effectiveness test, and would leave the train unattended on a descending grade on the main track, that a fire would occur in the engine of MMAC's lead locomotive, or that the engine, which was still running, would be shut down by firefighters and that as a result of the engine being shut down, the air in the trains' brake system would slowly begin to be depleted, all of which caused the train to roll downhill toward Lac-Mégantic.

72. Still with respect to paragraph 57, it was the shipper, WPC, which designated the route, thereby requiring the interchange with MMAC and use of the MMAC tracks that pass through Lac-Mégantic, to transport the petroleum crude oil from New Town, North Dakota, to St John, New Brunswick. As specified in the bill of lading for train 606-282 (Exhibit CP-2), CP was instructed by WPC to transport the petroleum crude oil from New Town to Saint-Jean-sur-Richelieu and to interchange with MMAC such that MMAC would transport it from Saint-Jean-sur-Richelieu to the Irving Oil Ltd refinery in Saint John.

73. CP denies the allegations contained in paragraph 58 for the reasons more fully explained in the Further Plea section of this Defence.

74. CP denies the allegations contained in paragraph 59, adding that the allegation of the existence of a subcontract between CP and MMA is irregular and, in any event, false. The allegation that "*CP Rail subcontracted with its partner, MMA[C]*" is also inconsistent with the two judgments of the Court authorizing the present class action, as previously explained under paragraphs 17 and 18 of this Defence.

75. CP denies the allegations contained in paragraphs 60 to 63, for the reasons more fully explained in the Further Plea section of this Defence.

76. With respect to paragraph 64, CP admits that the tank cars selected by the shipper, WPC, to transport the petroleum crude oil were DOT-111 tank cars, adding that such tank cars were approved for use in the transportation of petroleum crude oil, as per applicable legislation and regulations in force at all relevant times in Canada and the United States. CP denies the remaining allegations contained at paragraph 64.

77. CP denies the allegations contained in paragraphs 65 to 71, for the reasons more fully explained in the Further Plea section of this Defence, repeating that the tank cars were approved for use in the transportation of petroleum crude oil regardless of that oil's packing group classification. Furthermore, CP objects to Exhibits P-18 to P-24 being introduced into evidence, being irrelevant since they refer to other proceedings than the case at bar; they also constitute hearsay and deal with issues that, if relevant at all, can only be addressed through expert evidence.

78. CP denies the allegations contained in paragraph 72, adding that the tank cars were selected by the shipper, WPC, to transport the petroleum crude oil and that the tank cars were approved for use in the transportation of petroleum crude oil as per applicable legislation and regulations in force at all relevant times in Canada and the United States.

79. CP denies the allegations contained in paragraphs 73 and 74.

80. With respect to the allegations contained in paragraph 75, CP admits that the train was interchanged between CP and MMA in Côte Saint-Luc, adding that the *Canada Transportation Act* requires railway companies to furnish adequate and suitable facilities for the interchange of traffic between connecting carriers. CP denies the rest of the allegations contained in that paragraph.

81. CP denies the allegations contained in paragraph 76, for the reasons more fully explained in the Further Plea section of this Defence.

82. CP denies the allegations contained in paragraph 77, adding that CP acted in accordance with all applicable laws and regulations and committed no fault. When the Derailment occurred in Lac-Mégantic, the train was operated by MMAC, using MMA's locomotives and MMAC crew, on MMAC's tracks. MMAC had custody and control of the train from the time of interchange when the MMA locomotives were connected to the train at Côte Saint-Luc.

83. CP denies the allegations contained in paragraph 78, adding that it was the shipper, WPC, that selected the route to transport the petroleum crude oil from Saint-Jean-sur-Richelieu to Saint John, New Brunswick, as shown in the bill of lading for train 606-282 (Exhibit CP-2). From the moment that MMAC took control

of the tank cars at the point of interchange, it was MMA, and MMA alone, that was responsible for the transport of the petroleum crude oil.

84. CP denies the allegations contained in paragraph 79 and in each of subparagraphs 79 (a) to 79 (d).

85. With respect to the introductory part of paragraph 79, CP states that it is irregularly pleaded. Plaintiffs' use of the words "*as well as, of their agents or servants, for whose actions, omissions and negligence, they are responsible*" is an attempt to re-introduce the theory that CP is vicariously responsible for MMAC's fault. As previously stated, CP submits that all such allegations are inconsistent with the reasons and conclusions of the judgment of May 8, 2015, authorizing the present class action. In any event, CP and MMA are separate and distinct railway companies and legal entities and CP never had any control over MMA's operations.

86. With respect to paragraph 79 a), CP denies the allegations contained in this subparagraph, adding that CP had not owned the MMAC tracks at issue for more than 16 years at the time of the Derailment and had no means at its disposal, no statutory authority and no obligation to inspect MMAC's rails tracks or operations. In any event, the Derailment was not caused by MMAC's track condition.

87. With respect to paragraph 79 b), CP denies the allegations contained in this subparagraph, adding that CP did not engage or retain the services of MMAC. CP adds that if, by using the words "[CP] *failed and / or neglected to hire a competent and competent railway operator*", the Plaintiffs are implying that CP did "sub-contract" with MMAC, CP reiterates that it did not engage or retain MMAC's services in contract or otherwise.

88. Still with respect to paragraph 79 b), CP was not responsible for verifying or validating that MMAC was solvent, adequately capitalized or insured. Moreover, CP states that the *Railway Third Party Liability Insurance Coverage Regulations*, SOR/96-337, which were enacted under the authority of the *Canada Transportation Act*, provide that a railway company must have sufficient liability insurance. Section 4 of the regulations confirms that the Agency, not CP, is responsible for determining whether sufficient liability insurance has been purchased by the railway companies that are subject to the Act. The Agency is also required to ensure that there is sufficient liability insurance on an on-going basis to take into account changes in risk profile.

89. With respect to paragraph 79 c), CP denies the allegations contained in this subparagraph.

90. With respect to paragraph 79 d), CP denies the allegations contained in this subparagraph. It adds that it is the consignor's (i.e. the shipper's and/or Canadian importer's) responsibility to ensure that a dangerous good is properly classified, identified and marked in accordance with all applicable legislation and

regulations in force at all relevant times in Canada and the United States. In this case, WPC and Irving Oil Ltd were responsible for the classification of the petroleum crude oil in question, and CP had the right to rely on their classification. Moreover, WPC warranted to CP the correctness of the packing group classification in the bill of lading and is contractually liable to indemnify CP in the event liability is imposed upon CP on account of misclassification of the packing group of the oil.

91. With respect to paragraph 79 e), CP denies the allegations in this subparagraph, adding that the DOT-111 tank cars selected by the shipper were "*standardized means of containment*" as this expression is defined in the *Transportation of Dangerous Goods Act* that were approved for the transportation of petroleum crude oil pursuant to applicable legislation and regulations in force at all relevant times in Canada and the United States.

92. With respect to paragraph 79 f), CP denies the allegations in this subparagraph, which partly reproduces the allegations contained in subparagraph 79 b). For this reason, CP refers to its response above that relates to subparagraph 79 b), adding that for this movement, CP never hired any railway operator.

93. CP denies the allegations contained in paragraph 79 g) and CP reiterates its previous responses to subparagraphs 79 b) and f).

94. Still with respect to paragraph 79 g), more specifically with respect to the allegation that CP failed to hire a safe and qualified railway operator "*that would have adequately staffed its trains to ensure safety*," CP states that its railway was adequately staffed, and that it is the responsibility of each railway company to use its human resources as it sees fit, subject to the applicable laws and regulations under TC's oversight.

95. CP denies the allegations contained in paragraph 79 h), which partly re-state the allegations contained in subparagraphs 79 b), f) and g). CP reiterates its previous responses with respect to these subparagraphs.

96. Still with respect to paragraph 79 h), regarding the allegation that CP would have failed and/or neglected to hire a safe and qualified operator "*that would only operate locomotives in good working order, instead it contracted with MMAR which had a poor safety record and which railway tracks were considered to be excepted,*" CP reiterates that the allegation that it subcontracted the transportation of petroleum crude oil to MMAC is inconsistent with the reasons and conclusions of the judgment of May 8, 2015, authorizing the present class action. This allegation is also false. Moreover, MMAC had a COF and the responsibility of determining which railway company should hold such a COF rests exclusively with the Agency. CP reiterates that when it attempted, after the Derailment, to embargo the interchange of dangerous goods, which included petroleum crude oil shipments, with MMAC, the Agency, by Order, compelled CP to lift its embargo.

97. With respect to paragraph 79 i), CP denies the allegations contained in this subparagraph. CP adds that the shipper WPC selected MMAC for the portion of the transportation between Saint-Jean-sur-Richelieu and Saint John, as evidenced by the bill of lading for train 606-282 (Exhibit CP- 2).

98. With respect to paragraph 79 j), CP denies the allegations contained in this subparagraph.

99. With respect to paragraph 79 k), CP denies the allegations contained in this subparagraph, adding that it had no responsibility or authority, statutory or otherwise, over MMAC staff, or how MMAC managed its operations.

100. With respect to paragraph 79 l), CP denies the allegations contained in this subparagraph. In this regard, CP reiterates the previous paragraph and refers to the Further Plea section of this Defence.

101. With respect to paragraph 79.1, the allegations refer to MMAC and CP therefore leaves it to Defendants MMAC and Harding to respond.

102. With respect to paragraph 79.2, the allegations refer to MMAC and CP therefore leaves it to Defendants MMAC and Harding to respond. However, CP admits that the Defendant Harding, an employee of MMAC, failed to apply a sufficient number of hand brakes on the train.

103. With respect to paragraph 79.3, the allegations refer to MMAC and CP therefore leaves it to Defendants MMAC and Harding to respond. CP asserts, however, that it is the faults of MMA, including the faults of MMA's employee Defendant Harding, which were the cause of the Derailment, as further explained in the Further Plea section of this Defence.

104. With respect to paragraph 79.4, CP admits in part the allegation contained in the introductory paragraph, that the "*Train Derailment and the resulting injuries and damages were caused by the faults of MMA Canada [MMAC] and Thomas Harding themselves*", adding that MMAR is equally liable as it effectively controlled MMAC, including its day-to-day affairs. Furthermore, MMAR admitted in U.S. proceedings that it is liable for MMAC's faults.

105. Still with respect to paragraph 79.4 and the words "*as well as, of their agents or servants, for whose actions, omissions and negligence they are responsible, which include, but are not limited to...*", CP is in agreement, inasmuch as the allegations only refer to the fact that Defendant MMAC is liable not only for the actions or omissions of its employee, i.e. Defendant Harding, but also for the actions or omissions of other MMAC employees. CP further reiterates that MMAR is equally liable as it effectively controlled MMAC, including its day-to-day affairs. Furthermore, MMAC and MMAR operated as a single, seamless entity and MMAR admitted in U.S. proceedings that it is liable for MMAC's faults.

106. Still with respect to paragraph 79.4, if Plaintiffs mean by the words "*as well as, of their agents or servants*" that CP and MMAC acted pursuant to a "sub-contract," then CP denies and reiterates what it submitted above regarding the reasons and conclusions of the judgment of May 8, 2015, authorizing the present class action.

107. With respect to paragraph 79.4 a), CP admits that Defendant Harding failed to, among other things, apply a sufficient number of brakes on the train that derailed.

108. With respect to paragraph 79.4 b), CP admits that Defendant Harding failed to perform a proper test of effectiveness of the hand brakes on the train that derailed.

109. With respect to paragraph 79.4 c), CP admits that Defendant Harding failed to apply a sufficient number of hand brakes on the train that derailed.

110. With respect to paragraphs 79.4 d) to 79.4 u), CP leaves it to the Defendants MMAC and Harding to respond to these allegations.

111. CP has no knowledge of the allegations contained in paragraphs 80 to 84.

112. CP denies the allegations contained in paragraph 85, stressing that Plaintiff Ouellet's damages were caused by the faults of MMA, including the faults of MMA's employee Defendant Harding. Alternatively, should there be any finding of liability based upon the misclassification of the cargo or use of the DOT-111 tank cars, which liability is denied as such alleged faults did not cause the Derailment, the liability would, in any event, rest on parties other than CP.

113. CP denies the allegations contained in paragraph 86, inasmuch as they concern CP. CP adds that Plaintiff Ouellet filed a proof of claim in the course of the insolvency proceedings.

114. CP has no knowledge of the allegations contained in paragraphs 87 to 91.

115. CP has no knowledge of the allegations contained in paragraphs 92 and 93, stressing that whatever damages that Plaintiff Jacques may have suffered, they were caused by the faults of MMA, including the faults of MMA's employee Defendant Harding and by them alone. Alternatively, should there be any finding of liability based upon the misclassification of the cargo or use of the DOT-111 tank cars, which liability is denied as such alleged faults did not cause the Derailment, the liability would, in any event, rest on parties other than CP.

116. CP denies the allegations contained in paragraph 94.

117. CP denies the allegations contained in paragraph 95, inasmuch as they concern CP. CP adds that the Plaintiff Jacques already received an amount of $2,697,005 for the material damages he suffered from his insurer The Guarantee Company of North America.

118. CP has no knowledge of the allegations contained in paragraphs 96 to 98.

119. CP has no knowledge of the allegations contained in paragraphs 99 and 100, stressing that whatever damages that Plaintiff Parent may have suffered, they were caused by the faults of MMA, including the faults of MMA's employee Defendant Harding, and by them alone. Alternatively, should there be any finding of liability based upon the misclassification of the cargo or use of the DOT-111 tank cars, which liability is denied as such alleged faults did not cause the Derailment, the liability would, in any event, rest on parties other than CP.

120. CP denies the allegations contained in paragraph 101.

121. With respect to paragraph 102, CP denies the allegations contained in this paragraph, inasmuch as they concern CP.

122. CP denies as drafted the allegations contained in paragraphs 103 to 105, inasmuch as they concern CP.

AND FOR FURTHER PLEA, BUT WITHOUT LIMITATION TO THE FOREGOING, DEFENDANT CANADIAN PACIFIC RAILWAY COMPANY PLEADS AS FOLLOWS:

III. THE PARTIES

a) Canadian Pacific Railway Company

123. CP is the operating subsidiary of Canadian Pacific Railway Limited, a Canadian corporation.

124. CP is a Class 1 railway carrier incorporated pursuant to the laws of Canada, as it appears from a copy of the Federal Corporation Information, communicated herewith as **Exhibit CP-6**.

125. CP operates a railway primarily in Canada.

126. CP holds a COF issued by the Agency and is duly authorized to operate a railway in Canada, as evidenced by the Agency's decision number 396-R-2007, communicated herewith as **Exhibit CP-7**.

127. CP is not authorized to operate on MMA's railway tracks.

128. At the material time, CP's Canadian railway network stretched from the Pacific coast to Saint-Jean-sur-Richelieu, Québec, as appears from CP's route map, communicated herewith as **Exhibit CP-8**.

129. CP does not have any railway tracks and does not carry on any railway operations east of Saint-Jean-sur-Richelieu, Québec (aside from 0.8 mile of tracks east of Saint-Jean-sur-Richelieu).

130. Distinct American CP subsidiaries, which are in fact separately incorporated United States entities, operate railroads primarily in the United States, including SOO.

b) **MMAC and MMAR**

131. The Defendant MMAC is an inter-provincial and international railway company governed by the *Canada Transportation Act*, SC 1996, c. 10.

132. MMAC is incorporated pursuant to laws of Nova Scotia, as it appears from a copy of the Registry of Joint Stock Companies, communicated herewith as **Exhibit CP-9**. It was formed as an unlimited liability company and its parent MMAR is thus liable to MMAC's creditors for any unpaid liabilities of MMAC.

133. MMAC holds COF number 02004-3, issued by the Agency, as evidenced by Agency Order No. 2013-R-266, communicated herewith as **Exhibit CP-10.**

134. Pursuant to its COF, which it first received in 2002, MMAC was authorized to operate, at all material times, a railway between Saint-Jean-sur-Richelieu and the Canada-U.S border to mileage point 26.25 of the Newport subdivision.

135. MMAC held such a COF until August 12, 2014, when the Agency withdrew the certificate.

136. MMAC, as any other railway company operating in Canada, was under the oversight of TC.

137. MMAR is a railway company incorporated pursuant to foreign law, as it appears from a copy of the *État de renseignements d'une personne morale au registre des entreprises*, communicated herewith as **Exhibit CP-11**. It is authorized to operate on certain tracks in Canada under the same COF, which covers MMAC's operations.

138. MMAR is the parent company of MMAC (as previously mentioned, these two corporations are collectively referred to as "**MMA**").

139. MMAR treated MMAC as MMAR's mere instrumentality, dictating MMAC's lax safety and other operating rules, and caused significant damages as a result. Given its effective control of MMAC and the fact that it was *de facto* its *alter ego*, MMAR is liable for all faults committed by MMAC.

140. Moreover, MMAR has admitted in the U.S. bankruptcy proceedings that MMAC's operations were integrated with MMAR's operations and that any liabilities of MMAC are liabilities of MMAR:

> As Your Honor knows, and has been established on the record in this case many, many times, the Canadian subsidiary [MMAC] was an unlimited liability company formed under Nova Scotia law. **All of**

> **its liabilities are liabilities of the U.S. company [MMAR]**. And the entire case has been conducted on that basis.
>
> So, when the Canadian entity incurred liabilities that led to its eventual demise, **those same liabilities were incurred by the U.S. company and led to its demise**. As your Honor has, I think, observed many times throughout this case, **the operations were integrated**. The entire operations of the case post-bankruptcy were financed by the U.S. operation, not by the Canadian operation.
>
> [Our emphasis]

The whole as appears from an excerpt of the transcript of the December 20, 2016 hearing before the Honourable Peter G. Cary, of the U.S. Bankruptcy Court District of Main, in the matter of *Keach v. Canadian Pacific Railway Company* (Case No. 13-10670), communicated herewith as **Exhibit CP-12.**

141. MMA's railway network at the material time is depicted in its route map, communicated herewith as **Exhibit CP-13**.

142. Proceedings under the *Criminal Code* have been brought against MMAC. Penal charges under federal statutes have also been brought against MMAC and MMAR under the *Fisheries Act* and the *Railway Safety Act.* All of these proceedings are still pending.

c) **Thomas Harding**

143. The Defendant Harding was, at all material times, an employee of MMAC and parked the train that derailed in Lac-Mégantic, Québec, on July 6, 2013.

144. Criminal proceedings and penal charges under the *Fisheries Act* and the *Railway Safety Act* have been brought against Defendant Harding. As an employee of MMA, all of his faults with respect to the negligent acts which caused the Derailment are also faults of MMA.

IV. CP & MMA ARE SEPARATE AND DISTINCT RAILWAY COMPANIES

145. CP and MMA are distinct, separate and independent railway companies, each holding their own COF.

146. The COF of each of CP and MMA defined the territorial limits within which each of the railway companies was permitted to operate. As reflected in the respective COF, there was no overlap in the territorial limits between the two, except for the limited portion of CP's tracks that MMA had access to pursuant to the Interchange Trackage Rights Agreement.

147. CP's COF does not authorize it to operate on MMAC's railway tracks. Where the tracks of CP connect with those of MMAC, that is the point of interchange

between CP and MMAC. In order for CP to comply with the shipper's instructions and selected route, CP was obliged to interchange with MMAC. This interchange was governed by applicable legislation and rules established by the Association of American Railroads ("**AAR**"), including the AAR Rules of Interchange and the AAR Railway Accounting Rules.

148. CP does not inspect, maintain or repair MMAC's tracks as CP does not have the obligation, responsibility or authority, statutory or otherwise, to do so.

149. CP does not hire, train, supervise or manage any employees of MMA.

150. At all material times, MMA had sole and unfettered control over its network. CP did not control the operations of any train whatsoever running on MMAC's tracks. CP could not and did not exert any degree of control or influence over MMAC.

151. Once rail cars are interchanged to MMAC, or to any connecting carrier for that matter, CP's role with respect to the cargo is at an end. Pursuant to the AAR Rules of Interchange, there is a transfer of liability when traffic is interchanged from a carrier to a connecting carrier. When a shipper chooses a route that requires interchanging with MMAC, an agreement by CP with MMAC regarding the mechanics of that interchange in no way constitutes a subcontract with MMAC.

V. WFS AND ITS SUBSIDIARY, WPC, ARE SOPHISTICATED AND EXPERIENCED SHIPPERS OF PETROLEUM PRODUCTS

152. WPC is a sophisticated and experienced shipper of petroleum products. WPC often conducted business through its agent SST Energy Logistics ("**SST**"), which is a professional and experienced broker with expertise in the shipping of dangerous goods by rail.

153. WPC had, from January 13, 2012 to June 30, 2013, submitted to CP numerous bills of lading for the transportation of petroleum crude oil from New Town, North Dakota to the following cities: St-James (Louisiana), Albany (New York), Galveston (Texas), Westville (New Jersey), Walnut Hill (Florida), Nederland (Texas), Philadelphia (Pennsylvania), and Reybold (Delaware).

154. Furthermore, WPC had, from January 1, 2012 to July 1, 2013, submitted about 60 bills of lading for the transportation of petroleum crude oil from New Town, North Dakota to Saint John, New Brunswick. In all cases, the delivery was to the consignee, Irving Oil Ltd (which is by definition a "consignor" under the *Transportation of Dangerous Goods Regulations*, Section 1.4) of the 60 bills of lading:

a) Twenty-four (24) of these bills of lading were completed by Vicki Edblom, John Diotzler, Endem Nelson or Garcia Walks, who are all employees of WPC.

b) The remaining 36 bills of lading were completed by employees of "SST Energy Logistics, acting for WPC", a company that provides transhipment and logistics services in North America.

155. In all cases, the specified route selected by the shipper was CPRS STJNS MMA. In this route code:

a) CPRS (Canadian Pacific Railway System) stands for the railway companies doing business under the name Canadian Pacific, that is CP, SOO and CP's other United States subsidiaries;

b) STJNS stands for Saint-Jean-sur-Richelieu (the interchange point); and

c) MMA stands for Montréal, Maine & Atlantic Canada Co.

156. In all cases, whether WPC had completed the bills of lading itself or whether they were completed on WPC's behalf by its agent SST , the shipper always selected the route. WPC also represented and warranted to CP that "*it controls the routing of the Commodity(ies) being transported by the Carrier(s)*", as appears from section 4 under Item 200 of Tariff 1 (Exhibit CP-2).

157. At all material times, WPC knew or should have known that CP had no control over MMAC or the cargo in MMAC's custody and control.

VI. THE BILL OF LADING INSTRUCTED CP TO INTERCHANGE WITH MMAC

158. On or about June 29, 2013, WPC submitted shipping instructions to CP and subsequently updated the shipping instructions on June 30, 2013, as appears from the bill of lading for the train 606-282 (Exhibit CP-2), to transport 79 tank cars holding petroleum crude oil and one buffer car, from the point of origin in New Town, North Dakota to the point of destination of Saint John, New Brunswick for delivery to the refinery of Irving Oil Limited.

159. CP provides, as do its affiliates when applicable, each registered shipper, including WPC, with a login and password in order to access a web-based application called Customer Station. Customer Station is designed to enable shippers (or their agents) to manage their shipments, including enabling shippers to submit a bill of lading, as was the case here (Exhibit CP-2). WPC completed the bill of lading form on CP's Customer Station.

160. A bill of lading serves as both the evidence of the carrier's receipt to the shipper and the contract of carriage. It specifies, *inter alia,* the quantity and the proper shipping name of the goods being transported, the rail car to be used, the point

of origin and point of destination, as well as the terms and conditions that are incorporated by reference thereto.

161. To complete a bill of lading, the shipper, WPC, had to input information into a variety of data fields, such as the route, the proper shipping name of the commodity and the classification, including the packing group which indicates the level of danger for the dangerous goods in question. The proper identification and classification, including the packing group, of the commodity also assist in the validation of the selection of approved tank cars in accordance with applicable legislation and regulations in force at all relevant times in Canada and the United States. For flammable liquids (Class 3), the packing group designation depends on the product's flashpoint and its initial boiling point. The DOT-111 tank cars used by WPC were approved by law to transport all Class 3 petroleum crude oil, regardless of packing group classifications.

162. By submitting the bill of lading, and as evidenced by the attestation contained therein, WPC accepted CP's terms and conditions, which include all of CP's Tariffs, which were made known and available to WPC on Customer Station and otherwise. Additionally, CP's Tariffs are also made known and available publicly on its website at www.cpr.ca. By virtue of WPC's previous dealings with CP, WPC was well aware of CP's Tariffs, that these Tariffs were incorporated by reference in CP's bills of lading and that WPC was bound by these Tariffs.

163. As appears from the railway route map (Exhibit CP-8), CP's rail network (including that of SOO) is connected to WPC's facility at the point of origin in New Town, North Dakota. However, CP's network does not extend all the way to the chosen destination of Saint John, New Brunswick. As such, WPC needed to choose which carrier CP would interchange the tank cars with, and thereby choose the point of interchange.

164. Prior to issuing the bill of lading, WPC had asked CP to provide it with a "through rate" (that is, a single rate made up of two or more separately established rates by connecting carriers) for two different routes from New Town, North Dakota to Saint John, New Brunswick, one that would involve the interchange with Canadian National Railway Company ("**CN**") at Côte Saint-Luc and the other with MMAC at Saint-Jean-sur-Richelieu. There were other routes that were available to WPC, with other connecting carriers, which would have also allowed it to ship its petroleum crude oil from New Town, North Dakota to Saint John, New Brunswick. However, WPC did not request a rate from CP for any of these other routes.

165. CP contacted each of CN and MMAC for their respective rate and based on CN's and MMAC's rate divisions, CP provided WPC with two different rates for the two different routes as requested, the whole as it appears from the documents exchanged for that purpose, communicated herewith as **Exhibit CP-14.**

166. Having obtained the through rates from CP for these two selected routes, for each shipment of its petroleum crude oil, WPC had a choice as to which connecting carrier would, after interchanging with CP, take the shipment to Saint John, New Brunswick.

167. In relation to the train in question, by the bill of lading submitted indicating that the selected route was CPRS STJNS MMA, WPC instructed CP to transport the petroleum crude oil using the CP's network (including SOO for part of the trip completed in the United States) and to interchange with MMAC for delivery to Saint John, New Brunswick.

168. In the route selected by WPC as reflected in the bill of lading, the acronym "STJNS" means, as previously mentioned, that CP would interchange the tank cars to MMAC at the interchange point located in Saint-Jean-sur-Richelieu, as per the shipper's request.

169. WPC could have selected other routes by which to transport the petroleum crude oil from New Town to Saint John, including a route using CP's railway network and providing for an interchange switching with the CN railway system.

170. WPC thus designated MMAC as a "connecting carrier" within the meaning given to this term pursuant to section 111 of the *Canada Transportation Act.*

171. Having received instructions to use this route to transport the petroleum crude oil, CP, as a common carrier, was bound by law to follow the shipper's chosen route and to interchange the petroleum crude oil from its rail lines to MMAC's rail lines at the interchange point.

172. Had CP failed to follow WPC's instructions regarding the route and to interchange the petroleum crude oil cargo to MMA in Saint-Jean-sur-Richelieu, this would have constituted a breach of CP's obligations under sections 113 and 114 of the *Canada Transportation Act.*

VII. CP'S TARIFFS

173. As mentioned above, WPC was a sophisticated shipper with previous dealings with CP and it had entered into numerous similar transactions with CP and other carriers regarding the transportation of petroleum crude oil prior to the movement of train 606-282. WPC was therefore well aware of CP's terms and conditions, which include all of CP's Tariffs, all of which were readily available online and by request, were incorporated by reference into the bill of lading (Exhibit CP-2) and were expressly accepted by WPC, through its agent, when generating the said bill of lading.

174. The application of CP's Tariffs to the movement of train 606-282 was admitted by the World Fuel Entities in their Application for Review of *Order no. 628 issued by the Minister of Sustainable Development, Environment, Wildlife and Parks on*

July 29, 2013. A copy of said Application for Review is hereby communicated herewith as **Exhibit CP-15**.

175. As a matter of fact, by the bill of lading, the shipper WPC, acting through agent Eli Jasso, an employee of SST, expressly agreed to CP's "*Terms and Conditions for Shipment of freight and any supplemental charges*", which include CP's Tariffs 1 to 10 (Exhibit CP-2).

176. CP's relationship with WPC was therefore governed by the bill of lading and the terms of CP's Tariffs. More particularly, CP's Tariff 1 ("*CP's Guide to Products and Services*"), Tariff 6 ("*Private Equipment*") and Tariff 8 ("*Hazardous Commodities*") are integral parts of the bill of lading for the train that derailed:

- By Item 200 of Tariff 1, section 4, the shipper represented and warranted that it controlled the routing of the petroleum crude oil. It also represented and warranted that the lading, packing, and classification complied with all applicable laws;

- By Item 20 of Tariff 6, the shipper committed to "*be responsible for ensuring that the Private Equipment are free from mechanical defects and failures, contain no prohibited or obsolete parts, comply with all applicable tariffs, comply with all applicable industry, federal, provincial, state and local laws, etc.*" and ensuring that the Private Equipment (as defined in Item 2 of Tariff 6) "*are otherwise in suitable condition for the safe rail transportation of Commodities*";

- Item 20 of Tariff 8 confirms that the shipper is responsible for product classification and selection of packaging (i.e., tank cars) in accordance with legal requirements;

- Item 21 of Tariff 8 obligated the shipper to accurately describe and classify the commodity on the bill of lading and other documents associated with the shipment.

177. Tariff 6 also contains indemnification clauses whereby the shipper, WPC, undertook to fully indemnify CP from all liabilities resulting from a violation of WPC's obligations, including those pertaining to the selection of the tank cars and the classification of the cargo.

VIII. THE TRANSPORTATION OF PETROLEUM CRUDE OIL BY CP FROM NEW TOWN TO CÔTE SAINT-LUC / SAINT-JEAN-SUR-RICHELIEU WAS UNEVENTFUL

178. On June 30, 2013, as instructed by WPC and in accordance with the bill of lading, SOO took possession of the cargo in New Town, North Dakota.

179. From this point of origin, CP transported the petroleum crude oil on train 606-282 using CP's locomotives, crew and rail track (or rail tracks on which it has trackage rights) to the Côte Saint-Luc rail yard.

180. Pursuant to the Interchange Trackage Rights Agreement between CP and MMAC, the parties had agreed to stage the unit train at the Côte Saint-Luc rail yard for interchange at Saint-Jean-sur-Richelieu, in Québec (Exhibit P-14). MMAC took possession of the train in Côte Saint-Luc rather than in Saint-Jean-sur-Richelieu.

181. As a result, MMAC brought MMA's locomotives and MMAC's crew to the CP yard in Côte Saint-Luc and coupled MMA's locomotives with the tank cars shipped by WPC.

182. Thus, at that point, on July 4, 2013, as required by the shipper, WPC, in the bill of lading (Exhibit CP-2), CP proceeded with the interchange of the cargo with MMAC.

183. MMAC then hauled the tank cars from the Côte Saint-Luc rail yard to Saint-Jean-sur-Richelieu using CP's tracks, as per the Interchange Trackage Rights Agreement, but using MMA's locomotives and MMAC's crew. When operating on CP's tracks between Côte Saint-Luc and Saint-Jean-sur-Richelieu under the Trackage Rights Agreement, MMAC had to abide – and did abide - by CP's operating rules, which did not allow MMAC to operate with SPTO. CP had no authority, however, to prohibit or restrict MMAC from operating with SPTO on MMAC's own tracks. Such authority rested with TC, not CP.

184. MMAC acted as a connecting carrier to CP's railway lines in Saint-Jean-sur-Richelieu (although the staging, in fact, occurred in Côte Saint-Luc in order to facilitate the interchange). Saint-Jean-sur-Richelieu was the "interchange point" which has been defined under Section 111 of the *Canada Transportation Act* as "*a place where the line of one railway company connects with the line of another railway company and where loaded or empty cars may be stored until delivered or received by the other railway company.*"

185. As a result of the route chosen by WPC, CP was legally obliged to interchange with MMAC.

186. The interchange of traffic from one railway carrier to another is a separate and distinct activity provided for by the *Canada Transportation Act*.

187. The obligation to interchange in Canada is governed by the *Canada Transportation Act* and by the shipper's choice of route, and it constitutes one of the fundamental principles of Canada's railway transportation law and policy.

188. At the point of interchange, the petroleum crude oil tank cars on CP train 606-282 were placed on MMAC's train, designated as MMA-002. MMA-002 left the CP rail yard at Côte Saint-Luc under the sole control of MMAC. The train travelled on the

CP tracks between Côte Saint-Luc and Saint-Jean-sur-Richelieu, and once in Saint-Jean-sur-Richelieu, MMAC took train MMA-002 onto MMAC's tracks, with MMAC's crew to Farnham, where the train stopped for the night.

189. The involvement of CP in relation to the movement of train 606-282 ended after the interchange with MMAC. CP only learned about the following chronology of events after the Derailment, from, *inter alia*, the factual findings exposed in the TSB Report (Exhibit P-25).

IX. FOLLOWING THE INTERCHANGE, THE TRAIN WAS UNDER THE SOLE CONTROL OF MMAC AND ITS EMPLOYEE DEFENDANT HARDING

a) Departure from Farnham towards Nantes

190. On the morning of July 5, 2013, at 1100, the tank cars of train MMA-002 underwent a mechanical inspection by TC at Farnham.

191. Still on July 5, 2013, at 1300, the tank cars of train MMA-002 underwent a brake continuity test with TC's employees present.

192. TC's approval following the said inspection was required before train MMA-002 could resume its journey.

193. Following the mechanical inspection and the brake continuity test, train MMA-002 left Farnham travelling towards Nantes. The train was operated and occupied only by the locomotive engineer, the Defendant Harding.

194. At this point, train MMA-002 measured approximately 1432 metres (4700 feet) and weighed about 9334.9 metric tons (10290 tons). It consisted of the following materials:

a) Lead locomotive MMA 5017;

b) Special-purpose caboose IVB car VB1 (Specialized car containing the locomotive control system);

c) Locomotive MMA 5026, GE C30-7;

d) Locomotive CITX 3053, General Motors (GM) SD-40;

e) Locomotive MMA 5023, GE C30-7;

f) Locomotive CEFX 3166, GM SD-40;

g) Buffer car, CIBX 172032; and

h) 72 tank cars.

195. During the travel between Farnham and Nantes, Defendant Harding realized that the lead locomotive had mechanical difficulties and that excessive black and white smoke was escaping from the train stack. Despite this, Defendant Harding continued towards Nantes.

196. Shortly after departing Farnham for Nantes, Defendant Harding contacted the MMAC Rail Traffic Controller in Farnham, to inform the latter of the mechanical problems and asked if anyone had reported engine surges on that locomotive. The Rail Traffic Controller responsible for the route between Farnham and Nantes did not instruct or advise Defendant Harding that the mechanical difficulties required him to turn off the engine.

197. Less than an hour later, at about 1456 on July 5, 2013, Defendant Harding again contacted the MMAC Rail Traffic Controller in Farnham, to advise him that the train was losing speed and that the lead locomotive MMA 5017 could still not obtain full throttle power.

198. In the evening, at about 2000 on July 5, 2013, Defendant Harding informed MMAR's Rail Traffic Controller in Bangor of mechanical difficulties with the lead locomotive.

b) **Arrival at Nantes on July 5 2013 and Defendant Harding's failure to secure the train**

199. Once train MMA-002 arrived in Nantes at 2249 on July 5, 2013, the train was stopped by Defendant Harding at the east siding switch on the main track, on a descending grade, using the air brake application.

200. MMA's securement instructions, in accordance with the CROR, required that sufficient hand brakes be applied to prevent equipment from moving uncontrolled when left unattended. In order to properly verify sufficient hand brakes have been applied, the rules required that a hand brake effectiveness test properly be performed. These requirements are reflected in a letter dated October 29, 2013 addressed to MMAR's President & CEO, a copy of which is communicated herewith as **Exhibit CP-16.**

201. MMA's General Special Instructions also specified the minimum number of hand brakes required for 79 cars to be 9 hand brakes, plus any additional hand brakes required to prevent the equipment or train from moving on a grade.

202. CROR 112 specifies that after fully applying the hand brakes, the operator is to release all air brakes and allow or cause the rail cars to move. It must be apparent that the hand brakes are sufficient to prevent the rail cars from moving. This must be done before leaving equipment or a train unattended.

203. Defendant Harding applied handbrakes on all five locomotives, the VB1 car and the buffer car. That is, there were 7 pieces of equipment with hand brakes applied. The number of hand brakes applied by Defendant Harding was less than

the minimum number of hand brakes required by the MMA's own General Special Instructions. In addition, the hand brake on one locomotive was improperly applied, which further reduced the overall retarding brake force of the hand brakes that had been applied.

204. Defendant Harding then released the automatic air brakes on the train and applied full independent air brakes to all 5 locomotives. Defendant Harding then shut down the four trailing locomotives and left the train unattended. Defendant Harding left his 10,000 ton train on a 0.94% steep grade without performing a proper mandatory, critical hand brake effectiveness test to ensure the train did not move.

205. MMAR's Operating Bulletin No. 20133, dated October 20, 2007, stated in bold that the nine (9) hand brake minimum cannot be used when there is a grade and required that the air brake system must not be depended upon to prevent an undesired movement. A copy of MMAR's Operating Bulletin No. 20133 is communicated herewith as **Exhibit CP-17.**

206. Defendant Harding did not even apply the minimum of nine hand brakes applicable in no-grade (flat) conditions, as per MMA's general special instructions, which minimum number was itself insufficient under MMA's Operating Bulletin as well as industry custom and practices because of the descending grade of 0.94%.

207. At 23:05, Defendant Harding called the MMAC Rail Traffic Controller in Farnham and asked him to call a taxi.

208. At 2315, Defendant Harding contacted the MMAR Rail Traffic Controller, located in Bangor (Maine), to inform him that MMA-002 was secured at Nantes and that he had shut down four of the five locomotives. At this time, it was agreed between them that the engine of the lead locomotive would be left running for the night and that the engine situation would be re-evaluated the next morning.

209. Defendant Harding also informed the MMAR Rail Traffic Controller in Bangor, during the same conversation, that he had noted excessive smoke from the lead locomotive changing from black to white once he got to Nantes, adding that he expected the situation to resolve on its own. He was unsure as to the state of the locomotive for the following day.

210. The MMAR Rail Traffic Controller in Bangor, Maine, and Defendant Harding decided to leave the train as it was and to deal with the engine performance problems the following morning.

c) **Fire in the lead locomotive MMA 5017**

211. At about 2325 on July 5, 2013, the taxi for Defendant Harding arrived at Nantes.

212. The taxi driver noted that there were droplets of oil and smoke escaping from the train stack of the lead locomotive MMA 5017, and then asked the Defendant Harding whether the locomotive was to be left in that state.

213. At about 2330, the taxi departed from Nantes for a hotel in Lac-Mégantic, where Defendant Harding was staying for the night. The train, meanwhile was left unattended on a descending grade with insufficient number of hand brakes and without any proper brake effectiveness test having been performed.

214. At 2339, Defendant Harding called the MMAC Rail Traffic Controller in Farnham to indicate his off-duty time of 2345.

215. At that time, the independent air brakes of all of the locomotives remained fully applied.

216. At 2340, a 9-1-1 emergency call was received by the authorities with respect to a fire on a train at Nantes.

217. The Nantes Fire Department responded to the call and arrived on site, while the Sûreté du Québec ("**SQ**") called the MMAC Rail Traffic Controller in Farnham to inform MMA of the fire in the lead locomotive MMA 5017.

218. The fire was in the engine section of the lead locomotive MMA 5017, as appears from the July 2013 fire report of the Nantes Fire Department, completed by Patrick Lambert, the Director of the Fire Department, communicated herewith as **Exhibit CP-18**.

219. MMAC purportedly unsuccessfully attempted to contact an employee with mechanical experience or experience as a locomotive engineer. Instead, an MMAC track foreman was sent to meet with the Nantes Fire Department.

220. On site, the Nantes Fire Department discovered a fire in the engine of the lead locomotive and, consequently, had to shut down the engine, as appears from the transcript of the discussions between the emergency services and the Nantes Fire Department, communicated herewith as **Exhibit CP-19**.

221. Moreover, as appears from the same transcript, the MMAC Rail Traffic Controller in Farnham was called and was informed that the lead locomotive engine had caught fire and that the engine had been shut down.

222. When the MMAC track foreman arrived at the scene, he was told by the firefighters that the emergency fuel cut-off switch had been used to shut down the lead locomotive, which removed the fuel source of the fire.

223. Afterwards the firefighters and the track foreman communicated with the MMAC rail traffic controller in Farnham to provide him with an account of the condition of the train. Subsequently, the firefighters and the MMA track foreman left the premises.

224. The MMA employees and thus MMA knew or ought to have known that the engine of the lead locomotive MMA 5017 had been stopped and that, consequently, the independent air brake would be depleted and rendered useless.

225. Since the engine of the locomotive was no longer running, the air in the train's brake system slowly began to deplete, which resulted in a decrease of the force holding the train and made the securement of the train more reliant on the insufficient number of hand brakes.

226. Given that the train was on a descending grade and that the number of hand brakes applied by Defendant Harding was insufficient, the train slowly started to roll forward down grade towards Lac-Mégantic, and then, as noted in more detail below, picked up speed.

d) **The non-standard engine repair of the lead locomotive MMA 5017**

227. CP further learned after the Derailment, through the TSB report, that the fire in the lead locomotive MMA 5017 was the result of non-standard engine repair. On October 7, 2012, locomotive MMA 5017 was repaired at the MMA workshop in Derby, Maine. It was determined that several power assemblies as well as cam segments had been damaged due to the breakage of a joint rod of one of the power assemblies. The engine block had also been damaged at the same cam bearing.

228. On March 15, 2013, locomotive MMA 5017 was sent again to the workshop due to an oil leak in the bore of the same cam bearing. The camshaft fixing bolt at the bore of the cam bearing had been tightened to close the leak. The cam bearing had broken over time as the fixing bolt had been tightened too much following the installation of the cam bearing during a non-standard repair of the engine block. The temporary repair in question was carried out using polymer, a material which had neither the strength nor the durability required for this type of application.

229. Given that the cam bearing failed, this resulted in a decrease in the engine oil supply to the valve train at the top of the associated power assembly. In the absence of lubrication, the valves were damaged and, eventually, a piston crown was perforated. The damaged valves and piston crown allowed engine oil to enter the cylinder and the intake and exhaust manifolds. Some of the engine oil had accumulated in the turbocharger.

230. As a result, the engine fire that broke out in the exhaust stack of locomotive MMA 5017 on MMA-002 on July 5, 2013 was caused by the accumulation of engine oil in the turbocharger, which eventually ignited.

e) **Train MMA-002 rolls uncontrolled away from Nantes to Lac-Mégantic**

231. When the pressure on the independent brakes decreased to approximately 97,400 pounds, the train began to move. In particular, the insufficient braking

force of the locomotive, coupled with the fact that the train was parked on a descending grade, caused the train to move uncontrolled, on its own.

232. Subsequently, the descending grade and the weight of the train caused it to gain significant speed, ultimately descending at approximately 65 MPH immediately prior to the Derailment. 63 of the 72 tanks cars derailed in Lac-Mégantic at approximately 115 a.m. on July 6, 2013.

X. RAILWAY COMPANIES' SERVICE (COMMON CARRIER) OBLIGATIONS AND THE ABSENCE OF A SUB-CONTRACT BETWEEN CP & MMA

233. At no time did CP sub-contract to MMA the transportation of the petroleum crude oil shipped by WPC.

234. On the contrary, CP interchanged the cargo of petroleum crude oil in Saint-Jean-sur-Richelieu (as previously noted, the connection between CP and the MMAC occurred in Côte Saint-Luc to facilitate the transfer of the tank cars), as selected by WPC and as it was bound to do under sections 113 and 114 of the *Canada Transportation Act*.

235. The decision to use MMAC to transport the petroleum crude oil east of Saint-Jean-sur-Richelieu to its destination in Saint John, was the choice of WPC.

236. CP could not have objected to this choice of route, to the interchange point or to the connecting carrier selected by WPC.

237. Had CP failed to follow WPC's instruction to interchange in accordance with the route chosen by the WPC on the bill of lading, CP would have been in breach of its level of services obligations under the *Canada Transportation Act*.

238. Each and every federal railway carrier in Canada is subject to the *Canada Transportation Act* and, in particular, to the level of service obligations under sections 113 and 114.

239. As a matter of fact, after the Derailment and therefore after MMA's safety record was exposed, CP decided to embargo the interchange of dangerous goods, which included petroleum crude oil shipments, with MMA for, *inter alia,* safety reasons. However, on August 21, 2013, the Agency issued a Letter-decision no. LET-R-99-2013, accepting MMA's request to order the immediate lifting of the CP embargo with respect to MMA traffic exchange and the restoration by CP to the level of service maintained before the embargo. A copy of Letter-decision no. LET-R-99-2013 is communicated herewith as **Exhibit CP-20.**

XI. MMA'S POOR SAFETY CULTURE

240. The Derailment was not caused by the poor condition of MMAC's track or by MMA's general poor safety culture, even though such a poor safety culture may have contributed to MMA's and Defendant Harding's faults which caused the

Derailment. It was, in any event, TC's responsibility to oversee and ensure MMA's compliance with rules, regulations and industry standards.

241. The training provided to MMA's personnel and the monitoring performed by MMA prior to the Derailment were not effective enough to ensure that their team members understood and complied with the rules relating to the securement of trains.

242. When MMA made significant operational changes across its network, it did not properly identify or manage the risks associated with operating a railway network in a safe manner.

243. Indeed, at the material time key elements of the safety management system of MMA were lacking and other elements were not being used effectively. As a result, MMA did not have a safety management system that was properly functioning in order to fully and effectively manage safety risks. This coupled with MMA's poor safety culture contributed to the perpetuation of unsafe conditions and practices, and compromised the ability of MMA to effectively manage safety risks.

244. MMAR's President & CEO, in its August 22, 2013 letter to the U.S. Federal Railroad Administration (Exhibit CP-3), recognized that Defendant Harding's failure to apply a sufficient number of hand brakes, which he described as apparent, was a "blatant failure" to comply with operating rules:

> 5. SPTO had no relationship whatsoever to the tragic accident that occurred on 6 July 2013 at Lac Megantic, Québec. When the train in question arrived at Nantes station, where it was tied down awaiting a rested engineer to take it forward, the inbound engineer had been on duty 9 hours and 30 minutes. **He had plenty of time to set the proper number of hand brakes, which he apparently did not do properly. If true, this was a blatant failure to comply with operating rules. We all know that countless rail accidents over the years have stemmed from the same source** (i.e. violation of operating rules, many of them involving improper securement of cars), with essentially all of them involving multi-person train crews. **Rules compliance is the issue**, not train crew size.
>
> [Emphasis added]

245. Indeed, MMAR's Safety Briefing of July 9, 2010, in response to previous incidents where equipment had been discovered with partially applied hand brakes, reminded employees, *inter alia*, that "*improperly applied hand brakes can be the cause of catastrophic incident including fatalities*". A copy of MMAR's Safety Briefing of July 9, 2010, which was obtained by CP after the Derailment, is communicated herewith as **Exhibit CP-21.**

XII. TC'S FAILURE TO OVERSEE MMA'S OPERATIONS

246. It is CP's submissions that the Derailment was caused by the extreme negligence of MMA, including the negligence of its employee, Defendant Harding, in failing to properly secure the train for the night in Nantes, on July 5, 2013. In addition to obvious and significant indications of mechanical problems with the lead locomotive, Defendant Harding left the train MMA-002 unattended on a descending grade, with insufficient hand brakes applied to secure the train, and without having performed a proper test of the effectiveness of the brakes.

247. In any event, the responsibility to oversee MMA's operations and to inspect MMAC's track conditions, and to take enforcement action in case of non-compliance or lax safety standards, rested on TC, not CP.

248. As a matter of fact, under the *Railway Safety Act*, TC is responsible, *inter alia*, to oversee the safety of federally-regulated railways in Canada, to develop regulations, rules and engineering standards, to monitor industry compliance with rules, regulations and standards through audits and inspections and to take enforcement action, as required (Exhibit CP-4).

249. As such, it was legitimate for CP and for the public to rely on TC's supervision and assume that MMA operated its railways in a safe manner and in conformity with all applicable legislation, regulations and rules.

250. CP learned after the Derailment and after MMA's safety record was exposed, that TC had identified many safety deficiencies when conducting inspections of MMA and that it had issued numerous notices, orders, letters of concern and letters of non-compliance to MMA, before the Derailment. However, it appears that TC did not appropriately follow-up to ensure that MMA's recurring safety deficiencies were properly addressed and, as a consequence, MMA's unsafe practices and rule violations persisted.

251. Furthermore, since May 2010, TC knew that MMA was operating their trains with a single-person crew, as it appears, *inter alia*, from the letter sent to the Federal Railroad Administration by Mr. Robert C. Grindrod, President & CEO of MMAR, on August 22, 2013 (Exhibit CP-3). TC's supervision of MMA's implementation of SPTO was insufficient to ensure that the associated risks were effectively addressed.

252. Finally, the limited number and scope of audits of the safety management system ("**SMS**") performed by TC, and the lack of a follow-up procedure that would have been aimed at ensuring that MMA's corrective measures had been implemented, further contributed to the deficiencies in MMA's safety management system that had not been corrected.

253. TC therefore failed on its mandate to provide adequate oversight and to intervene and correct the deficient safety operations of MMAC.

XIII. CP WAS NOT RESPONSIBLE FOR THE CLASSIFICATION OF THE PETROLEUM CRUDE OIL

254. The shipper and the consignor were responsible for identifying the classification and packing group of the dangerous goods transported, not CP. CP did not know of the shipper's misclassification of the petroleum crude oil prior to the Derailment.

255. Classification is normally done by, or in consultation with, a person who understands the nature of the dangerous goods. As a carrier, CP does not have extensive knowledge of the petroleum crude oil business and is not a product specialist. It does not have the obligation nor the required expertise to classify the products transported.

256. In any event, CP was simply not in a position to do so, particularly when the petroleum crude oil was located in more than 70 different tank cars. Each would have had to have been opened and the contents separately tested in order to be certain that the packing group classification provided by the shipper is correct.

257. Nothing in the applicable legislation or regulations requires a carrier to verify the classification of the cargo. To the contrary, the applicable legislation and regulations permit a carrier to rely upon the classification provided by the shipper and consignor. In this case, the shipper's agent expressly warranted that the classification provided was correct.

258. The petroleum crude oil which was transported by CP was declared as having a PG-III classification by the shipper, WPC. WPC had a legal duty, as a shipper, under the applicable regulations and the bill of lading (Exhibit P-2), to classify the dangerous goods being transported but violated that obligation.

259. The shipper represented on the bill of lading that the petroleum crude oil was "*accurately described [...] and classified, packaged, marked and labeled/placarded*" in addition to being "*in proper condition for transport according to applicable international and national government regulations*" (Exhibit CP-2).

260. CP was entitled to rely on the classification assigned by WPC to the cargo and it did not have the obligation to verify or confirm its accuracy.

261. In any event, a different classification of the petroleum crude oil by the shipper would not have affected the selection of the approved tank cars or CP's handling of the tank cars used.

262. The misclassification of the petroleum crude oil by WPC does not involve CP or lead to any conclusion that CP committed any fault.

263. Furthermore, the misclassification had no impact on the Derailment nor on the faults committed by MMA and Defendant Harding, which were the only cause of the Derailment.

264. Alternatively, should there be any finding of liability based upon the misclassification of the cargo, which is denied, the liability would rest on parties other than CP, including WPC and the consignor Irving Oil Ltd who also had the obligation under the *Transportation of Dangerous Goods Act* to ensure the proper classification of the cargo. Moreover, in the event of any such finding of liability of CP, WPC has a contractual obligation to CP to indemnify CP for any such liability, and CP would therefore be entitled under the CCAA Order and U.S. Confirmation Order to a reduction to zero in the amount of any judgment against it.

XIV. THE USE OF DOT-111 TANK CARS WAS AUTHORIZED BY THE CANADIAN AND U.S. AUTHORITIES AT ALL MATERIAL TIME

265. In any event, the misclassification of the cargo did not result in the selection by the shipper of an unapproved container to transport the petroleum crude oil.

266. At the relevant times, TC and the U.S. Federal Railroad Administration had approved the carriage of all class 3 petroleum crude oil in DOT-111 tank cars, regardless of flash point, boiling point or chemical composition (regardless of packing groups).

267. The use of DOT-111 tank cars for the transportation of petroleum crude oil therefore complied with all applicable Canadian and U.S. laws and regulations in force at the time they were ordered by the shipper, upon whom lies the responsibility to ensure that the goods are transported in a means of containment approved by the relevant authorities. In this case, the shipper complied with that responsibility by using approved DOT-111 tank cars.

268. Federal regulations at all relevant times did not require the use of enhanced Class 111 tank cars even for the transportation of petroleum crude oil classified as PG-I and II. In addition, given the speed at which the train was moving when it derailed and other factors, even enhanced Class 111 tank cars would not have prevented the subsequent rupturing of tank cars and combustion of petroleum crude oil contained therein.

269. While the Derailment spawned a regulatory debate over DOT-111 tank cars safety, the regulations in force at the time of the Derailment approved those very tank cars for the transport of all three petroleum crude oil packing groups.

270. Furthermore, the use of DOT-111 tank cars did not cause the Derailment nor did it have any impact on the faults committed by MMA and Defendant Harding, which were the only cause of the Derailment.

271. Alternatively, should there be any finding of liability based upon the use of the DOT-111 tank cars, which is denied, the liability would rest on parties other than CP.

XV. THE MAIN QUESTIONS TO BE DEALT COLLECTIVELY

a) **The first common question : « *L'intimé CP savait-il ou aurait-il dû savoir que les liquides de schiste acheminés à partir de New Town, Dakota du Nord vers St-John au Nouveau-Brunswick dans les wagons-citernes DOT-111 étaient mal classifiés et identifiés?* »**

272. The first common question must be answered in the negative. CP did not know that the petroleum crude oil transported from New Town, North Dakota, to Saint John, New Brunswick, being transported in DOT-111 tank cars, was misclassified by WPC, however it was properly identified by WPC by its shipping name as petroleum crude oil.

273. It was not CP's duty or obligation to classify or identify the cargo's content.

274. It was the shipper's responsibility, as well as that of the consignor under the *Transportation of Dangerous Goods Regulations*, to ensure the cargo was properly classified and identified. CP insisted upon, and obtained, an express representation from the shipper that the shipper's classification and identification was correct.

275. The misclassification of the petroleum crude oil by WPC does not involve CP or lead to the conclusion that CP committed any fault. Furthermore, the misclassification had no impact on the Derailment nor on the faults committed by MMA, including through MMA's employee Defendant Harding, which were the only cause of the Derailment.

b) **The second common question : « *L'intimé CP savait-il ou aurait-il dû savoir que les liquides de schiste acheminés par transport ferroviaire à partir de New Town Dakota du Nord vers St-John au Nouveau-Brunswick étaient plus volatiles, explosifs et inflammables que du pétrole brut typique?* »**

276. The second common question must be answered in the negative. CP is not a product specialist and does not have extensive knowledge of the petroleum crude oil business.

277. In any event, classifying the petroleum crude oil transported as a PG-I or II instead of PG-III did not cause the Derailment.

c) **The third common question : « *L'intimé CP a-t-il été négligent en permettant que les liquides de schistes acheminés à partir de New Town au Dakota du Nord vers St-Jean au Nouveau-Brunswick le soient dans des wagons-citernes DOT-111?* »**

278. The third common question must be answered in the negative. Nothing CP did in connection with the transportation of the petroleum crude oil from New Town, North Dakota, to Saint John, New Brunswick, in the DOT-111 tank cars selected by the WPC constituted negligence.

279. It is incumbent upon the shipper to ensure that the dangerous goods are transported in an approved "means of containment" or, more precisely, in a "standardized means of containment" as this expression is defined in section 2 of the *Transportation of Dangerous Goods Act*. DOT-111 tank cars were approved "standardized means of containment" for the transportation of petroleum crude oil.

280. TC and the U.S. Federal Railroad Administration both approved, prior to the Derailment, the carriage of all classifications of class 3 petroleum crude oil in DOT-111 tank cars, regardless of packing group classification, flash point, boiling point or chemical composition.

d) **The fourth common question : « *Les wagons-citernes DOT-111 utilisés pour transporter les liquides de schiste étaient-ils appropriés et la décision d'utiliser ces wagons-citernes a-t-elle causé ou favorisé l'incendie, les explosions et la contamination qui ont suivi le déraillement survenu le 6 juillet 2013 à Lac-Mégantic?* »**

281. With respect to the fourth question, CP did not play any role in the selection of the means of containment used for the transportation of the petroleum crude oil. This was the responsibility of the shipper, WPC. In this case, the tank cars used to transport WPC's petroleum crude oil were not owned by CP. Rather, they were supplied by World Fuel Entities.

282. The use of DOT-111 tank cars for the transportation of petroleum crude oil complied with all applicable Canadian and U.S. laws and regulations at the relevant time.

283. The use of DOT-111 tank cars did not cause the Derailment nor affect the causal role of the faults committed by MMAC whose actions and omissions, directly and through its employee Defendant Harding. Even if the use of DOT-111 tank cars could somehow be viewed as a cause, which is denied, the subsequent gross negligence of MMAC, including that of its employee Defendant Harding, constituted a supervening cause.

e) **The fifth common question : « *L'intimé CP a-t-il été négligent dans le cadre de ses discussions et négociations avec les intimés World Fuel pour le choix du trajet afin d'acheminer les liquides de schiste de New Town, Dakota du Nord vers St-John au Nouveau-Brunswick et a-t-il eu un rôle prépondérant et fautif dans la détermination finale du trajet et par voie de conséquence, du transporteur utilisé?* »**

284. The fifth common question must be answered in the negative. CP was not negligent in its discussions and negotiations with WPC for the route selected for the transportation of the petroleum crude oil from New Town, North Dakota, to Saint John, New-Brunswick. As requested by WPC, CP provided the route options and it did not make the final determination of the route, which was ultimately selected by the shipper, and did not commit any fault in this regard.

285. It was the shipper, WPC who selected the route, thereby resulting in the required interchange with MMAC and the use of MMA's locomotive and MMAC's crew and MMAC's tracks that went through Lac-Mégantic, to transport petroleum crude oil from New Town, North Dakota, to St John, New Brunswick.

286. In accordance with the bill of lading submitted to CP, WPC represented and warranted that the lading, packaging, classification and identification complied with all applicable laws (Section 4 of Item 200 of Tariff 1, Exhibit 2).

287. WPC could have replaced MMA with CN but chose not to do so.

288. As previously mentioned, WPC is a professional shipper and it had retained the services of MMA in the past on numerous occasions. MMAC was the holder of a COF issued by the Agency since 2002 and was therefore legally entitled to operate in Canada.

f) **The sixth common question : « *L'intimé CP a-t-il été négligent en choisissant, suggérant, recommandant ou permettant que les liquides de schiste acheminés à partir de New Town au Dakota du Nord, vers St-John au Nouveau-Brunswick le soient sur la voie ferrée propriété du transporteur ferroviaire MMA?* »**

289. The sixth common question must be answered in the negative. CP did not select the route, CP did not suggest using one specific route, CP did not recommend using MMA, its locomotive, crew or tracks. CP never allowed the petroleum crude oil to be transported on MMA's tracks. CP merely transported the petroleum crude oil on its own tracks without incident and then was required to interchange the cargo to MMA.

g) **The seventh common question : « *Quelle est la nature et l'étendue des dommages et autres remèdes que peuvent réclamer les membres du recours collectif?* »**

290. CP committed no fault. Moreover and in any event, CP has not caused or contributed to the Derailment.

291. In this regard, CP submits that the damages that resulted from the Derailment were caused by MMA's fault, directly and through its employee Defendant Harding.

292. In the further alternative, should there be any finding of liability based upon the misclassification of the cargo or the use of the DOT-111 tank cars, which is denied, the liability would rest on parties other than CP. CP indeed states that the World Fuel Entities misrepresented the crude oil packaging group classification, made the decision to utilize the DOT-111 tank cars for the cargo, and chose the route.

293. Still in the alternative, should CP be held liable, it would invoke all of its rights resulting from the judgment reduction provisions in the Order dated October 9, 2015 amending MMAC's Amended Compromise and Arrangement Plan, as well as the U.S. Confirmation Order, including settlement credits, insurance credits and contribution/indemnity credits set forth therein and explained in more detail below, under section XVI.

294. In addition to Plaintiffs' assertion that CP is liable for the faults of MMA, Plaintiffs also allege that CP is liable on account of the faults of the shipper in misclassifying the flammability of the petroleum crude oil and in deciding to use DOT-111 tank cars to transport the product. CP denies any such liability.

295. Still in the alternative and more specifically, should CP be held liable for the misclassification of the cargo's content and the use of the DOT-111 tank cars, which is denied, the World Fuel Entities contractually agreed to indemnify CP with respect to any such damages. The effect of that contractual indemnification under the judgment reduction provisions noted above is explained below.

h) **The eight common question: « *Les membres du recours collectif ont-ils le droit à des dommages et intérêts corporels, moraux et matériels? Si oui, quel est le montant de ces dommages?* »**

296. The answer with respect to CP is negative, as it committed no fault at all and played no role in the Derailment.

XVI. CP'S RIGHTS RESULTING FROM MMAC'S AMENDED COMPROMISE AND ARRANGEMENT PLAN AND THE ORDER CONFIRMING MMAR'S PLAN OF ARRANGEMENT

297. On July 13, 2015, the Honourable Gaétan Dumas sanctioned MMAC's Amended Compromise and Arrangement Plan in the Montreal, Maine & Atlantic City Canada Co./ (Montreal, Maine & Atlantique Canada Cie) (Arrangement related to) Superior Court no. file 450-11-000167-134. This judgment was corrected on August 3, 2015 (Exhibit CP-1).

298. On October 9, 2015, the Honourable Gaétan Dumas ordered that the Amended Compromise and Arrangement Plan be amended, more specifically to add paragraphs 101.1 to 101.8 (Exhibit CP-1).

299. Paragraph 101.2 (the "**Judgment Reduction Provision**"), which refers to Montreal Main & Atlantic Railway as MMA rather than MMAR, provides that a Non-Settling Defendant in any Derailment-Related Causes of Action, such as CP in the present case, is entitled to the greater of the following alternative Judgment Reduction Amounts:

a) "The **"Settlement Credit**," which shall be an available alternative regardless of whether the Trial Court determines that there is any liability on the part of any Released Parties and shall mean the Distribution received or to be received by such Plaintiff pursuant to the Plan or the U.S. Plan, including by way of payment by the WD Trust (as defined in the U.S. Plan) (the "**Distribution**"); provided, however, that the Settlement Credit shall be limited to the amount of the Distribution received or to be received by the Plaintiff with respect to the type of Derailment Claim asserted by Plaintiff against the Barred Person, so that, for example, the Barred Person shall not receive a Settlement Credit for Distributions received by Plaintiff for a personal injury claim if the claim against the Barred Person is for property damage.

b) The "**Insurance Credit**," which shall mean the amount of coverage, if any, the Trial Court determines would have been recoverable to such Barred Person under any insurance policies owned by the MMAC or MMA on account of such Plaintiff's Claim but for the operation of the Order; or

c) The "**Contribution/Indemnity Credit**," which shall mean, in the event the Trial Court determines that the Barred Person could establish a valid indemnity or contribution claim against a Released Party but for the operation of this Order, an amount equal to the value, as determined by the Trial Court, of all contribution or indemnification claims (whether equitable or contractual), if any, that the Trial Court determines such Barred Person would be entitled to as against one or more Released Parties but for operation of the Order, which shall be equal to the aggregate proportionate shares of liability, if any, of the Released Parties, plus the contractual indemnification for which the Barred Person would, in the absence of this Order, be entitled to recover, as determined by the Trial Court at the time of entry of any judgment against any Barred Person, *provided however*, that any Contribution/Indemnity Credit with

respect to MMAC and/or MMA shall be allocated among the Plaintiff, the Barred Person and/or Released Parties other than MMAC and/or MMA determined to be liable, in whole or in part, by the Trial Court, such allocation (a) to the extent the Trial Court is located in the United States, shall be in accordance with the holding in, and methodology adopted by, Austin v. Raymark Indus., 841 F.2d 1184 (1st Cir. 1988) (*Austin*); or (b) to the extent the Trial Court is in Canada, shall be in accordance with applicable provincial law (provided, however, that such reference to Austin and/or such provincial law shall govern only with respect to the allocation of the proportionate liability of MMAC and/or MMA, and shall have no effect on the scope of the Contribution/Indemnity Credit (including, without limitation, that it extends to claims for contractual indemnity, if any.) Without limiting the foregoing, if a Barred Person holds both contribution and indemnity claims against the same Released Party, the value of such claims shall not be combined to determine the amount of the Contribution/Indemnity Credit unless such Barred Person could simultaneously recover, in the absence of this Order, under both such contribution and indemnity claims as a matter of law. Notwithstanding the foregoing, nothing in this provision is intended to dictate the procedure in the Trial Court of determination of the Judgment Reduction Amount pursuant to and consistent with this provision, provided, however, in cases tried in the United States, the trial judge (or equivalent arbitrator, tribunal or panel) shall in the first instance determine the allocation of the proportionate liability of MMAC and/or MMA in accordance with *"Austin".*

300. Substantially the same provisions are in the U.S. Confirmation Order. Under the U.S. Confirmation Order, MMAR has been released from all liability for derailment-related suits, whether in the U.S. or in Canada.

301. Should CP be held liable, which is denied, it reserves all its rights resulting from MMAC's Amended Compromise and Arrangement Plan and the U.S. Confirmation Order (Exhibit CP-1), including with respect to the Order dated October 9, 2015 and its settlement credits, insurance credits and contribution/indemnity credits, as defined above.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

A. **GRANT** the present Defence;

B. **DISMISS** the Plaintiffs' Amended Application to Institute Proceedings against Canadian Pacific Railway Company, with costs.

Montreal, June 1st, 2017

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CANADA
PROVINCE OF QUEBEC
DISTRICT OF MÉGANTIC

(Class Action)
SUPERIOR COURT

File N° : **480-06-000001-132**

GUY OUELLET

and

SERGE JACQUES

and

LOUIS-SERGES PARENT

Plaintiffs

v.

MONTREAL MAINE & ATLANTIC CANADA COMPANY

and

THOMAS HARDING

and

CANADIAN PACIFIC RAILWAY COMPANY

Defendants

LIST OF EXHIBITS IN SUPPORT OF THE DEFENCE OF CANADIAN PACIFIC RAILWAY COMPANY

CP-1	*En liasse*, **a)** Montreal, Maine & Atlantic Canada's Amended Compromise and Arrangement Plan, **b)** Judgment dated July 13, 2015 sanctioning the Amended Compromise and Arrangement Plan, **c)** Judgment dated August 3, 2015 correcting the Canadian Approval Order, **d)** Order dated October 9, 2015 varying the Order approving the Amended Plan Compromise and Arrangement, **e)** U.S. Confirmation Order in the Chapter 11 case of MMAR, dated October 9, 2015.

CP-2	*En liasse,* **a)** the bill of lading, **b)** the uniform straight bill of lading (49 CFR Part 1035, Appendix B), **c)** CP's Tariffs 1 to 10 (effective at the relevant time) and **d)** Tariff Number 2248.
CP-3	Letter sent to the Federal Railroad Administration by Mr. Robert C. Grindrod, President & CEO of MMAR, on August 22, 2013.
CP-4	Transport Canada's Website entitled "Rail Safety".
CP-5	Certificate of fitness issued to MMA by the Canadian Transportation Agency.
CP-6	CP's Federal Corporation Information.
CP-7	Canadian Transportation Agency's decision number 396-R-2007.
CP-8	CP's Route Map.
CP-9	MMAC - Registry of Joint Stock Companies.
CP-10	Canadian Transportation Agency Order No. 2013-R-266.
CP-11	MMAR - État de renseignements d'une personne morale au registre des entreprises.
CP-12	Transcript of the December 20, 2016 hearing before the Honourable Peter G. Cary, of the U.S. Bankruptcy Court District of Main, in the matter of Keach v. Canadian Pacific Railway Company (Case No. 13-10670).
CP-13	MMA's Route Map.
CP-14	K. Loxam's price quote email to WFS dated January 16, 2013.
CP-15	World Fuel Entities' Application for Review of Order no. 628 issued by the Minister of Sustainable Development, Environment, Wildlife and Parks on July 29, 2013.
CP-16	Letter addressed to MMAR's President & CEO, Mr. Robert C. Grindrod, dated October 29, 2013
CP-17	MMAR's Operating Bulletin No. 20133, dated October 20, 2007.
CP-18	Fire report of the Nantes Fire Department, July 2013.
CP-19	Transcript of the discussions between the emergency services and the Nantes Fire Department.
CP-20	Canadian Transportation Agency Letter-decision no. LET-R-99-2013.
CP-21	MMAR's Safety Briefing of July 9, 2010.

Montreal, June 1st, 2017

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S U P E R I O R C O U R T
Class action
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File No.: 480-06-000001-132

GUY OUELLET
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Plaintiffs

vs.

MONTREAL MAINE & ATLANTIC CANADA COMPANY
and
THOMAS HARDING
and
CANADIAN PACIFIC RAILWAY COMPANY

Defendants

DEFENCE OF CANADIAN PACIFIC RAILWAY COMPANY AND LIST OF EXHIBITS

Amount: $
Nature:
Code:

ORIGINAL

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