

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MÉGANTIC

No.: 480-06-000001-132

DATE: 10 January 2014

PRESENT: HONOURABLE JUSTICE MARTIN BUREAU, J.S.C.

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

Petitioners

v.

RAIL WORLD, INC.

and

RAIL WORLD HOLDINGS, LLC

and

MONTREAL MAINE & ATLANTIC RAILWAY LTD

and

EARLSTON ASSOCIATES L.P.

and

PEA VINE CORPORATION

and

MONTREAL, MAINE & ATLANTIC CORPORATION

and

MONTREAL, MAINE & ATLANTIC CANADA COMPANY

and

EDWARD BURKHARDT

and

ROBERT GRINDROD

and

GAINOR RYAN

and

DONALD GARDNER, JR.

and

JOE MCGONIGLE

and

CATHY ALDANA

and

THOMAS HARDING

and

IRVING OIL LIMITED

and

IRVING OIL COMPANY, LIMITED

and

IRVING OIL OPERATIONS GENERAL PARTNER LIMITED

and

IRVING OIL OPERATIONS LIMITED

and

IRVING OIL COMMERCIAL G.P.

and

WORLD FUEL SERVICES CORP.

and

WORLD FUEL SERVICES, INC.

and

WORLD FUEL SERVICES CANADA, INC.

and

DAKOTA PLAINS HOLDINGS, INC.

and

DAKOTA PLAINS MARKETING, LLC

and

DPTS MARKETING LLC

and

DAKOTA PLAINS TRANSLOADING, LLC

and

DAKOTA PETROLEUM TRANSPORT SOLUTIONS, LLC

and

WESTERN PETROLEUM COMPANY

and

PETROLEUM TRANSPORT SOLUTIONS, LLC

and

STROBEL STAROSTKA TRANSFER, LLC
and
MARATHON OIL CORPORATION
and
SLAWSON EXPLORATION COMPANY INC.
and
UNION TANK CAR COMPANY
and
TRINITY INDUSTRIES, INC.
and
TRINITY RAIL GROUP, LLC
and
TRINITY RAIL LEASING 2012 LLC
and
GENERAL ELECTRIC RAILCAR SERVICES CORPORATION
and
CANADIAN PACIFIC RAILWAY COMPANY

Respondents
and
XL INSURANCE COMPANY LIMITED
and
XL GROUP PLC
Third parties

JUDGMENT ON PRELIMINARY MEASURES CONCERNING PRESENTATION OF
RELEVANT EVIDENCE (art. 1002 C.C.P.)

[1] On 6 July 2013, 72 cars carrying petroleum products in a Montreal Maine & Atlantic Canada Company rail convoy derailed in downtown Lac-Mégantic, thereby causing the worst rail accident, or one of the worst, in Canadian history.

[2] Forty-seven people died in the incident. Numerous families were decimated, leaving many children orphaned and a very large number of people bereaved.

[3] This very substantial physical and personal damage was further aggravated by immeasurable material damage for the economy of the entire town and the region as a whole. The environmental damage, not all of which has yet been determined, is

considerable and the losses of every kind, both moral and physical, will leave deep scars on a very large number of victims.

[4] Less than ten days after this tragedy, the first motion for authorization to institute a class action was filed with the Superior Court registry.

[5] Subsequently, three amended motions were produced and served, as a result of new allegations and the addition of new petitioners and respondents.

[6] Currently, four petitioners who state that they are victims of the tragedy in various ways, are petitioning against thirty-eight different respondents (7 individuals and 31 corporate entities) for authorization to institute a class action to obtain various compensation of all kinds.

[7] The petitioners allege a number of facts and mention a number of items that they deem constitute wrongdoing, in connection with all the circumstances around the production, identification, transshipment and all of the safety measures connected with the transport of what they are calling crude oil, or shale gas or liquid.

[8] The motion for authorization to sue these respondents is, generally speaking, based on their collective and solidary liability for having allegedly contributed in some way to this tragedy through their actions, misconduct or negligence, and their consequent liability, according to the allegations made, for the damage resulting therefrom.

[9] Within the context of this procedural action by the petitioners, under articles 999 and following of the Québec Code of Civil Procedure (C.C.P.), with the intent of obtaining authorization to bring a class action, certain respondents or groups of respondents have filed five preliminary motions to obtain permission to present relevant evidence at the hearing on the motion for authorization.

[10] These motions were presented in two days of hearings held in Sherbrooke, despite the fact that the hearings should in principle have taken place in Lac-Mégantic. At present, hearings of this kind, involving such a large number of participants (nearly 25 lawyers) cannot be held in that town because the court house there has been inaccessible since the tragedy. It is located in one of the areas affected by the disaster and replacement facilities cannot currently accommodate a hearing of this size.

[11] In this judgment, the Court intends to dispose of these five preliminary arguments, jointly with regard to the principles to be applied and specifically with regard to the conclusions sought by each respondent or group of respondents concerned.

...

A) The parties concerned

Representatives

[12] The group for which authorization is requested is defined by the petitioners themselves as follows:

“Petitioners wish to institute a class action on behalf of the following group, of which they are members, namely:

. all persons and entities (natural persons, legal persons established for a private interest, partnerships or associations as defined in article 999 of the Code of Civil Procedure of Quebec) residing in, owning or leasing property in, operating a business in and/or were physically present in Lac-Mégantic [including their estate, successor, spouse or partner, child, grandchild, parent, grandparent and sibling], who have suffered a loss of any nature or kind relating to or arising directly or indirectly from the train derailment that took place on July 6, 2013 in Lac-Mégantic (the “Train Derailment”), or any other group to be determined by the Court.”

Respondents

[13] They number 38: 7 natural persons and 31 corporate legal entities; they are grouped by the petitioners into various groups which can be described as follows:

1- Rail World corporate respondents (Rail World)

[14] These are seven American and Canadian corporations interconnected, *inter alia*, through a holding company (Rail World Inc.). Of these seven corporations, two, Montreal Maine & Atlantic Railway Limited and Montreal Maine & Atlantic Corporation, are allegedly involved more specifically in the rail network that serves Lac-Mégantic.

[15] On 8 August 2013, in the context of proceedings under the *Companies' Creditors Arrangement Act* (R.S.C. 1985 c. C-36), a suspension order was pronounced in favour of Montreal Maine & Atlantic Canada, its insurers and a number of companies of the group, and in favour of a number of its executive officers. This suspension order is still in effect.

[16] The petitioners allege, for all of the corporations in the Rail World group, that they are operated as a single economic unit or a single group of companies and that they have executive officers and directors in common.

2- Rail World natural respondents

[17] These executive officers, who are also respondents, are described in the motion as “the Rail World natural respondents”. According to the allegations in the motion, each

serves either as president, chief executive officer or vice-president of one or other of the six Rail World corporate respondents. These individuals are also described as the executive heads of these companies.

[18] The last natural respondent, Thomas Harding, is described as the conductor of the train that derailed.

3- Irving Oil respondents

[19] The second group of respondents is described as the Irving Oil respondents. These are five companies which, at first glance, have in common the particularities of bearing the name Irving, being incorporated under the laws of New Brunswick, and having their corporate headquarters in St. John, New Brunswick.

[20] The petitioners allege that these companies, directly or indirectly, through an agent or a subsidiary, bought and/or were the owners of the crude oil or shale liquid that was transported on 6 July 2013 by train from Newtown, North Dakota toward an Irving Oil refinery located in St. John, New Brunswick.

4- World Fuel respondents

[21] According to the allegations in the motion, ten companies belong to this group. First, three of them bear the name World Fuel in their titles and are described as entities which, themselves or through one of their subsidiaries, sold and/or were the owners of crude oil or shale liquid transported on 6 July 2013 toward the Irving Oil refinery in Saint John, New Brunswick.

[22] Five other companies also grouped under the name World Fuel respondents have the shared characteristic of bearing titles that refer in some manner to Dakota, i.e., Dakota Plains, DPTS or Dakota Petroleum.

[23] Finally, two of the companies in the World Fuel group, Western Petroleum and Petroleum Transport Solutions, are described as being full subsidiaries of one or other of the World Fuel companies.

[24] All of the companies designated by the name World Fuel respondents are described as being, in various respects, interconnected or controlled by one or other of them, and are claimed to be the sellers and/or owners of the heavy petroleum or shale liquid or to have been involved in various capacities in the transport and transshipment of these petroleum products.

[25] The petitioners claim that all of the respondents in the World Fuel group are individually and solidarily liable through their actions for the losses and damages

suffered by the petitioners and the members of the group for which authorization to bring a class action is sought.

5- Petroleum producer respondents

[26] Two corporate entities, Marathon Oil Corporation and Slawson Exploration Company, are described as producers of petroleum or shale gas and, specifically, of the petroleum products which were shipped by train from North Dakota in the direction of the Irving refineries in Saint John, New Brunswick.

[27] The motion for authorization indicates in a general way that these companies have the responsibility of determining the category of goods shipped and giving an adequate indication of the risk level thereof, and ensuring that the appropriate indications for this level of risk are adequate.

6- Lessor respondents

[28] *Inter alia*, this title covers three companies which have the shared characteristic of bearing corporate designations containing the name Trinity. It also includes two other entities, the Union Tank Car Company and the General Electric Railcar Service Corporation (Gersco).

[29] According to the allegations of the petition, all of these legal entities are lessors/suppliers of the leased tank cars used to transport crude oil or shale liquid by train on 6 July 2013 from Newton toward Saint John.

[30] Generally speaking, all of the lessor respondents are charged with deciding to use inadequate cars and with being informed of the use of such cars for the transport of petroleum products on an inadequate, deficient railway.

7- Respondent Canadian Pacific (CP)

[31] This well-known Canadian federal corporation is designated by the petitioners as the one they claim contracted with World Fuel for the train transport of the petroleum products, and subcontracted transport over part of the route to certain respondents in the Rail World group.

8- Insurer third parties

[32] XL Insurance Company Limited and XL Group PLC are described as the insurance companies claimed to be the liability insurers for respondent Montreal Maine & Atlantic Corporation.

...

B) The main legal principles that apply in the context of the five preliminary motions

[33] The procedural process set out in the Code of Civil Procedure for the preliminary stage of any class action, i.e., the motion for authorization, has been analyzed and commented on numerous occasions in the Superior Court, the Court of Appeal, and even in the Supreme Court of Canada.

[34] It does not seem essential to revisit all of these analyses or instructions in detail, except to indicate the legal principles established by case law which will guide the Court in producing its analysis of the motions of certain respondents for presentation of relevant evidence.

[35] Article 1002 C.C.P. stipulates that prior authorization must be obtained from the Court before a member can institute a class action. It is also in this same article that the legislator indicates that, at the stage when a motion for authorization to institute a class action is filed, the judge may allow the presentation of relevant evidence.

[36] It is now widely recognized by numerous decisions that permission to present relevant evidence must not be granted except in specific or particular conditions or circumstances. This permission should only be contemplated with the objective, during the filtering process intended to eliminate frivolous, abusive or excessive claims, that the proposed relevant evidence may make it easier for the Court to analyze the authorization criteria set out in article 1003 C.C.P.

[37] A large number of decisions refer to the one handed down in 2006 by Honourable Justice Clément Gascon, then of the Superior Court and now a judge on the Court of Appeal, in the case *Option Consommateur c. Banque Amex du Canada et al*¹. Honourable Justice Gascon identifies seven propositions to apply in the analysis of motions to present relevant evidence. He describes these seven propositions as follows:

- "1) Because, in the context of the filtering and verification mechanism that characterizes the motion for authorization, the judge must, if the factual

¹ *Option Consommateurs c. Banque Amex du Canada*, 2006 QCCS 6290.

allegations appear to justify the claimed right, grant the motion and authorize the class action, evidence will not be necessary in every case;

- 2) Under the new article 1002 C.C.P., the removal of the obligation for an affidavit and the limitation of examinations to those which are authorized facilitates and accelerates the process without neutralizing the role of the judge, as the law grants the judge the discretion to authorize relevant and appropriate evidence in the context of the authorization process;
- 3) The judge must use his discretion, which must of course be exercised judicially³, to assess whether it is appropriate or useful in the circumstances to grant the right to present evidence or conduct an examination. Ideally, in principle, such evidence is presented and such examinations conducted at the hearing on the motion for authorization, not out of court;
- 4) To assess whether it is appropriate or useful to grant the motion, the judge must be sure that the evidence sought or the examination requested will make it possible to verify whether the criteria of article 1003 C.C.P. are met;
- 5) In assessing the appropriateness of this evidence, the judge must act in accordance with the rules of reasonable conduct and proportionality set out in articles 4.1 and 4.2 C.C.P., as well as with the rule of relevance, in terms of the criteria in article 1003 C.C.P.;
- 6) The judge must exercise prudence and not authorize evidence that will be relevant on the merits, because, at the authorization stage, he must hold the allegations of the motion to be proved without verifying their truth, which bears upon the merits. At this authorization stage, the burden is one of demonstration and not one of evidence;
- 7) The burden of proving the appropriateness or usefulness of the evidence sought rests on the respondents. It is also their responsibility to specify the precise content and objective of the evidence they seek and the examinations they want to conduct, linking their requests to the objectives of appropriateness, relevance and prudence already described.

The objective is not to allow examinations or evidence of all kinds, without rules, but rather to authorize only limited evidence and/or examinations on clearly defined, specific subjects.

[reference omitted]

(our emphasis) [unofficial translation]

[38] Honourable Justice Dominique Bélanger, who is also now a Justice at the Court of Appeal, had the opportunity while sitting in Superior Court to contemplate this

problem of what must be deemed to be relevant evidence, in the case *Simon Jacques et al. c. Pétrole Turgeon et al.*²

[39] In an overview of certain precedents in that case, Honourable Justice Bélanger recalled that:

“The Court must be prudent and cannot authorize evidence that bears on the merits of the case, being required to hold the facts of the motion for authorization as proved.”

[40] Honourable Justice Bélanger also specifies that:

“while the Court must hold the facts of the motion as proved, it must not forgo evidence whose aim is precisely to shed light on one of the essential aspects allowing it to assess the criteria set out in article 1003 C.C.P.”

(our emphasis) [unofficial translation]

[41] A number of decisions also refer to those pronounced by Honourable Justice Danielle Richer in the case *Option Consommateur et al. c. Fédération des Caisses Desjardins du Québec et al.*, particularly to this excerpt³:

“The Courts have also stated that, in the assessment context of paragraph 1003 c) C.C.P., the alleged facts are held to be proved; however, in his assessment, the judge must take into account all of the evidence in his case, particularly evidence in the case which is contradicted by other evidence or is unreasonable or implausible. This is what emerges from the following cases: *Leblanc c. Capital d'Amérique CDPQ inc.* and *Option Consommateurs c. Novopharm.*

[reference omitted] [unofficial translation]

[42] Honourable Justice Marie-France Bich of the Court of Appeal, in her reasons in the case *Allstate du Canada, compagnie d'assurances c. Frank Agostino*⁴, with which honourable justices Thibeault and Dufresne agreed unanimously, expressed herself as follows on this subject:

“[25] It emerges clearly from this provision that at this stage in the proceedings, all evidence must be authorized by the judge who, in this regard, enjoys vast discretionary power of which he cannot be deprived through an agreement between the parties. In effect, the latter cannot simply agree on the evidence they want to produce and tie the judge's hands. Quite the opposite: the judge's power remains intact (although it goes without saying that he is permitted to give effect to the parties' consent). To conclude otherwise could result in a situation where the parties, even with the best intentions, might encumber the authorization process with useless data or even transform it into something entirely other than the filtering tool it is and must remain. In fact, we have a good example of that here, as we will see below.

² 9 September 2009, 200-06-000102-080.

³ AZ-50465743.

⁴ 2012 QCCA 678 (C.A.). par. 25, 34, 35 and 36.

[34] As we saw earlier, in *Pharmascience inc. c. Option Consommateurs*, the Court warns the parties and the courts against the temptation to use article 1002 C.C.P. in a way that would convert the filtering mechanism which the class action authorization process constitutes into a kind of preliminary inquiry on the merits. In *Bouchard c. Agropur Coopérative*, however, in a decision written by Justice Pelletier, the Court stressed that:

[45] Incidentally, the case at the bar illustrates the importance the presentation of evidence at the authorization stage can sometimes assume. In this case, it allowed the addition of particulars which proved useful for the examination of the conditions set by law. In the current state of the law, while the legislator has removed the petitioner's obligation to provide a sworn statement, it will often be in judges' interest to take a favourable view when they receive requests to conduct one or more examinations.

[35] This passage from the *Agropur* decision must not be read as a repudiation of the viewpoint expressed by the Court in *Pharmascience*, and *Agropur* does not seek to reopen gates that *Pharmascience* sought to close. Rather, the goal is definitely to choose a middle path between rigidity and permissiveness, the way of prudence: a prudence suitable to the summary nature of the class action authorization procedure. This is the principle explained by Justice Crête in *Option Consommateurs c. Brick Warehouse, I.p.*, which, moreover, explains the conditions governing the authorization of relevant evidence, within the meaning of article 1002 C.C.P., according to the terms of Justice Gascon's judgment in *Option Consommateurs c. Banque Amex du Canada*⁵:

[28] Prior to the amendment made to this article 1002 C.C.P. in January 2003 [reference omitted], the text of the article stipulated that the motion for authorization to institute a class action had to be supported by an affidavit; over the years this sometimes resulted in interminable, tedious examinations, so that "debates on authorization [had] gotten out of proportion." [reference omitted]

[29] The principle was then established that, at the authorization stage, the Court must hold the allegations of a petitioner for class action as proved, without the need for an affidavit which would have attested to their truth.

[30] Nonetheless, to prevent suits which were clearly doomed to fail from being unduly authorized and entailing often very substantial costs to the parties, the legislator in a sense provided a safety valve by giving the judge seized with the case the possibility of allowing the presentation of relevant evidence. The aim was thus to prevent the authorization process from becoming a mere formality in which the Court found itself the prisoner of allegations whose only merit was having been set down in writing in a motion for authorization and filed with the Registry, without an affidavit attesting their truth. [reference omitted]

...

⁵ 2006 QCCS 6290, EYB 2006-115073.

[32] “Relevant evidence” is thus evidence which allows the court, not to assess the validity of the action on the main issue but, rather, to “verify summarily whether the conditions of article 1003 C.C.P. are met”. [reference omitted]

That said, evidence is appropriate if it is intended to contradict evidence which the respondent party deems to be implausible, false or inaccurate, and thereby to establish the lack of colour of right. [reference omitted]

[36] It is in this respect that evidence covered by article 1002 C.C.P. is relevant and may be authorized. It will be agreed that the corridor is thus quite narrow.

(our emphasis) [unofficial translation]

[43] The legislator, particularly in the amendments to the Code of Civil Procedure which came into effect in January 2003, sought to facilitate the authorization process, make it more accessible and shorten the delays caused in the former system by the requirement that the motion be accompanied by an affidavit, with all the ensuing incidents and preliminary arguments.

[44] We must always bear in mind what the Supreme Court of Canada recalled recently with clarifications in the decision in *Infineon Technologies AG c. Option Consommateurs*⁶, written by honourable justices Wagner and Lebel. It seems important to analyze any motion for authorization in terms of the burden of proof required to authorize a class action.

“[67] At the authorization stage, the facts alleged in the applicant’s motion are assumed to be true. The applicant’s burden at this stage is to establish an arguable case, although the factual allegations cannot be [translation] “vague, general [or] imprecise” (see *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380) (CanLII), par. 44). ...

...

“[134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant’s allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. The respondent has provided evidence, limited though it may be, in support of its assertions, namely the exhibits attesting to the existence of a price-fixing conspiracy and to the international impact of that conspiracy, which had been felt in the United States and Europe. At the authorization stage, the apparent international impact of the appellants’ alleged anti-competitive conduct

⁶ 2013 SCC59

is sufficient to support an inference that the members of the group did, arguably, suffer the alleged damages.”

(our emphasis)

[45] The Court believes it is important that the analysis required to determine whether relevant evidence can be allowed, based on the judicial discretion granted by article 1002 C.C.P., take into account the nature of the dispute and the serious consequences a judgment of authorization can have on the parties.

[46] In this case, clearly, the direct and indirect victims of this rail tragedy are numerous; the human, physical and economic consequences are overwhelming for the victims, but also, very probably, for all of the businesses subject to prosecution, due to the considerable financial burdens arising from defence fees and the risk of a conviction with its consequences.

C) The five motions presented by the respondents for production of relevant evidence

I Motion of the Irving Oil Group respondents

[47] This motion was the first to be argued before the Court. The parties most particularly concerned pleaded the applicable legal principles extensively and presented quite an exhaustive review of the principles set out in the doctrine and case law on relevant evidence.

[48] Consequently, when the four other motions were presented, counsel for both the respondents concerned and the petitioners were not obliged to revisit or repeat all the same arguments and instead focused more on the particulars of their motions than on basic principles.

[49] In fact, a number of the decisions laid before the Court were submitted by several parties and the memoranda produced often contained the same authorities.

[50] Respondents Irving Oil Commercial G.P., Irving Oil Limited, Irving Oil Company Limited., Irving Oil Operations General Partner Limited and Irving Oil Operations Limited, collectively designated as Irving Oil, applied to the Court for permission to present relevant evidence composed of the following items:

- 50.1. a redacted version of the “Crude Oil Purchase and Sale Agreement” allegedly signed by Irving Oil Commercial G.P. (IO CGP) and World Fuel Service Inc. (WFS) on 29 May 2013 (exhibit R-1).
- 50.2. an affidavit by Michael Thompson, Logistics and Distribution Manager at IOCGP (exhibit R-2).

[51] Irving Oil submits that the evidence it seeks to produce is “likely to be useful” to the Court in its subsequent analysis of whether or not to authorize the class action. It refers the Court to some decisions allowing presentation of certain items of evidence. It claims that written agreements are regularly allowed as evidence in the context of a motion for authorization because they in themselves constitute neutral facts which are generally not contradicted.

[52] Irving Oil adds that the courts have on numerous occasions allowed the production of affidavits, particularly when they are concise and clearly delimited, because such affidavits meet the reasonableness and proportionality criteria of articles 4.1 and 4.2 of the C.C.P.

[53] Irving Oil deems that when the affidavit whose production is sought, and for which an examination may subsequently be held, allows a better overall survey of the situation, it should be allowed as relevant evidence.

[54] Irving Oil contends that the petitioners’ allegations against it are grossly inaccurate in a number of regards and that production of the document (R-1) and the affidavit (R-2) will make it possible to demonstrate unambiguously that none of the Irving Oil entities have any connection with the facts and claims in the case, with the exception of IOCGP.

[55] Irving Oil seeks the possibility of demonstrating by affidavit that Irving Oil was never the owner of the crude oil and never had control thereof, that it did not plan the transport nor make any arrangement in that connection, that it did not determine the classification and packing group of the crude oil, that it prepared no shipping documents and, ultimately, that it had none of the obligations the petitioners accuse it of failing to meet.

[56] Irving Oil also pleads that the agreement with WFS indicates that the latter was bound by contract to guarantee suitable, safe transport of the crude oil.

[57] Irving Oil adds that the affidavit is relevant to demonstrate that IOCGP alone is involved in the contract process with WFS and that the presence of the other Irving Oil entities has no relevance to the debate.

[58] Irving Oil also states that its representative’s affidavit is necessary to inform the Court of the interactions, or absence of interaction, between IOCGP and WFS, and to correct other false or inaccurate allegations in the motion for authorization, particularly regarding the choice of the carriers’ route and of the cars used; regarding the nature of the connections with MMA, CP or any other company involved in the transport; regarding the titles of ownership and/or use of the leased cars; and regarding the agreements for the preparation of shipping documents.

[59] Moreover, Irving Oil deems that the affidavit must be filed as evidence to establish that WFS and IOCGP agreed that WFS should take charge of preparing the shipping, export and import documents, including determination of the crude oil's packing group classification for transportation purposes.

[60] Finally, Irving Oil contends that the affidavit rectifies an erroneous allegation contained in paragraph 18.2 of the motion for authorization, regarding a New Brunswick rail company alleged to belong to Irving Oil.

[61] The petitioners for authorization to bring a class action have no objection to the written agreement (R-1) being produced as evidence, provided that the version produced is not redacted or, if it is, that they be provided with an unredacted copy with conditions governing how they may use it.

[62] As for Michael Thompson's affidavit, the petitioners agree to its production, subject to conditions regarding the examination of the deponent, but with the exception of paragraphs 4 to 13, 15 and 16.

[63] The petitioners deem that these parts of the affidavit are not relevant evidence because they are merely explanations of a written document (R-1); that these allegations are nothing more than denials of participation in the derailment case and the damages, which cannot be accepted because that constitutes self-serving evidence. The petitioners add that part of the affidavit contradicts exhibits filed regarding the consignee's identity.

[64] Finally, the petitioners deem that by allowing this evidence, the Court would give rise to an excessively elaborate examination to determine the specific participation of the five companies in the Irving group that they seek permission to sue. The petitioners submit that such a procedure exceeds the limits of the evidence required in a hearing on authorization to bring suit.

[65] After obtaining the Court's permission to do so, the respondents in the World Fuel group also opposed Irving Oil's motion. These respondents deem, in the case of certain information in the affidavit, that the signatory did not necessarily have knowledge of the facts, and for other statements, that this affidavit puts forward facts which are more within the scope of a legal debate on the liability of the various stakeholders.

[66] After also obtaining the Court's permission to do so, the respondents in the Rail World group also opposed production of a redacted version of R-1 and a number of the assertions in affidavit R-2 because they constitute a pure and simple denial of certain facts, which is likely to lead to a premature debate on the merits of the case.

Analysis and discussion

[67] In the context of any class action suit, whether at the authorization stage or subsequently, it almost always seems useful and relevant to prove the contractual framework linking the parties, particularly if contractual relations are alleged between certain of the parties involved. This evidence may be relevant even if extracontractual rather than contractual liability of certain respondents is sought by the victims. The production of written agreements allows a clearer assessment of all the legal connections.

[68] In this case, contractual relations are alleged between two major groups or between legal entities in two major groups of respondents, to wit, the purchaser of the crude oil, i.e., the party to which the oil was being sent, the Irving Oil Group, and the alleged producer and/or seller of the crude oil, World Fuel. However, no written evidence of these agreements currently appears in the file.

[69] All of the parties agree to production of the contracts if unredacted versions are produced. The petitioners demand that an unredacted copy be delivered to them. The Irving Oil respondents claim that only the purchase price has been redacted, due to a confidentiality agreement and for trade secret reasons.

[70] The petitioners agree that for now, a redacted copy can be used for the purposes of the case, but wish to reserve the right, should it become necessary, to produce and use an unredacted copy. They contend that the price paid or invoiced can be an indication of the parties' knowledge of a higher risk regarding the safety of the purchased product.

[71] The Court deems it appropriate to allow the Irving Group to file, for the hearing on the motion for authorization, exhibit R-1, i.e., the contract of 29 May 2013 between World Fuel Services Inc. and Irving Oil Commercial GP (IOCGP) and the annex thereto, i.e., the Conoco General Provisions Domestic Crude Oil Agreements.

[72] Also permitted is the production of exhibits MT-A and MT-B, i.e., emails between representatives of IOCGP, International Trade Solutions and World Fuel regarding certain executory provisions of contract R-1 and another contract between World Fuel and IOCGP dated 11 July 2012.

[73] The Court also allows the Irving Oil group to produce as relevant evidence part of Michael Thompson's affidavit of 27 November 2013 (exhibit R-2).

[74] This means, first, the paragraphs to which there is no objection, i.e., paragraphs 1, 2, 3, 14 and 17 to 19 of this affidavit.

[75] In addition, the Court allows the production of paragraph 16 of this affidavit, to wit, the statements that concern an agreement between IOCGP and WFS regarding preparation of the shipment and the documents for export, import, classification and labeling of the crude oil.

[76] The Court also allows the production of Michael Thompson's additional affidavit of 16 December 2013 (R-3) in its entirety. This affidavit merely enters into evidence and gives certain explanations with regard to exhibits MT-A and MT-B, concerning emails whose production has been allowed.

[77] The Court agrees with the parties regarding the usefulness of the contracts and agrees, for now, that a redacted copy can be produced. An unredacted copy must nonetheless be delivered to the petitioners' counsel. The petitioners shall keep the redacted passages confidential and may not use or reveal the contents to anyone except their experts and advisors without obtaining the Court's express permission.

[78] Regarding the additional exhibits MT-A and MT-B, which comprise an exchange of emails between IOCGP and the apparent agents of World Fuel concerning certain terms related to transport and customs clearance, and another written agreement between Irving [and] World Fuel, their production is allowed because these written documents, which concern relationships between certain of the respondents, appear potentially useful for the hearing on authorization. With regard to the exhibit MTB, a redacted copy may thus be produced, subject to the same conditions governing the redacted part as those imposed for exhibit R-1.

[79] Regarding the affidavits for which the Court allows production of the first in part and of the second in its entirety, the Court observes that the paragraphs objected to by the petitioners or certain respondents consist, *inter alia*, of statements made by the deponent Michael Thompson regarding the role of Irving Oil Limited, Irving Oil Company, Irving Oil Operation General Partner Limited and Irving Oil Operations Limited in the agreements with World Fuel. They also contain statements concerning decisions regarding transport of the oil, the choice of carrier, the route taken, the cars used and the transport costs, before or at the time of the derailment.

[80] The Court deems it appropriate that the items in the affidavit connected with production of the contracts and emails as evidence should be allowed. However, the explanations as to the roles of the respective companies do not appear relevant at this stage. This is so, in part, because these explanations could easily result in adversary proceedings and could also give rise to prolonged examinations, and, for the moment, at the authorization stage, production of the contractual elements seems sufficient for the analysis that must be done based on the criteria of article 1003 C.C.P.

...

II Motion of the Trinity group respondents

[81] As mentioned above, three of the respondents have the common characteristic of bearing corporate designations containing the name "Trinity". Two of them, Trinity Rail Group and Trinity Industries, are applying for permission to present relevant evidence. The third, Trinity Rail Leasing 2012 LLC, has just been added to the file as a new respondent following service of the third amended motion for authorization.

[82] The two respondents Trinity Industries Inc. and Trinity Rail Group LLC, collectively designated as Trinity, are applying for permission to file an affidavit by S. Theis Rice, Senior Vice-President and Director of the Legal Department of Trinity Industries. The objective of this eleven-paragraph affidavit is to show that the two respondents play no role in the leasing or ownership of any of the cars involved in the Lac-Mégantic derailment. In the affidavit, the deponent specifies that, within the Trinity group, the actual lessor is the new respondent Trinity Rail Leasing 2012 LLC, and that that company is a subsidiary of Trinity Industries. It seems, however, that the latter merely holds, through other firms, an interest of less than 33 1/3 % in Trinity Rail Leasing 2012 LLC.

[83] Without wishing to repeat and revisit the arguments already presented by Irving Oil, which can also apply to the analysis of its motion, Trinity pleads that the facts alleged in the motion for authorization are very general and not particularly detailed. It contends that, if an authorization is granted, it is important that it be granted against the right legal entities, because such an authorization will have serious consequences for all the parties, particularly for those that need not be involved.

[84] Trinity adds that the presence of too large a number of respondents in the case, especially if they have nothing to do with the events, will cause significant delays.

[85] Trinity adds that, with regard to both itself and certain other firms, the petitioners refer in an overly general fashion to too many legal entities, interchangeably, and that the Court must allow clarification of the relationships and the legal entities.

[86] The petitioners do not oppose the production of paragraphs 1 to 6 of the affidavit. However, they challenge the evidence Trinity seeks to present by paragraph 7 of this affidavit, unless the relevant contracts are produced.

[87] Regarding paragraphs 8, 9 and 10 of the same affidavit, the petitioners, while contending that it is also in their interest that only genuinely liable parties be prosecuted, nonetheless wish to be sure that parties currently involved as respondents have absolutely no reason to be; consequently they want the evidence to be made up not solely of affidavits but also the relevant documents.

[88] The petitioners reiterate their arguments, which they also raised against Irving Oil's motion, and plead that the allegations of their motion for authorization must be held to be proved, and above all, that it is important not to allow evidence which should only be given at the trial on the merits of the case.

[89] The petitioners and the World Fuel and Rail World respondents are worried about the deponent referring to contracts without producing them.

Analysis and discussion

[90] In the light of Trinity's motion, we can essentially conclude that the items Trinity seeks to have entered into evidence and to which the plaintiffs and the Rail Group and World Fuel respondents object consist of assertions that Trinity Industries and Trinity Rail Group are neither the lessors nor the owners of any of the cars involved in the derailment; that they played no role in the decisions regarding preparation of the train, use of the cars, or the nature and volume of the products processed; and that they allegedly exerted no control in this matter.

[91] Specifically, Trinity Industries Inc. and Trinity Rail Group LLC seek to demonstrate that they played no part in the decision to transport the crude oil in the cars that derailed on 6 July 2013. They add that they were also not involved in any way in the decision to entrust these cars to Montreal Main & Atlantic Railway Ltd or any other entity designated as one of the Rail World respondents.

[92] The Court's opinion is that the Trinity respondents should be allowed to produce S. Theis Rice's affidavit (exhibit TR01), in part, as relevant evidence.

[93] First, the petitioners or the other respondents have raised no objections to the production of paragraphs 1, 2, 3, 4, 5 and 6 of this affidavit. Moreover, the Court deems that these items can be produced because they may be useful during the hearing on the motion for authorization, in order to better understand certain relationships between the business units of the Trinity group which are parties to the motion as respondents.

[94] Moreover, these statements should not give rise to examinations that are overly elaborate or would entail disproportionate costs or interventions.

[95] With regard to paragraphs 7 and 11 of this affidavit, it is also appropriate to allow their production because they concern clear facts, unequivocal statements that are easy to verify and give rise to little or no controversy.

[96] The Court does not, however, allow the production of paragraphs 8, 9 and 10 of the affidavit (exhibit TR-1). Allowing the production of such statements would

necessarily entail examinations and cross-examinations on relatively elaborate affidavits which, given the process at the authorization stage, could easily result in debates that would not comply with the proportionality rules at this stage.

[97] The decision could have been different if the leasing contracts or contracts related to ownership or leasing of the cars had been produced or supplied by Trinity, but that is not the case at present. Answers or clarifications could then have been found in the contracts, but for the moment none of the parties involved in these contracts, if such contracts exist, has applied for permission to produce them.

[98] Consequently, paragraphs 8, 9 and 10 of the affidavit (exhibit TR-1), without production of the contracts which could limit future examinations, do not now appear to be relevant evidence under the applicable principles, including those of proportionality and absence of controversy.

[99] Based on the other items in the affidavit whose production is permitted, the Court should be sufficiently enlightened and capable, in the light of all the allegations and statements made by the petitioners and the clarifications or additions allowed to the Trinity respondents, of adequately assessing, based on the criteria of article 1003 C.C.P., the appropriateness of granting an authorization to bring suit against one or more of the entities of the Trinity group.

...

III Motion of respondent Gersco

Respondent General Electric Railcar Services Corporation (GERSCO) is targeted by the motion for authorization to institute a class action as one of the companies that allegedly acted as lessor (or supplier) of some of the tank cars transporting the crude oil or shale liquid from Newtown toward St. John, New Brunswick, which derailed on 6 July 2013 in Lac-Mégantic.

[100] The petitioners contend that Gersco is either responsible for their use or was informed of the decision to use these tank cars, and used them or allowed them to be used to transport the shale gas on a rail network that was inadequate or flawed, given the extremely hazardous nature of the oil being transported, its inappropriate classification and the design error failures of its tank cars.

[101] Gersco seeks to produce the following items, which it claims are relevant evidence: two affidavits and documents annexed thereto in order to clarify the regulatory aspects pertaining to rail transport of hazardous materials in both Canada and the United States, and also to establish and introduce into evidence various important facts which it claims are necessary to allow the Court to perform an

enlightened analysis of the criteria of article 1003 C.C.P. for the motion for authorization.

[102] Respondent Gersco therefore requests permission to produce an affidavit by one Edward W. Pritchard (R-1); a table accompanied by documents concerning 17 tank cars involved and destroyed in the derailment (R-2); a partially redacted copy of leases for tank cars which were allegedly signed by it and Western Petroleum Company (R-3); and finally, another affidavit by one of its employees, John Byrne (R-4).

[103] The petitioners are generally opposed to the production of Mr. Pritchard's affidavit (R-1) and documents EP-1 to EP-4 attached thereto. In the alternative, they particularly and specifically oppose certain parts of this affidavit, i.e., paragraphs 16 to 21, 27, 42 and 43, 46, 52, 54 to 57 and 65.

[104] The World Fuel and Rail World respondents also oppose the evidence contemplated by Gersco. In particular, with regard to Pritchard's affidavit, they deem that it is a partisan report which can only be useful at the time of the hearing on the merits and not at all at the hearing on authorization.

The contents of Edward W. Pritchard's affidavit (R-1)

[105] The deponent has worked in the rail transport field for over 50 years, 40 of them being at the United States Federal Railroad Administration (FRA). This is one of the 10 components of the US Department of Transportation (DOT). It seems this organization is responsible for ensuring that rail transport in the United States is handled safely and efficiently. This organization discharges its duties by preparing and implementing regulations on all aspects of rail transport, including safety matters.

[106] At the present time, it appears the deponent is a partner in a firm of consultants in the rail transport field. *Inter alia*, it seems his areas of activity include consulting on carriers' compliance with regulatory requirements connected with the safe transport of hazardous materials.

[107] Based on the deponent's own statements and the details in his résumé, he appears at first glance to be a person with extensive experience of the entire regulatory framework concerning all aspects of rail transport safety.

[108] In this affidavit, which is certainly and unequivocally an expert report on a number of aspects of rail transport in the United States and probably even in Canada, the deponent deals, first of all, with the regulatory framework established for the transport of hazardous materials and tank cars. He refers to the Canadian and

American regulations on the subject. He explains the rules governing this industry and the organizations that exist to enforce them, both in the United States and in Canada.

[109] In his affidavit, referring to his experience and the texts of the regulations, the deponent spells out the classification of hazardous materials, the organization of monitoring groups and the roles of the various parties involved in this matter. He specifies the responsibilities the regulations assign to tank-car owners and also those attributed to the consignor of these hazardous materials.

[110] The deponent deals with the responsibilities attributed to carriers, their obligations in terms of safety plans and the tests and verifications which must be performed.

[111] Specifically, the deponent gives explanations and clarifications on the precise regulations concerning DOT-111 cars and what one is allowed to transport in them.

[112] The deponent also addresses harmonization of the Canadian and American regulations due to the frequent international transport of hazardous materials.

[113] Specifically, the deponent deals precisely with the regulatory provisions and the frequent use in Canada of CTA-111 and in the United States of DOT-111 tank cars to transport hazardous materials, and with the regulatory standards regarding them, which are identical on both sides of the border.

[114] After giving highly detailed explanations, the deponent focuses specifically on 17 of the 72 cars that derailed on 6 July 2013 in Lac-Mégantic, which allegedly belong to Gersco. It appears these cars were leased to Western Petroleum under various contracts produced as exhibit R-3.

[115] The deponent gives explanations, based on his experience, of what he says is the manner one generally proceeds in such cases (leasing of cars) and what he deems to be the responsibility thereby assumed by both the lessor and the lessee.

[116] Next, based on the analysis of documents and regulations he deems to be applicable, the deponent concludes that Gersco's 17 tank cars were built, tested and inspected as required by regulatory standards, and that they met all the specifications required by the regulations for the transport of hazardous materials.

[117] Finally, the deponent specifies that these 17 tank cars also complied with all regulations regarding their design and construction and those developed for testing and the required qualification inspection. He concludes that these 17 cars were thus authorized to transport crude oil from the United States to Canada and that they complied with all standards set for them.

John Byrne's affidavit (R-4)

[118] It appears that this deponent is now and has for 14 years been a manager in charge of regulatory compliance for respondent Gersco. He has been working in the rail transport industry for 37 years.

[119] His sworn statement is devoted to clarifying ownership of the 17 Gersco tank cars involved in the derailment and the details of their lease to Western Petroleum.

[120] In support of his written testimony, the deponent is producing partially redacted copies of the lease agreements (R-3) and refers to what he deems to be Western Petroleum's commitments in these contracts.

[121] He specifies that during the time period covered by the leases, Gersco reserved no control of its tank cars and did not participate in any way in the choice of their route for the transport of the crude oil contained therein.

[122] The deponent also specifies that the tank car had undergone the tests and inspections required by regulation. He concludes his written testimony by stating that it is Gersco's policy to subject all its tank cars to the required tests and inspections and that this was the case for all the tank cars belonging to it which were used in the convoy that derailed on 6 July 2013.

[123] Gersco deems that the Court must authorize production of the two affidavits filed and the exhibits related thereto, so that the Court may be adequately informed, during the hearing on authorization, of all the applicable regulations in the field of rail transport of hazardous materials in both the United States and Canada.

[124] Gersco pleads that the petitioners allege in their motion for authorization that all the respondents, without distinction, are at fault, thereby ignoring the respective roles of the various parties in an industry that is highly regulated in terms of track, cars, inspection of conveyances, car design, sampling of hazardous products, etc.

[125] Gersco deems that this expert evidence is relevant and necessary at the authorization stage, so that the Court can correctly analyze each party's obligations.

[126] Gersco submits that, without this evidence, the Court will face merely general, relatively undetailed allegations or assertions ungrounded in any specific fact.

[127] Gersco adds that the Court must have a thorough knowledge and understanding of the Canadian and American regulatory systems and the entire normative framework in order to issue a suitable judgment at the authorization stage.

[128] It is Gersco's opinion that the Court must understand what constitutes the "standard of conduct" in this highly regulated field before deciding to authorize the class action. Gersco specifies that it cannot be acceptable to contend, as the petitioners do in a general, relatively undetailed way, that all of the parties have or had a joint responsibility in each stage connected with the train transport of hazardous materials.

[129] In addition to the evidence it seeks to bring regarding the regulatory rules and norms, Gersco also seeks permission to file the opinion expressed by the deponent that the tank cars leased to Western Petroleum complied with said norms.

[130] Gersco deems that this evidence and the production of documents on this subject is relevant and appropriate, particularly since the petitioners allege the absence of inspection or improper use of the tank cars.

[131] Numerous authorities are cited to convince the Court that expert evidence may sometimes be admissible even if it presented by the respondents, and that in certain cases the courts have also allowed the production of regulations and even of explanatory documents on the applicable standards.

[132] As mentioned above, the petitioners and the World Fuel and Rail World respondents are opposed, at the outset, to the production of Edward Pritchard's affidavit and the exhibits annexed thereto, and they specifically oppose paragraphs 16 to 21, 27, 42 and 43, 46, 52, 54 to 57 and 65 of this affidavit.

[133] They deem that this is an expert report and its production will very likely require the preparation and possibly the production of a second assessment, which will surely entail costs that are disproportionate at the authorization stage and would impose an excessive burden on the petitioners.

[134] The petitioners submit that the evidence whose production is sought consists of grounds of defence on the merits, particularly since the liability sought is sought against the respondents, including Gersco, in a general way, based on criteria of extracontractual liability, not infringement of established regulatory standards.

[135] It is the petitioners' view that the evidence whose authorization is sought is, in some respects, merely assertions of the "self-serving evidence" type.

Analysis and discussion

[136] The Court deems it appropriate to accept as relevant evidence John Byrne's affidavit (exhibit R-4) [and] the leases related thereto (exhibit R-3).

[137] This affidavit (R-3) is relatively uncontroversial. The deponent refers to written contracts for the tank cars belonging to Gersco and leased to Western Petroleum. These documents and the summary explanations given to introduce them make it possible to identify the contractual relations between these respondents via written agreements.

[138] Moreover, this permission is granted because the petitioners did not oppose the essentials of the affidavit and, moreover, because the Court deems it appropriate, for the application of the provisions of article 1003 C.C.P., that the relatively uncontroversial information contained therein should be produced. This evidence will not give rise to major controversy or require excessive examinations or cross-examinations, and thus appears to meet the normal criteria for the admissibility of certain evidence at the authorization stage.

[139] Regarding Edward Pritchard's affidavit (R-1) and the exhibits (R-2) to which he refers in this affidavit, the Court deems that much of the legal information contained therein can be transmitted or brought to the notice of the Court without the need for this affidavit.

[140] Moreover, the affidavit is an expert report, which should not be accepted at the authorization stage in the context of this case.

[141] In the first part of this affidavit, the deponent makes ample reference, with numerous explanations, to the American and Canadian regulations in the field of rail transport, specifically with regard to the transport of hazardous materials.

[142] It is possible that the Court will need to study the American regulations or laws at some stage of the case, but it must be borne in mind that this tragedy occurred on Canadian soil, involving, *inter alia*, rules and standards that exist or must exist in Canada.

[143] It is possible that the Canadian rules incorporate or take into account American legislation or regulations. However, the Court is supposed to take judicial notice or accept the production of Canadian legislation and regulations and facilitate their introduction into evidence.

[144] This Canadian legislation and these Canadian regulations, if they include or refer to the legislative or regulatory provisions of another country, could also constitute relevant evidence or be deemed to be judicially noticed without an expert report being necessary or even appropriate at this stage.

[145] It is the Court's role to receive and apply all relevant legislation, and it will be the task of the parties' counsel to plead, based on this legislation and these regulations, at

the hearing on the motion for authorization. It will be their responsibility to apprise the Court of their interpretation thereof, if they deem it necessary and useful to do so.

[146] At this stage, based on the criteria of article 1003 C.C.P., the Court does not believe it needs an expert report nor, above all, that it is appropriate to allow the production of an expert report of this kind which makes ample reference to the legislation. Production of this legislation and these regulations according to the usual rules seems more appropriate, without the need to admit this expert report with all the consequences its production is likely to entail.

[147] However, it does seem relevant and appropriate for certain documents in addition to those already authorized concerning the leases for the cars (R-3) to be produced as well.

[148] The manufacturing certificates issued at the time these cars were initially commissioned may be appropriate or possibly relevant documents at the stage of the analysis for authorization of the action, with the result that all of the exhibits EP-2 referred to by the deponent can be produced.

[149] Regarding exhibit EP-3, i.e., the post-use inspection reports, it does not seem useful, necessary or suitable at the authorization stage to allow their production. Their production is likely to give rise to prolonged examinations and require a second opinion to be obtained. This would possibly lead to needless controversy, would significantly increase pre-authorization costs and would very likely not shed essential or necessary light in terms of the criteria of article 1003 C.C.P.

[150] It is highly probable that the deponent's testimony may prove useful and necessary in a potential trial if authorization to proceed is granted against one or other of the respondents, but it is not appropriate at the authorization stage.

[151] Also, in order to avoid controversy, needless debates that are long and costly, and examinations that are not essential at this stage, the charter or document prepared by the expert regarding the cars and their inspections (exhibit EP-4) also does not seem relevant at the authorization stage. It has more bearing on a potential debate on the merits.

[152] Consequently, only John Byrne's affidavit (exhibit R-4) and copies of the leases (exhibits R-3) and the certificates (exhibits EP-2) may be produced by Gersco.

...

IV Motion of Dakota Plains Holdings Inc. (Dakota Plains)

[153] Dakota Plains Holdings Inc. (Dakota Plains) is one of the five respondent companies bearing the name Dakota. It is applying for permission to produce, as relevant evidence, two documents showing the corporate structure of the Dakota group, including the wholly-owned subsidiaries and the joint ventures in which they participate (DPH-1A). Dakota Plains also seeks to produce a copy of a quarterly report produced recently by World Fuel Services (DPH-1B) and an excerpt from a WFS annual report concerning the list of its subsidiaries (DPH-1C) to show that Western Petroleum and Petroleum Transport, recently added as respondents, are wholly-owned subsidiaries of World Fuel Service.

[154] To these documents, Dakota Plains seeks to add an affidavit (DPH-1) by its vice-president, principal legal advisor and corporate secretary James L. Thornton.

[155] The purpose that would be served by producing this affidavit and the documents to which it refers is to correct what Dakota Plains calls facts erroneously described by the petitioners, particularly with regard to its own activities and those of its subsidiaries and the joint ventures in which it participates through its subsidiaries.

[156] Dakota Plains also wishes to clarify or correct certain allegations made by the petitioners regarding the corporate structure of certain joint ventures of World Fuel.

[157] This affidavit also deals with the role of the two alleged joint ventures DPTS Marketing and Dakota Petroleum Transport in the purchase and transport of crude oil prior to the events of 6 July 2013.

[158] The petitioners do not oppose this motion, except for a very small part of paragraph 11 of the affidavit (2nd sentence) and paragraphs 27 and 28 in their entirety. In both cases, the objections could be withdrawn if the relevant contracts connected to these affirmations are produced.

[159] The petitioners deem that unless the contracts to which paragraph 28 seems to refer are produced, these statements are merely unsupported allegations, whereas they could and should be easily supported.

[160] At the time this motion was heard, the two joint ventures DPTS Marketing and Dakota Petroleum, while apparently held equally by subsidiaries of the World Fuel and Dakota groups, were not yet represented by counsel and have therefore not made representations even though the motion for authorization was served on them over a month ago.

Analysis and discussion

[161] First, because much of the evidence contemplated by Dakota is not challenged by the petitioners, but also because the part that is challenged – i.e., the second sentence of paragraph 11 of this affidavit and paragraphs 27 and 28 – seems by and large to be relatively uncontroversial, the Court deems it appropriate to accept the production, in its entirety, of affidavit DPH-1 and the documents accompanying it, i.e., DPH-1A and DPH-1B and DPH-1C.

[162] On the one hand, production of such evidence seems appropriate in that it will allow the Court to better understand certain relationships among some of the respondents by referring to relatively uncontroversial documents, without requiring the petitioners to carry out exorbitant examinations. Production of this evidence can be readily accepted while abiding by the rules of proportionality.

[163] The Court takes into consideration that a number of the allegations laid by the petitioners in their motion for authorization are vague, may sometimes create ambiguity and could certainly require clarification, even at the authorization stage, particularly when such clarification is readily available at reasonable cost and without too much controversy.

[164] Many of the entities subpoenaed by the petitioners as respondents appear to be associated with each other, but if simple, clear evidence that doesn't require a major investment to check can be brought, that constitutes relevant evidence, particularly given the large number of respondents in this case.

[165] Certainly, it would very likely have been preferable, particularly with regard to the statements in paragraphs 27 and 28 of the affidavit, for the contracts concerning them to be produced if they exist. However, because Dakota contends, based on supporting documents, that respondent DPTS Marketing LLC is not its wholly-owned subsidiary and that this company is already listed as a respondent in the case, the Court assumes or at least presumes that such contracts could potentially be produced by the parties concerned by said contracts.

[166] Whatever the case may be, as the file now stands, despite the absence of these contracts, the information in paragraphs 27 and 28 of the affidavit appears relevant to simplify the Court's work and the analysis of the motion for authorization, based on the criteria in article 1003 C.C.P.

...

V Motion of respondent Canadian Pacific

[167] Respondent Canadian Pacific (CP) is also applying for permission to produce evidence it deems to be relevant.

[168] This evidence consists, first, of an affidavit by its assistant vice-president James Clements (CP-1). This affidavit comprises 53 paragraphs.

[169] In addition, CP seeks to produce nine groups of exhibits, most of which are referred to by the deponent in his sworn written testimony.

[170] The affidavit deals essentially with the following matters:

- 170.1. The nature of CP's activities and its possession of a certificate of fitness issued by the Canadian Transportation Agency authorizing it to operate a railway in Canada;
- 170.2. Details and clarifications regarding the limitations imposed upon it within the Canadian rail network;
- 170.3. Similar details regarding the other respondent, Montreal Maine & Atlantic Company (MMA);
- 170.4. A number of assertions regarding the relationship or absence of relationship between the two rail companies and their mutual independence;
- 170.5. Clarifications concerning the bill of lading issued in June 2013 for transport of the 79 tank cars from Newton, North Dakota toward the consignee Irving Oil Limited at their final destination in Saint John, New Brunswick;
- 170.6. Details concerning the discussions and negotiations between the consignor World Petroleum and CP, including the instructions CP may have received regarding the route to take;
- 170.7. The transport operation from 30 June 2013 in North Dakota to the time the convoy was transferred to MMA in Montréal;
- 170.8. Explanations concerning the obligations and responsibilities of public carriers in connection with legislation on rail transport in Canada.

[171] The documents CP is applying to produce concern its certificate of fitness (CP-2), that of MMA (CP-3), the rail companies' map of North America (CP-4) and, specifically, MMA's map (CP-5).

[172] CP is also applying for the production of a magazine article concerning the permission MMA obtained to operate its trains with a single person as operator (CP-6);

a copy of the bill of lading issued regarding transport of the crude oil involved in the tragedy (CP-7); the invoice issued for this transport (CP-8); CP's tariff schedules (CP-9); and those of MMA (CP-10). Among other things, these tariff schedules include the terms and conditions associated with the various tariffs.

[173] CP also seeks permission to produce a number of rulings and orders issued by the Canadian Transportation Agency subsequent to the events of 6 July 2013, in connection with MMA.

[174] CP deems that the affidavit filed and the exhibits whose production it seeks are vital and necessary to allow the Court to better assess the actual facts and the legal relations between the consignor and the rail carrier, as well as those between the various public carriers.

[175] This evidence is allegedly necessary so that the Court can be well informed and enlightened before deciding whether or not to grant the motion for authorization to bring suit, given a number of the petitioners' allegations which CP deems to be false or incorrect, regarding its involvement in the derailment and its failure to take appropriate measures for the safe transport of crude oil, and regarding the absence of measures for the identification and transport of hazardous products.

[176] CP also seeks permission to question the petitioners, putting a single query to them concerning whether a copy of a subcontract between MMA and CP exists and is in their possession, because CP contends that the rules governing rail transport make this subcontract theory impossible.

[177] The petitioners agree that CP may produce part of its assistant vice-president's sworn statement, but on certain conditions. They also accept the production of all of the announced exhibits CP-1 to CP-10, but regarding the production of the contract (CP-6), they require an unredacted copy. The parts of the affidavit whose production is challenged are paragraphs 33, 36, 41 to 48, 50, 51 and 53.

[178] The petitioners object, however, to the production of decisions and orders subsequent to 6 July 2013.

[179] The World Fuel and Rail World respondents have a broader objection to the evidence CP seeks to present. In their opinion, exhibits CP-2 to CP-6 should not be accepted as evidence. Moreover, these respondents have an overall objection to the production of James Clements' affidavit.

[180] These respondents deem that this evidence can only be presented at the stage of the trial on the merits and that the affidavit could cause contradictory situations. They plead that the testimony of CP's representative is in a number of respects an expert

legal opinion and that this testimony even contradicts written documents regarding the contractual relationships that exist between certain players.

Analysis and discussion

[181] Given the petitioners' acceptance of the production of parts of the affidavit and of all the exhibits filed with the exception of the Canadian Transportation Agency decisions, but given also the objections of the World Fuel and Rail World respondents to all or nearly all of this evidence, the Court deems that the following items constitute relevant evidence and consequently authorizes their production.

1° All of the exhibits, i.e.:

- CP-2: CP's certificate of fitness issued by the Canadian Transportation Agency;
- CP-3: MMA's certificate of fitness issued by the Canadian Transportation Agency;
- CP-4: Railway Association of Canada map of Canadian railways in North America;
- CP-5: MMA network;
- CP-6: Article from the magazine *Eastern Railroad News*: "MMA Prepares for Daily Ops in Canada with One-Person Crews";
- CP-7: The bill of lading (BOL; in French, "connaissance");
- CP-8: The invoice addressed by CP to World Fuel Services;
- CP-9: CP's Guide to Products and Services (Tariff 1), Private Equipment (Tariff 6) and Hazardous Commodities (Tariff 8);
- CP-10: MMA's Conditions of Carriage (MMA tariff).

[182] It is important to stress, at the outset, that exhibits CP-2 to CP-10 are written documents that are relatively uncontroversial and can certainly facilitate comprehension of certain legal or contractual relationships between some of the respondents.

[183] Production of these exhibits is not likely to necessitate abusive examinations, nor to create a situation that results in problems of proportionality in the means used or contemplated by the parties in the case.

[184] These are documents which the parties can readily analyze, understand and use with no likelihood of needing to devote energy to them unnecessarily from the standpoint of the motion for authorization.

[185] The petitioners are the ones most concerned by this motion for authorization and even though certain respondents had the right, in the Court's view, to plead their arguments against production of the documents, preponderance must be given to the position of the petitioners, who accept the production of this evidence and deem it to be relevant.

[186] The Court agrees with the position taken by the petitioners in deeming this evidence to be relevant, and cannot accept the objections to it formulated by the World Fuel and Rail World respondents. These are documents which could be used and which should not give rise to deeply controversial positions.

[187] As for the petitioners' request for an unredacted copy of CP-6, this does not appear useful but, as CP suggests, if it succeeds in obtaining the Transport Canada decision to which this article refers, the decision must replace exhibit (CP-6).

2° James Clements' affidavit (partial)

[188] Here again, the petitioners do not oppose all of the paragraphs of this sworn statement but only a part. The World Fuel and Rail World respondents have an overall objection to the use of this entire piece of evidence.

[189] It is appropriate to accept the petitioners' position as to the relevance of the unchallenged parts of the affidavit, and to reject the position taken by the respondents who object to them. Permission is granted for the same reasons as those stated concerning the production of exhibits CP-2 to CP-10.

[190] Regarding the other parts of the affidavit, it is appropriate to decide as follows: Paragraph 33 is an opinion on the application of legislative provisions and is not relevant, necessary or useful evidence for the hearing on the motion for authorization, based on the criteria set out in article 1003 C.C.P.

[191] Paragraph 36 will be allowed if the written contractual agreement is produced in order to avoid all ambiguity and controversy on this matter.

[192] Paragraphs 40 to 48, 50, 51 and 53 are, in part, an opinion of the deponent on the relations between CP and MMA and on the Canadian transportation system. It does not seem appropriate at the authorization stage to allow this type of partly legal, partly factual analysis.

[193] The legislative and regulatory provisions can be produced and pleaded, and the contracts or agreements and documents whose production is allowed should suffice to allow the Court to decide on authorization. In this regard, it will be the lawyers' responsibility to plead what they deem to be applicable law and to ensure that the Court is well informed thereof, even though that can or should be a matter of judicial knowledge. Consequently, this part of the affidavit will not be part of the evidence accepted at the hearing for authorization.

3° Out-of-court examination

[194] Regarding CP's other two requests, the Court believes it is appropriate to allow the written examination of the petitioners and to clarify, by this single question, the possibility that the petitioners may have a written agreement regarding a contract between CP and MMA.

[195] This evidence is potentially useful for the hearing on the motion for authorization, and given that the consequences of this examination concern a simple, clear question that does not entail significant disbursements, it appears to meet the criteria of reasonableness and proportionality. This request is therefore granted, and the examination will be conducted as requested.

[196] On the other hand, the decisions of the Canadian Transportation Agency concerning MMA, issued after the events and arising out of acts allegedly performed by CP, are not relevant evidence for the purposes of the motion for authorization, based on the criteria of article 1003 C.C.P.

[197] The Court does not see the necessity or the usefulness of this evidence and does not see how evidence regarding the decisions of an administrative tribunal can have any effect, based on the allegations of the petitioners, on the decision at the authorization stage. This request is therefore refused.

...

Procedure and application to case management of decisions on the permission granted to the respondents to produce certain evidence

[198] As mentioned previously to the parties during the days of hearings on the motions for permission to produce relevant evidence, a hearing on the motion for authorization must be expected in June 2014. It is therefore crucial that the preliminary steps for this hearing be conducted efficiently, while allowing each of the parties involved to plead its rights and take appropriate preparatory action for such a hearing.

[199] The permission granted to certain respondents to file affidavits or exhibits means that the deponents may be examined, at least by the petitioners, if the latter deem it necessary, and possibly also by certain respondents if the deponents' written testimony may concern them.

[200] It is also possible that these examinations may result in the need for the deponent to provide certain undertakings, insofar as these are necessary and appropriate based on the criteria set out in article 1003 C.C.P.

[201] While the Court is responsible for managing this case and may offer the parties a certain availability should that prove necessary in the short term, it is best to set out certain procedures and rules now, in advance, regarding the conduct of examinations, the production of undertakings and the resolution of problems likely to arise due to or in connection with these examinations.

[202] First of all, the Court wishes to stipulate the following:

- The examinations shall be conducted under the provisions and according to the rules set out for all examinations on affidavit under articles 93 C.C.P. and 398.2 C.C.P., with the distinction that, if the parties conducting them so wish, the examinations shall be filed at least 20 days prior to the beginning of the hearing on the motion for authorization.
- Unless particular circumstances arise, a party that wishes to have the deponent produce additional documents or undertakings should make the request at least five days before the examination is conducted.
- If all of the parties consent or, failing consent, if the Court so allows, some examinations may be conducted in writing in order to comply with certain rules of proportionality.
- Except in exceptional circumstances, with the Court's permission, all examinations on affidavit must be conducted prior to 1 March 2014.
- Any objection regarding the relevance of questions shall be taken under advisement for further consideration, save in exceptional circumstances, and shall be submitted in writing to the Court without delay as soon as the examination is over.
- All other objections shall also be submitted in writing to the Court without delay.

- The Court reserves the possibility of pronouncing any order concerning expenditures incurred by abusive procedures or objections in the context of conduct of the examinations.
- None of these examinations may last more than 90 minutes, if conducted by the petitioners, or more than 30 minutes, if conducted by the respondents, unless permission is granted in advance by the Court.

FOR THESE REASONS, THE COURT:

[203] **GRANTS**, in part, all of the five motions for relevant evidence presented by respondents Irving Oil, Trinity, Gersco, Dakota Plains and Canadian Pacific.

[204] **AUTHORIZES** the production of the items below as relevant evidence for the hearing on the petitioners' motion for authorization to institute a class action against the respondents:

Concerning the motion of Irving Oil

[205] Paragraphs 1, 2, 3, 14, 16 and 17 to 19 of Michael Thompson's affidavit of 27 November 2013 (exhibit R-2);

[206] Michael Thompson's affidavit of 16 December 2013 (exhibit R-3);

[207] The contract of 29 May 2013 between World Fuel Services Inc. and Irving Oil Commercial G.P., with its annex (exhibit R-1). An unredacted copy of this exhibit shall be provided to counsel for the petitioners. The latter shall keep this copy confidential and may not use it or reveal its contents to anyone except their experts and legal advisors without the express permission of the Court;

[208] Exhibits MT-A and MT-B.

Concerning the motion of Trinity

[209] Paragraphs 1, 2, 3, 4, 5, 6, 7 and 11 of S. Theis Rice's affidavit of 27 November 2013 (exhibit TR-1).

Concerning the motion of Gersco

[210] John Byrne's affidavit of 27 November 2013 (exhibit R-4);

[211] The documents concerning leases (exhibit R-3);

[212] The certificates of compliance at the time of construction of the tank cars (exhibit EP-2).

Concerning the motion of Dakota Plains

[213] James L. Thornton's affidavit of 6 December 2013 (DPH-1);

[214] The documents referred to in that affidavit, i.e., exhibits DPH-1A, DPH-1B, DPH-1C).

Concerning the motion of Canadian Pacific

[215] James Clements' affidavit of 28 November 2013, except for paragraphs 33, 36 unless the written contract is produced, 40 to 48, 50, 51 and 53.

[216] Exhibits CP-2, CP-3, CP-4, CP5, CP-6, CP-7, CP-8, CP-9 and CP-10.

[217] The result or transcript of the out-of-court examination of the petitioners, bearing solely on the one single question concerning production of a copy of any contract or document establishing that CP subcontracted or engaged MMA to transport the shale oil.

[218] **AUTHORIZES** examinations on affidavit to be conducted on all persons whose affidavits have been accepted as evidence.

[219] **ORDERS** that these examinations be conducted under the provisions of articles 93 C.C.P. and 398.2 C.C.P. and that if the parties conducting them wish to produce the transcript in whole or in part, they shall do so at least 20 days prior to the date which shall be set subsequently for the start of the hearing.

[220] **ORDERS** that any request for an examined deponent to produce other documents or undertakings shall be made at least 5 days prior to the date set for the examination.

[221] **ALLOWS** certain examinations to be conducted in writing, by consent or with specific authorization.

[222] **ORDERS** that except with special permission, the examinations shall be conducted between now and 1 March 2014.

[223] **ORDERS** that any objection concerning the relevance of a question shall be taken for further consideration and that any objection shall be filed in writing to the Court without delay at the end of the examination.

[224] **ORDERS** that, unless special permission is granted in advance, any examination of the deponents by the petitioners shall not exceed 90 minutes and that those conducted by the respondents shall not last longer than 30 minutes each.

[225] **COSTS TO ABIDE** the event.

MARTIN BUREAU, J.S.C.

Dates of hearing: 11 and 18 December 2013

Maître Daniel Larochelle
Maître Jeff Orenstein
CLG
For petitioners
Yannick Gagné
Guy Ouellet
Serge Jacques
Louis-Serges Parent

Maître Laurent Nahmiash
Maître Mélanie Jacques
Dentons
Counsel for respondents
Rail World Inc., Rail World Holdings, LLC
Earlston Associates LP
Edward Burkhardt
Robert Grindrod, Gainor Ryan
Donald Gardner Jr., Joe McGonicle
Cathy Aldana, Pea Vine Corporation

Mes Yves Martineau
Maître Frédéric Paré
Maître Carole Plante
Stikeman & Elliot
For respondents
Western Petroleum Company
World fuel Services Canada, Inc.
World Fuel Services Corp.
World Fuel Services, Inc.

Maître Jean-Philippe Lincourt
Maître Martin Pichette
Lavery
For respondents
MMA Ltd., MMA Corp., MMA Canada Co.
Thomas Harding

Maître Sylvain Lussier
Maître Elizabeth Meloche
Osler
For respondents
Irving Oil Ltd.
Irving Oil Company, Limited
Irving Oil Operations GPL
Irving Oil Operations Ltd.

Maître André Durocher
Maître Enrico Forlini
Fasken Martineau
Counsel for respondent
CP Railway Company

Maître Philippe Cantin
Maître Michel Gagné
McCarthy
Counsel for respondents
Trinity Industries, Inc.
Trinity Rail Group, LLC

Maître Stéphane Pitre
Borden Ladner Gervais LLP
Counsel for respondent
Trinity Rail Leasing 2012 LLC

Maître André Migneault
Maître Marc Lemaire
Maître Pierre-Alexandre Fortin
Tremblay Bois Mignault Lemay
Counsel for respondent
Strobel Starostka Transfer, LLC

Maître Francis Rouleau
Maître Robert J. Torralbo
Blakes
Counsel for respondent
Union Tank Car Company

Maître André Ryan
Maître Caroline Beaudoin
BCF
Counsel for respondent
Marathon Oil Corporation

Maître Jacques Rossignol
Lapointe, Rosenstein, Marchand, Mélançon
Counsel for respondent
Slawson Exploration Company, Inc.

Maître Geneviève Bertrand
Torys Law Firm LLP
Counsel for respondents
DPTS Marketing LLC and
Dakota Petroleum Transport Solutions, LLC

Maître Dominique Naud
Maître Prachi Shah
Clyde & Co.
Counsel for third parties
XL Insurance
XL Group PLC

Date of hearing: 11, 18 December 2013