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# THE LAC-MÉGANTIC RAIL DISASTER IN CANADA : WHAT TO DO WHEN YOUR CLIENT IS CAUGHT IN A MAELSTROM THROUGH NO FAULT OF ITS OWN

**By**

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## (I) FACTUAL BACKGROUND

On July 6, 2013, a train made up of 72 tank cars containing crude oil derailed in Lac-Mégantic, Québec. Forty-seven people died in the resulting explosion and fire, most of the historic downtown of Lac-Mégantic was destroyed, and the city's subsoil, Mégantic Lake, and the Chaudière River were polluted.

The train was loaded with crude from the Bakken shale formation in North Dakota, and its destination was the Irving Oil refinery in St. John, New Brunswick. The Canadian Pacific Railway Company ("CP") took charge of the train from North Dakota and brought it to its marshalling yard in Montreal, Québec. At that point, five locomotives from MMAC picked up the tank cars and continued the journey towards the refinery.

The train was operated by only the locomotive's engineer, no one else, on rails that belonged to the Montreal, Maine & Atlantic Canada ("MMAC") railway company. It was pulled by five locomotives, also belonging to MMAC. The train was left unattended the day before in Nantes, 11.5 kilometres from Lac-Mégantic, on a hill with a 1.2% grade. The engine of the lead locomotive was kept on, and an insufficient number of handbrakes were applied. There was a fire in the chimney of the lead locomotive during the night and the Nantes firefighters who were called to the scene turned the engine off. After the fire was extinguished, the MMAC employee who arrived at the scene, a track foreman with no experience as either a locomotive engineer or a conductor, did not turn on the engine of any of the other four locomotives. As the engine of the lead locomotive was off, the pressure on the automatic brakes diminished gradually. The locomotive engineer's bosses awakened him from his sleep at a hotel in Lac-Mégantic, but he did not disclose to his boss that he had applied an insufficient number of handbrakes to the train. The train was left immobilized with insufficient retarding force. It eventually started to move downhill and derailed in Lac-Mégantic.

## (II) THE ORDER OF THE MINISTER OF THE ENVIRONMENT

In July 2013, it became apparent that the Montreal, Maine & Atlantic entities were insolvent and would not be able to pay their suppliers and the environmental consultants that had been hired immediately after the derailment.

On July 29, 2013, the Québec Minister of the Environment issued a characterization and remediation order against MMAC, the Canadian subsidiary, and Montréal, Maine & Atlantic Railway Inc., the U.S. parent. The order also named the World Fuel Services entities, which had purchased the petroleum crude oil in North Dakota in order to deliver it to the Irving Oil refinery.

## (III) THE INSOLVENCY PROCEEDINGS

Canada has a statute that is the equivalent of Chapter 11 of the U.S. Bankruptcy Code, called the *Companies' Creditors Arrangement Act*[1]. On August 8, 2013, MMAC sought and obtained protection against its creditors under the authority of that statute[2] and its U.S. parent made a similar filing under the U.S. Bankruptcy Code the day before.[3]

## (IV) THE AMENDMENT TO THE ORDER OF THE MINISTRY: CP IS ADDED

With MMAC out of the picture, the World Fuel Services entities became the only solvent corporations named in the order. They indicated to the Minister of the Environment that they had no assets or operations in Canada and that an administrative order from a minister of a Canadian province has no extraterritorial effect. They suggested strongly that CP should be added to the order on the spurious theory that CP had a contract with MMAC to deliver the oil to the point of destination. This theory was spurious because the *Canadian Transportation Act*[4] makes it obligatory for railway companies to "furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic" (section 113). This provision is known in Canada and in the United States as the "common carrier" doctrine and as the "public carrier" doctrine in the United Kingdom.

The Québec government decided to add CP to the order on August 13, 2013, and began to parrot the line that CP had "subcontracted" the transportation of the petroleum crude oil to MMAC. Interestingly, the Minister of the Environment admitted publicly that CP had been added to the characterization and remediation order because the MMAC entities were insolvent and CP had deep pockets. In fact, in an extraordinary interview, the provincial Minister of the Environment said:

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[1] R.S.C., 1985, c. C-36.

[2] Montreal, Maine & Atlantic Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à), 2015 QCCS 3235

[3] Case number : 13-10670 Chapter 11

[4] S.C. 1996, c. 10. Section 113 of the *Canada Transportation Act* reads as follows :

> 113 (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,
>
> (a) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;
>
> (b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;
>
> (c) without delay, and with due care and diligence, receive, carry and deliver the traffic;
>
> (d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and
>
> (e) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

*[TRANSLATION]*

*Radio host : (…) if we just take the railway operator, which is almost bankrupt, it can operate for a certain time (...), and using the insurance policies, how much can be recuperated, ten, twelve, fifteen millions dollars?*

*Minister: I will not go into the details because there is a judicial proceeding, but I will tell you that CP subcontracted with MMA. It is CP that had the transportation contract. CP is not in any financial difficulty; it even declared a profit of a quarter of a billion dollars* [$186M USD] *for the first quarter of the year.(…)*[5]

## (V) THE CLASS ACTION LAWSUIT

The Province of Québec has had a class action regime since 1979. It is inspired by the U.S. Federal Rules of Civil Procedure and New York State's Civil Practice Law and Rules. One peculiarity of the Québec system is that the first law firm that files the motion for authorization to institute a class action at the court house is the firm that obtains control of the motion. In other words, unlike in Ontario, these are no "beauty pageants" in Québec. As a result, plaintiffs' firms in Québec scramble to produce pleadings fast. Since plaintiffs' lawyers often work in haste, they tend to file proceedings that are poorly drafted and then frequently amended.

In the case at hand, the initial version of the motion for authorization to institute a class action was filed on July 15, 2013, and the amended version was filed two days later. It was only in the second amended motion for authorization to institute a class action, filed on August 16, 2013, that CP was added as a defendant.

## (VI) THE U.S. PROCEEDINGS

The holding company of the MMA entities, Rail World, Inc., is headquartered in Rosemont, Illinois, in Cook County. As I learned from American attorneys, Cook County is famously known to be a "judicial hellhole." U.S. lawyers arrived in Lac-Mégantic and persuaded some families to sue in Illinois.[6] Another law firm in Dallas, Texas, persuaded families to sue in Dallas County.[7] After the Chapter 11 filing, these lawsuits were transferred to the U.S. Bankruptcy Court for the District of Maine.[8]

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[5] The original transcription in French reads as follows :

> (Animateur): Oui, mais si on prend juste le transporteur, qui est pratiquement en faillite, là, il peut opérer encore pendant un certain temps avec …on sait pas trop la hauteur des polices d'assurance globales, on lui permet de continuer à opérer; on va récupérer - quoi? - dix (10), douze (12) quinze (15) millions?
>
> (Le ministre): J'irai pas dans les détails, parce qu'il y a une procédure judiciaire, mais je vous rappellerai que le Canadien Pacifique a sous-traité avec MMA. C'est le Canadien Pacifique qui avait le contrat de transport. Le Canadien Pacifique est pas du tout en difficulté financière; ils ont même déclaré un bénéfice d'un quart (1/4) de milliard de dollars pour le premier trimestre de l'année.

[6] Case number 15-CV-8698

[7] Case number 15-CV-02673

[8] Case number 15-CV-250-NT

Ironically, the Québec lawyer who helped the American attorneys is the head of a political party, *Parti 51,*[9], which proposes that Québec becomes the 51st state of the United States!

## (VII) THE POLITICIANS: FEDERAL, PROVINCIAL AND LOCAL

International and interprovincial railways are a federal responsibility in Canada. MMAC is an interprovincial and international railway, linking Québec, Maine and New Brunswick.

The federal politicians were accused of giving in to railway companies – allowing single-person train operations, for example – and not having had a vigorous inspection program. Books were written about this, and words like "deregulation" and "regulatory capture" are used to describe a so-called process of deregulation of the railway industry that allegedly took place at the time of the conservative administration of Prime Minister Brian Mulroney from 1984 to 1993. In fairness, the Transportation Safety Board, which was commissioned to conduct an investigation into the accident, criticized Transport Canada for its inaction and lack of enforcement vigour.[10]

The provincial politicians were incensed at the federal politicians for the loss of life and environmental devastation and also for the liability that fell on the provincial government to clean up the site, the city, the Mégantic lake and the Chaudière river. In fairness, the federal government offered to pay 50% of the environmental characterization and rehabilitation costs.

Finally, the town of Lac-Mégantic, shell-shocked at the catastrophe, asked for relief from the upper echelons of government.

In this atmosphere, the temptation to pass the buck and search for deep pockets became irresistible, and the provincial government, the class action plaintiffs, and the media began to blame CP.

## (VIII) THE COURT OF PUBLIC OPINION IN THE DIGITAL AGE

There is a valid distinction between the courts of law and administrative agencies on the one hand and the court of public opinion on the other.

Lawyers are asked to represent corporations before the courts of law and the agencies, and public relations specialists take care of the media and the court of public opinion. Having lived through the Lac-Mégantic ordeal, I can tell you that the court of public opinion is of phenomenal importance and that the two forums do not have a separate and distinct existence.

Just imagine that you are a judge in a rural district in the United States or in Sweden and that a town that is part of your district has gone through a fire that killed 47 people and destroyed the historical downtown. The courtroom is overflowing and reporters are packing the lobby of the courthouse. Lawyers entering the courtrooms are on the TV news and in the newspapers.

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9 https://parti51.com/

10 http://www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054.pdf

### A. Will Your Client Get a Fair Hearing in the Court of Public Opinion?

In this frenzied atmosphere, you have to make a very rapid call about the media landscape. What do newspapers say? What do you read in the digital versions of the media? What is said on social media? What do the pundits say?

Fundamentally, the question is this: Does your opinion on the subject, as compassionate, subtle and nuanced as it might be, have a chance of a fair hearing? The short answer is no.

People were saying that the “industry” was responsible, and this included several entities that had no juridical link to the railway company that transported the crude. For example, in the fifth amended version of the application for authorization to institute a class action, blame was spread among the pipeline operators, tank car lessors, oil producers, to name a few. No rational debate was possible, and the truth was deemed unacceptable. The truth was that the locomotive engineer had not applied a sufficient number of handbrakes in Nantes, on a hilly segment of the track, did not convey this information to his bosses when he was awakened in the middle of the night.

There is always an audience for stories about greedy corporations and governmental complicity and malfeasance. It takes an enormous amount of courage from politicians to state the truth when the audience does not want to hear it.

You often hear that there is a clear distinction between a court of law and the court of public opinion. When you go through a catastrophe like the Lac-Mégantic derailment, you see that the distinction is, sadly perhaps, one of degree. The absolute, incontrovertible truth about the cause of the accident is the negligence and dereliction of duty of one individual, the locomotive engineer. That truth is unacceptable to many, people who cannot accept that the people at the top of the corporate ladder are not somehow guilty of something.

### B. Is Your Client Facing an Existential Threat?

In that kind of atmosphere, what can be done? The client has done absolutely nothing wrong, and the dispute is really just philosophical. A railway company, such as CP, has no control over another one, such as MMAC, in the transportation of goods requiring several railway companies. It is simply unthinkable that a railway company would accept liability for the actions of another railway company. Railways are natural monopolies and, in order to negate the harm to shippers that result from that, lawmakers in Canada and the U.S. have codified the “common carrier doctrine” in their statutes. Because of this doctrine, it is nonsensical to argue that there is a contract between railway companies that transport a cargo in sequence. Such a fundamental principle of railway law may be too subtle in the court of public opinion, but that is the reality. Your client cannot compromise.

### C. From “No Comment”…

Most media experts say that “no comment” is always a bad answer. I disagree. In some cases it is, and in Lac-Mégantic it was the best approach, at least at the beginning and for quite a while. Only when it became clear that CP was sued only because it was a corporation with assets in Canada and “deep pockets” did it become advisable to modify the “no comment” stance. This happened organically, and it took a long time.

### D. …To "Not our Crew, Not our Locomotives, Not our Tracks"

At some point, when CP was asked to summarize its defense and simply said this: "Not our crew, not our locomotives, not our tracks" (in French: *Pas nos employés, pas nos locomotives, pas nos rails*) and these nine words became our public posture. We repeated them constantly, and we never said anything else. We began to see that our position was reflected in media coverage, sometimes with those exact words.

The key to a successful message in the court of public opinion and the courts of law is to say the same thing in both forums according to these rules:

Rule #1: Speak the incontrovertible truth.

Rule #2: Speak it using plain, concrete, every-day words.

Rule #3: Be concise.

Rule #4: Use a parallel structure to give the message punch.

Rule #5: Repeat it, repeat it, repeat it….

## (IX) TAKEAWAYS

In the digital era, the clarity and concision of the message are the key qualities that one should strive to achieve. It cannot always be delegated to a media consultant. In our case, as I indicated earlier, it grew organically from representations in the court rooms and administrative agencies to summaries to stakeholders and, eventually, the media and public at large.