

Two-Tiered Rail Liability Regime

Overview: Following the Lac-Mégantic accident, the Government, the Canada Transportation Agency (the Agency) and the House Transportation Standing Committee began their respective reviews of the transportation of dangerous goods by rail. Specifically, in the October 2013 Speech from the Throne, the Government pledged to:

- Amended the *Railway Safety Act* to further enhance the safety of rail transportation.
- ***Require shippers and railways to carry additional insurance so they are held accountable.***
- Take targeted action to increase the safety of the transportation of dangerous goods.

Issue: If taken literally, the Government's pledge could mean a fundamental shift in the current railway-shipper liability relationship, including increased, open-ended exposure for shippers. The railways have revealed in submissions to the Agency that they support a cap on their liability as part of a multi-tiered regime, and promote unspecified amendments to the Common Carrier Obligation to better "risk share" and remove a potentially unsustainable burden on short-line railways. While these recommendations make sense from a railway stand point and speak to real challenges, they fail to address the underlying policy concerns informing the Government's Throne Speech commitments. Nonetheless, if shippers do not come forward with a positive proposal that addresses the Government's two-fold goal of increasing rail safety and indemnifying the Canadian taxpayer, there is a risk that the railways will help dictate the liability regime.

Principles: MAC's position should be guided by the following principles:

1. The current liability rules under review work for the vast majority of incidences. Changes should be focused on addressing the gap presented by catastrophic accidents, like Lac-Mégantic.
2. Liability *is* part of a safety regime, intended to help ensure safe practices. It is also a foundational component of a system based on the 'polluter pay' principle. Liability should first and foremost rest with those that have care, custody and control over the goods. This does not relieve the shipper of responsibilities for its part in an accident, including proper classification, tank car maintenance, etc.
3. The second-tier of the fund is primarily for ensuring that railways do not have a catastrophic event that leads to bankruptcy and would cripple the economy, and to indemnify taxpayers. As such, it should only be triggered at a very high-amount, with the limit being what is commercially available for the Class 1s.
4. Special consideration has to be given to how short-lines can be adequately included in the 1st Tier of a two-tier regime. Many short-lines will struggle to self-insure or acquire sufficient liability in the commercial market, and may need to participate in a pooled fund or shared liability system with other railways.
5. The Common Carrier Obligation should not be amended as part of this exercise. This proposal by the railways is about reducing their own liability, not increasing the safety of our transportation system. There is likely no railway in Canada that will not want to carry the Bakken oil involved in the Lac-Mégantic accident in the future because it is so profitable; instead, they will try to move away from less profitable movements. Moreover, most dangerous goods would still move, only now they would likely be in trucks.
6. Any legislative or regulatory loophole that permits the railways to unilaterally impose liability onto the shipper outside the oversight of the Government or Agency should be closed. Without this, the railways could compromise the integrity of the safety and liability regimes.

TWO-TIER LIABILITY MODEL PROPOSAL

2nd Tier – Shippers

This fund should only be accessed when the first tier is fully exhausted, and should be modelled off of regimes already in place or actively being considered in Canada, like the Ship Source Oil Pollution Fund and the Hazardous and Noxious Substance Convention:

- The fund could either be collected up to a certain cap pre-incident or post-incident. Pre-incident has the advantage of establishing an initial fund that can accrue interest overtime, potentially paying for the fund’s administration and other rail safety initiatives (i.e. pilot projects, studies, etc.), while post-incident allows for precision in payment
- The fund could apply to all shippers, or be divided according to good type (i.e. oil, solid bulk materials, LNG, LPG, other substances)

1st Tier – Railways (Cap ~\$1 Billion)

<u>Class I</u>	<u>Short-Lines</u>
<p>As with the current proposals regarding Canadian offshore oil and nuclear liability regimes, it is essential that the liability of the operator—the railway—be deemed as absolute, without proof of negligence. That said, a clause should be included that clearly states that <i>“all persons to whose fault or negligence [an accident] is attributable are jointly and severally liable, to the extent determined according to the degree of the fault or negligence proved against them.”</i> [Canada Oil and Gas Operations Act, Sec. 26 (1)(b)]</p> <p>Where the fault is to be deemed that of the railway, a liability cap should be set based on what is commercially available for the Class I railways, which is currently above \$1 billion, or attainable through another means for short-lines (e.g. pooled fund). The only reason not to remove the cap is to ensure our railways can continue to operate even after what otherwise result in bankruptcy. A lower cap can be considered in instances where the railways and shippers are deemed not at fault.</p>	
<p>The Government should ensure that a multi-tiered regime does not allow the Class I railways to reduce their coverage from what it is today, as this would be a perverse outcome. Considering their size, capacity to carry significant amounts of insurance, and historic role in accidents, establishing a cap around \$1 billion is feasible and consistent with other liability regimes.</p>	<p>Short-lines should participate in a liability sharing program amongst themselves, and, where appropriate, with Class Is (e.g. when the Class Is are providing the power and crew) to have them able to cover an equivalent amount to the Class Is.</p>