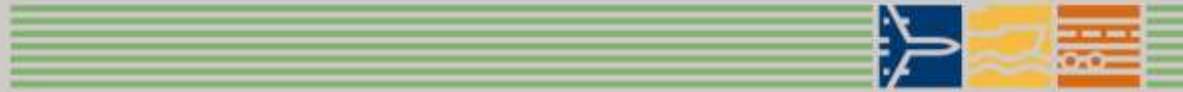




Transport
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COMPREHENSIVE REVIEW OF THE THIRD PARTY LIABILITY AND COMPENSATION REGIME FOR RAIL



DISCUSSION
PAPER

Canada



Discussion Paper – Liability and Compensation Regime for Rail

Following the Lac-Mégantic tragedy, the Government committed to taking targeted action to increase the safety of the transportation of dangerous goods by rail. Complementing these actions to enhance rail safety, the recent Speech from the Throne also stated that: “*Our government will require shippers and railways to carry additional insurance so they are held accountable.*” Transport Canada is now moving forward to conduct a comprehensive review of the liability and compensation regime for rail, with a view to ensuring that sufficient funds are available to adequately compensate potential victims, pay for any clean-up costs, and protect taxpayers in the event of an incident.

This paper highlights issues for discussion with interested parties. Consultations will contribute to understanding the impacts of the current regulatory framework, the insurance market for rail and options for change.

Context

The scope of the rail disaster in Lac-Mégantic and the amount of liability insurance carried by Montreal, Maine and Atlantic (MM&A) Railway have highlighted weaknesses in the current liability and compensation regime, particularly as it relates to insurance coverage railways are required to have, and the capacity to cover damages in the event of catastrophic incidents regardless of whether the incident is caused by a deliberate action or is accidental.

The *Canada Transportation Act* (CTA) requires federally regulated railways, as common carriers, to transport all traffic offered to them. Likewise, the CTA prescribes the manner in which responsibility for third parties’ liability can be contractually determined between the parties and prohibits railways from unilaterally limiting or restricting their liability to a shipper. Provinces also have liability regimes that apply to provincially regulated railways (i.e. those that operate within a single province).

Currently, railways of similar size to MM&A, of which there are approximately 60 in Canada (20 federally regulated and around 40 provincially regulated), typically carry \$5 million–\$50 million in third party liability insurance coverage. Damages associated with the Lac-Mégantic tragedy will substantially exceed this level of coverage. Large North American railways carry third party liability insurance coverage of up to \$1.5 billion each. It is possible that the maximum liability insurance available to railways in the marketplace would not be adequate in the case of a catastrophic event involving dangerous goods. This gap – as highlighted by the Lac-Mégantic tragedy – needs to be addressed.

The Government has recently updated, or is in the process of updating, the liability regimes for other transport modes and sectors, including the nuclear industry, marine tankers, offshore drilling, and pipelines. Although each regime has been tailored to the realities of the specific mode or sector, the present review and dialogue with stakeholders will reflect key principles common across all transport modes and sectors, including ensuring that polluters are held financially responsible for the cost of the damage they cause and provide adequate compensation should an incident occur.

The Canadian Transportation Agency (the Agency) is currently undertaking a review of insurance coverage requirements for the issuance of certificates of fitness required by federally regulated railways as prescribed by its regulations. Transport Canada will go further to review all aspects of liability and compensation with a view to establishing a liability and compensation



regime in the rail sector that is consistent with a Government of Canada-wide approach to addressing what has emerged as a critical issue facing the transportation sector today.

Role of the rail sector in Canada's economy

The rail-based supply chain plays a key role in supporting Canada's competitiveness in the global economy. Railways regularly ship a broad range of commodities including grain, minerals, forestry products and energy products over vast distances to domestic and international markets. Canadian exporters depend on maintaining a global reputation as reliable trading partners and rely on safe and efficient rail services to get their goods to market.

In 2011, Canada's two major railways, Canadian National (CN) and Canadian Pacific (CP) moved approximately \$68 billion in exports and \$34 billion in imports. These railways carried a combined total volume of more than 330 million tonnes, including intermodal containers as well as commodities from the forestry, mining and agricultural sectors and generated combined annual revenues of over \$15 billion.

Short line railways operating in Canada account for approximately 10,000 kilometres of track (22% of total kilometres of track), and \$655 million in revenues. These short line railways are responsible for feeding and delivering traffic to and from mainline railways, originating more than 20 percent of all CN and CP's freight carload traffic. They play an important role in the supply chain, by supporting local and regional economic activity and moving goods to market. The bulk of traffic carried by federally regulated short lines comprises mining, forestry and grain products originating in regional communities.

Volumes of crude oil shipped by rail have risen significantly in recent years, and will likely continue to do so. In addition, railways regularly ship other dangerous goods such as chlorine gas for water purification and anhydrous ammonia for fertilizer. These shipments also pose considerable liability and compensation risks should a serious incident occur.

Current liability regime

The CTA requires anyone wanting a certificate of fitness to operate a federal railway to demonstrate that they have adequate third party liability insurance to cover railway operations.

As the economic regulator of federal railways, the Agency is responsible for making decisions and determinations on a range of matters as set out in the CTA. This includes, on a case-by-case basis, determining whether the third party liability insurance is adequate by confirming: the railway has fully disclosed risks to the insurer and the Agency; the financial capability of the insurance company to pay for coverage; the financial capability of the railway to cover its self-insurance; and the railway's coverage is in line with similar railway operations.

The *Railway Third Party Liability Insurance Coverage Regulations* describe a range of factors that the Agency considers in making its adequacy assessment, including: volume of traffic, types of population areas served, volume of dangerous goods, number of level crossings, speed of trains, and overall safety record of the railway. Railway companies have the obligation to notify the Agency if their liability insurance is cancelled or altered, or if their operations change in a manner that renders their insurance coverage inadequate. The Agency can thereafter cancel or suspend a railway's certificate of fitness if it determines that the liability insurance coverage is no longer adequate. While current regulations do not prescribe a mandatory minimum dollar value of coverage, railway third party liability insurance must be adequate to cover: injury or death to persons; damage or destruction of property (excluding the cargo); and named pollution perils (e.g., spill of contaminants and environmental damage) related to the railway's operations.



Guiding Principles

A cornerstone of the Government's approach to liability and compensation regimes in other modes and sectors is the "polluter-pays" principle, which has been implemented, through various mechanisms, with the aim of protecting taxpayers.

In addition to early actions that were taken immediately following the Lac Mégantic disaster to improve the railway safety regime, including an emergency directive that requires railways carrying dangerous goods to take a number of enhanced safety measures and a protective direction requiring any shipper or importer to conduct classification tests on crude oil moved by rail, work is continuing to ensure an optimal safety regime for transportation networks moving or proposing to move dangerous goods. At the same time, a system that provides adequate compensation for potential victims and environmental clean-up, and protects taxpayers in the event of an incident is fundamental to reinforcing public confidence. Furthermore, an effective response will also need to respect the principle of modal neutrality, as well as minimize any potential negative effects on the Canadian economy.

By clearly defining the allocation of risks and responsibilities amongst the players, a modern rail liability and compensation regime should serve to support safer supply chains as well as provide for timely responses and appropriate compensation should an incident occur, while ensuring that the rail system continues to effectively support Canada's competitiveness in the global economy.

Discussion Questions

- What strengths of the current system could be enhanced or expanded going forward?
- What weaknesses or gaps in the current regime need to be addressed?
- What are key elements or best practices in the liability regimes for other transportation modes or for rail in other countries that should be considered for the rail sector in Canada?
- What are key considerations/challenges (economic, safety, jurisdictional) in designing a new approach to third party liability coverage in the rail sector?
- What expenditures and damages should the liability and compensation regime cover?
- How should risk and cost be apportioned amongst the players to reflect their relative responsibilities and to reinforce incentives for the safe transport of goods by rail taking into account comparability with and potential impacts on other modes of transportation?
- To what extent is insurance available to cover third party liability that carriers want or need to obtain? Are there impediments to obtaining more insurance? If so, what options exist to increase availability of coverage?
- How is the availability and affordability of insurance influenced by the size of railway and the nature of traffic?
- What would be the implications, including on the competitiveness of Canadian industry, of a mandatory minimum level of insurance coverage?
- If insurance is capped or unaffordable, what other options exist to increase available compensation?



- Are there any other key considerations or challenges in designing a new approach to third party liability coverage in the rail sector that are not addressed in the questions above?

Providing Comment

Transport Canada is interested in hearing from those who might be affected by any potential changes to the federal liability and compensation regime as it applies to the rail sector, such as shippers, railways, and their respective associations. The Department will be organizing meetings with interested stakeholders on liability and compensation and would welcome the submission of written input to:

Email: RailPolicy-Politiquesferroviaires@tc.gc.ca

Mail: Transport Canada
Rail Policy
330 Sparks Street, 27th floor
Ottawa, Ontario
K1A 0N5

The Department will be accepting input until **March 21, 2014**.

Once received by the department, all submissions will be subject to the Access to Information Act and may be disclosed in accordance with its provisions.