UPDATE: GOVERNMENT OF CANADA PROPOSES TO CHANGE FEDERAL RAILWAY LIABILITY REGIME

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The Government of Canada has unveiled Bill C-52, the Safe and Accountable Rail Act, which responds to a number of concerns that gained wide attention following the tragic derailment at Lac-Mégantic, Québec, in July 2013, as well as railway company efforts to pass risks of liability onto shippers. Bill C-52 and associated regulations would apply to railways and railway companies subject to the authority of Parliament andc would implement a levy on shipments of crude oil, impose new railway insurance requirements, and restrict a railway company's ability to unilaterally shift risk of third party liability to shippers.Crude Oil Shipment Levy: The Lac-Mégantic derailment highlighted the possibility that victims of railway accidents may not receive full compensation for their losses. Bill C-52 establishes a compensation fund for certain persons who incur losses due to railway accidents involving crude oil funded by a levy on shipments of crude oil to address claims above railway insurance limits. The levy will begin at $1.65 per tonne of crude oil, indexed to inflation. The proposed legislation also empowers Cabinet to expand the list of commodities subject to a levy. Transport Canada has previously indicated that such a list might include Toxic Inhalation Hazard (TIH) commodities, a class of dangerous goods.

Insurance Requirements: Bill C-52 would require railway companies to hold minimum railway liability insurance set at thresholds of $25 million, $100 million, $250 million and $1 billion, for prescribed third party and contamination risks, including the accident risks described above. The amount of insurance required of a railway company would depend on the quantity of crude oil and TIH commodities transported. The $25 million and $1 billion thresholds would be imposed once Bill C-52 is in force, while the $100 million and $250 million thresholds would be phased in over time. If claims exceed available insurance and the amount in the compensation fund, the federal government may draw on the Consolidated Revenue Fund (primarily taxpayer funded) to cover such claims, with possible recovery of those monies by way of a further levy on railway companies. A railway company involved in a railway accident involving designated goods would be liable for the losses, damages, costs and expenses resulting therefrom to the limits of its insurance without proof of fault or negligence. However, the Bill removes railway liability for accidents that result from an act of war, hostilities, civil war or insurrection. The Bill further contemplates that Cabinet may allow for more railway company defences in future.

Risk Shifting: The Act currently prohibits a railway company from limiting or restricting its "liability to a shipper" for the movement of freight traffic, except by means of a written agreement. Railway companies have expressed increasing concern about risk of liability for the transportation of dangerous goods, particularly TIH commodities. Some rail carriers had sought to pass on those risks to shippers of those goods by unilaterally issuing tariffs requiring shippers to indemnify, hold harmless and defend third party spill and accident claims against railways.

Similar risk shifting efforts have been made by rail carriers in the United States, resulting in court and regulatory proceedings. In particular, Union Pacific Railroad (UP) initiated a proceeding before the U.S. Surface Transportation Board in 2011 requesting a declaratory order as to the reasonableness of tariff provisions that required shippers to indemnify UP in respect of all liabilities arising in connection with the transportation of TIH commodities, except to the extent of UP's negligence or fault. The STB ultimately declined to issue the requested declaratory order.

Canadian Pacific Railway used its unilateral tariff-making power to shift liabilities to shippers in a similar manner. In effect, CP allocated to shippers all liabilities associated with the rail transportation of TIH commodities to the extent caused by impecunious third parties, natural disasters and certain other causes; that is, anything not arising from the negligence or willful misconduct of CP.

In late 2012, a group of shippers of chlorine, a TIH commodity, initiated a proceeding before the Canadian Transportation Agency seeking an order requiring CP to remove the risk shifting portion of one of its tariffs on the grounds that it restricts CP's liability to a shipper contrary to the Canada Transportation Act. The Agency interpreted its jurisdiction narrowly and determined that only the shipper obligation to hold CP harmless from liabilities associated with the transportation of TIH commodities limited its "liability to a shipper" (emphasis added) and therefore was not permissible. The Agency, however, found that the corresponding shipper obligation to indemnify and defend CP was limited to liabilities CP may owe to third parties, as opposed to "liability to a shipper". Consequently, the Agency determined that it lacked jurisdiction to grant the requested order. CP has since removed the hold harmless language from the offending tariff, but the shipper indemnification and defense obligations remain intact. Both CP and the shipper group have appealed certain aspects of the Agency's ruling to the Federal Court of Appeal.

Bill C-52 would limit railway risk shifting power further by preventing a railway company from limiting its "liability, including to a third party", except "by means of a written agreement". This language accords to the Agency the jurisdiction it felt it did not have in the chlorine shippers case against CP. While the language of Bill C-52 does not explicitly address the indemnity and defense obligations that were at issue in those proceedings, the prohibition on liability shifting in the absence of a written agreement would logically extend to the unilateral imposition of shipper defense and indemnity obligations. Whether or not the Agency or a court

would agree that the CP limitations on its liability are prohibited or warranted remains to be seen.

In any event, Bill C-52 is clear that railway companies and shippers remain free to allocate, by way of agreement, liabilities arising in connection with the rail transportation of a shipper's traffic. Because railway companies may exert their market power over shippers in more or less captive markets, including TIH shippers, CP and other railway companies may simply offer agreements to shippers of TIH commodities or other dangerous goods in those markets that contain liability and indemnity provisions similar or identical to those found in offending railway tariffs.

The Act allows a shipper to choose to ship its rail traffic by way of confidential contract or railway tariff. As a result of Bill C-52, a shipper may have to balance its desire for limiting risks it cannot control while its goods are in transit on the railway with higher rates or inadequate terms of service or both. It may be able to limit risk by choosing to ship its traffic by way of tariff.

by François Tougas and Ryan Gallagher

a cautionary note