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LEGISLATIVE SUMMARY

Bill C-52:
An Act to amend the Canada Transportation Act and the Railway Safety Act

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-52
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-52: AN ACT TO AMEND THE CANADA TRANSPORTATION ACT AND THE RAILWAY SAFETY ACT

1 BACKGROUND

Bill C-52, An Act to amend the Canada Transportation Act and the Railway Safety Act (short title: Safe and Accountable Rail Act) was introduced by the Honourable Lisa Raitt, Minister of Transport, and received first reading in the House of Commons on 20 February 2015.[1] It was passed by the House of Commons on 27 May 2015, and received first reading in the Senate on 28 May 2015.

Bill C-52 is the latest in a series of legislative measures intended to address concerns about safety and liability in the federal railway industry following the derailment and explosion of a runaway train carrying crude oil in Lac-Mégantic, Quebec, in July 2013.

1.1 Recent Initiatives to Improve Safety in the Federal Railway System

Since the rail accident in Lac-Mégantic, a number of federal initiatives to prevent and respond to accidents in the federal railway system have been made under the *Railway Safety Act* (RSA) and the *Transportation of Dangerous Goods Act, 1992*.[2] The Minister has issued several Protective Directions, Emergency Directives and Orders with respect to certain trains carrying dangerous goods, imposing new requirements for, among other things: [3]

- the number of crew members on board locomotives;
- the protection of unattended locomotives against unauthorized entry;
- the use of handbrakes on unattended trains;
- operating speeds;
- risk assessment procedures;
- providing municipalities with annual totals reflecting the nature and volume of dangerous goods transported by rail through their communities; and
- training for crews.

The railway companies have since formulated new, permanent operating rules to the same effect.[4]

The federal government has also introduced new regulations concerning safety management systems for railway companies,[5] as well as regulations respecting the classification and testing of, and Emergency Response Assistance Plans for, crude oil offered for transport.[6] Transport Canada has removed from dangerous goods service the least crash-resistant tank cars for the transportation of flammable liquids,

and new regulations respecting the standards of these tank cars have come into effect.[7] In addition, amendments have been made to the *Transportation Information Regulations* in an effort to ensure that Transport Canada has the most up-to-date and relevant information respecting railway operations to support its oversight activities. Finally, new regulations that require federal railways to meet baseline safety requirements in order to operate and that impose financial penalties on railway companies for certain violations have come into force.[8]

1.2 The "Common Carrier" Obligation

Unlike commercial air carriers and truck and marine vessel operators, federal railway companies in Canada may not refuse to carry any freight, not even dangerous goods. The railways' responsibility to provide adequate and suitable accommodation for freight and a reasonable level of service is referred to as its "common carrier obligation" and is set out in sections 113 to 116 of the *Canada Transportation Act* (CTA).[9] Freight shippers may file complaints with the Canadian Transportation Agency if they believe that a federal railway company has breached its common carrier obligation.[10] The Agency is a federal administrative tribunal and the economic regulator of the federal railways. It administers many of the rail provisions of the CTA, including those respecting rates, tariffs, services, and the construction and operation of railways.[11]

1.3 Existing Liability and Compensation Regime for Federal Railway Companies

Federal railway companies are required to obtain third party liability insurance to pay for any damages caused by their operations. The Agency must find a railway company's third party liability insurance coverage to be adequate before issuing the certificate of fitness (i.e., financial fitness) that the railway requires to operate within the federal jurisdiction. The Agency determines whether each federal railway's third party liability insurance is adequate in the manner prescribed in the *Railway Third Party Liability Insurance Coverage Regulations*, on a case-by-case basis.[12] There is no minimum coverage amount set out in the regulations. The *Railway Third Party Liability Insurance Coverage Regulations* are currently under review.[13]

1.4 Highlights of Bill C-52

Among the most notable provisions contained in Bill C-52 are amendments to the CTA that are intended to enhance the liability and compensation regime for federally regulated railway companies. The bill establishes new minimum dollar amounts for liability insurance for freight rail companies that carry significant volumes of certain dangerous goods, and makes the minimum insurance coverage a condition of the railway's certificate of fitness. The bill makes these railway companies liable – up to their minimum liability insurance coverage – for all losses, damages, costs and expenses resulting from accidents involving crude oil or other designated goods.

Bill C-52 also establishes the new Fund for Railway Accidents Involving Designated Goods – financed by levies on shippers of certain dangerous goods – to cover losses, damages, costs and expenses that exceed the minimum insurance coverage. The bill also amends the RSA by creating a process by which provinces and municipalities may be reimbursed by railway companies for the cost of fighting fires that are the result of railway operations.

The other amendments to the RSA contained in the bill address a wide range of railway safety issues. Among other things, Bill C-52 amends provisions respecting devices, such as train whistles, to warn the public of the risks in the vicinity of railway operations. It also touches upon "proximity issues" by amending provisions concerning measures to restrict and prevent access to land on which a railway is situated.[14] In addition, the bill provides the Minister with the authority to order activities to stop, procedures to be followed or corrective measures to be taken in the interest of safe railway operations.

1.5 Application

Interprovincial and international railway operations are governed by the CTA and the RSA, as are regional and local railway companies that hold a certificate of fitness issued by the Agency.[15]

Since 1 May 2013, regional and local railway companies that operate on federal railway infrastructure without a certificate of fitness from the Agency have been subject to the RSA, but not the CTA. Nonetheless, the text "persons other than railway companies," which has been added to the new CTA definition of railway accidents, applies to provincially regulated railways operating on federal track. This indicates that Bill C-52 intends that railway companies be held responsible for accidents involving designated goods carried by a provincially regulated railway company operating on their track. Transport Canada is the safety regulator for federal railway companies and enforces the RSA.[16]

2 DESCRIPTION AND ANALYSIS

Bill C-52 contains 40 clauses. The following sections discuss the substantive amendments to the CTA and the RSA as well as the significant coordinating and transitional amendments.

2.1 Amendments to the *Canada Transportation Act* (Clauses 2 to 16)

The CTA establishes the Canadian Transportation Agency and the framework that the Agency uses to issue certificates of fitness to federally regulated railways. Clauses 2 to 9 of the bill amend this framework by establishing minimum insurance coverage requirements for federal railways and by providing the Agency with additional powers to carry out its mandate.

2.1.1 New Definitions (Clauses 2 and 4)

The bill adds definitions for “crude oil” and “toxic inhalation hazard” to the CTA. The definition of crude oil is added to section 87 of the CTA, which deals specifically with railway transportation. The definition of toxic inhalation hazard is added to section 6 of the CTA, which applies to all modes of transportation.

2.1.2 Mediation and Arbitration (Clause 3)

Clause 3 amends section 36.2(1) of the CTA to clarify that the Agency does not have the power to mediate or arbitrate a dispute related to the administration of the new Fund for Railway Accidents Involving Designated Goods (established in clause 10). The Agency would continue to mediate and arbitrate in its existing fields of competency.

2.1.3 Certificate of Fitness Requirement (Clause 5)

Clause 5 amends section 90(1) of the CTA, which deals with the requirement to have a certificate of fitness to build or operate a railway, by adding that no person shall build or operate a railway for either passenger or non-passenger rail service unless it has a certificate of fitness that has been issued by the Agency. This certificate may be obtained only once a company has demonstrated that it has adequate liability insurance coverage for the activity that it is proposing according to the new conditions set out in section 92 of the CTA, amended in clause 6.

In the CTA, the term “railway” refers to railways within the legislative authority of Parliament, not those (regional and local) within the legislative authority of a province. Provincial regional and local railways do not require a certificate of fitness from the Agency in order to operate.

2.1.4 Power to Grant Certificates of Fitness (Clause 6)

Clause 6 amends section 92 of the CTA, which deals with the issuance of certificates of fitness, by providing more specific insurance liability coverage requirements that railways must meet before the Agency can grant a certificate of fitness.

For the operation of non-passenger railways, clause 6 refers to a new schedule to the CTA (Schedule IV, which is established in clause 14), which sets out minimum insurance coverage amounts based on the class and scope of railway operations (new section 92(1)(*b*)). Liability insurance coverage must include:

- third party bodily injury or death, including injury or death to passengers;
- third party property damage, excluding damage caused to goods carried on a shipper’s behalf;
- risks associated with pollution and contamination; and
- other losses, damages, costs and expenses defined in new section 153(1) of the CTA (clause 10).

Clause 6 also specifies that:

- the amount of self-insurance cannot exceed the maximum amount that a railway can sustain based on its financial capacity (new section 92(1.2));
- the Governor in Council has the power to amend Schedule IV as needed (new section 92(4)); and
- the Agency may make regulations concerning the provision of information that it receives from railways to determine whether they meet the minimum coverage requirements set out in Schedule IV (new section 92(3)(*b*)).

For the operation of passenger rail services and/or the construction of a railway, clause 6 grants the Agency the power to make regulations for determining the adequacy of liability insurance coverage, including self-insurance (new section 92(3)).

2.1.5 Liability Insurance (Clause 7)

Clause 7 removes section 94 from the CTA. That section describes the duty of a holder of a certificate of fitness to inform the Agency if any changes occur to its insurance coverage, and is replaced with new sections 93.1 to 94.1. New section 93.1 requires each holder of a certificate of fitness to maintain adequate insurance coverage as set out in Schedule IV (or the Agency's regulations when applicable) at all times. Certificate holders will continue to be responsible for immediately advising the Agency when there are any changes to their liability insurance coverage or to any of their activities that may affect their liability insurance coverage (new sections 94(*a*) and 94(*b*)).

New section 94.1 grants the Agency the power to make an inquiry to determine whether a holder of a certificate of fitness continues to have adequate insurance coverage. New section 94.2 states that, if the Agency determines that a holder of a certificate of fitness has failed to comply with section 93.1, the Agency shall suspend or cancel the certificate in question.

2.1.6 Carriage on Payment of Levy (Clause 8)

Clause 8 amends section 113 of the CTA, which deals with levels of service. It adds section 113(2.1), which states that a railway company must transport crude oil, or any other traffic specified by the Governor in Council in regulations made in accordance with new section 155.97 of the CTA (see Part 2.1.8.6 of this Legislative Summary), once it has received payment by the shipper of the levy for the Fund for Railway Accidents Involving Designated Goods. This obligation applies to the first railway company to carry a shipment at a rate other than the interswitching rate after the shipment has been loaded.

2.1.7 Means to Deal with Carriers' Liability (Clause 9)

Clause 9 replaces section 137 of the CTA, which deals with limiting carriers' liability. New section 137 specifies that signed written agreements between railways and

shippers will be used to determine each party's liability for shipper's traffic, including third party liability. New section 137(2) states that when an agreement does not exist, the railway company's liability regarding the loss, damage or delay of a shipment shall be dealt with by the Agency and/or in the manner set out in regulations. New section 137(3) grants the Agency the power to make regulations respecting the manner in which a railway company's liability towards a shipper is to be dealt with when there is no agreement.

2.1.8 New Liability and Compensation Regime in Case of Railway Accidents Involving Designated Goods (Clause 10)

2.1.8.1 Regime Structure

Clause 10 creates a new liability and compensation regime for railway accidents involving the transportation of designated goods. The definition of "railway accident" (new section 152.5 of the CTA) includes accidents involving the transport of designated goods associated with the operation of rolling stock on a railway:

- by a railway company on a shipper's behalf; or
- by a person other than a railway company on behalf of a person who sends or receives goods. The use of the term "person" signals the inclusion of railway companies not under the legislative authority of Parliament.

Only crude oil is designated in Bill C-52 (clause 4); other goods may be designated in regulations to be made by the Governor in Council (new sections 152.5 ["designated good"] and 155.97(*a*)). The liability and compensation regime applies only to railway companies that are not operating a passenger rail service and that have been issued a certificate of fitness by the Agency (new sections 152.6 and 92(1)(*b*)).

In the event of a railway accident, a railway company's liability is limited to the amount of the minimum liability insurance coverage it is required to maintain in order to be issued a certificate of fitness (new section 152.7(1)). This minimum liability insurance coverage, applicable per occurrence, is set out in new Schedule IV (clause 7 [new section 93.1(*b*)]). The amount ranges between $25 million and $1 billion, based on the type and quantity (in tonnes) of designated goods transported annually.[17]

2.1.8.2 Railway Company's Liability

The regime provides for strict liability for a railway company involved in a railway accident (new section 152.8). Prior proof of fault or negligence is not required for the railway company to be found liable; however, the railway company may rely on certain defences set out in regulations to be made by the Governor in Council (new section 153.1(*b*)). The defences contained in the regulations would account for emerging risks over which the railways have little control. As well, the railway company is not liable if an accident results from an act of war, hostilities, civil war or insurrection (e.g., terrorism).

However, if there is proof of an act or omission that was committed either with intent to cause the accident or recklessly and with the knowledge that the accident would result,

the limit of a railway company's liability does not apply (new section 152.7(3)). Furthermore, the bill provides for joint and several, or solidary, liability if more than one railway company is involved in a railway accident, up to the amount of the minimum liability insurance coverage that applies to each company (new section 152.7(2)). In the event that the railway company is liable under the new regime and another Act, the higher limit of liability applies, or if there is no limit provided in the other Act, then no limit applies (new section 152.9). While no other Act that would apply to a railway accident exists at this time, section 152.9 ensures that future regimes with higher limits of liability would apply.

2.1.8.3 Losses, Damages, Costs and Expenses

New section 153 sets out the losses, damages, costs and expenses for which the railway company involved in an accident is liable, as well as certain exclusions. Table 1 summarizes this information.

Table 1 – Losses, Damages, Costs and Expenses for Which a Railway Company Involved in an Accident Is Liable

Section(s) in the Amended *Canada Transportation Act*	Losses, Damages, Costs and Expenses	Exclusions/Clarifications
153(1)(*a*)	All actual loss or damage incurred by or with respect to any person	Any actual loss or damage incurred by the railway company that is liable (or to goods being carried by it)
153(1)(*b*)	The costs and expenses reasonably incurred by Her Majesty in right of Canada or a province or any other person in taking any action or measures in relation to the railway accident	
153(1)(*c*) and 153.2(4)	All loss of non-use value relating to a public resource that is affected by the railway accident or as a result of any action or measures taken in relation to the accident	Only Her Majesty in right of Canada or a province may institute proceedings for a loss of non-use value
153(2)	Loss of current and future income Loss of hunting, fishing and gathering opportunities with respect to Aboriginal peoples	Any loss or damage incurred by a person who operates a railway not within the legislative authority of Parliament that is involved in the accident (or loss or damage to goods being carried by it), for the portion that does not relate to a passenger rail service Any loss of income that is recoverable under section 42(3) of the *Fisheries Act*[a]
153(3)	Remedial measures taken to repair, reduce or mitigate environmental damage	
153(4)		Amounts recoverable by Her Majesty in right of Canada or a province are not recoverable under section 42(1) of the *Fisheries Act*[b]

Notes: a. *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42, provides for civil liability where there occurs an unauthorized deposit of a deleterious substance in water frequented by fish.

b. Ibid.

2.1.8.4 Recourse and Limitation Periods

Claimants must first seek compensation for losses, damages, costs and expenses resulting from a railway accident from the insurer of the railway company or companies. Under the bill, all claims for the losses, damages, costs and expenses described in section 153(1) may be sued for and recovered in any court of competent jurisdiction in Canada (new section 153.2(1)).[18] The right to recourse to the courts may be exercised within a period of three years, beginning on the day on which the losses, damages, costs and expenses were incurred, but not after a period of six years, beginning on the day on which the railway accident occurred (new section 153.2(3)).

The railway company that is liable may also initiate any action against another person (new section 153.3).

2.1.8.5 Fund for Railway Accidents Involving Designated Goods

The bill establishes a Fund for Railway Accidents Involving Designated Goods in new sections 153.4 to 155.96. A claim may be filed by a person who incurs a loss, damage, cost or expense as the result of a railway accident. The claim must be filed with the Fund Administrator, whose role is to receive, investigate and assess claims (new section 154.6).[19] In order for a claim to result in an offer of compensation, certain conditions must be met:

- While the claimant is not required to satisfy the Administrator that the loss, damage, cost or expense resulted from the railway accident, the Administrator may dismiss a claim under investigation if it is determined that the alleged loss, damage, cost or expense did not result from the accident (new section 154.4(2)).
- The Administrator may reduce or nullify any amount of a claim under investigation if the claimant acted with the intent to incur a loss, damage, cost or expense or if the claimant was negligent (new sections 154.6(2) and 154.6(3)).
- With respect to the portion of the claim found to be legitimate, compensation must not have been already provided by the liable railway company (or companies) (new section 154.7).
- The railway company (or companies) that is liable must have first paid compensation equal to or more than the minimum liability insurance coverage required under new section 93.1(1)(*b*).

A claim must be filed within a period of three years, beginning on the day on which the loss, damage, cost or expense was incurred, but not after a period of six years, beginning on the day on which the railway accident occurred (new section 154.4(1)). In other words, a claimant may receive compensation from the Fund for the portion of a founded claim that cannot be recovered through the liability insurance policy of the railway company (or companies) liable for the losses, damages, costs and expenses resulting from a railway accident. The Fund provides compensation in cases where the amount exceeds the maximum that a railway company may be held liable to pay under the new liability and compensation regime.

Once a claimant accepts an offer of compensation, that claimant loses all rights against any person, and the Fund Administrator is entitled to any rights of the claimant as far as the payment is concerned (new sections 155(2)(*a*) and 155(2)(*b*)). Under new section 155(2)(*c*), the Administrator may then take measures to recover the amount of the payment from:

- the liable railway company, but only in cases where the limit of liability referred to in new section 152.7(1) does not apply because the railway company:
  - was negligent or reckless under new section 152.7(3), or
  - is also liable under another Act, up to an amount equal to the difference between both limits; or
- any other person that is liable.

The amounts credited to the Fund (new section 153.4(2)) include:

- interest on the balance of the Fund (new section 153.5);
- amounts from the Consolidated Revenue Fund if the Fund is insufficient (new section 153.6);
- amounts recovered by the Administrator (new section 155(2)(*c*)); and
- levies paid for the carriage of crude oil and other designated goods (new sections 155.7 and 155.8).

Under new section 155.3, a levy of $1.65 per tonne is payable for the carriage, on a railway, of crude oil in the year ending 31 March 2016. This levy will be adjusted annually. As well, new section 155.5 provides for a levy payable for the carriage of any traffic as specified in the regulations, which will also specify the calculation method. Section 155.83(1) of the bill allows the Minister to discontinue the levy once the Fund is sufficiently capitalized and to re-impose the levy as necessary. The bill also provides a number of mechanisms for monitoring, reviewing and inspecting railway companies as a way to ensure compliance with these provisions (new sections 155.81 to 155.91).

2.1.8.6 Regulation-Making Power

Under new section 155.97, the Governor in Council may make regulations:

- determining what is deemed a “designated good,” whose carriage by a railway company would fall under the new liability and compensation regime (new section 152.5 [“designated good”]);
- setting out the defences available to railway companies to rebut the strict liability regime provided under new section 152.8 (new section 153.1);
- respecting traffic or any class of traffic for which the carriage may be subject to a levy, and the way such a levy is calculated (new section 155.5);
- respecting the expiry of the specified period during which a levy is payable by a railway company respecting the carriage of certain traffic (new section 155.7);

- respecting the keeping and filing of information by railway companies in relation to the carriage of traffic for which a levy is payable (new sections 155.3, 155.5 and 155.6);
- respecting the rate of interest applicable to the unpaid balance of the levy payable or the way the interest is calculated (new section 155.7(1)); and
- providing for any other matter in respect of the application of the bill's provisions.

2.1.9 Administrative Monetary Penalties (Clauses 11 to 13)

Clauses 11 to 13 concern the addition of new administrative monetary penalties in the amount of $100,000. The new penalties apply in cases of a contravention of the new CTA provisions that require a railway company:

- to maintain liability insurance and to notify the Agency without delay of any changes (clause 7 [new sections 93.1 and 94]); and
- to pay the levy applicable to the carriage of certain designated goods (new section 155.7(1)) and to keep records and books of account (new section 155.84).

2.1.10 Schedules III and IV (Clauses 14 to 16)

Clause 14 adds Schedules III and IV to the CTA. Schedule III lists the UN numbers[20] for dangerous goods that meet the definition of "TIH (Toxic Inhalation Hazard) material" in clause 2. Schedule IV sets the minimum liability insurance coverage amounts that a railway company is required to maintain under new section 93.1(1)(*b*).

Clauses 15 and 16 (which will come into force at a later date; see section 2.5 of this Legislative Summary) will double the minimum liability insurance coverage amounts appearing in the "Class of Railway Operations" items 2 and 3 of Schedule IV, increasing them from $50,000,000 to $100,000,000 per occurrence, and from $125,000,000 to $250,000,000 per occurrence, respectively. According to Transport Canada, the initial minimum liability amounts established in Schedule IV (clause 14) will come into force 12 months after the bill receives Royal Assent, and the full amounts (clauses 15 and 16) will be implemented 12 months later.[21]

2.2 Amendments to the *Railway Safety Act* (Clauses 17 to 35)

2.2.1 Interpretation (Clause 17)

Clause 17 amends the definitions contained in section 4(1) of the RSA:

- It repeals the definition of "fatigue science," a term that clause 34 of the bill removes from section 47.1(1)(*c*) of the RSA, which concerns railway safety management systems.
- It amends the definition of "proponent" in relation to a railway work to include those who are ordered by the Minister to construct or alter a railway work pursuant to new section 32.01 (clause 27).

- The definition of “security document” is amended to refer to notices containing orders to take measures to mitigate an immediate security threat issued by railway inspectors under new section 31(2) (clause 25).

2.2.2 Construction or Alteration of Railway Works (Clause 19)

Clause 19 adds to existing section 7.1 and the heading before it a reference to the alteration of road crossings. Previously, these elements referred only to the construction of road crossings.

2.2.3 Operation and Maintenance of Railway Works and Equipment (Clause 20)

Clause 20 adds new section 17.21, which requires every railway company to construct or alter railway works in accordance with the applicable engineering standards, unless the company is exempted from the standards under existing section 22.1 of the RSA. Section 22.1 allows railway companies to seek a short-term (less than six months) exemption from the established standards in order to test railway equipment or for other reasons.

2.2.4 Powers of the Agency – Fire (Clause 21)

Clause 21 adds new section 23 to the RSA (the previous version of section 23 was repealed in 2012) to allow a province or municipality to apply to the Canadian Transportation Agency to recover the costs incurred from responding to a fire caused by a railway company’s operations. The Agency can order a railway company to reimburse the costs it determines to have been reasonably incurred in responding to the fire (section 23(4)). New section 23(5) authorizes the Agency to make regulations concerning the application itself and other required information.

2.2.5 Audible Warnings (Clause 22)

Clause 22 amends section 23.1 of the RSA, which concerns audible warnings (i.e., train whistles). Section 23.1 currently refers to some conditions under which a municipality can request that railway companies provide no audible warnings in the area, as well as some exceptions to those conditions. Clause 22 amends the list of conditions under which audible warnings may not be eliminated by adding reference to “any regulations” that require the use of train whistles.

2.2.6 Regulations (Clause 23)

Clause 23(2) of the bill amends section 24 of the RSA, which describes the regulations the Governor in Council may make concerning non-railway operations that affect safety. Clause 23(2) amends section 24(1)(*f*), which currently allows for regulations to be made concerning means, such as fences or signs, to prevent or restrict unauthorized access to land on which a rail line is situated. The amendment allows these means to be situated on adjoining land as well as on the land where the rail line is situated. For example, the owner of a condominium building close to a railway line could be obligated by regulation to build a fence to restrict access and reduce the risk of trespassing on the railway line.

2.2.7 Orders Concerning Use of Railway Works or Equipment (Clauses 24 and 25)

Clauses 24 and 25 amend section 31 of the RSA, concerning the powers of railway safety inspectors to issue notices and orders.

Clause 24 replaces the heading before section 31. The new heading reflects amendments contained in Bill C-52, stating that inspectors may issue notices concerning the *security* as well as the safety of railway operations.

Clause 25 replaces existing sections 31(1) to 31(4) of the RSA, which concern threats to safe railway operations as a result of:

- standards of maintenance or construction of line work or crossing work;
- standards of railway equipment;
- the use of a road crossing; or
- the operations of certain works or equipment.

Whenever a threat is detected, a railway safety inspector must send a notice of the threat, containing an explanation of it, to the responsible persons. When the threat is imminent, the railway safety inspector may order the responsible persons not to use or operate line work, railway equipment or crossing work, other than in the way specified, until the threat is removed to the inspector's satisfaction. Section 31(4) currently prohibits a railway safety inspector from sending a notice respecting threats posed by the construction or maintenance of line work, railway equipment or crossing work in situations where their respective standards conform with the applicable regulations, rules and emergency directives.

Bill C-52 replaces these sections of the RSA with fewer, more general provisions. New section 31(1) authorizes inspectors to send notices concerning threats to the "safety or security of railway operations" resulting from a "person's conduct" or "any thing for which a person is responsible." If the threat is immediate, new section 31(2) authorizes inspectors to include in the notice an order to the person or the railway company to take particular measures to mitigate the threat. Existing section 31(4), which inhibits an inspector's authority to send a notice when the regulations are respected, is, in effect, repealed.

2.2.8 Ministerial Orders (Clauses 26 to 30)

Clause 26 adds new section 32(3.2) to the RSA, authorizing the Minister to order a company to take the necessary corrective measures if the Minister is of the opinion that the company is implementing its safety management system in a manner that risks transportation safety. This new section complements existing section 32(3.1), which gives the Minister similar authorities if the Minister is of the opinion that the company's safety management system has deficiencies. Clause 26 also amends section 32(4), respecting the contents of notices containing ministerial orders, in order to include the notices issued under new section 32(3.2).

Clause 27 adds new section 32.01, which allows the Minister to order a company, road authority or municipality to stop an activity, to follow procedures or to take corrective measures (including constructing, altering, operating or maintaining a railway work) in the interests of safe railway operations.

Clauses 28, 29 and 30 make amendments to existing sections 32.1, 32.2 and 32.3 of the RSA, regarding the review and appeal processes for ministerial orders, in order to include new section 32.01.

2.2.9 Other Information Requirements (Clause 31)

Clause 31 amends sections 37(1)(*a*) and 37(1)(*b*) of the RSA, which describe the Governor in Council's regulation-making powers respecting the maintenance and production of safety records. The substantive change to section 37(1)(*a*) is the replacement of the term "each company" with "any person" in reference to who must keep and preserve information, records and documents relevant to the safety of railway operations.

Clause 31 also adds new section 37(1)(*a.1*), which would provide a new authority to regulate the sharing, between third parties, of information, records and documents concerning railway safety. For example, regulations could be made regarding the submission, from railway companies to municipalities, of information relevant to the safety of railway operations.

Section 37(2), which describes the application of the regulations, is amended by replacing the words "a group or class of companies" with "a group or class of persons."

New section 37(3) states that information, records and documents that are filed with the Minister under section 37(1)(*b*) are deemed to be information that is required to be provided to the Minister under the CTA.

2.2.10 Offences (Clause 32)

Clause 32 amends section 41(2), which describes offences related to the contravention of regulations, rules and other measures under the RSA. Specifically, clause 32 amends section 41(2)(*b*) to include, in the list of measures for which a contravention is considered to be an offence, the orders the Minister may make under new section 32.01.

2.2.11 *Statutory Instruments Act* (Clause 33)

Clause 33 amends section 46 of the RSA, which lists measures under the Act that are not statutory instruments for the purposes of the *Statutory Instruments Act*. Clause 33 adds to existing section 46(*f*) notices sent by the Minister to a railway company to carry out security measures, which are authorized in section 39.1(2). Currently, section 46(*f*) refers only to the security measures themselves, formulated under section 39.1(1). The orders, standards, rules, notices, emergency directives

and security measures listed in section 46 of the RSA need not be registered with the Clerk of the Privy Council or published in the *Canada Gazette*.

2.2.12 Regulations – General (Clause 34)

Clause 34 amends section 47.1, which authorizes the Governor in Council to make regulations respecting safety management systems. The bill makes a substantive amendment to section 47.1(1)(*c*), which refers to the criteria to which a safety management system must conform and its components. "The principle of fatigue science applicable to scheduling," which was given as a required component of the safety management system, is replaced with the more general "management of employee fatigue." According to a Transport Canada official, the term "fatigue science" proved to be an impediment in the drafting of new safety management regulations for the railways.[22]

Clause 34 also amends section 47.1(3) to allow the Governor in Council to make regulations respecting a company's environmental management plan and the way it is filed. Currently, this section simply authorizes the Governor in Council to make regulations requiring a company to file environmental management plans with the Minister.

2.2.13 Regulations and Orders of General Application (Clause 35)

Clause 35 adds new section 119(1.1) to the RSA, which lists safety regulations made under the CTA that are deemed to have effect, retroactively, from the day on which they were made, as if they were regulations made under the RSA. It appears that most of the regulations listed in new section 119(1.1) and deemed to have been made under the RSA concern dangerous goods and their handling and storage facilities.

Clause 35 also:

- adds new section 119(1.2), declaring that other instruments made under the CTA, such as the traffic rules and regulations pertaining to certain railways, as well as regulations respecting railway abandonment and railway hygiene, are deemed to have been made under the RSA; and
- replaces section 119(3) with new sections 119(2.1) and 119(2.2), which clarify that, until repealed by the Governor in Council or Minister, regulations and orders related to railway safety (other than those referred to in section 119(2)) continue to be in effect if they:
  - were made by the former Canadian Transportation Commission under the repealed *Railway Act*;
  - apply to one or more particular railway companies; and
  - are still in effect.

2.3 Transitional Provisions (Clauses 36 and 37)

Under clause 36, certificates of fitness issued by the Agency under section 92(1) of the CTA prior to the coming into force of Bill C-52 will be deemed to have been issued under new sections 92(1)(*a*) and 92(1)(*b*) (clause 6) once the bill comes into force.

Under clause 37, on the date that clause 6 comes into force, certain provisions of the *Railway Third Party Liability Insurance Coverage Regulations* will continue to apply until new regulations are made. These provisions pertain to the evaluation of the minimum liability insurance coverage for the proposed operation of a railway that does not relate to a passenger rail service.

2.4 Coordinating Amendments (Clauses 38 and 39)

Clause 38 coordinates the coming into force of clauses 12 and 13, which replace sections 178(1) and 180.8(2) of the CTA, with certain provisions in the *Fair Rail for Grain Farmers Act*.[23] Under the latter Act, temporary measures were passed with respect to the minimum amount of grain that must be moved by Canadian National and Canadian Pacific Railways. These measures are to expire on 1 August 2016.[24] Bill C-52 therefore reflects these temporary changes.

Clause 39 coordinates the coming into force of certain provisions of Bill C-52 and certain provisions of Bill C-627 in the event that the latter receives Royal Assent.[25] The affected provisions are sections 31, 32(3.2), 32(4) and 32.3 of the RSA.

2.5 Coming into Force (Clause 40)

Clauses 9 and 17 to 35(1) will come into force upon Royal Assent, while clause 35(2) will come into force on a day to be fixed by order of the Governor in Council.

Clauses 2 to 8, 10 to 14, 15, 16, 36 and 37 will come into force on a day to be fixed by order of the Governor in Council, although clauses 15 and 16 will come into force on a day after the other clauses.

3 COMMENTARY

The minimum liability insurance requirements for federal railway companies that transport significant quantities of certain dangerous goods and the pooled liability fund capitalized by dangerous goods shippers proposed in Bill C-52 are consistent with the federal government's commitment in the 2013 Speech from the Throne to require shippers and railways to carry additional insurance.[26]

The House of Commons Standing Committee on Transport, Infrastructure and Communities commenced a review of the safety regime in the Canadian transportation system in November 2013 and tabled a final report in the House of Commons in March 2015.[27] According to this report, the Committee received

testimony from a number of stakeholders concerning the liability and compensation regime for railway accidents.

Based on this testimony, the Committee concluded that the existing supply of liability insurance available to railway companies is limited and exhausted. Some witnesses, including the Federation of Canadian Municipalities (FCM), recommended that a pooled fund be established to cover the costs of catastrophic events, such as the derailment and explosion in Lac-Mégantic in July 2013.[28] These witnesses proposed that the pooled fund supplement the existing liability regime for federal railway companies and be similar to the pooled compensation funds already in place for the aviation and marine industries. The FCM recommended that everybody who contributes to the risk (i.e., shippers and railway companies) should contribute to the pooled fund, whereas a representative of Canadian Pacific Railway recommended that shippers' liability alone be increased. Representatives of dangerous goods shippers were opposed to any suggestion that the shippers contribute further to the liability regime.[29]

The Committee recommended:

> that Transport Canada implement a comprehensive reform of the liability and compensation regime for rail to ensure that victims and their families obtain the compensation they deserve, that the polluter-pays principle is upheld, and that taxpayers are not forced to pay for compensation, remediation, and reconstruction costs in the event of a rail disaster.[30]

The Committee convened three meetings to study Bill C-52 in April 2015 and passed amendments to provisions in clauses 8 and 10. The changes to the provisions in both clauses were similar and served to clarify that the per-tonne levy on designated goods would be paid to the first railway company to carry the shipment *at a rate other than the interswitching rate*.[31] This amendment would prevent a railway that merely transfers shipments of designated goods a short distance from being responsible for collecting and remitting the levy.

NOTES

1. Bill C-52: An Act to amend the Canada Transportation Act and the Railway Safety Act, 2nd Session, 41st Parliament.
2. The legislative measures taken by the Minister of Transport since July 2013 pursuant to the *Railway Safety Act* and the *Transportation of Dangerous Goods Act* are described in detail in House of Commons, Standing Committee on Transport, Infrastructure and Communities [TRAN], *Review of the Canadian Transportation Safety Regime: Transportation of Dangerous Goods and Safety Management Systems*, March 2015.
3. Transport Canada, "Archived – Emergency Directive Pursuant to Section 33 of the Railway Safety Act," *Backgrounder*; Transport Canada, "Minister of Transport Order Pursuant to Section 19 of the *Railway Safety Act* (MO 14-01)," *Ministerial Orders, Directives/Directions and Response Letters*; Government of Canada, "Archived – Protective Direction No. 32," *Backgrounder.*

4. Transport Canada, "Updated Canadian Rail Operating Rules (CROR)," *New definition used in the application of new Rule 62 and revised Rule 112 in the Canadian Rail Operating Rules*.

5. *Railway Safety Management System Regulations, 2015*, SOR/2015-26, 6 February 2015.

6. *Regulations Amending the Transportation of Dangerous Goods Regulations (Update of Standards)*, SOR/2014-152, 13 June 2014; and *Regulations Amending the Transportation of Dangerous Goods Regulations (Lithium Metal Batteries, ERAPs and Updates to Schedules)*, SOR/2014-306, 12 December 2014.

7. *Regulations Amending the Transportation of Dangerous Goods Regulations (Update of Standards)*, SOR/2014-52, 13 June 2014.

8. *Railway Operating Certificate Regulations*, SOR/2014-258, 7 November 2014; and *Railway Safety Administrative Monetary Penalty*, SOR/2014-233, 10 October 2014.

9. *Canada Transportation Act*, S.C. 1996, c. 10, ss. 113–115.

10. Canadian Transportation Agency, *Disputes about level of service (rail)*.

11. *Canada Transportation Act*, ss. 7–42.

12. *Railway Third Party Liability Insurance Coverage Regulations*, SOR/96-337.

13. Canadian Transportation Agency, *Review of Railway Third Party Liability Insurance Coverage Regulations*.

14. Federation of Canadian Municipalities and Railway Association of Canada, "Welcome," *Proximity*.

15. Canadian Transportation Agency, *Federal railway companies*.

16. Transport Canada, *Rail Safety*.

17. The minimum liability insurance coverage referred to in new section 93.1(1)(*b*) and in Schedule IV is calculated based on the type and volume of toxic inhalation hazard materials, crude oil and dangerous goods (as defined in *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34, s. 2) that are transported.

18. One could reasonably presume that this remedy applies to situations where a railway company neglects or refuses to compensate an individual. As well, the railway company being sued shall provide the Administrator of the Fund for Railway Accidents Involving Designated Goods with a copy of the document commencing the proceedings, since the Administrator will be a party to the proceedings (new s. 155.2).

19. Under new section 154.8, the Administrator has the powers of a commissioner under the *Inquiries Act*, R.S.C. 1985, c. I-11, Part I. New sections 155.92 to 155.96 outline some of the Administrator's roles, including keeping records and books of account, as well as producing an annual report. The Administrator is assisted by a Deputy Administrator, and both are appointed by the Governor in Council. Both are to hold office during good behaviour for a term of not more than five years, which may be renewed (new ss. 153.7–153.8).

20. As provided in column 1 of the "Dangerous Goods List" in chapter 3.2 of the *UN Recommendations on the Transport of Dangerous Goods – Model Regulations*, 18th revised edition, 2013.

21. Transport Canada, "Minister Raitt introduces legislation to strengthen railway safety and accountability," Backgrounder, February 2015.

22. TRAN, *Evidence*, 2nd Session, 41st Parliament, 23 April 2015, 1540 (Laureen Kinney, Assistant Deputy Minister, Safety and Security, Department of Transport).

23. *Fair Rail for Grain Farmers Act*, S.C. 2014, c. 8, ss. 10(2) and 12(2).

24. These changes expire on 1 August 2016 or at a later date if their coming into force is postponed by a resolution passed by both Houses of Parliament; see the *Fair Rail for Grain Farmers Act*, s. 15.

25. Bill C-627: An Act to amend the Railway Safety Act (safety of persons and property), 2nd Session, 41st Parliament.

26. Government of Canada, *Speech from the Throne*, 2nd Session, 41st Parliament, 16 October 2013, p. 15.

27. TRAN (March 2015).

28. TRAN, *Evidence*, 2nd Session, 41st Parliament, 15 May 2014, 0850 (Pauline Quinlan, Co-Chair, National Municipal Rail Safety Working Group, Federation of Canadian Municipalities; and Mayor, City of Bromont); and TRAN, *Evidence*, 2nd Session, 41st Parliament, 1 April 2014, 0955 (Daniel Gardner, Professor, Law Faculty, Université Laval).

29. TRAN, *Evidence*, 2nd Session, 41st Parliament, 10 April 2014, 0925 (Bob Bleaney, Vice-President, External Relations, Canadian Association of Petroleum Producers; and Greg Stringham, Vice-President, Oil Sands and Markets, Canadian Association of Petroleum Producers).

30. TRAN (March 2015), Recommendation 4.

31. TRAN, *Eighth Report*, May 2015.