RISK SHIFTING AS USE OF MARKET POWER: TRANSPORTATION OF DANGEROUS GOODS

Ryan Gallagher, McMillan LLP[1]
François E.J. Tougas, McMillan LLP[2]

Introduction

Risks associated with the transportation by rail of dangerous goods, particularly petroleum products and Toxic Inhalation Hazard ("TIH") commodities, have received significant attention following the tragic incident at Lac-Mégantic and subsequent incidents. Even before Mégantic, rail carriers had already exercised their market power to shift certain of those risks to those unable to avoid it.[3] In this paper, we identify some commercial manifestations of that market power, many of which apply in the context of the transportation of dangerous goods, while others apply more generally.

Overview of the *Canada Transportation Act*

The *Canada Transportation Act* (the "Act") allows a rail carrier to enter into a confidential contract with a shipper in connection with freight rates, conditions of service, or both.[4] A rail carrier instead may unilaterally publish a tariff governing shipments of that shipper.[5] That tariff may establish freight rates for the shipper's traffic and those rates may be increased unilaterally by the rail carrier, provided the carrier meets brief notice requirements.[6] Once published, the Act deems these tariff rates the lawful rates of the rail carrier.[7] The Act also permits rail carriers to publish tariffs, again unilaterally, containing terms and conditions applicable to the movement of traffic and incidental services.[8] Railway tariffs are notoriously short on railway obligations and heavier on the shipper's obligations.

Subsection 137(1) of the Act prohibits a rail carrier from limiting or restricting its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper (or by an association or other body representing shippers).[9] In the absence of a written agreement, the rail carrier's liability for loss or delay of, or damage to, goods, is restricted to the extent provided in the Railway Traffic Liability Regulations (the "RTL Regulations") or as specified by the Canadian Transportation Agency (the "Agency") upon application of the railway company.[10,11]

Section 120.1 of the Act allows shippers to apply to the Agency for a determination as to the reasonableness of "charges and associated terms and conditions" for the movement of traffic or for the provision of incidental services contained in a tariff that applies to more than one shipper.[12] For all tariffs that apply to only one shipper, section 120.1 is not available. Further, the Agency recently has interpreted the language of this remedy in such a way as to significantly limit its effectiveness against risk shifting, as explained further below.

Compensation for Risk

The most obvious and readily quantifiable way in which a rail carrier seeks compensation for risks associated with the transportation of dangerous goods is monetary, via both freight rates and surcharges. In particular, shippers of TIH commodities pay comparatively high freight rates, which rates have been markedly increasing in recent years. For instance, a 2012 study (the "ACC Study") commissioned by the American Chemistry Council found that 80% of survey respondents reported that over the last five years, the rates paid to ship TIH products had increased more rapidly than freight rates paid to ship other products.[13] Further, the ACC Study found that shippers paid an average premium of 221% to ship TIH products relative to non-TIH products.[14]

The level of rail freight rates may be constrained to a certain extent by the final offer arbitration ("FOA") provisions of the Act, as long as a shipper is willing to endure the many obstacles to its use. Assuming a shipper proceeds to FOA and assuming that shipper is successful, a carrier with market power is able to use the inherent incentive to lower service quality to effectively set a quality-adjusted price equal to that which would occur in the absence of a restraint, such as FOA.[15] Shippers will identify readily with this regularly recurring problem.

Rail carriers also impose surcharges for shipments of certain dangerous goods in certain types of equipment. For instance, Tariff 8 issued by Canadian Pacific Railway ("CP") unilaterally imposes a surcharge of $325 per car for shipments of crude oil in tank cars that do not conform to certain specifications.[16] This compares to no equipment-dependent surcharge for non-dangerous goods or crude oil in equipment meeting the specifications.

In addition, CP Tariff 2 imposes a demurrage charge of $1,500 per car per day for loaded TIH railcars or railcars containing TIH residue, and $160 per car per day for railcars loaded with dangerous goods, in both cases irrespective of which party provides the railcars.[17] This compares to $60 per car per day for non-dangerous goods in shipper-supplied equipment, which charge rises to $95 in some areas, and $100 per car per day for non-dangerous goods in CP-supplied equipment. TIH shippers are also unable to benefit from demurrage credits that are potentially available to other shippers under CP's demurrage system.[18]

Rail carriers seek to justify these high freight rates and charges, particularly in the case of TIH and other dangerous goods, on the basis of risk. A carrier will point to the potentially extensive liabilities that it might face as a result of an accident, and to the cost associated with its insurance against such risks. By way of example, CP has stated that "the bulk of CP's liability insurance expense is directly attributable to the TIH portfolio, which makes up less than 1% of CP's book of business".[19] Furthermore, CP has indicated that it purchases US $1.2 billion in liability insurance specifically to cover the risks associated with TIH commodities, but in the absence of such TIH commodities, CP would likely only purchase insurance up to US $400 million.[20]

One point that bears underscoring is that a rail carrier is the supply chain participant best placed to insure against risks associated with rail transportation of TIH commodities and other dangerous goods when it has the care, custody and control of the commodities on its system. The rail carrier is the only party that can prevent an accident from occurring once a railcar is safely tendered for carriage. The rail carrier operates its insured claims within the context of Canada's robust, dynamic and comprehensive safety scheme. The scheme assumes a rail carrier will operate in accordance with all applicable safety laws, regulations and rules; if it does not, enforcement measures are available. Hence, the creation, maintenance and enforcement of the scheme are not a carrier cost – those have been allocated to taxpayers like other public safety schemes. Only compliance is a direct carrier cost, which it observes in its own self-interest. The rail carrier allocates the cost of remaining risk through comparatively high rates and its insurance premiums. Even those cost allocations are disproportionate to the risks, as evidenced by the income statements of CP and CN.

Liability Shifting - Recent Proceedings

Aside from monetary compensation, certain Class I rail carriers have sought to minimize their risks from the rail transportation of dangerous goods by using their tariff-making power to shift potential liabilities to other parties, notably shippers.

This issue initially became publicly contentious in the United States. In particular, in 2011, Union Pacific Railroad ("UP") initiated a proceeding before the Surface Transportation Board (the "STB") requesting a declaratory order that Items 50 and 60 of UP Tariff 6607 were reasonable. Those provisions effectively required the shipper 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, although UP Tariff 6607 remains in force in modified form, including a very similar shipper indemnity of UP.[21,22]

In addition, CP has used its unilateral tariff-making power to issue CP Tariff 8, Item 54, which, stated simply, allocates to the shipper all liabilities associated in any way with the transportation of TIH commodities, except to the extent such liabilities arise from the negligence or willful misconduct of CP. Accordingly, Tariff 8 purports to allocate to a shipper all liabilities associated with the rail transportation of TIH commodities to the extent caused by or arising from impecunious third parties, natural disasters and certain other causes.

In late 2012, a group of shippers of chlorine, a TIH commodity, led by Canexus Chemicals, LP (the "Shipper Group") initiated a proceeding before the Agency pursuant to sections 120.1 and 137 of the Act that sought, among other things, an Agency order requiring CP to remove Item 54 from Tariff 8 on the grounds that (i) Item 54 of Tariff 8 restricts CP's liability to a shipper contrary to subsection 137(1) of the Act, and (ii) Item 54 of Tariff 8 is unreasonable contrary to section 120.1 of the Act. Following receipt and analysis of extensive submissions, the Agency issued an initial decision (the "Initial Decision") in May of 2013 and a final decision (the "Final Decision") in October of 2013.[23,24] The Agency interpreted its jurisdiction narrowly and determined that only the shipper obligation to hold CP harmless in Tariff 8 limited CP's "liability to a shipper" and therefore was not permissible.[25] 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 those owed "to a shipper". Consequently, the Agency determined that it lacked jurisdiction to grant the requested order.[26]

With respect to section 120.1 of the Act, the Agency held that the liability and indemnity obligations in Item 54 neither contain a "charge" nor a "term and condition associated with a charge" within the meaning of section 120.1.[27] Therefore, in the absence of such a charge, the Agency found that it lacked jurisdiction to consider the reasonableness of Item 54.[28]

CP appealed the Initial Decision, the Shipper Group appealed the Final Decision and CP cross-appealed the Final Decision, all of which is now before the Federal Court of Appeal.

While the Agency found itself unable to provide any relief to the Shipper Group based on its interpretation of sections 137 and 120.1 of the Act, in the Final Decision the Agency acknowledged the hardship that Item 54 of Tariff 8 imposes on shippers:

> "[115] … Item 54 imposes very onerous obligations on shippers. These obligations…have the effect…of transforming the shipper into the insurer of CP's rail operations. …the shipper does not need to be at fault for the obligation to indemnify, defend and hold harmless to be triggered. Such an obligation…would be clearly disproportionate to CP's own obligation under the Tariff, especially if it materialized in the context of a catastrophic event. However, the existence of an imbalance does not automatically confer jurisdiction on the Agency…
>
> [116] In this case, the Agency could not intervene to remedy the imbalance caused by the unilateral imposition of the allocation of liability… However, the Agency can only conclude that as there was a need to enact legislation to prevent railway companies from limiting their liability to a shipper without the written agreement of that shipper, there is also a need for regulatory intervention when a railway company unilaterally imposes indemnification, defense and hold harmless obligations on a shipper as a condition for the movement of the shipper's traffic. This need exists because of the magnitude that such an obligation can take when…it is left to the railway company to unilaterally allocate third party liability to a shipper.
>
> [117] The Agency is of the opinion that the allocation of liability between the parties involved in railway operations…should be subject to similar or even more rigorous restrictions than those found in section 137 of the CTA...

> [118] …Section 137 of the CTA sets out that a railway company may not limit its liability to a shipper "except by means of a written agreement signed by a shipper…" This clearly indicates that the preferred means by which allocation of liability …should be determined is by way of a negotiated agreement and not unilaterally imposed by a railway company."[29]

Clearly, the Agency viewed the foregoing as unfair to shippers and in need of regulatory intervention. The obvious nature of the problem is that it would not have been possible for CP to unilaterally impose "very onerous obligations on shippers" nor would it have been necessary for the Shipper Group to initiate proceedings before the Agency, if CP did not have sufficient market power to shift these risks. Further, the tariff-making power allows the use of that power in a way that the Agency found objectionable but helpless to deter.

Regulatory Response – Bill-C52

Following a consultation led by Transport Canada to review the railway third party liability and compensation regime in Canada, the Government of Canada responded to a number of concerns that gained wide attention following Lac-Mégantic by proposing Bill C-52, the *Safe and Accountable Rail Act*, which, at the time of writing, had only received first reading in the House of Commons.[30]

Bill C-52 would require rail carriers to hold minimum railway liability insurance set initially at thresholds of $25 million, $50 million, $125 million and $1 billion, for prescribed third party and contamination risks. The amount of insurance required would depend on the quantity of crude oil and TIH commodities transported.[31]

Bill C-52 would also establish 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.[32] The proposed legislation also empowers Cabinet to expand the list of commodities subject to a levy and Transport Canada has previously indicated that such a list might include TIH commodities.[33]

With respect to risk shifting, Bill C-52 would impose an amendment to subsection 137(1) of the Act that would prevent a rail carrier from limiting its “liability, *including to a third party*” (emphasis added), except “by means of a written agreement”.[34] This language grants to the Agency the jurisdiction it felt it did not have in the Final Decision. While the language of Bill C-52 does not explicitly address the indemnity and defense obligations that were at issue in the Final Decision, the prohibition on shifting liability 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 rail carriers and shippers remain free to allocate, by way of agreement, liabilities arising in connection with the rail transportation of a shipper’s traffic. Because rail carriers may exert their market power over shippers in more or less captive markets, including TIH shippers, CP and other carriers may simply offer contracts 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.

As noted above, the Act allows a shipper to choose to ship its rail traffic by way of confidential contract or railway tariff. Shippers that ship by way of confidential contract may in some circumstances negotiate lower rates than the rail carrier’s posted tariff rates, improved service provisions, or both. It is possible that a shipper in some circumstances, perhaps in less captive circumstances, could negotiate more favourable liability and indemnity terms. But, in other circumstances, including captive circumstances, a dangerous goods shipper may not be able to avoid the risk shifting power enjoyed by the rail carrier. As a result of Bill C-52, that shipper could ship under tariff and limit those onerous liability and indemnity obligations, although doing so may forego other benefits (favourable rate and service terms) that might otherwise be available under contract.

Force Majeure Clauses

Rail carrier market power manifests itself in various other commercial contexts, including contractual provisions one would expect to find in a commercial agreement between a supplier and a customer. Force majeure ("FM") clauses are a good example. An FM clause typically excuses performance (service failures, in the rail freight context). It transfers the consequences of a party's non-performance to the other (innocent) party without making the defaulting party liable for that non-performance. As described by Dickson, J. of the Supreme Court of Canada, an FM clause

> "…generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill."[35]

In a rail freight contract between a rail carrier and a shipper, it is the rail carrier that has the obligation to perform the service obligations. Suppliers, as opposed to customers, perform all or most of the service obligations in virtually all supply contracts. These are not partnerships with equal performance obligations. A shipper may have obligations for receiving, shipping, loading and unloading, but the transit portion of a supply chain cycle is entirely a rail carrier obligation. Consequently, it is the rail carrier that is the most likely to rely on an FM clause, regardless of the degree of market power. Rail carriers with market power, however, may impose broadly worded FM clauses in tariffs and confidential contracts, with terms favourable to the carrier, so as to maximize the probability that the carrier will rely on the FM clause to excuse performance failures.

In a competitive environment, on the other hand, FM clauses are worded more narrowly. The commercial tension in those circumstances increases the likelihood that only matters outside the control of the contracting parties will excuse performance.

To illustrate the impact of market power in the context of FM clauses, consider a scenario in which parties have relatively equal bargaining power, as is the case for the following FM clause of a services supply agreement between arm's length parties of similar bargaining power:

> "…the date for any performance by a Party…shall be postponed to the extent and for the period of time that that Party is prevented from performing, or is materially affected in its performance, by natural disasters such as storms, fires, earthquakes or floods, strikes, riots, civil insurrection or war, or any other cause or causes that are beyond the reasonable control of the Party claiming to be excused (such events being events of force majeure) and not resulting from any action or inaction of the Party claiming to be excused."

Notice that all enumerated FM events are beyond any party's reasonable control. This contrasts sharply with the FM clauses found in rail carrier tariffs, such as the one-sided FM clause found in Tariff 9000 published by Canadian National Railway Company ("CN"):

> "The term "Force Majeure" shall include Acts of God (including flood, earthquake, storm, hurricane or other natural disaster, as well as specific incidents of exceptional adverse weather conditions, which are materially worse than those typically encountered in the relevant places at the relevant time of year), act of public enemy, war, insurrection, terrorism, authority of law, <u>embargo</u>, fire or explosion, strike or other labour dispute, <u>derailment</u>, or an unforeseeable circumstance beyond the control of the parties against which it would be unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts…"[36]

Derailments can arise as a result of insufficient track maintenance programs, a good example of which is evident in the United States National Transportation Safety Board's determination that the probable cause of the January 2002 CP derailment in Minot, North Dakota was "an ineffective Canadian Pacific Railway inspection and maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint".[37] Accordingly, because a rail carrier's track maintenance programs are completely within the carrier's control, at least some derailments are not beyond the rail carrier's control, yet are found in rail carrier FM clauses.

Further, embargoes issued by a rail carrier are within that carrier's control. This is amply demonstrated by the embargo issued by CP against traffic moving to Montreal, Maine & Atlantic Railway over the Saint-Jean-sur-Richelieu interchange shortly following the Lac-Mégantic derailment. The Agency ultimately ordered CP to lift the embargo as it constituted a breach of CP's level of service obligations to Montreal, Maine & Atlantic Railway.[38] While an embargo issued by another rail carrier may be a good faith FM event, the above clause in CN Tariff 9000 draws no distinction between embargoes issued by CN versus embargoes issued by another rail carrier.

Like CN, CP has also published a self-serving FM clause. The "Rules and regulations" set out in CP's Tariff 1 (CP's Guide to Products and Services) sets out:

> "Either Shipper, or Consignee, or CP shall be excused from its or their obligations…under the Contract or applicable tariffs provided that Customer or CP is prevented or delayed in such performance by any event which is unavoidable or beyond its reasonable control, including, without limitation, act of God, act of the Queen's or public enemies,…strikes, lockouts, walkouts or other industrial dispute, war, sabotage, riot, insurrection, <u>derailment</u>, <u>labour shortages</u>, <u>power or fuel shortages</u>, the act or failure to act of any government or regulatory body. …<u>Failure to provide notice shall not preclude a party from relying on the existence of a condition of force majeure</u>."[39]

Labour shortages and power or fuel shortages are not outside the rail carrier's control. The presence of the language "strikes, lockouts, walkouts or other industrial dispute" in addition to "labour shortage" suggests the latter is intended to apply to crew shortages or similar events that arise in circumstances other than a labour dispute. The recruitment and training of crews is well within CP's control, and therefore not a bona fide or even customary subject matter of an FM condition.

Furthermore, the CP provision says that failure to notify a party of an FM event does not preclude reliance on the FM provision. This operates strongly in CP's favour because CP as the party with the performance obligations is the most likely party to rely on the FM clause to excuse its service failures. In that case, a shipper might not even be aware until after the fact.

Limitation of Liability for Loss of or Damage to Goods

As described above, the Act prohibits a rail carrier from limiting its liability to a shipper, except by written agreement signed by the shipper. In the absence of a written agreement, the RTL Regulations apply and deal with liability for loss or delay of, or damage to, goods.

As background, at common law, a rail carrier is the insurer of goods placed with it for carriage, subject to limited exceptions such as acts of God, and that position is reflected in the RTL Regulations, section 4 of which makes a carrier "liable, in respect of goods in its possession, for any loss of or damage to the goods or for any delay in their transportation" unless that liability is limited by the RTL Regulations.[40,41] The RTL Regulations then provide specific situations in which a carrier is not liable for goods in its possession, such as acts of God, riots, strikes, lockouts, etc.[42]

However, tariffs issued by certain carriers purport to unilaterally modify the RTL Regulations to the rail carrier's advantage. For instance, Item 200 of CP's Tariff 1 sets out that for the transportation of commodities on CP in Canada, the RTL Regulations will apply, except as modified therein.[43] Item 200 then purports to invert carrier responsibility for the safe carriage of goods as follows:

> "There shall be no presumption of CPR fault for the loss, damage or delay of cargo. The burden of proof to establish the culpability of CP is upon the claimant. CP is not liable for any loss, damage or delay of cargo, except where CP's intentional act or omission, gross negligence or simple negligence is the direct and proximate cause of the injury."[44]

In addition, Item 200 sets out that "the onus is on the shipper/receiver to prove loss, damage or contamination to lading", whereas the RTL Regulations explicitly impose an onus only in certain limited circumstances, and in all such cases, the onus is placed on the carrier.[45]

While one might question the enforceability of tariff provisions that purport to unilaterally modify the RTL Regulations, the mere attempt to modify the RTL Regulations demonstrates CP's market power.

Conclusion

Rail carriers exercise market power by charging supra-competitive rates, imposing charges, including supra-competitive charges, providing sub-competitive service and by shifting risk to shippers. Risk shifting occurs in a variety of ways, including in connection with the transportation of dangerous goods, by using tariff making power to impose on the shipper (i) indemnity provisions that allocate to the shipper potential liabilities to third parties, although Bill C-52 may limit a carrier's ability in this regard, (ii) FM clauses favourable to the carrier, and (iii) provisions that purport to modify the responsibility for liability for loss or delay of, or damage to, goods that would otherwise apply under the RTL Regulations.

The net effects of the exercise of market power is well-documented and the subject of antitrust and regulatory economics. To the extent market power can be curtailed or addressed by various means, including statutory means, it would benefit captive shippers and Canada's economy as a whole by efficiently allocating risks and rewards, increasing output and optimizing the operations of supply chain participants. Otherwise, national transportation policy prefers one industry (rail transportation) over all others to the extent of their reliance on rail transportation, as well as decreasing national output and associated corporate and export earnings, labour output and tax contribution.

Endnotes

[1] © 2015, Ryan Gallagher and François E.J. Tougas.
[2] Ryan Gallagher practices transportation law at McMillan LLP and François E.J. Tougas practices transportation and competition law at McMillan LLP and is Adjunct Professor in Competition Law & Policy at the University of British Columbia, Faculty of Law.
[3] Gallagher, R. and Tougas, F.E.J., "Apportioning Potential Liability For The Rail Transportation Of Hazardous Commodities" in Proceedings of the 47th Annual Conference of the Canadian Transportation Research Forum, June 2012.
[4] *Canada Transportation Act*, S.C. 1996, c. 10. See Division IV of Part III.
[5] *Supra*, note 4, s. 117-119.
[6] *Supra*, note 4, ss. 119(1).
[7] *Supra*, note 4, ss. 119(2)(a).
[8] *Supra*, note 4, s. 87, 117 - 119.
[9] *Supra*, note 4, ss. 137(1).
[10] *Supra*, note 4, ss. 137(2).
[11] *Railway Traffic Liability Regulations* (SOR/91-488).
[12] *Supra*, note 4, s. 120.1.
[13] "ACC Rail Issues Survey Results Report", Veris Consulting, Inc., 2012, online: American Chemistry Council <http://www.americanchemistry.com/Policy/Rail-Transportation/Rail-Issues-Survey-Final-Report.pdf>, 20.
[14] *Supra*, note 13, at 20.
[15] Gillen, D. and Tougas, F.E.J. "Transportation Policy, Competition and Economic Growth" in Proceedings of the 46th Annual Conference of the Canadian Transportation Research Forum, May 2011, at page 7.
[16] CP Tariff 8 effective January 1, 2015, online: Canadian Pacific Railway <http://www.cpr.ca/en/customer-resources-site/Documents/tariff-8-hazardous-commodities-jan-2015.pdf >. See Item 12 (page 4).
[17] CP Tariff 2 effective February 1, 2015, online: Canadian Pacific Railway <http://www.cpr.ca/en/customer-resources-site/Documents/tariff-2-railcar-supplemental-services-feb-2015.pdf >, Items 11 – 13 (pages 7-9).
[18] *Supra*, note 17.
[19] Paragraph 122 of CP's Answer dated January 10, 2013 in proceedings that led to Canadian Transportation Agency Decision No. 202-R-2013.
[20] *Supra*, note 19, paragraph 121.
[21] *Union Pacific Railroad Company – Petition for Declaratory Order*, FD 35504, STB Decision 42820 EB, online: S.T.B. <http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/9201300C7096C27485257B5C0062F704/$file/42820.pdf>.

[22] Union Pacific Railroad Company Tariff 6607, online Union Pacific Railroad Company < http://c02.my.uprr.com/wtp/pricedocs/UP6607BOOK.pdf>, Items 50 and 60.
[23] *Canexus et al v. Canadian Pacific Railway* (24 May 2013), Canadian Transportation Agency Decision No. 202-R-2013, online: Canadian Transportation Agency <https://www.otc-cta.gc.ca/eng/ruling/202-r-2013>.
[24] *Canexus et al v. Canadian Pacific Railway* (7 October 2013), Canadian Transportation Agency Decision No. 388-R-2013, online: Canadian Transportation Agency <https://www.otc-cta.gc.ca/eng/ruling/388-r-2013>.
[25] *Supra*, note 24, paragraphs 54-56.
[26] *Supra*, note 24, paragraphs 46-53.
[27] *Supra*, note 24, paragraphs 80-104.
[28] *Supra*, note 24, paragraph 105.
[29] *Supra*, note 24, paragraphs 115-118.
[30] 2nd Session, 41st Parliament, 62-63-64 Elizabeth II, II, 2013-2014-2015, online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=7846828&File=4>
[31] *Supra*, note 30, subsection 6(1) (modifying subsection 92(1) of the Act) and Schedule 2 (adding a new Schedule IV to the Act).
[32] *Supra*, note 30, section 10 (adding Division VI.2 to the Act).
[33] *Supra*, note 30, section 10 (adding a new subsection 155.97 to the Act).
[34] *Supra*, note 30, section 9 (modifying subsection 137(1) of the Act).
[35] *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co*., [1976] 1 S.C.R. 580, at paragraph 4.
[36] Canadian National Railway Company Tariff 9000 effective February 1, 2015, online Canadian National Railway Company < http://www.cn.ca/en/customer-centre/tools/optional-services-tariffs >, 29.
[37] "Derailment of Canadian Pacific Railway Freight Train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, North Dakota – January 18, 2002 – Railroad Accident Report", NTSB/RAR-04/01, adopted March 9, 2004, online: National Transportation Safety Board <http://www.ntsb.gov/investigations/AccidentReports/Reports/RAR0401.pdf>, 69.
[38] *Montreal, Maine & Atlantic Canada Co. and Montreal, Maine & Atlantic Railway, Ltd. v. Canadian Pacific Railway*, Canadian Transportation Agency Interlocutory Decision No. LET-R-99-2013, August 21, 2013, online Canadian Transportation Agency <https://www.otc-cta.gc.ca/eng/ruling/let-r-99-2013>.
[39] Canadian Pacific Railway Tariff 1, effective January 1, 2015, online: Canadian Pacific Railway <http://www.cpr.ca/en/customer-resources-site/Documents/tariff-1-products-and-services-guide-jan-2015.pdf >, Item 200, section 16 (page 39).
[40] *Halsbury's Laws of Canada*, LexisNexis Canada Inc., 2011, HCG-36 (page 216).
[41] *Supra*, note 11, s. 4.
[42] *Supra*, note 11, s. 5 and 6.
[43] *Supra*, note 39, Item 200, subsection 11(a) (page 37).
[44] *Supra*, note 39, Item 200, subsection 11(u) (page 38).
[45] *Supra*, note 39, Item 200, subsection 11(o) (page 38).