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Chair

Mr. Larry Miller

Standing Committee on Transport, Infrastructure and Communities

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• (1540)

[English]

The Chair (Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC)): We'll start our meeting. We have a number of people with us.

Thank you very much for being here. I'm sorry about the delay with the votes going on. We were going to delay the start, but that has changed. With that, we're going to go into our bill and go through clause by clause.

If it's okay, if I get approval from the committee, we know there are a couple of amendments, but I think that if it's possible we could lump most of the clauses together. Is everyone okay with that?

An hon. member: Yes.

An hon. member: That's fine.

The Chair: Okay. Good.

Under clause-by-clause consideration, pursuant to Standing Order 75(1) consideration of clause 1, the short title, is postponed, and the chair calls clause 2. Have I approval to group clauses 2 to 5 inclusive?

(Clauses 2 to 5 inclusive agreed to)

(On clause 6)

The Chair: The reason I'm asking the clerk about this, Mr. Mai, is that a couple of your amendments, as I think you probably realize, totally change the intent of the bill and are inadmissible. They can't be used, but amendment NDP-1 is eligible, so we'll go through it.

Does everybody want me to read the whole amendment?

An hon. member: No.

The Chair: I believe everyone has it in front of them. Is there discussion on the amendment?

Mr. Mai.

Mr. Hoang Mai (Brossard—La Prairie, NDP): Amendment NDP-1 is further to the witness who came from the Railway Association and talked about the Essex Terminal Railway. What we understand is that some of the railways don't do the same type of carrying of dangerous goods or carrying crude oil that the other railway companies do, and there are some concerns that they would also be affected by the coverage of insurance.

In that case, what we heard from the witness is that it would really affect the company's business. There is a concern about some sort of

unintended consequences. We obviously believe in the principle that the polluter pays, and we believe that companies should have minimum insurance, but we're concerned about companies that are not the regular companies carrying dangerous goods.

My question may be for Transport Canada officials.

First of all, thank you for being here, for coming in and withstanding the heat with us.

Is there a way for a company to get an exemption from the application of this bill in the case of a business that is really different from other railway companies? Is there a way other than a legislative change?

The Chair: Does anyone want to speak to that?

Ms. Duff.

• (1545)

Mrs. Lenore Duff (Director General, Surface Transportation Policy, Department of Transport): The legislation provides for a regulatory authority that allows the insurance amounts and criteria—for example, the types and volumes of good hauled—to be amended by regulation over time, but there is no exemption from the legislation for the application of insurance.

Mr. Hoang Mai: Would it be possible later on to have regulations that would deal with companies that are falling through the cracks in this bill? I don't know if you've read the amendment that was proposed.

Mrs. Lenore Duff: Yes.

Mr. Hoang Mai: Do you have any comments on that amendment? Do you find it applicable?

Mrs. Lenore Duff: In terms of the amendment as it's written, it's broad in terms of how it would exempt the railway entirely from any insurance requirements, so it wouldn't be in keeping with the objective of the bill.

My other comment is that there are specific circumstances that various railways have, but this is based on an assessment of risk and what goods they actually carry. That's how their insurance requirements would be determined.

The railway you're referring to does carry a level of dangerous goods that would require that insurance and operates through the City of Windsor level crossings, so it does carry some element of risk with respect to its goods. But there is a regulatory authority that it could be adjusted given changing circumstances or to account for specific issues that might arise over time.

Mr. Hoang Mai: Okay. Thank you for the answer.

I think we've asked to have the risk assessment, for instance, because unfortunately when we look at the bill, we haven't seen where the numbers come from and where the studies were done regarding the bill. So that is a concern.

I think the concern with proposing an amendment that actually opens too wide a door is also your concern. It might bring in something that is too large. Are you telling us we can have regulations that will actually deal with specific cases in which, for instance, the risk is not as high?

Mrs. Lenore Duff: No, I'm saying there is a regulatory authority that provides for regulations. I can't comment on whether there might be or not.

Mr. Hoang Mai: So, it would be possible.

Do you have any questions on that?

The Chair: I have Mr. Watson first and then I'll come back to Mr. Kellway.

Mr. Jeff Watson (Essex, CPC): Mr. Chair, I have a couple of items that are important.

First of all, I'm a little surprised, after hearing the opposition's concern about exemptions from railway operating rules, that they might now be asking for an exemption from higher liability rules for short lines. I don't think that's consistent with improving rail safety and it's certainly not consistent with liability and compensation after the fact. If I understood officials correctly, this amendment wouldn't exempt them from the proposed new legislative rules, it would exempt them from existing rules around insurance. That's a dramatic step back for rail safety.

As I understand it, and I've done a little bit of digging on this, Essex Terminal Railway, which does carry sufficient dangerous goods, does so through a community of 200,000 people with homes on either side of the railway. They have had 11 accidents at crossings with 14 accidents between 2000 and 2013, so it's not that there is no risk with this particular railway. Understanding that, we certainly wouldn't want to exempt them from existing insurance, but I don't think we should be looking at exempting from new rules that would strengthen liability and compensation, so we're opposed to the motion.

• (1550)

The Chair: Mr. Kellway.

Mr. Matthew Kellway (Beaches—East York, NDP): I'd like to dig into this a little further.

I don't know about Essex, and that is the kind of case in point, but the broader position laid out in the testimony was that not all short lines are the same.

I'm wondering if the regulatory authority you're referring to would allow for a finer gradation of short lines, for example. The point that Essex made was that they never go above, whatever it was, 10 kilometres an hour, or something like that.

Does the regulatory authority allow for distinctions at some point in time between different short lines? Could a new category of short line be created with different liability and insurance burdens?

Mr. Alain Langlois (General Counsel and Associate Head, Department of Transport): Yes. The regulatory authorities found in proposed subsection 92(4) of the legislation allow for regulations that would replace or add to the class of operation that is found in the schedule. As long as we can create a class of operation and can create a different class depending on the type of operation of the short line, then yes, it's possible under the regulatory authority.

Mr. Matthew Kellway: With that then one could, theoretically or hypothetically, through the regulatory mechanism, change liability and insurance coverage required for a different class?

Mr. Alain Langlois: Yes. One could set a different amount of liability per class of operation.

Mr. Hoang Mai: On the amendments, again, one of the problems we had is not having enough information. As you know, Mr. Chair, we had two meetings. We had one with the minister and the officials and the other one with some of the witnesses.

I will not move the amendment.

With the regulatory provisions that might come after, I trust that the officials and Transport Canada will actually look at specific issues and maybe make regulations that are more appropriate than just a legislative change is.

The Chair: The clerk has informed me that you would have to withdraw it. I believe that's what you're doing anyway, correct?

Mr. Hoang Mai: Yes, exactly. I am withdrawing the amendment.

The Chair: Do I have unanimous consent for Mr. Mai to pull his amendment?

Some hon. members: Agreed.

(Amendment withdrawn)

The Chair: Thank you.

In that case, then, we can lump clauses 6, 7, 8.... No?

Mr. Hoang Mai: I have questions about clause 7.

The Chair: Okay. Shall clause 6 carry?

(Clause 6 agreed to)

(On clause 7)

The Chair: Go ahead.

Mr. Hoang Mai: Clause 7 deals with liability and the minimum insurance level. What we heard in committee and from witnesses is in regard to the class 1 liability. We asked to have the numbers for class 1 insurance coverage. What we understand is that right now it's more than \$1 billion. We heard numbers in the range of \$1.5 billion for CN and CP, so we asked the CTA, which was here, for clarification. Unfortunately, we were told that those numbers are proprietary information, so we couldn't get them.

Again, I think we did ask the minister for some of the information regarding that calculation. There's a lack of information in terms of how we came up with those numbers for insurance.

Again, let me be clear. We are in support of having a minimum liability coverage insurance, but we're concerned about the fact that maybe CN, CP, or class 1 railways will have to pay less or will have less insurance than what they currently have. Has Transport Canada looked at that issue? Are we giving a free pass to class 1 railways?

• (1555)

Mrs. Lenore Duff: The insurance requirements are based on risk assessment and historical accident costs. The objective was to share accountability between shippers and railways for the transportation of designated dangerous goods. The amounts are set based on risk, and that's where the \$1 billion comes from.

With respect to what the railways carry now, it is confidential information. I guess I would say that our assessment is that \$1 billion currently.... Well, I'll say that there have been no rail accidents that have exceeded that level of insurance at this stage, and we believe, given the data we had, that it is sufficient to cover the vast majority of rail accidents.

Mr. Hoang Mai: When the minister came to the committee, I asked her about Lac-Mégantic, because a lot of legislation came after the Lac-Mégantic disaster. Does Transport Canada have a number in terms of costs for Lac-Mégantic?

Mrs. Lenore Duff: No, we don't have a cost. I don't know that a final cost has been determined for the Lac-Mégantic accident at this point.

Mr. Hoang Mai: Has Transport Canada considered having unlimited liability for class 1 railways?

Mrs. Lenore Duff: In terms of the policy direction, it was to share accountability between shippers and railways, and unlimited liability would be inconsistent with that.

Mr. Hoang Mai: I understand that point.

Also, the Canadian Association of Fire Chiefs came to the committee and spoke about the need for funds for training. It has made a recommendation to this committee that the disaster relief fund be used to pay for training and to pay to help out municipalities. I know that there's a working group right now, but has that been considered? Or would it be possible in the future to use that fund in order to pay for training for first responders?

Mrs. Lenore Duff: That wasn't contemplated as part of this fund. It was for paying damages for accidents to victims of those accidents.

Mr. Hoang Mai: Is it possible with the mechanism that is in place for the fund to use that amount later on?

Mrs. Lenore Duff: There is no provision in the legislation currently that allows that money to be used other than for the purposes that are defined in the act, and that is damages associated with accidents.

Mr. Hoang Mai: If we were to be able to use part of that fund for training, we would have legislative amendments to the bill, I guess. Or would it be something that can be done through other regulations?

Mrs. Lenore Duff: It could not be done through regulations.

Mr. Hoang Mai: Okay.

Thank you very much.

The Chair: Mr. McGuinty.

Mr. David McGuinty (Ottawa South, Lib.): On that, if I may, Mr. Chair, I'm just following up. I think this is a clause 7 issue as well. When the head of the Canadian Association of Fire Chiefs was here, he alluded to proposals in this regard that had been made to the government and had been declined.

Are you aware of those proposals? Do you know which proposals he was referring to?

Mrs. Lenore Duff: No, I don't.

Mr. David McGuinty: He said that he made a formal submission to Transport Canada that had been declined because it didn't meet certain criteria. It was to raise the very revenue he was looking for: the training funding.

Mrs. Lenore Duff: I'm sorry. I'm not familiar with that.

Mr. David McGuinty: You're not aware of that?

Thanks.

The Chair: Mr. Kellway.

Mr. Matthew Kellway: I'm curious about the billion dollars. Clearly, the railways do their own risk assessments, and I guess that's proprietary. It hasn't been shared with us, blah, blah, blah. But the testimony was that their insurance coverage exceeds what's in the act by \$500 million, so the question went to the minister when she was here: what is the department's risk assessment that would get us to a lower amount?

Can you unpack that for us and tell us what went into your risk assessment? What are the numbers? What's the math that brought you to the conclusion that a billion dollars was sufficient?

• (1600)

Mrs. Lenore Duff: I can comment generally on it and say that what the numbers were based on was historical accident data. I can say that there have not been a great number of rail accidents with significant damages. So the data is limited to some extent, and obviously that's a positive thing, but it's based on the cost of actual accidents that have occurred and what the payouts were for them. That's how we came to the billion dollars.

I guess I'd just make another comment with respect to that. These are minimum requirements, so if class 1 railways choose to ensure their operations for more than a billion dollars, they are certainly free to do that. In terms of what their insurance levels are now or what the market supports, those things vary somewhat over time, but the billion dollars was arrived at by looking at historical accident data and what has actually been paid out, and what we understand this billion dollars would cover.

The Chair: Do you have another question?

Mr. Matthew Kellway: I do.

The Chair: Continue, then.

Mr. Matthew Kellway: Do you know or do you understand how your risk assessment differs from the one done by the railways? You're looking strictly at historical data. One of my concerns was that we know specifically with respect to oil by rail that it's been increasing at quite a dramatic rate over the last six years or so.

Historical data is going to be of limited use, it seems to me, if the probabilities of an accident are going to go up because you have more cars carrying oil across this country. Is that possibly what the railway is looking at? Is the railway looking at it prospectively and saying that these are the trends and they need to account for higher probabilities because of the growth in oil by rail?

How does your risk assessment differ from theirs? Do you know that? Do you have that kind of information?

Mrs. Lenore Duff: No. I don't have the information with respect to the railways' risk assessment and how they determine business decisions.

Mr. Matthew Kellway: Their methodology...? You don't look into it?

Mrs. Lenore Duff: No. I don't have access to that methodology.

With respect to your specific comment about increasing volumes of oil, I agree that it potentially may increase the potential for accidents, but the billion dollars in insurance is per occurrence, so it would still have sufficient coverage for each accident that could potentially occur. The additional amount of oil being transported would be accounted for by the billion dollars per occurrence. It doesn't necessarily increase the cost of an accident.

Mr. Matthew Kellway: Well, at the risk of being argumentative, except that if there's more oil by rail, it's more oil passing through bigger cities. The one accident we've had that has been quite catastrophic and expensive was in a small town. I guess we don't know exactly what the total cost of all that was, but it was up in the hundreds of millions. I think everybody understand that.

In the context of a big city such as Toronto, where we have a lot of oil going by rail in communities of literally 10,000 people a stone's throw away from rail track, clearly there's an increased probability of an accident in a dense urban community that's going to cost well in excess of what's happened in Lac-Mégantic for a few hundred million dollars. I would have thought that those are the kinds of things that would have been taken into account in the risk assessment.

If yours is different from theirs, and you don't know how they came up with theirs, is there not an industry standard for determining liability that you would have employed?

• (1605)

Mrs. Lenore Duff: When you say "an industry standard", I expect that there would be an insurance industry standard about how they advise on liability, and they do that with actuarial assessments. Our work was based on risk assessments, I expect in the same manner; I can't confirm that because I don't know exactly what the railways do or what insurance companies do. But we believe the methodology we used has provided for the amount of liability insurance that would cover the accidents that could potentially occur.

Mr. Matthew Kellway: In your process of arriving at a billion dollars, you didn't go out to the insurance industry and ask what

those guys do to assess risk, costs, and all the rest of that kind of stuff that would have gone into this?

Mrs. Lenore Duff: Yes, we did go to insurance companies and did have those discussions with them, both with respect to what would be a reasonable amount of insurance for liability.... In the case of these accidents, we dealt with both Marsh, which was before the committee here, and Aon, both on whether the assumptions we used were the right ones and for whether the market could bear the amount of insurance that we had proposed.

Mr. Matthew Kellway: I'm struggling to reconcile the answers I'm getting to this. You've told me that you don't know what the differences were, and yet you consulted and adopted their methodology. How am I to reconcile those?

Mrs. Lenore Duff: I think you asked me what the difference was between our methodology and their methodology with respect to the class 1 railways. I said that I don't know what that methodology is. Then you asked me if I consulted with insurance companies with respect to confirming our approach, and I said, yes, we had. I don't think those two things are inconsistent.

We used a methodology and consulted with insurance companies with respect to the amounts we proposed for this legislation and had confirmation from them that these seem like the appropriate amounts, but I don't know what methodology they specifically use with class 1 railways and where they determine insurance levels for them.

The Chair: Before we go to Mr. Mai, somebody's phone is beeping. I think it's over there.

Could you shut it down, please?

Mr. Mai.

Mr. Hoang Mai: Thank you very much.

Quickly, also regarding the risk assessments, when you looked at previous accidents, did you look at what happened here in Canada or was it more in North America or other countries?

Mrs. Lenore Duff: We looked at what happened in North America. The majority of the significant accidents were in the United States.

Mr. Hoang Mai: Thank you.

The Chair: Mr. Watson.

Mr. Jeff Watson: Thanks, Chair.

I'm hoping I can bring some clarity to this.

In the government's assessment, checked with the insurance industry and based on data, I think that as the minister herself testified, something like the 99th percentile is covered under the \$1 billion, which would be, first of all, strict liability. You wouldn't have to prove a claim in court now. You would assume the fault of the rail company on a per incident basis. Anything, presumably, for the 100th percentile, or if there were a theoretical 120th percentile, would be covered by the supplemental fund, backstopped by the CRF, and repayable by shippers through the levy. Again, anything for the 100th percentile and above, anything exceeding the \$1 billion, in other words, would be shipper covered. Is that right?

Mrs. Lenore Duff: That's right.

Mr. Jeff Watson: Okay—

Mrs. Lenore Duff: [*Inaudible—Editor*]

Mr. Jeff Watson: So we've covered every scenario, then, if you will.

Not only that, I believe it was the CTA that last year in this committee's study suggested that the rail companies would not have access to additional insurance beyond what they carry at that particular point in North America, so I think we've found improvement to the system. It's a threshold that will cover the overwhelming majority of incidents on a per incident basis. It's strict liability now, not provable claim, and backstopped by the shippers covering the remainder of the liability.

Is that a fair assessment?

Mrs. Lenore Duff: That's a fair assessment.

Mr. Jeff Watson: I hope we can move on to clause 8.

The Chair: Is there any further discussion on the amendment?

Mr. McGuinty.

Mr. David McGuinty: I have just a quick question, if I may.

Ms. Duff, which insurance companies and who did you consult with exactly?

• (1610)

Mrs. Lenore Duff: The insurance companies were Aon and Marsh.

Mr. David McGuinty: We had Marsh here two weeks ago. We asked them directly if they had been consulted, and I'm not even sure if they said that they had made a written submission. I asked them specifically whether they had consulted with officials and the answer we got was no, so can you let us know who exactly was consulted at Aon and Marsh, please?

Mrs. Lenore Duff: It was Lois Gardiner at Aon. At Marsh, actually, I believe the person from Marsh indicated that he had consulted with the agency, but he actually consulted with the agency and with Transport Canada. For the gentleman from Marsh, I'll have to come back to you with his name.

Mr. David McGuinty: That would be great. Thanks.

The Chair: I'm going to call the question on clause 7.

Do you not have an amendment on this one?

A voice: No.

The Chair: Okay. My apologies. That's not what it says here in front of me.

(Clause 7 agreed to)

(On clause 8)

The Chair: Mr. Watson.

Mr. Jeff Watson: I'd like to move government amendment 1 on this. We heard from the Railway Association of Canada that they wanted some clarity with respect to application of the levy and who would collect. I think our officials could probably explain what this particular amendment will do, in effect, but it will stipulate who will have that responsibility.

I don't know if our officials want to explain.

Mrs. Lenore Duff: The amendment addresses an issue raised by stakeholders.

As currently drafted, the bill would require the levy to be collected by the first railway to carry the traffic to which the levy applies after loading. Because in the case of a regulated interswitching movement the first railway would not have a commercial or billing relationship with the shipper, the levy could be administratively burdensome to collect.

The motion to amend clause 8 of the bill modifies section 113 of the act to make the level of service obligation of a railway company responsible for levy collection, contingent upon the shipper's payment of the required levy. The proposed amendment is required to clarify that the railway responsible for collecting the level under sections 155.3 and 155.5 is the one that is first to carry the traffic to which the levy applies at a rate other than a regulated interswitching rate.

The Chair: Is there any other further discussion on Mr. Watson's amendment?

(Amendment agreed to [*See Minutes of Proceedings*])

(Clause 8 as amended agreed to)

Mr. David McGuinty: Don't we have to get going for votes, Mr. Chair?

The Chair: Yes, I was just going to finish that up.

We'll come back here immediately after the votes. The meeting is suspended.

• (1610)

_____ (Pause) _____

• (1700)

The Chair: We'll call the meeting back to order.

I apologize to everyone here, but that was out of our control.

(Clause 9 agreed to)

(On clause 10)

The Chair: On clause 10, I believe Mr. Watson wants to speak to amendment G-2.

Mr. Jeff Watson: Yes, Mr. Chair.

I want to move amendment G-2. Again, this amendment addresses an issue raised by stakeholders.

As currently drafted, the bill would require that the levy be collected by the first railway to carry the traffic to which the levy applies after loading. Because in the case of an interswitching movement that first railway would not have a commercial or billing relationship with the shipper, the levy could be administratively burdensome to collect.

The department is proposing a motion to amend three sections of clause 10 to clarify that the railway responsible for collecting the levy under sections 155.3 and 155.5 is the one that is first to carry traffic to which the levy applies at a rate other than an interswitching rate.

The Chair: Is there discussion on the amendment? All in favour? Opposed?

(Amendment agreed to [See *Minutes of Proceedings*])

The Chair: Clause—

Mr. Hoang Mai: I have questions regarding clause 10.

The Chair: Yes, well, I asked. Sorry.

Mr. Hoang Mai: No, you asked regarding the amendment.

I have just a few clarifications to get from the officials.

The Chair: You have some comments on the amendment?

Mr. Hoang Mai: No, on clause 10, not on the amendment.

The Chair: First of all, we were going to have a motion to approve the amendment. We had that. Now you want to speak to the clause itself.

Go ahead, Mr. Mai.

• (1705)

Mr. Hoang Mai: Thank you, Chair.

[*Translation*]

Again, my apologies for making you wait. My apologies, as well, for the heat.

We've heard from witnesses that the disaster or accident relief fund wouldn't cover environmental damage. Could you comment on that?

Mr. Alain Langlois: Covered damage for which railways are responsible under the first part of the liability regime is exactly the same damage covered under the fund. The damage covered under both regimes is entirely equivalent. Theoretically, environmental damage is covered by both.

Mr. Hoang Mai: One of the concerns raised was the fact that the provincial or federal government wouldn't be able to sue for environmental damages. I don't necessarily mean cleanup costs but, rather, long-term environmental damages.

Mr. Alain Langlois: If we are talking about damage caused by a third party, the damages are the same.

But if we are talking about damages that represent the loss of the non-use value of public resources, only a government can claim for those damages. Individuals can't claim for those damages.

Mr. Hoang Mai: If I understand correctly, then, it's still possible for a government to claim for environmental damages.

Mr. Alain Langlois: Both regimes are the same as far as covered damages are concerned. Now, as for who is allowed to make a claim under both regimes, that, too, is the same.

Mr. Hoang Mai: Very good.

Since I have the floor, I'd like to ask another question.

[*English*]

We did ask the minister when she came to the committee, and she said that she would submit to the committee the math that was used for calculation of the fund or the \$250 million. I was wondering if it was tabled today.

Not today? Okay.

[*Translation*]

When the Minister of Transport appeared before the committee, she agreed to submit the math used to calculate the \$250 million for the fund. So do you, as the Transport Canada representative, have those numbers? Can you provide them to the committee?

Again, it has to do with the calculations around the risk assessment.

[*English*]

For the risk assessment, from the start we've been asking for more information and more transparency for us to better understand the bill, and the minister did say that she would table the basis of the calculation to the committee.

I understand that we don't have it yet. Is it in the hands of Transport Canada? Can we expect to get that? Were you informed?

Mrs. Lenore Duff: I know that the minister did speak to that issue and said that the information would be forthcoming. I assume that it's just in process.

Mr. Hoang Mai: Thank you.

The Chair: Mr. McGuinty.

Mr. David McGuinty: Thanks.

I want to go back to the environmental litigation question. I didn't understand it, Mr. Langlois. Are you saying that under this bill the only party able to pursue a cause of action for ecological damages is the government?

Mr. Alain Langlois: No.

Mr. David McGuinty: Who is capable?

Mr. Alain Langlois: If a party suffers damages—

Mr. David McGuinty: Not a party.

Mr. Alain Langlois: If a person suffers damages—

Mr. David McGuinty: Not a person—if the environment suffers damages.

If, for example, the spill at Lac-Mégantic had not had a layer of natural clay, we would have seen thousands and thousands of litres of oil percolate through the soil into aquifers and then into watersheds. Is there a cause of action for any party to sue for damages that affect the environment?

Mr. Alain Langlois: A party.... I'll answer it in two portions. If a person suffers damages, they can claim. There is no question there. If there's damage to the environment, then there are costs incurred by government to clean up. Those costs are allowed. If there's loss of non-use value, the government is entitled to go after the railway up to the billion dollars and then to the fund for whatever is not covered. Well, assuming it's a class 1, it's a billion dollars, but if...it's whatever is covered by the insurance company.

• (1710)

Mr. David McGuinty: So if this bill passes, there's another Lac-Mégantic, and there are thousands if not millions of litres of fuel that spill into a river, what's the cause of action and who would actually proceed in civil courts?

Mr. Alain Langlois: The answer is who is going to clean it, and usually government goes out and cleans. In the case of Lac-Mégantic, the government went out and cleaned the oil. Costs incurred by governments are included, so those costs are eligible to be recovered, either against the railway or against the fund, depending on whether or not the insurance has been—

Mr. David McGuinty: I thought one of the witnesses who testified said that the only party, the only government, the only order of government, that would be authorized or eligible under this legislation to indemnify themselves for those costs was the federal government, not provinces and municipalities.

Mr. Alain Langlois: No, I mean—

Mr. David McGuinty: Is that right or wrong?

Mr. Alain Langlois: I'm not sure what the exact testimony was, but any costs or expense reasonably incurred by Her Majesty, or a province, or any other person in taking an action or measure in relation to railway accidents can be compensated, so it's pretty broad.

Mr. David McGuinty: Including a municipality?

Mr. Alain Langlois: Yes.

Mr. David McGuinty: Okay.

Can I go to my second question, Mr. Chair?

The Chair: Yes.

Mr. David McGuinty: It relates to the wording in proposed subsection 152.7(1) on the limit of liability of railway companies. It's described in the statute: "A railway company that operates a railway that is involved in a railway accident is liable for the losses, damages, costs and expenses...".

It states "that is involved in a railway accident". My understanding under most time-tested regulatory schemes is that this is not normal language. In most of those I've seen that cover the transportation of dangerous goods such as crude oil, the language is very much that it is the party that is in "the charge, the management or control" at the time of the accident or release, not the railway involved in a railway accident. What's the rationale for this language?

Mr. Alain Langlois: The language you allude to is language that is in the Transportation of Dangerous Goods Act. That's the construct of that legislation. We're working with different legislation.

Under this legislation, notions are defined differently. If we go to the section in the act that defines what "operation" means, for example, the notion of operation in the act means an operational physical sense. The way this section is construed, it's construed in line with the language that is currently used in the statute as a whole. What this section says is basically that while a railway company is physically operating its railway, if its physical operation gets involved in an accident, then they're liable.

It's not unusual. We're working with the language of that statute, and the language in this section is completely consistent with the language of the statute.

Mr. David McGuinty: The railway insurers came here. They testified that the vagueness of the language in C-52 was problematic for them. What I'm saying is that this is different language from what I've seen elsewhere. It's very broad. I'm wondering, too, about the risk here of insurance withdrawal, as well as any kind of protracted and unnecessary litigation. From 2006 to last year, this federal government has outsourced \$460 million on outside legal fees on top of having 2,550 full-time lawyers at Justice Canada. Are you not worried at all about this or given any thought to the possibility that this is going to create a significant amount of litigation?

If there is a sizable spill and sizable funds are spent to clean it up and there is sizable litigation on who was responsible for it, won't there a problem with the clarity of the language between "that is involved in a railway accident" and the party who is in "charge, the management or control" at the time of the accident or release?

Mr. Alain Langlois: Using the words "charge, the management or control" would not convey the policy intent in the first place, because the policy intent was to cover more than that. The policy intent was to cover every railway company that is physically involved in the operation and physically involved in an accident. The language in my opinion clearly conveys the intention.

Mr. David McGuinty: Okay.

Finally, was there any kind of legal opinion prepared in terms of the potential litigation that might flow from this?

Mr. Alain Langlois: An official opinion? I don't think an official opinion was provided.

• (1715)

Mr. David McGuinty: No legal opinion was—

Mr. Alain Langlois: We provide tons of legal opinion in the process of drafting legislation. When in the drafting room, that's all we do. We provide legal opinion to the client who is beside us. In terms of a formal legal opinion, I would probably say no, but in terms of legal opinion in the context of this bill, a lot.

Mr. David McGuinty: But nothing on that point?

Mr. Alain Langlois: On that point, yes.

Mr. David McGuinty: On that point, no, nothing was prepared formally?

Mr. Alain Langlois: On this issue of what these words imply?

Mr. David McGuinty: Mean?

Mr. Alain Langlois: Mean. Yes.

Mr. David McGuinty: Yes, there was an opinion prepared?

Mr. Alain Langlois: Yes.

Mr. David McGuinty: Is that something you can table here?

Mr. Alain Langlois: Personally, I'm not going to be able to table it. It's protected based on solicitor-client privilege. It's for the department to.... I give opinions to the Department of Transport and then they.... Normally I can say the Department of Justice and the Department of Transport are not in the habit of providing legal opinion in public.

Mr. David McGuinty: Thanks, Mr. Chair.

The Chair: Mr. Mai.

Mr. Hoang Mai: I'd like to come back to the non-use issue. If I understand correctly, when we talk about non-use and the environment, it's the fact that we might lose its use for future generations and things like that. You're saying that individuals might not be able to sue, but only governments. In the proposed changes, it clearly says that the non-use "shall rank without preference before those recover loss of non-use value". It will come after damages. Why do we have that?

Mr. Alain Langlois: I can't speak for the policy, but the intent was to allow damage suffered by parties to be compensated first.

Mr. Hoang Mai: You say it's the same regime as the minimum coverage for insurance. For non-use value, the environment will always come after damages or loss that can—

Mr. Alain Langlois: Indeed. If we assume a billion dollar insurance coverage, and if within the billion dollars there's not enough, damage suffered by private parties or cleanup costs will come first, will come before, if there's not enough before non-use value. If there's enough, then it's a moot point. If there's not enough, then the funds would kick in.

Mr. Hoang Mai: Okay. Again our concern is that at the end of the day it's not the taxpayers who have to pay for cleanup costs. You're saying that either the liability or the fund will cover that. It's just a question, I reckon....

Mr. Alain Langlois: Okay.

Mr. Hoang Mai: I'm fine with that.

The Chair: Mr. Watson.

Mr. Jeff Watson: That was the point I was going to make. The fund would kick in and the fund is not capped. There may be a target to it, but the fund itself is not capped. Theoretically the only limitation at the end of the day might be the full capacity of the shippers to absorb the cost of it. That would be the only theoretical liability beyond the billion and the \$250 million set aside, whatever else would have to come. That would be the only theoretical limitation.

Mr. Hoang Mai: In committee we heard the Ontario Association of Fire Chiefs, CAPP, and the FCM say that they would like to see dangerous goods other than crude oil covered by the fund. I understand that might happen afterward. Can you tell us where we are at in terms of the process? Is it because we're looking at covering

other types of dangerous goods, or is it something that will have to come from the minister? Where are we at on that front?

Mrs. Lenore Duff: There are regulations that provide for scoping in other dangerous goods. A decision would have to be made by the government to move forward with that.

Mr. Hoang Mai: The government would have to tell Transport Canada to cover other dangerous goods.

Mrs. Lenore Duff: That's right.

Mr. Hoang Mai: At this stage we don't have anything yet.

Okay, thank you very much.

Mrs. Lenore Duff: This legislation doesn't cover anything other than oil.

Mr. Hoang Mai: Yes thanks.

The Chair: Mr. McGuinty.

Mr. David McGuinty: If I could, Mr. Chair, I have one last question on this issue of "involved" versus in "charge, management or control" at the time of the accident or release. Is it not the nature of the rail industry in Canada that shipments are regularly interchanged and passed off between different companies?

• (1720)

Mr. Alain Langlois: It happens.

Mr. David McGuinty: Say there are three or four railway companies involved in a particular shipment, from point A to its final destination. Correct?

Mr. Alain Langlois: Under a certain level, yes.

Mr. David McGuinty: If there's an accident involving one of the four railways, who is responsible?

Mr. Alain Langlois: The question will be, who is the operator? I'm going back to the notion of operates. "Operate" is defined in the act in a way that it's the physical operation of a railway. It's not how you operate a business; it's the physical operation. You have to be involved while you physically operate your railway. If you have two railways that collide with each other, both railways are involved. If you have one railway that is involved in an accident, and the traffic was interchanged from another railway a hundred miles away, the other railway is not involved.

Mr. David McGuinty: So you say, but in terms of causality I don't know if that's the case. Did you ask the insurance industry about this and the effects on insurance availability and coverage? What did they say when they looked at this question, or this wording that you say is commonplace, on whether a company is involved in a railway accident? If I'm a lawyer acting for one of these four railways, and I'm acting for the railway that had possession of the goods when the accident occurred, why wouldn't I construct the case that says the three other railways were involved as well?

Mr. Alain Langlois: I was only a part of one meeting. Lenore may be able to add something.

Mr. David McGuinty: Ms. Duff, is there something you can help us understand in terms of plain English understanding?

Mr. Alain Langlois: The comment was made to us. We gave the same explanation I'm giving you, and this seemed to satisfy the concern.

Mr. David McGuinty: The insurance industry is satisfied with this?

Mr. Alain Langlois: The comments that were made, the explanation that was given, and the explanation as to what “operate” means in the context of the act seemed to address the concern.

Mr. David McGuinty: Mr. Chair, as a former corporate lawyer who litigated and I look at the plain English language of this, what I see is cause of action all over this for different parties who will argue that somebody else was in fact involved as well, and not just their client. This is why we’ve evolved, especially in terms of the specificity of “charge, the management or control” at the time of the accident or release, on so many of the transportation of dangerous goods questions. We’ve narrowed it down precisely to circumscribe the possibility of saying others were involved too.

Mr. Alain Langlois: The problem with that language is that if I have a railway that carries traffic on the railway line of another railway, and there’s an accident, who has control of the traffic is technically speaking the railway that’s carrying the traffic. I think the intention of the government was to avoid debate as to what was the cause of the accident. It could be faulty trackage, which would be the host railway. In that case, the intention of the government was to make both railways that are physically involved in the accident liable, and that language would not address it.

Mr. David McGuinty: Thanks, Mr. Chair.

The Chair: Is there no further discussion?

(Clause 10 as amended agreed to)

(Clauses 11 to 16 inclusive agreed to)

(On clause 17)

The Chair: Next we have NDP-2.

Mr. Hoang Mai: Mr. Chair, I’m moving the amendment.

NDP-2, our second amendment, is regarding the fact that this bill repeals the definition of “fatigue science”, in subsection 4(1) of the Railway Safety Act.

We did ask questions to the—

The Chair: Before we go any further, you’ve moved it and I had to let you do that before I make my ruling. I have to rule this inadmissible on advice that I have, Mr. Mai.

Okay?

Mr. Hoang Mai: Noted.

The Chair: I don’t think we need a vote on it.

Mr. Hoang Mai: Unless I challenge the chair.

The Chair: Yes, okay.

With that, shall clause 17 carry?

Mr. Hoang Mai: On division.

The Chair: On division? Okay.

(Clause 17 agreed to on division)

(Clauses 18 to 20 inclusive agreed to)

The Chair: Now on to proposed new clause 20.1.

•(1725)

Mr. Hoang Mai: That’s NDP amendment 3.

The Chair: Okay, are you moving that?

Mr. Hoang Mai: I am moving that.

The Chair: I have a similar ruling on that one, Mr. Mai.

Mr. Hoang Mai: Noted.

The Chair: This was for a new clause, and now that it’s basically withdrawn, we don’t have a vote on it.

Mr. Hoang Mai: It’s deemed inadmissible.

The Chair: Rathika.

Ms. Rathika Sitsabaiesan (Scarborough—Rouge River, NDP): I thought it was deemed inadmissible.

The Chair: Yes, it was.

(Clauses 21 to 33 inclusive agreed to)

(On clause 34)

The Chair: On clause 34, PV-1.

Is there any discussion on Ms. May’s amendment?

Mr. Hoang Mai: I understand that the amendment is to have positive train control.

Does the chair accept the amendment?

The Chair: Yes, I have no ruling.

Mr. Hoang Mai: This is something that the NDP has also been asking for—for a long time.

We’re talking about rail safety. I don’t know if the officials who are here have seen the amendment, but maybe they can comment on it.

Ms. Brigitte Diogo (Director General, Rail Safety, Department of Transport): We have seen the amendment. The department does not support this amendment for the reason that the current legislation already contains a series of powers to ensure that we take into account innovation of technology into the rail safety regime.

Furthermore, the amendment as proposed is amending the section relating to SMS, the safety management system, which is about the processes and procedures that companies have to put in place to ensure that safety is incorporated into their day-to-day operations. The amendment technically would not fit under SMS.

Mr. Hoang Mai: I understand the technicality of where it is placed, but can you explain whether it is the decision of Transport Canada not to move forward regarding the implementation of positive train control, and why?

Ms. Brigitte Diogo: I would say that it’s not a question about moving or not moving. There are discussions right now in terms of doing research on train control.

At this stage, it would be premature for us to provide advice to the minister on whether to adopt it or not because the research is ongoing.

Mr. Hoang Mai: It’s something that has been raised for many years now.

At the end of the day, if I understand correctly, Transport Canada will make a proposal or a suggestion and then it's the minister's decision to move forward or not.

Is that correct?

Ms. Brigitte Diogo: I would say there are two ways. What you just described is certainly one of them. The second possibility is for the industry to approach Transport Canada and to make a submission for this to be considered either through a submission of the rule, or by requesting an exemption so they can use the technology.

Mr. Hoang Mai: Has Transport Canada set a timeline of when the studies will be done in order to have an opinion on the technology?

Ms. Brigitte Diogo: What I would say is that the discussions are ongoing. These discussions include not only Transport Canada, but also the industry. There is a working group that has been established under the advisory council for rail safety. Once the working group has reached a consensus on recommendations they will be submitted to the minister.

• (1730)

Mr. Hoang Mai: Thank you very much.

The Chair: Any further discussion on the amendment?

(Amendment negatived [See *Minutes of Proceedings*])

(Clause 34 agreed to)

(Clauses 35 to 40 inclusive agreed to)

The Chair: Shall the schedule carry?

Some hon. members: Agreed.

The Chair: Shall the short title carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

Some hon. members: Agreed.

The Chair: Shall the chair report the bill as amended to the House?

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill as amended for the use of the House at report stage?

Some hon. members: Agreed.

The Chair: Thank you very much, everyone.

Ms. Duff.

Mrs. Lenore Duff: Thank you, Mr. Chair.

Just to respond to the question that was asked earlier about whom we communicated with at Marsh Canada, the name was Evan Garner.

Mr. David McGuinty: Garner?

Mrs. Lenore Duff: Garner.

The Chair: Thank you very much to all of you for being here.

The meeting is adjourned.

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