When the train leaves the tracks: protecting yourself against liability for a spill

By By David de Groot, Burnet, Duckworth & Palmer LLP

We all generally know the horrific details—late on July 5, 2013, a Montreal, Maine & Atlantic Railway, Inc. train containing 72 non-pressure dangerous goods tank cars was left unlocked and unattended on a downhill grade near Nantes, Que. In the very early morning of the next day, the train began to roll and did so uncontrolled for approximately seven miles until it reached the town of Lac-Mégantic, where it derailed. The resulting loss of life and damage to property and the environment was unprecedented in Canada.

No oil producer, oil refiner or any other person who arranged for the crude oil to be shipped (for convenience we will include all of them as consignors) was present when this derailment occurred. Yet the resulting litigation has named some of these entities—raising allegations that, among others, the consignors:

- Failed to take reasonable care to ensure the crude oil was properly and safely transported;
- Failed to ensure the crude oil was transported in the appropriate means of containment;
- Failed to inspect the train before allowing it to be used to transport dangerous goods; and
- Failed to hire properly trained staff with a positive safety record to handle the transfer of the crude oil.

The dangerous goods and transportation statutory regime

In Canada, the transportation of dangerous goods is regulated by both the federal and provincial governments. Both regulatory regimes classify crude oil as a Class 3 dangerous good. These regimes place a number of express obligations on persons who have “possession of dangerous goods immediately before they are in transport” and those who “offer for transport” dangerous goods (which could include an operator if oil is loaded from their facility, under Canadian Association of Petroleum Landmen procedure). These obligations include:
• Preparing and providing the carrier with a shipping document that includes the name and address of the consignor and a description of the dangerous goods, including its class, its UN number (like a bar code for dangerous goods) and its packing group;
• Providing and displaying all dangerous goods safety marks on the railcar. The federal regulations contain detailed requirements on the visibility, legibility, colour, size, orientation, display, removal and change of safety marks;
• Ensuring that the dangerous goods are shipped in the prescribed type of railcar and that those containers comply with all applicable prescribed safety standards; and
• Ensuring that any individual responsible for shipping any dangerous goods is adequately trained.

Importantly, when shipping crude oil, consignors must classify the crude oil appropriately using the Packing Group system, which is based on the crude oil products’ boiling point and flash points. Packing Group I is the most explosive and requires the most stringent means of containment and handling. Packing Group III is the least explosive. In the Lac-Mégantic situation, the crude was classified as a III, but should have been a II.

Since the Lac-Mégantic derailment, Transport Canada has issued Protective Direction No. 31, requiring that any person offering crude oil for transport must immediately test the crude oil classification if such testing has not been conducted since July 7, 2013. If no such testing is completed, the person offering the crude oil for transportation must classify the crude oil as Packing Group I. This will result in increased transportation cost due to the more stringent requirements for shipping this type of crude oil.

Considering how to mitigate damages
Based on all of these requirements, consignors should at least consider the following issues before offering crude oil for transportation:

• Does the consignor have an employee who is adequately trained to properly understand the regulatory requirements, including sufficient knowledge of safety marks, means of containment and shipping documents to fulfill their obligations under the regulatory regimes?
• Does the consignor have processes and company policies in place to ensure that shipping documents are completed appropriately, that safety marks meet the prescribed requirements of the regulations and that the type of railcars being employed by the carrier are appropriate?
• Is the consignor conducting testing of crude oil according to a reasonable schedule to ensure that the classification of the crude oil is accurate? This factor is important because as new wells come on line or new purchases are made at facilities, the characteristics of the product may change. Accordingly, developing reasonable testing schedules is important.

In addition to these considerations, those who offer crude oil for transportation should:

• Investigate those carriers with whom they contract to ensure that the carriers also meet the regulations, including the requirement that the carrier has adequately trained employees, proper railcars and proper safety marks;
• Conduct periodic investigations into the carriers’ on going safety policies and equipment; and
• Include provisions in their contracts with carriers to assign liability to the carrier, to ensure the carrier has sufficient insurance and to include terms prohibiting subcontracting without the express consent of the consignor.

Consignors should take all reasonable measures to ensure that they have implemented policies that guarantee they and their carriers are complying with the regulatory regime for the transportation of dangerous goods. Not only will these steps ensure that consignors can respond to any charges under the statutory regime with due diligence defences (i.e. they did everything reasonably required to comply with the regulations), but these steps will also assist the consignor in responding to any allegation that they acted unreasonably and should be liable in damages.
Finally, given the detailed complexity of this regulatory regime and the importance of adequate training, anyone who has questions about their obligations when offering crude oil for transportation should consult appropriate legal advice or retain individuals who are appropriately qualified under the regulations.

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