

**DANGEROUS MOVES: THE LAW RESPONDS  
TO THE TRANSPORTATION OF DANGEROUS GOODS**

Comments on the Paper of Murray Rankin,  
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on Law and the Environment

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## INTRODUCTION

One of the keynote questions in environmental protection today is whether, or to what extent, a comprehensive code of laws for the protection of the environment now exists. Where it does not exist, or is not effective, we must also ask what the components of such a code ought to be. Professor Rankin has pointed out that there is a complex web of overlapping laws, at all levels of government, dealing with the movement of dangerous goods on land. I propose to comment on his paper by asking whether, or to what extent, we have that comprehensive code with respect to the transportation of dangerous goods on land. I will not attempt to answer the question by developing a checklist of critical matters and then asking whether they are covered by the laws Professor Rankin has referred to. Instead, I will use as a standard the question of whether the existing laws achieve the basic goals of such a comprehensive code. As part of that enquiry, I will ask whether, in attempting to achieve those basic goals, the existing laws are characterized by what I regard as the hallmarks of effective environmental legislation, namely the fair and efficient allocation of risk.<sup>i</sup> I will suggest that only by that fair and efficient allocation of risk can environmental protection laws effectively reduce uncertainty and risk.

Laws governing the transportation of dangerous goods on land must satisfy three basic goals:

1. The prevention of spills;
2. The clean-up of spills, with a minimum of damage and at a minimum cost;
3. The compensation, quickly and adequately, of those who suffer damages from the spills.

In determining whether the existing laws effectively accomplish those goals, we must also deal with a related issue: are the obligations contained in those laws imposed fairly and efficiently? The most important criterion in making that determination is whether the obligations in the laws are imposed on those best able to bear them; if they are not, the likelihood that the laws will operate effectively is substantially reduced.

With these general principles in mind, I will divide my comments into two sections. The first will deal with the prevention and clean-up of spills. The focus will be on the *Transportation of Dangerous Goods Act* (TDGA).<sup>ii</sup> I will suggest that the TDGA is a model for the fair and efficient allocation of obligations. To illustrate that point, I will contrast the TDGA with the Ontario legislation which adopts the TDGA standards for intra-provincial movements of dangerous goods, the *Dangerous Goods Transportation Act 1981*, (DGTA).<sup>iii</sup>

The second section will deal with the issue of compensation. Although compensation is a broad topic, in some measure outside the scope of both Professor Rankin's paper and these comments, it is important in determining whether a comprehensive code to deal with the transportation of dangerous goods on land exists. I will focus on the Ontario "Spills Bill" as a model for a system of compensation for those injured by spills.

## II. THE PREVENTION AND CLEAN-UP OF SPILLS

It is useful to remember what the TDGA does not cover. First, it is a Federal legislation which does not apply automatically to the intra-provincial transportation of dangerous goods. Secondly, it is legislation which deals with “dangerous” goods and not with “pollutants”. Finally, it does not deal with the issue of compensation, an element which is critical to the successful operation of any scheme of environmental protection. These are significant gaps in the legislation. I also share Professor Rankin’s concern with some of the provisions of the TDGA and its regulations, for example, the adequacy of the provisions dealing with training.

It is also important to remember that, notwithstanding its name, the TDGA applies not just to the transportation of dangerous goods, but also to the handling and offering for transport of dangerous goods. The core of the TDGA lies in its regulations,<sup>iv</sup> which have been correctly characterized as bewilderingly complex. Those regulations impose a number of different obligations. The primary obligation is the classification of goods.<sup>v</sup> Once that classification has taken place, and depending upon the classification, the regulations impose requirements with respect to packaging,<sup>vi</sup> marking<sup>vii</sup> and labelling<sup>viii</sup> dangerous goods. Further obligations relate to placarding<sup>ix</sup> the goods when they are shipped. There are detailed requirements with respect to the documentation<sup>x</sup> which must accompany the goods when being transported. There are obligations to train individuals<sup>xi</sup> who will be handling dangerous goods and obligations to notify responsible agencies and parties when there has been a spill.<sup>xii</sup> Finally, the regulations require, in some instances, that emergency response plans be prepared and filed.<sup>xiii</sup>

The most important feature of the regulations under the TDGA is that each of those burdens is placed on the party best able to discharge them. This is clear, for example, from the documentation requirements. Those requirements are detailed and necessitate a thorough knowledge of the precise characteristics of the product being shipped. The consignor, who in most cases will also be the manufacturer, is responsible for the preparation of the shipping document. Because the consignor almost certainly knows more than anyone else about the product, it is appropriate that he bear that burden. It is also less costly for the consignor to bear that burden. The same can be said, for example, of the packaging and marking requirements.

In thus allocating burdens to those best able to bear them, the TDGA meets the criteria of fairness and efficiency. In contrast, the Ontario legislation which applies the TDGA requirements to intra-provincial movements, (the DGTA), adopts the federal standards but applies them only to the transporting of goods.<sup>xiv</sup> The result is that the extensive and detailed obligations created by the regulations under TDGA fall on the carrier, regardless of its size, sophistication, financial resources or the value to the carrier of the transportation of the goods in question. To illustrate this phenomenon, I offer the example of a small for-hire carrier whose principal business is the transportation of products for one large shipper. Included among the products which the shipper moves are goods classified as dangerous in the regulations under TDGA. The shipper, through inadvertence or otherwise, mis-describes those dangerous goods and, as a result, prepares incomplete and improper documentation. The carrier may be aware of the problem and may, indeed,

bring it to the attention of the shipper. But the shipper is not liable under the DGTA and, therefore, refuses to comply with the requirements. The carrier, however, is liable. Unless the carrier refuses to transport the mis-described goods with the improper documentation, the due diligence defence under Section 5<sup>xv</sup> of the DGTA is effectively not available to him. The carrier is thus caught by the dilemma of having to refuse to transport goods for the shipper, and thus perhaps going out of business, or paying the occasional fine under the DGTA.

An argument can be made that the carrier could issue its own documentation. Quite apart from any other considerations, this suggestion illustrates the point that the allocation of risks should be efficient in the sense of being borne by those able to most economically bear them.

This represents what I would call the “bottleneck” theory of enforcement. Carriers are the easiest to catch because a system of regulation is already in place, for example, with respect to weight laws, which requires carriers to report on a regular basis to weigh scales. It would be more difficult to enforce the DGTA if the activities of the shippers had to be investigated as well.

The principal weakness of the DGTA is that it does not impose its burdens fairly and efficiently. There is, thus, a built-in disincentive to compliance. In addition, by allocating the burdens unfairly, the DGTA exacerbates the pressures which arise naturally from the difference in economic strengths of shippers and carriers. Carriers would be unlikely to complain to a shipper about the shipper’s violation of the DGTA for fear of losing business. Indeed, they may be unable to rectify problems without risking their livelihood. The end result is that the detailed requirements of the regulations under the TDGA may not in fact provide maximum protection to society from the risk of spills.

Professor Rankin notes that most accidents involving dangerous goods occur as part of shipments by road. Unfortunately, no reliable data is available which breaks down those shipments by size or type of shipment or by size or type of carrier. It is impossible to know how many goods of a particular kind are carried by larger, relatively sophisticated carriers as opposed to smaller carriers who are more vulnerable to economic pressure. The important point, even in the absence of that data, is that the system designed to encourage the safe transportation of dangerous goods and to prevent spills should not impose an undue burden on those least able to bear it. To the extent that it does, it weakens the prevention mechanisms and, incidentally, increases the risk and uncertainty associated with the movement of dangerous goods.

### III. THE COMPENSATION OF THE VICTIMS OF SPILLS

Victim compensation laws form a critically important part of the nexus of laws designed to prevent spills and ensure that they are cleaned up quickly. Such laws, which impose burdens for compensation and create mechanisms by which victims can be compensated quickly and completely are, in my view, a major incentive for shippers and carriers to transport goods safely. Absent such laws, shippers and carriers might be inclined to regard the fines for violation of the TDGA or its provincial counterparts as merely a cost of doing business.

As discussed by other speakers in this Seminar, the common law remedies to compensate the victims of spills are not adequate to the task. Too many difficulties arise from having several heads of liability, each with problems of standing and proof. There are too many limitations on the range of compensable damages for these remedies to be truly useful in dealing with the often far-reaching and complicated consequence of the spills of dangerous goods. One model for a statutory scheme of victim compensation is Part IX of the Ontario *Environmental Protection Act*<sup>xvi</sup> popularly known as the "Spills Bill". The Spills Bill will be dealt with at greater length at another point in this conference. At this stage I will restrict myself to a limited number of observations about it.

To begin with, the Spills Bill attempts to overcome, in some measure, the deficiencies of the common law remedies, through the following provisions:

1. By imposing a standard of absolute liability for the costs of cleanup and restoration;
2. By extending damage compensation awards to include pure economic loss;
3. By eliminating the need for proof of negligence;
4. By creating a system of ultimate state compensation in circumstances where the person who caused the spill is unable to pay.

These are all important improvements on the old system which relied entirely on the common law remedies.

I want to focus on whether the Spills Bill achieves the goal of the fair and efficient allocation of burdens on those most able to bear them. Two matters require comment. The first is that the Spills Bill imposes the burdens of clean-up, restoration and compensation jointly and severally on the owner of the pollutant and the person in control. By the use of simple, and quite legitimate, contractual arrangements the ownership of the goods can be shifted from, for example, an owner, typically a manufacturer or shipper, to the carrier or consignee. I suggest that, in the overwhelming majority of cases, the owner of the goods is in the best position to prevent a spill and is most likely to be able to bear the burden of compensating a victim. By contrast, a carrier or consignee is less able to prevent a spill and may, in many cases, be less able to provide compensation.

The Spills Bill also allows an owner to shift its obligations to other

parties by legitimate contractual devices such as, for example, indemnification provisions. These provisions are less insidious in their effect than shifts in the ownership of the goods transported. The owner remains jointly and severally liable with the person in control. However, the ultimate burden of compensating the victims of the spill may fall on the person in control who may be the person least able to avoid the risk and least able to compensate the victim.

The Spills Bill is in many respects an important and worthwhile advance in the development of a comprehensive code for the protection of environment. Unfortunately, it permits, by quite legitimate contractual devices, the shifting of important obligations onto those least able to bear them. One result is that society does not at all times know where its risks lie with respect to preventing spills, cleaning them up, restoring the environment and compensating victims. In other words, the Spills Bill in some measure leaves untouched the problems of risk and uncertainty which are the central concerns of any comprehensive code for the protection of the environment.

## **CONCLUSION**

I am unable, in these brief comments, to do justice either to Professor Rankin's paper or to the layered complexity of this subject. In conclusion, I believe that we are moving, perhaps in a somewhat disjointed fashion, toward a comprehensive code for the protection of the environment. With respect to the transportation of dangerous goods on land we are, as Professor Rankin suggests, moving in the right direction. Unfortunately, as I have suggested above, there are gaps in that code which are attributable, in my view, to a failure to design all the legislation so that risks are allocated fairly and efficiently. Only when that is done will the problems of risk and uncertainty be truly manageable.

## FOOTNOTES

- i. The concept of efficiency arises from the application of economic principles to legal issues. There is a substantial body of literature applying the concept of efficiency to such issues. A useful analysis of the concept of efficiency in the context of environmental protection legislation is found in a paper prepared by Freya Kristjanson for Professor Rankin. The author gratefully acknowledges the use of her work in pre-paring these comments.
- ii. *Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19.
- iii. *Dangerous Goods Transportation Act 1981*, S.O. 1981, c. 69.
- iv. *Transportation of Dangerous Goods Regulations*, SOR/85-77.
- v. *Ibid.* s. 3.1.
- vi. *Ibid.*
- vii. *Ibid.* s. 5.37.
- viii. *Ibid.* s. 5.7.
- ix. *Ibid.* s. 5.16.
- x. *Ibid.* s. 4.1.
- xi. *Ibid.* s. 9.10.
- xii. *Ibid.* s. 9.13.
- xiii. *Ibid.* s. 7.15.
- xiv. S.O. 1981, c. 69, s.3.
- xv. *Ibid.* s. 5.
- xvi. R.S.O. 1980, c. 141.