Panel 4: (How) Can the transportation of oil by rail be made safe? How (Can) the justice system and regulatory system be reform in the wake of Lac-Mégantic? What are the implications for future oil transportation infrastructure development?

Summary: Rachel Nadeau, and Semie Sama, law faculty students, University of Ottawa

Moderator: CBC investigative journalist, Dave Seglins

The first speaker was Harry Gow, past president of Transport Action Canada. He addressed the different issues, making several recommendations. Mr. Gow first observed that the political will of Transport Canada to enforce safety standards is weak. He recommended that: 1) the Crown and corporations should be made more accountable and possibilities of escape should be diminished; 2) climate change action must not be ignored in decisions about transport safety; and the Green party should seek for an injunction to get off oil. However, the mission of the Transportation Safety Board (TSB) should not change. It would affect the objectivity of TSB. It is also necessary to harmonize information concerning dangerous goods across Canada. Mr. Gow considered that regarding the future of oil transportation, bypasses are not the only alternative to look at. While the bypass of Lac-Mégantic is the subject of delays and further studies, still no investments are planned in such works. Moreover, the abandonment of alternative railway lines is problematic, because only main lines across cities are used. Municipalities should refuse new construction along railroads to ensure population’s safety.

The second speaker, Lynda Collins, is an associate Professor at Ottawa University. Prof. Collins identified three crucial levers—criminal liability, constitutional remedies, and the judiciary—that can be useful for lifting the company veil and holding senior officers, board of directors, etc. accountable for rail accidents. It is important to sue corporate directors and senior officers, ensuring that profits do not come from wrong decisions. People involved in class actions should invoke a constitutional violation of the rights to life, liberty and security. Serious threats to the rights to life, liberty and security could constitute a violation of the Canadian Charter and those accusations would get attention from media. Finally, judiciary debates should not end before Court. Even with judges, judicial education is needed, because their perception about the carefulness of government when regulating is not always correct. They should also consider that responsibility regarding environmental protection is as important as other judicial aspects. In those cases, she suggests public intervention via the elaboration of petitions reclaiming environmental protection. However, all suggestions put forward by Prof. Collins are not applied. To arrive at technical solutions needs a lot of work, though some success stories exist. For example, the outcome in the wake of the water contamination in Walkerton was a massive public outcry for environmental protection.

Mr. René-David Cooper holds a L.L.M. in Aviation law and is a Law Clerk at the Federal Court of Appeal. He discussed the usefulness of safety management system. Regulation by state, meets its threshold in predicting every possible scenario. A gap will always exist between the security and state’s regulation. The role of regulation is to keep control of
railway safety and stabilize the situation when the industry is in crisis. In fact, laws need regulations, because without it, the state cannot intervene. Using safety management system (SMS) helps to identify risks and to take subsequent measures. SMS are increasing global security while allowing proactive risk assessments put forward by railway companies. However, the actual situation allows railway companies with financial difficulties to cut corners. SMS should be consider as an addition, rather than a major defence mechanism and should remain a shared responsibility—a collaborative effort between the government and industries—given its multidisciplinary nature. The absence of such an effort was the cause of the Lac-Mégantic disaster. From M. Cooper’s perspective, it is currently difficult for a company to implement and maintain SMS, given the huge costs involved and considering that Transport Canada rushed their implementation in railway transportation. The employees had not an entire knowledge of the system and it contributed to the problem that led to the tragedy of Lac-Mégantic. Moreover, there is an economic aspect in the viability of SMS: if the industry is financially weak, how can ensure that it is working in an effective way?

The fourth speaker was Mr. Bruce Campbell, former Executive Director of the Canadian Centre for Policy Alternatives and visiting fellow at the University of Ottawa. As preliminary remarks, he said that that the contribution of journalists had been essential in raising awareness about the Lac-Mégantic disaster. He made a number of recommendations to transportation oil by rail more safely as it continues to increase in coming years. They include: accelerating the phase-out of unsafe tank cars (CPC-1232s); measures to stabilize the most volatile components of Bakken shale and bitumen (dilbit); a rethinking of the safety management systems model of regulation and measures to reduce regulatory capture; measures to improve brake systems and address worker fatigue. Furthermore, he stated the justice system has failed to hold those responsible accountable, and should be reformed.

The last speaker was Linda Duncan, an NDP MP involved in transportation issues and environmental protection. Her two major concerns were toward enforcing laws and giving a voice to communities. The Transport Committee published a report this summer, with several recommendations. Nearly six months later, MP Linda Duncan notes that the review of Railway Safety Act, one of the recommendations, has not started yet. She also summarized the private member’s bill she introduced earlier in the fall (Bill C-304). Transportation of oil by rail is not subject to the Canadian Environmental Assessment Act. Under her bill, it would be mandatory under the Act for the Minister to designate a physical activity not prescribed by regulations that poses a potentially significant risk to the environment, human life or public health. The second set of amendments of Bill C-304 would oblige railway companies transporting dangerous goods to get special authorization under Railway Safety Act.

Discussion:
Caroline Burgess, who worked with Mattagami First Nation after the 2015 Gogama, ON derailment, underlined the issue of constitutional rights for aboriginal people. Risks caused by oil transportation could infringe treaty rights and legal challenges. To choose between transport of oil by pipelines or railways is a false choice. Regardless of new pipelines that will be built, transportation of oil will increase in the coming years.
The point is that both modes should be made safe to prevent future disasters. Lynda Collins, in response, asserted that transition to renewables is the end goal. It is important to shift to strong measures to facilitate the transition away from a fossil fuel society.