Crown Liability: What is it, and What does it really Mean?

Introduction
I would like to thank Bruce and my fellow panelists for the opportunity to speak today. Several fascinating aspects have already been covered on the issue of how our laws can respond to tragedies of such magnitude. One particular actor in this situation happened to be Transport Canada and the Canadian Transportation Agency. Issues were raised regarding the quality of oversight that it offered Montreal Maine & Atlantic Railway. In that vein, I would like to discuss the concept of Crown Liability. Before I get started, let’s set the stage regarding the legal redress sought on behalf of victims.

Background of legal proceedings
Following the derailment, a wrongful death suit was launched in the United States and a class action was launched in Quebec. It became apparent that suing the MM&R would be insufficient—the company was underinsured. Very shortly, the American division filed for Chapter 11 bankruptcy protection and the Canadian operation utilized Companies’ Creditors Arrangement Act (CCAA) proceedings. If victims and their survivors were to gain financial compensation, the net would have to be cast wider beyond the owners of the derailed train, to other parties that may have played a role in the eventual outcome. The suits were eventually settled against all defendants, except Canadian Pacific Railway. A $460 million fund was established for creditors. The Government of Canada, on behalf of Transport Canada and the Canadian Transportation Agency contributed $75 million to this settlement. By statute, Transport Canada is responsible for ensuring railway safety by enforcing applicable acts and regulations. It also had the power to delegate railway rule making to the industry, which it did in this case. The Canadian Transportation Agency issued certificates of fitness to railway operators based on adequacy of insurance. Transport Canada and the CTA evaded judicial scrutiny of its performance so it is not clear what the courts would have made about government liability in this context, had
the matter proceeded to trial. However, the notion of Crown liability can help us understand some of the legal issues at play.

**Crown liability**

Western legal traditions were founded against the backdrop of sovereign leaders. An oft-heard maxim was that “A king (or queen) could do no wrong.” As the state embodied this sovereign power, governments were also deemed beyond civil reach. Accordingly, the Crown could not be sued in tort, its assets were untouchable, the wrongdoing of government officials could not be imputed to the Crown, and such wrongdoers were personally liable. This changed with the 1952 passage of the *Crown Liability and Proceedings Act (CLPA)*, RSC 1985 c C-50 and co-ordinating legislation in eight provinces. Section 3 of the *CLPA* holds that the Federal Crown is labile in Quebec for the fault of its servants and damage flowing from something in the Crown’s care. The corresponding liability in common law provinces is narrower, based on finding that a tort was committed or a duty regarding the custody of property was breached. Article 1475 of the Civil Code of Quebec establishes the definition of fault and includes situations where acts or omissions regarding things in a person’s control cause injury. Article 1376 establishes that the state may be liable in the same way as individuals, subject to applicable laws. One of such limits comes from the public law principle of the policy/operational divide in defining crown liability.

Courts defer to government action flowing from policy decisions, as long as those policies are not unreasonable. An earlier example of this principle from Canadian jurisprudence comes from *Just v British Columbia*, [1989] 2 SCR 1228 where a boulder above a highway struck a man’s car and killed his daughter. He sued the province for poorly scaling rocks beside the highway. The Supreme Court held that the province’s highway maintenance regime was dictated by policy and thus immune from judicial scrutiny. More recently in *R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, the Supreme Court helped define the policy decision making as: “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are
neither irrational nor taken in bad faith.” In essence where the government can show its decisions were the result of balancing competing priorities, it is unlikely that the court will interfere.

Were this to be a negligence analysis under the common law system, we would first need to establish that the government owed a duty of care to the plaintiffs. There can be no duty where proximity is lacking and the common law jurisprudence indicates that there is no proximity between the government and those suing it for breach of a duty that it generally owes all its constituents (*Drady v Canada (Minister of Health)* 2008 ONCA 659). The duty must be a private one owed to a person or class of individuals. Thus, even if an impugned act could be categorized as operational, failure to establish proximity would be a challenge. Assuming that a *prima facie* duty of care is established, the courts will then consider if there are residual policy reasons to deny the duty.

The class action settlement precluded judicial consideration of the government’s liability for the eventual disaster. However, the class action filed in Quebec pleaded 18 acts and omissions against Transport Canada, relating to poor compliance enforcement and inspections. The Canadian Transportation Agency was sued for failing to ensure that the company was sufficiently insured. Lawyers for the plaintiffs would have been tasked with demonstrating that the government’s manner of regulation was an operational failure, not merely one of policy. Some of the pleaded facts at face value appear to be operational, for example the issuance of the Certificate of Fitness. A similar situation in Ontario could have faced significant hurdles due to the proximity analysis that negligence law requires.

**Limits of civil action**

Settlement undoubtedly did some financial good for the individuals, businesses and community impacted by the derailment. However, there is reason to question how effective this process was in holding the government accountable:

- There was no admission of liability
- Knowledge of Transport Canada’s contribution to this issue has been limited to a report reviewed and edited by the Minister prior to release.
The government has an easy ability to fund settlements with taxpayer dollars.

Public vs. Private Accountability


In a 2011 article, Lorne Sossin questioned the wisdom of imposing financial penalties on the government for wrongdoing. A government with an endless reservoir of money to fund litigation and settlements likely is not threatened by civil actions. True influence over its behaviour likely comes from political pressure of voters and the court’s power to review and invalidate its decisions.

While judicial review has been held out as a more effective mechanism for restraining government action, it is a highly circumscribed power. Individuals seeking review over government actions may be held to stringent standards of establishing standing and governmental impropriety. Furthermore, quashing harmful government action or decision-making will not provide access to the funds that litigants in cases like these urgently require. One the matter of public accountability, it is interesting to note that the Minister had the ability to call an inquiry pursuant to s. 21 of the Transportation of Dangerous Goods Act, S.C. 1992, c. 34. Had the Minister chosen this option, the person charged with the inquiry would have had the power to compel witnesses under oath and order the production of documents. However, calling an inquiry was solely within the Minister’s discretion, further limiting an avenue for public accountability.