

# 2023 BUDGET LEGISLATION PROPOSES AMENDMENTS TO THE CANADA TRANSPORTATION ACT

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On April 17, 2023, the federal Government published [draft legislation](#) to implement certain provisions of the 2023 Budget. Bill C-47 amends the *Canada Transportation Act* to effect a pair of changes relevant to rail freight shippers in Canada:

- extending regulated interswitching limits up to 160 kilometres for traffic in Manitoba, Saskatchewan, and Alberta, and
- empowering the federal Government to make regulations requiring data disclosure by users of the national transportation system, such as shippers.

## Increased Interswitching Limits Pilot Program

The amendments establish a new zone that extends the interswitching limit for the three prairie provinces to 160 km, which is a repeat of the geography and distance that was previously in place from 2014 to 2017 under the *Fair Rail for Grain Farmers Act*. The new zone will sunset after 18 months unless the Government takes action to continue that limit.

CN and CP will be required to provide the Minister of Transport (“**Minister**”) certain data regarding the use of regulated interswitching, including whether the origin or destination was within the 30 km limit, or within the 160 km limit but outside the 30 km limit, plus whether CN or CP moved the railcar at the regulated interswitching rate.

As we previously [reported](#), the temporary extension of interswitching limits will help a few shippers in the prairie provinces, but will shut out all shippers that cannot use the remedy, all of whom still need access to effective competition, whether via actual competition or effective surrogates for that competition.

CN and CP, via their industry association, the Railway Association of Canada, regularly criticize regulated interswitching in Canada on the basis that it allows rail carriers in the United States to poach traffic from lines in Canada. The railways raised similar concerns more than three decades ago, yet the availability of competition from U.S. carriers through regulated interswitching has not impaired CN’s or CP’s ability to grow

their respective businesses, including in the United States.

Bill C-47 may allow Government to assess how effective an expanded interswitching limit is at promoting competition.

*A shipper benefits from regulated interswitching because of the potential of transferring its traffic to a connecting carrier. That potential incents the local carrier to provide better service and to offer more competitive rates. Where regulated interswitching is not available, by contrast, a local carrier is free to charge a high connecting rate that ensures the connecting carrier cannot compete for the captive shipper's traffic.*

Regulated interswitching works by introducing some competitive tension into an otherwise one-sided commercial relationship to make it more like a normally functioning market. Rail shippers experience this effect first hand, but, due to Canada's secretive rail data system, can only compare their own rates, or highly aggregated revenue data that CN and CP publicly disclose.

The data the Minister will receive in connection with the pilot program, taken together with the data that the railways already provide, could provide the basis for a detailed examination of the effect of regulated interswitching on freight rates. Such a study could, for example, compare freight rates the local carrier charges for comparable movements on its own network from shipper facilities in the prairie provinces with access to regulated interswitching via the new 160 km interswitching limit under Bill C-47 versus shipments of comparable traffic, including rail mileage, in other provinces.<sup>[1]</sup>

The proposed data requirements will not provide meaningful insight into the effect of regulated interswitching on service. This could be examined, for example, by comparing the frequency with which the railways "confirm" car or train orders at facilities within interswitching limits and orders for similar service at facilities located outside those limits during periods when the railways are rationing service. Only CN and CP have access to comprehensive data of this nature. They should be required to provide it.

### **Information Sharing**

The amendments enable the Government to make regulations that require users of the national transportation system, such as shippers, to provide information "for the purposes of ensuring the proper functioning of the national transportation system or increasing its efficiency."<sup>[2]</sup> The amendments would enable, but not necessarily require, the Minister to disclose such information to railways, as well as to other users of the national transportation system.

The amendments also give the Minister a new power to order disclosure of information from various parties, including railways and shippers, if the Minister determines that there is an "unusual and significant disruption

to the effective continued operation of the national transportation system”.

We anticipate that the regulations will set out key details, including which users will be required to disclose information, the scope of required disclosure, any volume thresholds before disclosure is required, which parties may receive the information, the recipients' permitted use of the information, and other items. The regulations provide an opportunity for the Government to make significant improvements to the nature and scope of railway data available to rail shippers.

*We strongly encourage the Government to use the regulations to rectify the current lack of transparency faced by rail shippers in Canada. U.S. rail carriers, including CN and CP in respect of their U.S. operations, must publicly disclose a wide range of detailed operational and financial information that continues to be treated as confidential under Canadian law, putting rail shippers in Canada at a distinct disadvantage to their U.S. counterparts.*

As previously [expressed](#), we also encourage Transport Canada to focus on assessing and disclosing actual rail infrastructure capacity, the absence of which severely limits the utility of additional shipper data disclosure, quite apart from the unwarranted and disproportionate burden of that disclosure on shippers.

[1] Any such study should be careful to distinguish between rail traffic moving at rates in contracts that were negotiated before the expanded interswitching limit took effect and traffic moving at rates negotiated during or in anticipation of the pilot program.

[2] See the [Notice of Ways and Means Motion to introduce an Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023](#), section 439.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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