

# A CALL TO ADDRESS CANADA'S TRANSPORTATION SUPPLY CHAIN CRISIS: FINAL REPORT - PART II

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## Part II – Modernizing the Rail Transportation System in the National Public Interest

This bulletin follows on our previous [bulletin](#) regarding the Final Report of the National Supply Chain Task Force, where we offered our congratulations to the Minister of Transport and the Federal Government.

### **Modernizing the Rail Transportation System**

The Task Force “recommends that Canada's regulatory framework be modernized to reflect the future needs of an evolving transportation system.”

The willingness of government to listen to hard messages arising from the Final Report and to act on the most obvious solutions in a timely manner must be a high priority despite entrenched opposition to what the courts have called the federal railways “old ways” of doing things. The Task Force makes some bold recommendations, including a proposal that could modernize the rail transportation system. Importantly, the Task Force recommends a new statement of policy to increase competition.

The Task Force addresses the role of rail service in the supply chain crisis, pointing to a number of critical factors, including challenges that have “exposed and exacerbated longstanding weaknesses in the Canadian supply chain.” Certainly, rail users who rely on Canada's rail networks are acutely aware of the need for a modern regulatory framework and for intervention where competitive forces are lacking.

### **Living Up to the Objectives of National Transportation Policy**

The courts have consistently called out Canadian National Railway (“**CN**”) and Canadian Pacific Railway (“**CP**”), because they seek

“to preserve the historic methods of doing business in the railway industry which prevailed prior to the enactment of the National Transportation Act, 1987. This new legislation is aimed at changing the old ways by fostering more competition within the railway industry and within the transportation system generally.”

The courts have upheld the Canadian Transportation Agency and its predecessors in its efforts to allow rail shippers the benefit of national transportation policy, confirming that the policy “is to encourage competition among carriers, including intramodal competition.”

The current policy establishes the need for “a competitive, economic and efficient national transportation system.” And, importantly, the current policy recognizes that even though market forces are preferable,

“... regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation.”

The cases are now 30 years old, yet the “old ways” are still with us, undermining modernization, shielding CN and CP from exposure to competition, and harming Canadian industry dependent on rail. Government commissions and reviews repeatedly find that CN and CP both seek to preserve the “historic methods of doing business” and stand in the way of the benefits of competition for rail users.

### ***The National Public Interest***

The Task Force states that its work is built on the foundation of the national public interest and goes on to define it as actions the benefits of which accrue to the public and that clearly exceed the costs of the action. It recognizes that, ideally,

“there would be sufficient competition and capacity to produce low-cost, efficient options, as well as motivation and mechanisms for service providers to work together to improve traffic flow. Without these, intervention may be required to ensure the transportation supply chain operates smoothly.”

National transportation policy already recognizes these principles. However, too many Canadian rail users do not enjoy the benefits of competition. That is why the *Canada Transportation Act* regulates certain federal rail activities, with the long recognized need to address the lack of effective competition. However, these remedies are weak and the price of relying on them is prohibitive. It is no longer sufficient to rely on statutory remedies that no longer work, weakening Canadian productive output in the process. The Task Force’s policy recommendation to “increase competition” is the right step.

The Task Force recommends one bold immediate solution in the rail sector that will require attention. Rail shippers, however, will welcome modern efforts to level the playing field to address the unequal bargaining power, information asymmetry, inadequate levels of service, and uncompetitive rates they face, given their lack of bargaining power when faced with CN’s and CP’s exercise of their market power.

What Canada needs is a rail system that provides all that would prevail under conditions of effective competition.

### ***Task Force Recommendations***

The Task Force has divided its report into thirteen Immediate Response Actions to address the current transportation crisis, and eight Long-Term Strategic Actions

“to both initiate the systemic change required to drive the long-term competitiveness, prosperity and sustainability of Canada’s transportation supply chain, and to maintain appropriate governance of the transportation supply chain going forward. A functional and reliable supply chain is essential to ensuring Canada’s ability to fully and competitively participate in the global market.”

In our next bulletins, we intend to address those immediate response actions and long-term strategic actions pertinent to the supply of rail transportation services.

by [The McMillan Transportation Group](#)

### **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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