BILL C-49: SOME WELCOME IMPROVEMENTS TO RAIL SERVICE LEVEL ARBITRATION

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The Government of Canada's proposed "T*ransportation Modernization Act*" (Bill C-49), upon which we have previously reported, would amend the service level arbitration ("**SLA**") provisions of the *Canada Transportation Act* (the "**Act**").

The SLA provisions allow a shipper, upon failure of negotiations with a railway company, to submit certain railway service matters to the Canadian Transportation Agency (the "**Agency**") for arbitration. Currently, the SLA provisions do not provide for financial consequences payable to a shipper upon a rail carrier's failure to perform its obligations of carriage. This stands in stark contrast to the ability and regular practice of rail carriers of unilaterally imposing numerous penalties and restrictions on shippers, even for circumstances not of a shipper's making. Bill C-49 would permit, but not compel, a shipper to seek financial penalties in certain circumstances. Bill C-49 also provides that such penalties do not limit the shipper's statutory right to claim compensation from the railway company for failure to comply with its service obligations.

The Act also does not allow a shipper to include a term requiring the parties to resolve disputes through contractual commercial dispute resolution ("**CDR**") as part of a SLA proceeding. Bill C-49 addresses that issue by allowing a shipper to submit CDR provisions to resolve such disputes privately, instead of through the Agency or elsewhere.

The Act currently limits SLA to "operational terms". The Agency's authority to specify what constitutes an operational term and the regulations it has made to clarify this concept are set to expire along with the remainder of the *Fair Rail For Grain Farmers Act*. Bill C-49 would preserve the Agency's ability to specify what is and what is not an operational term.

Bill C-49 would amend the arbitrator's current obligation to have regard to the railway company's service obligations to other shippers, persons and companies, so as to require regard to any of "the railway company's obligations under this Act in respect of the operation of the railway". The Act already undermines the ability of a shipper to contract for specific rail service, but this extension impairs it considerably more. The SLA mechanism was implemented following a prolonged systemic pattern of railway company service failures that

caused damage to individual shippers and to the economy. SLA was intended to allow rail shippers to get the rail service they need to run their businesses.

Bill C-49 would also require the arbitrator to establish financial penalties in a manner that "encourages the efficient movement of the shipper's traffic and the performance of the railway system and that is balanced between the shipper and the railway company." The Agency and arbitrators are already charged with the responsibility of adjudicating disputes, including SLA, equitably and impartially, taking into account the parties' respective obligations. Perhaps the new provision is redundant.

Please do not hesitate to contact us if you wish to set up a private briefing to discuss the SLA remedy, Bill C-49 or any of the other shipper remedies under the Act.

(from left to right: Lucia Stuhldreier, Louis Zivot, Joanna Dawson, Ryan Gallagher, François Tougas – Co-Chair)

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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.