

FINAL REPORT: CANADA TRANSPORTATION ACT REVIEW – PART II (RAIL FREIGHT TRAFFIC)

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As we [previously reported](#), Transport Canada recently published the final report (Report) of David Emerson, P.C., O.B.C., entitled "Pathways: Connecting Canada's Transportation System to the World". Emerson, a former Conservative Cabinet Minister, chaired the statutory review (Review) of the *Canada Transportation Act* (Act), and was assisted by five advisors. The Minister of Transport of the time, Lisa Raitt, launched the Review on June 25, 2014, which concluded on December 21, 2015. The Report was submitted to the current Minister of Transport, Marc Garneau, following some 227 submissions from stakeholders and interested persons.

Our prior bulletin reviewed the Report in relation to the non-rail aspects of the Review. This bulletin focuses on the rail freight recommendations resulting from the Review, which, as in past statutory reviews of the Act, dominates much of the discussion in the Report and was the focus of many stakeholder submissions, particularly in the freight rail sector. The Report notes the "inseparable relationship between Canada's international trade performance and the quality of the transportation and logistics systems," a theme that emerges several times in connection with rail freight transport and justifies many of the recommendations in the Report.

There are several broad categories of recommendations in the Final Report in relation to rail:

- The Canadian Transportation Agency lacks the expertise required to deal with freight rail issues in particular and requires more resources and broader mandates, including money and staff, to carry out its tasks both under the Act and those recommended in the Report, and requires the ability to investigate rail service and other problems on its own motion, with broad investigative powers
- Governments at all levels need to address land and infrastructure access to accommodate future growth and to address the importance of exports to Canada's international trade profile
- Weaknesses in the rail transportation system have less to do with railway service delivery problems than (i) supply chain weaknesses, (ii) congestion due to high demand for rail services and (iii) lack of railway infrastructure
- Commercial agreements provide the likeliest path to achieving an end point where railways and shippers work together to maximize their respective economic opportunities

- Where regulatory intervention is required, an expertized Agency department would be better equipped to determine appropriate outcomes for the benefit of overall rail system efficiency than the current dispute settlement processes and guidance under the Act
- Railway performance data is required by the Agency for it to best perform its functions under the Act
- It is time to get rid of the special rail freight concession for certain agricultural products that puts a cap on rail company revenue in that sector (Maximum Revenue Entitlement)

The official backgrounder stated that the Review would "take into account the broader goal of a commercially based, market-driven multi-modal transportation system that delivers the best possible service in support of economic growth and prosperity." The Report seeks to stay close to this goal.

On the broadest theme in the Report, the Chair states that "access to a globally competitive transportation system is vital to the prosperity of the country, the competitiveness of industry, the sustainability of communities..." The Report underscores several times that the way to achieve this prosperity, competitiveness and sustainability is to increase the role of government, and confer powers on the Agency that it has not had for decades and some that it has not had at all.

Among its many recommendations for the rail sector, the Report includes the following items:

2.2: Transport Canada (through the proposed Advisory Committee on Transportation and Logistics) establish a mechanism to determine, on an ongoing basis and in collaboration with the provinces, territories, and the private sector, the state of Canada's transportation infrastructure, including gaps in Canada's long-term requirements.

3.2: The Government of Canada establish a National Corridor Protection Program within the next five years, with Transport Canada, Public Works and Government Services Canada, and provincial governments as partners.

5: In order to reinforce the functioning of alternative dispute resolution activities available to railways and shippers, to promote and provide consistency among formal and informal Agency processes, and to improve the effectiveness of commercial arrangements between railways and shippers, the Review recommends that:

- a. The Agency establish a dispute resolution unit and exercise its expertise on railway network operations within the organization in order to provide more effective and timely informal dispute resolution options that help to resolve operational issues between shippers and railways prior to them escalating into formal Agency proceedings;
- b. this unit include or advise Agency officials responsible for providing informal expert support, as noted above, when parties attempt to reach and conclude terms of negotiated arrangements;

- c. Agency officials providing alternative dispute resolution services (mediation, facilitation, arbitration) report within the new organizational unit noted above.

11. The Government of Canada modernize the mandate of the Canadian Transportation Agency, giving it greater legislative and regulatory authorities by:

- a. amending the Canada Transportation Act to confer upon the Agency investigative powers, and the authority to act on the Agency's own motion and on an ex parte basis, as well as to address issues on a systemic basis and to issue general orders (these new powers would only be executed on reasonable grounds, on issues pertaining to the Agency's mandate);
- b. adding provisions to the Canada Transportation Act that better define the power for Ministers and the Governor in Council to direct Agency activities or override Agency decisions, establishing clear criteria for such action;
- c. amending the Canada Transportation Act to allow the Chair of the Agency to delegate identified, routine regulatory approvals to Agency staff;
- d. establishing the new Integrated Data Platform and Multimodal Data Dashboard within the Agency, in accordance with Chapter 2, Recommendations 1 and 7, and providing the legislative authority to access and obtain relevant and strategic data consistent with its mandate; this new authority would also bestow the responsibility to do research, analyze system-wide trends, provide expert advice to Ministers, and take action where necessary to ensure on-going system fluidity and protect the well-being of Canadians;
- e. in accordance with Recommendation 5 in Chapter 8.1: Freight Rail, establishing a specialized rail unit, staffed by Agency experts, to lead and advise on informal dispute resolution issues, including level of service issues, and to provide support, or lead, alternate dispute resolution focussed on level of service complaints;
- f. providing the Agency with adequate financial resources and expertise commensurate with its enhanced mandate and legislative authorities.

The main body of the Report can be found [here](#) and the Appendices [here](#).

McMillan's Transportation Group

McMillan lawyers enjoy wide-ranging expert reputations among their peers and clients for their work in the transportation sector. Their participation in the field is long standing and ranges broadly, allowing clients to receive in-depth analysis, counsel and representation in their most important matters.

Rail: We are frequently called upon by other law firms, shippers, shortline railways, rail equipment manufacturers and lessors, governments and carriers in Canada and the United States to provide expert legal

counsel. Our strong relationships with industry participants, third party service providers and consultants in the fields of economics, costing, safety and environmental regulation, and other fields, uniquely qualify us to provide a broad spectrum of services to the transportation and distribution sector.

Marine and Terminals: Our industry specialists work on everything from transactional matters to long-term multi-disciplinary engagements to create ports and other terminal facilities. We have assisted clients with domestic and export terminal handling facilities as well as those relating to bulk commodity handling and container terminal facilities, as well as working with shippers, ship owners and charter parties, suppliers of marine equipment, lenders and government agencies.

Trucking: We advise clients in the surface transportation sector and have worked for some of the largest Canadian and international trucking companies. We also work with clients who operate within the broader industry, including vehicle credit and leasing firms, and clients who outsource transportation and logistics.

Aviation: Our lawyers represent national and international airlines, aviation associations, aerospace and defence contractors, aircraft and parts manufacturers, and maintenance providers, as well as aircraft operators, purchasers, sellers, financiers, lessors and lessees, airport authorities and aerodrome operators, air cargo organizations and pilots.

by François Tougas

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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