

FINAL REPORT: CANADA TRANSPORTATION ACT REVIEW

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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.

Following the pattern of previous reviews (the last statutory review was completed in 2001), the final report is lengthy. Although the Review was required by the Act itself, such that the Chair examined transportation governed by the Act (which governs the economic regulation of aviation, rail and marine, but not pipelines, trucking, transit, etc.), the Report affirms that the Review involved a broader review of the Canadian transportation system and the legal and regulatory frameworks which govern it. The former Conservative government established the terms of reference for the Review, which had a particular focus on the transportation of grain by rail, and more broadly to the rail-based supply chain for all commodities. The official backgrounder stated: "This will 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." In fact, the Review went well into the other transportation modes governed by the Act and the Report reflects that breadth.

In his report, and indeed in invitations to interested persons to make submissions, the Chair sought to look forward "20 to 30 years to identify priorities and potential actions in transportation that will support Canada's long-term economic well-being." As in all such prior reviews, the final report includes many recommendations, which the current Liberal government will now review.

The Chair states that a "recurring theme in the Report is the inseparable relationship between Canada's international trade performance and the quality of the transportation and logistics systems. As a small, geographically dispersed trading economy, access to a globally competitive transportation system is vital to the prosperity of the country, the competitiveness of industry, the sustainability of communities and the ease with which Canadians can travel. The advent of globalization has fundamentally altered the nature of industry

and the evolving role of transportation and logistics in achieving competitive success. Not surprisingly, governments must also adapt policy and regulatory approaches to secure the competitive position of the country. The Report makes significant recommendations on government decision-making and regulatory frameworks to reflect best practices in other jurisdictions. A swath of specific recommendations deal with the transport of grain, Canada's trade gateways and corridors, the north, climate change, technology and innovation, accessibility, as well as recommendations relating to each major mode of transport."

Upon reading the Report, one is struck by the emphasis on government planning and priorities, infrastructure development and the reservation of corridors, and the restructuring of the Canadian Transportation Agency (the economic regulator and quasi-judicial tribunal charged with administering the Act, among others). Whether or not one agrees with particular recommendations, it's clear that Emerson was conscious of Canada's place in the world and the impact that transportation has on Canada's competitiveness and the need for a more robust trading stance. The link between trade and transportation is not a new theme, but the Chair forcefully advocates for broader roles for senior and junior governments.

As in past reviews of the Act, a significant portion of the Report focuses on rail transportation, particularly freight rail. We expect to issue a separate bulletin on rail recommendations resulting from the Review. The Report also contains many other far reaching recommendations. Among others, the Review recommends that:

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.

9.4: Assuming bilateral agreements continue to form the basis of Canada's international air transport regime, the Review recommends that the Government of Canada amend the Canada Transportation Act and Canadian Aviation Regulations to: a. increase foreign ownership limits to at least 49 percent for air carriers operating commercial passenger services; b. increase foreign ownership limits to 100 percent for airlines operating all-freight and specialty air services.

10.4 The Government of Canada act to increase the competitiveness of Canadian shipping and competition in the short sea shipping market by: c. phasing-out the operating restrictions on the basis of reciprocity in the Coasting Trade Act, beginning immediately with container services; eliminating restrictions altogether within a transition period of no more than seven years; d. phasing-out all remaining duties on imported vessels within a

transition period of no more than seven years to respect Canadian ship-owners' recent investments in specialized vessels;

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:

http://www.tc.gc.ca/eng/ctareview2014/CTAR_Vol1_EN.pdf

and the Appendices here:

http://www.tc.gc.ca/eng/ctareview2014/CTAR_Vol2_EN.pdf

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

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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.

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.

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.

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.

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A Cautionary Note

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