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The Rail Shippers' Guide

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The Rail Shippers' Guide provides a high-level overview of your rights and remedies when shipping freight by rail under the *Canada Transportation Act (Act)*[1] and related regulations. Should you have any questions regarding its content, please contact a member of McMillan's Rail Transportation Group. *This guide does not constitute legal advice.*

[1] *Canada Transportation Act, SC 1996, c 10.*

Overview

In Canada, the *Canada Transportation Act* and the regulations thereunder govern the economic regulation of rail transportation within federal jurisdiction[2]. The Canadian Transportation Agency (Agency) is a quasi-judicial tribunal and regulator that is responsible for enforcing this legislative scheme. To fulfill this mandate, the Agency has the powers of a superior court and more, including resolving disputes and providing information to the public on Canada's transportation system[3].

Under the Act, a federal railway company cannot refuse to transport your freight if you can get your freight to an eligible loading point and agree to pay the applicable rates. Thereafter, the railway company has various obligations it must fulfill, including providing you with an adequate and suitable level of service and facilitating the transfer of your freight to a second railway company's lines (if necessary).

The remainder of this guide discusses these various responsibilities, as well as remedies available if a railway company fails to meet them, including:

- Your right to a freight rate for your traffic and your options for establishing a freight rate;
- Your options when you do not agree with the freight rates or conditions a rail carrier provides;
- Freight rates for grain;
- How to establish freight rates when you require the services of more than one rail carrier to reach the destination;
- Accessing a second rail carrier using interswitching;
- How to challenge a rail carrier's charges for demurrage or other ancillary services;
- Remedies you can use to enforce a rail carrier's service obligations;
- Freight claims and other liability issues;
- The steps a rail carrier must take before it can abandon or discontinue operations on a railway line;
- How to secure a railway crossing for a private or public road or for utility lines; and
- Alternative dispute resolution mechanisms the Agency offers.

[2]The federal statutes and regulations, such as the Railway Safety Act (Canada), the Canadian Transportation Accident Investigation and Safety Board Act, govern other aspects of federal rail transportation. Provincial statutes and regulations govern aspects of rail transportation within provincial jurisdiction.

[3]For more information on the Agency's role and powers, see the Agency's website at https://otc-cta.gc.ca/eng/home.

Rate Authorities
(Contracts and Freight Tariffs)

As a shipper, you have a right to request and receive a rate from a railway company. The Act provides for two ways to establish rates: by confidential contract and by tariff.

Contracts

You can agree with a railway company on a set of rates and conditions of service (which may include service obligations, financial incentives or penalties, liability terms and other contractual provisions) set out in a confidential contract. No regulatory approvals or authorizations are required.

If you and the railway company agree in a confidential contract on the manner in which the railway company must fulfill its service obligations, the terms of that agreement are binding on the Agency. A railway company's contract proposal may include standard terms that allow it to revise the agreed upon rates without your consent or that try to prevent you from using shipper remedies under the Act. You are not obligated to accept these terms.

Freight Tariffs

You can also use a rate contained in a tariff issued by a railway company. The Act requires railway companies to publish their tariffs on their websites. Unless you agree to a confidential contract, the railway company cannot charge rates that differ from those in its tariffs. If you request a tariff, a railway company must provide you with one.

A tariff is the railway company's unilateral declaration of the price and terms the railway company will accept to transport your traffic. A rail carrier can unilaterally increase its tariff rates on 30 days' notice, which offers less rate-certainty than longer duration confidential contracts. However, confidential contracts may limit your recourse to your rights and remedies, while tariffs do not.

Not all tariffs are the same. Railway companies may have different tariffs for different rates or services. For example, a railway company might have different tariffs based on the type of freight or railcars. A tariff may provide for certain rate reductions or discounts, for example, if you ship your freight in larger blocks of railcars or if you provide your own cars.

Joint Rates

If two or more railway companies operate the route to your destination, you may ask each of the companies to quote you a rate for its portion of the route[4]. Alternatively, you can ask them for a joint rate. If you request a joint rate from two or more federal railway companies, they must either agree with each other on a joint tariff you can use for the entire route or enter into a confidential contract with you for the entire route.

If the railway companies do not agree on a joint tariff and do not enter into a confidential contract with you, you can apply to the Agency to determine the route and the joint rate and to apportion the rate among the railway companies.

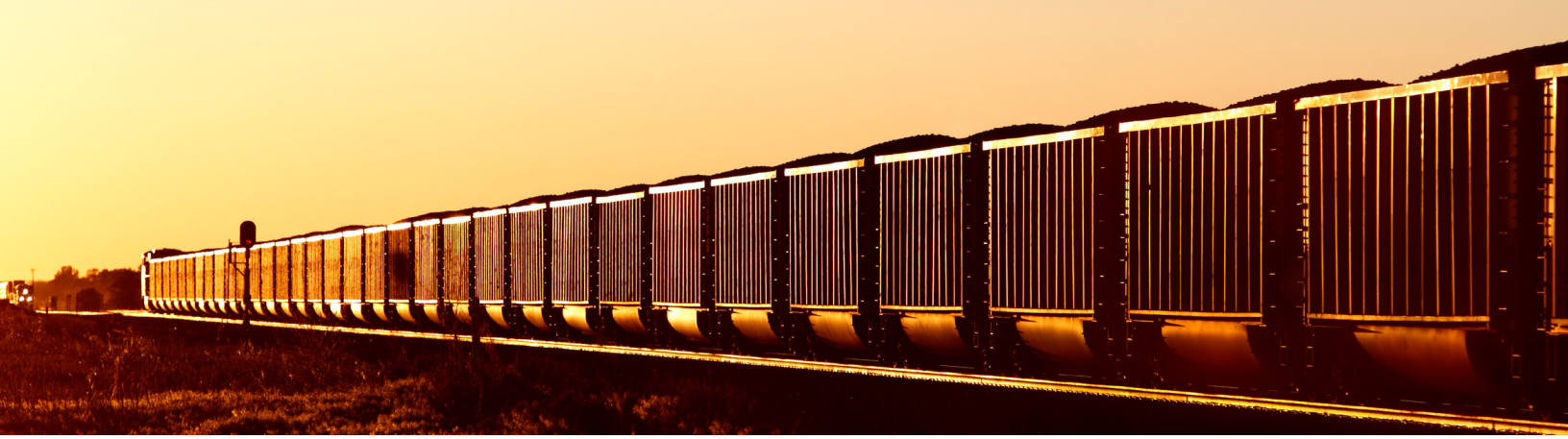
Depending on your circumstances, you may also be eligible for other remedies for accessing a second federal rail carrier (p.8).

Maximum Revenue Entitlement from Western Grain

While railway companies are generally free to set their tariffs at the rates they see fit, a specific scheme applies to the transportation of western grain. The Act limits the total amount of revenue each of CN and CP can receive for transporting certain grains products grown west of Thunder Bay, Ontario that are destined to certain destinations.

Each year, the Agency calculates the Maximum Revenue Entitlement (MRE) for each of CN and CP for the transportation of western grain. They use a formula that accounts for various factors, including inflation, average length of a western grain haul, the tonnes of western grain the railway company moved and investments in equipment to transport grain.

[4]Also known as a "Rule 11 rate."



Accessing a Second Carrier
(Regulated, Extended, and Long-Haul Interswitching)

A shipper may choose the routing of its traffic. Sometimes you may want your freight to use rail lines operated by two different railway companies. In these instances, you have a right to require the railway companies to transfer your freight from one rail line to another at an interchange (the point where the two lines meet). Where that transfer meets certain criteria set out in the Act, it is known as "interswitching".

Interswitching

There are two primary types of interswitching:

- **Regulated Interswitching** is available when your origin or destination is within a radius of 30 km of an interchange, in which case you can require the railway that serves your origin or destination (the "local carrier") to transport your freight to and from the interchange at rates the Agency sets annually. These rates are binding for all local federal rail carriers in Canada. Regulated interswitching is available without any application or regulatory proceeding, although if a railway company refuses to interswitch traffic at the prescribed rate, you or the connecting railway can apply to the Agency for an order requiring it to comply.

  In June 2023 the federal Government passed the *Budget Implementation Act* (Bill C-47) that introduced a temporary extension to the regulated interswitching limit within the prairie provinces. Beginning in September of 2023 this 18-month pilot program will extend the availability of regulated interswitching to shipments within 160 km of an interchange where the origin or destination is in Manitoba, Saskatchewan, or Alberta.

- **Extended Interswitching** is available when the Agency considers your origin or destination to be "reasonably close" to an interchange. In other words, the interchange is more than 30 km away, but factors such as physical proximity, competitive considerations and service issues render the interchange 'close enough'. To use this option, you must apply to the Agency for an extended interswitching order. If the Agency grants the order, regulated interswitching rates will apply.

Long-Haul Interswitching

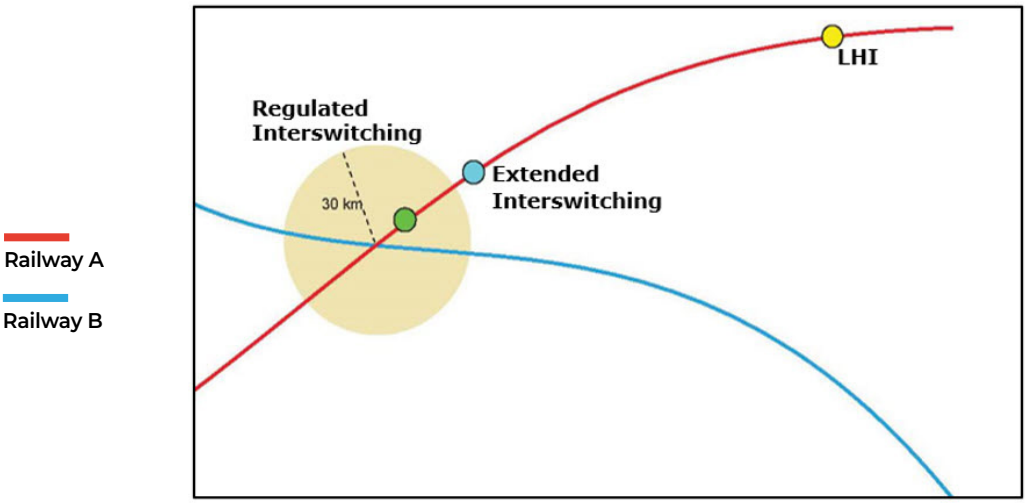
Long-Haul interswitching ("**LHI**") is another remedy intended to provide a shipper with access to a second railway company that does not serve its facility by regulating the rate that the local carrier can charge that specific shipper to reach an interchange with the second railway company. LHI may be available when you have access to only one railway company from your origin or destination, and the distance between

your origin or destination and the nearest interchange is less than 1200 km, or that distance is less than 50% of the total kilometers your freight will travel by rail in Canada, whichever distance is longer.

To apply for LHI, you must first have unsuccessfully attempted to reach an agreement with the local carrier on the matters referred to in the LHI application. The LHI remedy has never been used and suffers from significant shortcomings, including that the LHI rate set by the Agency cannot be less than the average of the revenue per tonne kilometer for the movement by the local carrier of comparable traffic. In addition, some types of freight and certain routings are ineligible for LHI.

Figure 1 below approximates the distances at which regulated interswitching (outside the prairie provinces), extended interswitching and long-haul interswitching may be available:

Figure 1



To discuss the regulated interswitching, extended interswitching, or long-haul interswitching remedies, send an email or telephone a member of McMillan's Rail Transportation Group at the contacts below.

Ryan Gallagher | Partner, Transportation | Competition, Antitrust & Foreign Investment

604-691-6865
ryan.gallagher@mcmillan.ca

Lucia Stuhldreier | Partner, Transportation

604-691-7431
lucia.stuhldreier@mcmillan.ca

François Tougas | Partner, Transportation | Competition, Antitrust & Foreign Investment

604-691-7425
francois.tougas@mcmillan.ca

Remedies for Rates and Charges
(Final Offer Arbitration and Unreasonable Charges)

The Act provides certain other remedies if you believe that a railway company is failing to meet its obligations or imposing unreasonable rates or conditions.

Final Offer Arbitration

Final Offer Arbitration (FOA) is the most effective remedy when you are dissatisfied with the rates the railway company is charging or proposing to charge, the conditions of service associated with your traffic or both. However, rates in a confidential contract are not subject to FOA.

FOA is a confidential process involving the shipper and the railway company. The Agency's role in the arbitration is limited; it will refer the matter to an independent arbitrator, deal with any preliminary objections by the railway company and provide "administrative, technical and legal assistance" to the arbitrator at the arbitrator's request.

You and the railway company will each file your final offer with the Agency, which then provides those offers to the other party and appoints an arbitrator. The shipper and the railway company each make submissions to the arbitrator who then selects the rates and conditions that will apply to your traffic for a fixed period of up to two years after the date of the submission. The arbitrator must select one of these offers (the arbitrator cannot strike a compromise) and does not give reasons for selection, unless all parties to the arbitration request reasons.

In coming to a decision, the arbitrator must consider whether the shipper has "an alternative, effective, adequate and competitive means of transporting" the freight, and "any other considerations that appear to the arbitrator to be relevant."

The arbitrator's decision is effective for up to two years from the date of the submission to FOA, as determined by the shipper at the start of the process. The arbitrator does not award costs. Instead, the shipper and the railway company are responsible for their own expenses and split the costs of the arbitrator evenly, regardless of which party is successful.

FOA typically takes 60 days from submission to resolution, unless the parties agree otherwise.

The Act sets certain timelines for the different steps in the FOA process. Apart from these, the rules for FOA are flexible in that the shipper, the railway company and the arbitrator can agree to any rules of procedure. In the absence of such an agreement, the Agency's rules of procedure generally will govern, subject to any procedural directions from the arbitrator. The parties must exchange evidence in writing, and each party has the right to direct written questions to the other. FOA proceedings usually involve an oral hearing before the arbitrator.

Summary and Multi-Party FOA

Depending on your circumstances, you may be eligible for either summary or multi-party FOA procedures.

If your final offer involves freight charges of less than approximately $2.1 million as of 2022, a streamlined summary FOA procedure applies, unless you indicate otherwise at the time of your submission for FOA. Summary FOA results in a determination within 30 days of your application to the Agency and proceeds based on written submissions alone, unless the arbitrator orders an oral hearing.

Multiple shippers who have a common issue with a railway company also can use FOA. In a multi-party FOA, you and your fellow shippers would make a joint submission and file a joint final offer. The arbitrator's final decision is binding on the railway company and the shippers who participated in the FOA.

Ancillary Charges/Associated Terms and Conditions

Railway companies use their tariff-making powers to set out charges over and above freight rates, such as demurrage, switching services, and various other incidental services. If you think the charges and associated terms in such a tariff are unreasonable, you can make a complaint to the Agency in a public proceeding. You cannot use this remedy to challenge freight rates and the tariff in issue must apply to more than one shipper. You can make your application alone or together with other shippers. When the Agency receives your complaint, it will assess the reasonableness of the charges and terms by considering the following:

- The objective of the charges or associated terms and conditions;
- The industry practice for setting charges and conditions, including whether other railway companies have similar terms;
- The existence of an effective, adequate and competitive alternative; and
- Any other relevant factors.

If the Agency finds the railway company's terms and conditions are unreasonable, it can order new terms and conditions so long as they are commercially fair and reasonable to all parties. This order will be in effect for up to one year.

Service
(Level of Service Complaints, Agency Own Motion Powers, and Service Level Arbitration)

Under the Act, a railway company must provide you with "adequate and suitable" accommodation for your freight at the "highest level of service … that it can reasonably provide in the circumstances." This includes, among other things, providing all necessary means (such as cars and other equipment) to transport and deliver your freight, providing prompt and diligent service, facilitating any transfers to other railway companies' lines and connecting to the private trackage or siding at your facility.

While the Act does not specify any particular actions a railway company must take to fulfill its obligations, you can enter into a confidential contract with the railway company that sets out specific terms regarding the manner in which the railway company will fulfill its service obligations to you. You can request that the railway company provide you with an offer respecting the terms of service; the railway company must provide this offer within 30 days after your request. Even in the absence of a confidential contract or offer that sets out specific service terms, a railway company must provide "adequate and suitable" accommodation for all traffic offered on its railway.

Level of Service Complaint

Any person may file a level of service complaint (LOS Complaint) if it perceives that the railway company has failed to meet its service obligations. When the Agency receives a LOS Complaint, it must investigate the matter.

The Agency has 90 days following receipt of the complaint to investigate and issue a decision on whether the railway company is fulfilling its obligations.

The standard the Agency will use to assess the complaint is whether the railway company provided the highest level of service that is reasonable in the circumstances. In determining whether the railway company failed to meet its level of service obligations, the Agency must consider the following:

- The traffic to which the service obligations relate;
- The reasonableness of your requests;
- The service that you require;
- Any undertaking you gave to the railway company;

- Both the railway company's and your operational requirements and restrictions;
- The railway company's obligations, if any, with respect to a public passenger service provider;
- The railway company's operational obligations under the Act;
- The railway company's contingency plans when faced with foreseeable or cyclical events; and
- Any other information that the Agency considers relevant.

If the Agency finds that the railway company failed to meet its statutory service obligations, it has broad powers to order the railway company to provide service, build facilities, acquire assets or otherwise take any action to rectify the failure.

While the Agency can require the railway to compensate you for out-of-pocket expenses resulting from a service failure, it does not have the power to award other damages. Any person aggrieved by the railway company's refusal or failure to meet its service obligations can bring a civil lawsuit against the railway company and the court can award damages.

Agency Investigations of Rail Service

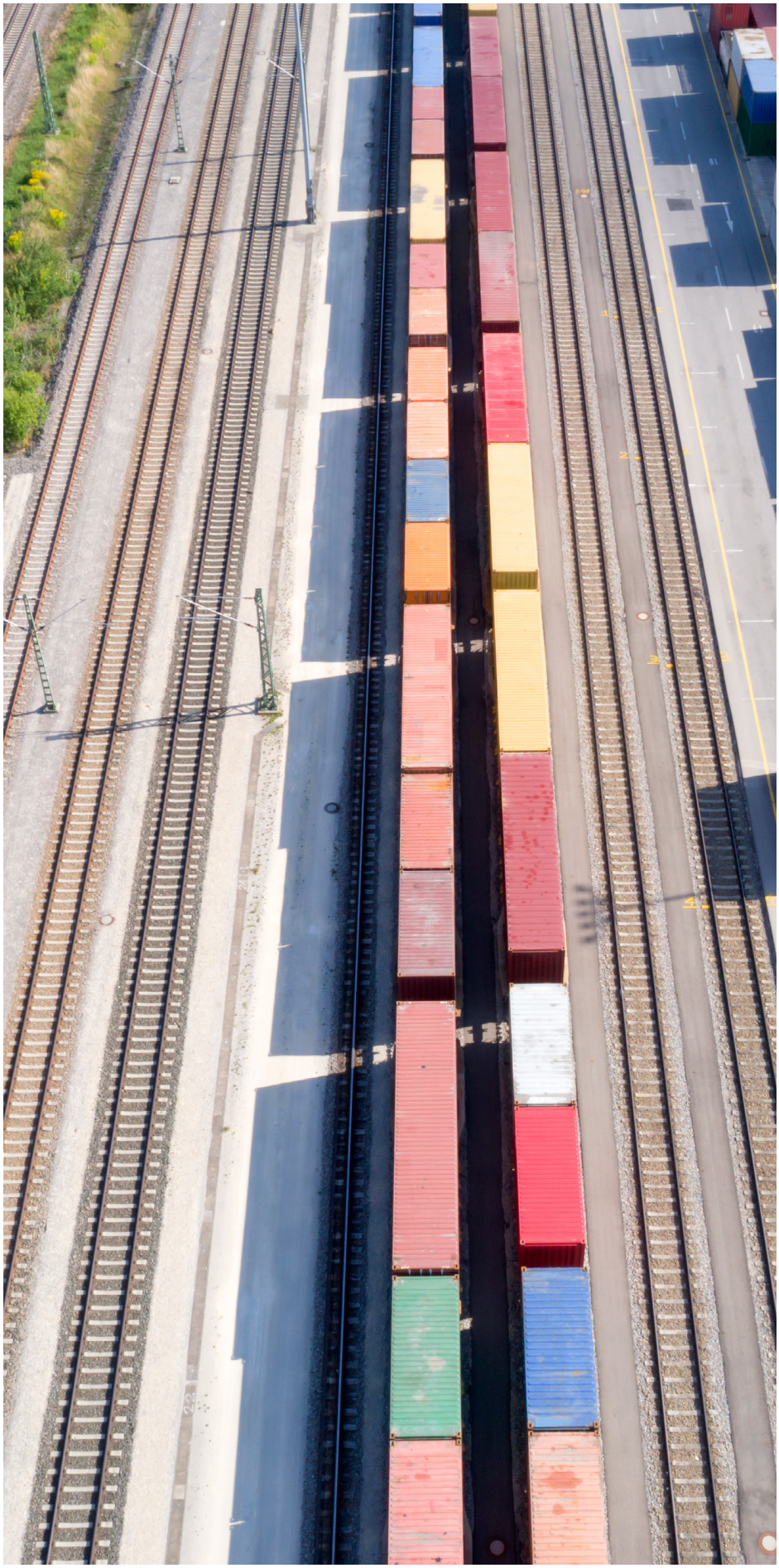
The Agency also has the power to launch an investigation into a railway company's service on its own motion. This gives the Agency broad discretion in determining whether to launch an investigation, including when the suspected service failures are widespread. So long as the Minister of Transport agrees, the Agency may choose to launch an investigation.
After the Agency launches an own-motion investigation, it will collect additional information and submissions from affected persons. The information that will be useful to the Agency varies depending on the investigation; however, it could include evidence such as emails and other evidence of discussions between the railway company and shippers, as well as evidence of factors beyond the railway's control.

The standard the Agency uses to assess the railway company's service level is the same as for shipper-initiated complaints, namely, whether the railway company provided the highest level of service that is reasonable in the circumstances. If the Agency finds the railway company failed to meet this standard, the Agency may make any order requiring the railway company to rectify the failure.

Service Level Arbitration

Service level arbitration (SLA) is designed to set specific terms for service on which you have not been able to reach agreement with a railway company. To initiate SLA, you must provide both the railway company and the Agency with 15 days advance notice before requesting the arbitration; the railway company then has ten days to object to the arbitration.

If your submission is eligible for SLA, the assigned arbitrator (who may be a member of the Agency or the Agency's staff) will consider proposals, evidence and arguments from both you and the railway company before determining what service terms should govern your traffic. SLA takes approximately 45 to 65 days to complete from application to the decision date. It differs from FOA in that the arbitrator is not bound to select either your or the railway company's proposal; the arbitrator may design different terms to resolve the matters at issue.



Liability
(Cargo Claims and Third Party Liability)

The Railway Traffic Liability Regulations (Regulations) set forth rules pertaining to the railway company's liability to a shipper for lost, damaged or delayed freight. However, you and the railway company may agree to different terms in a confidential contract.

The Regulations' general rule is that the railway company is liable, in respect of goods in its possession, for any loss or damage to the goods, or delay in transportation unless that liability is limited by the Regulations. The railway company, however, is not liable for loss or damage due to circumstances such as an act of God, strike, defective freight, legal authority, quarantine or any negligence on your part.

The Regulations require that if the railway company loses your freight, you must notify it of your loss within four months after a reasonable delivery period has expired. For damaged freight, you must notify the railway company of the damage within four months after the railway company delivers the goods.

The Regulations do not specifically address the allocation of liability to or of third parties (Third Party Liability). This can be a contentious issue, for example, when a railway accident involves a release of dangerous goods. While confidential contracts sometimes address Third Party Liability, the railway company cannot unilaterally impose liability obligations on a shipper in the absence of a written agreement signed by the shipper (or by an association or other entity representing shippers).

Transfer and Discontinuance of Rail Trackage (Process)

A railway company has the right to dispose of or abandon railway lines it no longer wishes to operate. However, the company must maintain and publish a plan indicating whether it plans to continue operating or discontinue any of its rail lines within the next three years. No regulatory approval is required to transfer a railway line to a willing purchaser for continued operation. Apart from such a transfer, if a railway company wishes to abandon a railway line or no longer wishes to operate the railway line, it must follow several steps before it can do so.

First, a railway company must provide notice of the planned discontinuance in its three-year plan for a minimum of twelve months.

Second, the railway company must publicly advertise the rail line's availability for sale, lease or transfer for continued operation as a rail line, as well as the railway company's intent to discontinue the line absent transfer. The advertisement must include, among other things, the date by which parties must express their interest in writing.

Third, the railway company has six months following the deadline in its advertisement to negotiate an agreement with an interested party. Any party to a negotiation can apply to the Agency to determine the net salvage value of the rail line, that is, the market value of the asset "less the costs associated with its disposal."

If no buyer expresses interest in continuing to operate the rail line, no agreement is reached or the transfer is not completed in accordance with the agreement, but the railway company still wants to stop operating the rail line, it must then offer to transfer the rail line to the applicable federal, provincial or municipal governments or urban transit authorities for any purpose at not more than the net salvage value of the line.

A transfer of the railway line at any point in this process relieves the railway company of its service obligations on the line. If the railway company completes this process and it does not result in a transfer, the railway company can file a notice of discontinuance with the Agency, thereby ending its obligations regarding that line.

Railway Crossings
(Private, Road, and Utility Crossings)

Other areas where you may need recourse to the Act and the Agency's remedies include when you need to cross a railway company's line that is on or next to your land or issues that arise when you operate a passenger rail service.

Crossing a Rail Line

Private Crossings

Sometimes, a railway line may be on or adjacent to your property, making it difficult or impossible to access your property. In these instances, you may need to contact the railway company to discuss building a crossing.

Under the Act, you can get a private crossing in one of the following circumstances:

- **Section 102 Crossing**: you have evidence that the railway line split a parcel of land into two when it was built and there is no way to get to the other side without a crossing. The railway company is responsible for the costs of building this crossing.

- **Section 103 Crossing:** you own land adjoining a railway line and you and the railway company do not agree on the construction of a crossing of that railway line. You are responsible for paying the costs of building and maintaining this crossing.

Road and Utility Crossings

Section 101 of the Act allows a person who is unsuccessful in negotiating a road crossing or utility crossing of a railway line to apply to the Agency for authority to construct the crossing.

A crossing must be suitable, meaning that it is adequate and appropriate for its intended purpose. Factors affecting this determination include whether the crossing will be safe and how the crossing will affect the railway's operations, as well as the people and property in the area.

Alternative Dispute Resolution
(Agency Facilitation, Mediation, and Arbitration)

In addition to the remedies listed above, the Agency also offers alternative dispute resolution mechanisms including facilitation, mediation and arbitration that are less formal and sometimes more easily accessible. These alternative mechanisms require the consent of all parties and are not available if the railway company refuses to participate.

Facilitation

Facilitation refers to a process by which Agency representatives will assist you and the railway company by phone or email to reach an agreement. If you are unsuccessful in resolving your dispute by facilitation, you can still use the Agency's other dispute resolution processes.

Section 36.1 Mediation

Mediation refers to a confidential process that occurs in person or by videoconference whereby you, the railway company and a neutral, third-party mediator come together to discuss and try to resolve your dispute. Unlike arbitration or adjudication, the mediator does not have the power to decide your dispute; the mediator can only assist you and the railway company in your negotiations. Mediation under section 36.1 can cover disputes on any matter within the Agency's jurisdiction, that is, any matter in which the Agency would have the ability to issue an order. If you and the railway company come to an agreement resulting from mediation, you can file the mediation agreement with the Agency and it will have the same force and effect as an order from the Agency.

If you have already begun a formal proceeding such as a LOS Complaint, you can still use the Agency's mediation processes; mediation will suspend the formal proceedings for the duration of the mediation and extend the Agency's time limits for making any determination under the Act.

Section 36.2 Mediation or Arbitration

You and the railway company can also request that the Agency mediate or arbitrate a dispute relating to railway transportation covered by the Act, with the exception of matters pertaining to railway accidents. Mediation or arbitration under section 36.2 may also provide a process for resolving issues that do not neatly fit within the statutory remedies, such as service complaints, FOA or SLA.

Conclusion

While these various regulatory provisions and remedies may seem daunting, the lawyers in our Rail Transportation Group are skilled in navigating them. If you would like to learn more about any of the remedies or topics discussed in this guide, please contact a member of McMillan's Rail Transportation Group listed below.

Key Contacts

Ryan Gallagher

Partner, Transportation | Competition, Antitrust & Foreign Investment

604-691-6865
ryan.gallagher@mcmillan.ca

Lucia Stuhldreier

Partner, Transportation

604-691-7431
lucia.stuhldreier@mcmillan.ca

François Tougas

Partner, Transportation | Competition, Antitrust & Foreign Investment

604-691-7425
francois.tougas@mcmillan.ca

Julia Loney I Partner, Energy | Environment
403-531-4717
julia.loney@mcmillan.ca

Joanna Dawson I Partner, Business Law | Marine
236-826-3019
joanna.dawson@mcmillan.ca

Carina Chiu I Associate, Litigation & Dispute Resolution
604-691-7416
carina.chiu@mcmillan.ca

Conner Wylie I Associate, Regulatory
604.691.7411
conner.wylie@mcmillan.ca

Vancouver

Royal Centre, Suite 1500
1055 West Georgia Street,
Vancouver, BC, Canada
V6E 4N7
604.689.9111

Calgary

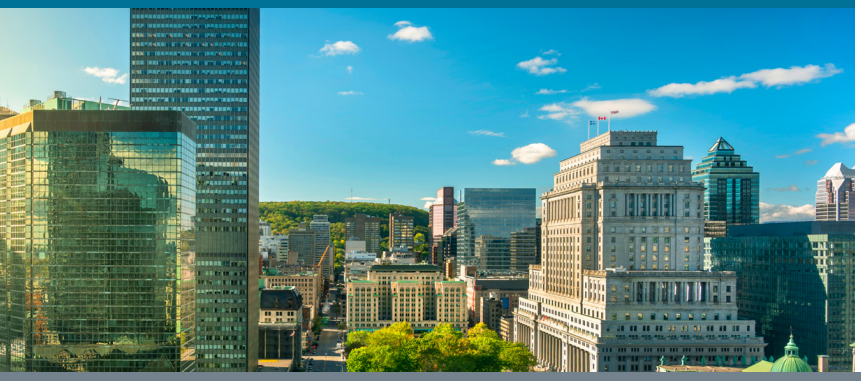
TD Canada Trust Tower, Suite 1700
421 7th Avenue S.W.
Calgary, AB, Canada
T2P 4K9
403.531.4700

Toronto

Brookfield Place, Suite 4400
181 Bay Street,
Toronto, ON, Canada
M5J 2T3
416.865.7000

Ottawa

World Exchange Plaza, Suite 2000
45 O'Connor Street,
Ottawa, ON, Canada
K1P 1A4
613.232.7171



Montréal

1000 Sherbrooke Street West
Suite 2700,
Montréal, Québec, Canada
H3A 3G4
514.987.5000