



Western Canadian Shippers' Coalition

*Representing Canadian-based companies and associations
that move mainly resource products through the supply
chain to domestic and international customers.*

Response to the *Canada Transportation Act* Review Report

**Submitted by the
Western Canadian Shippers' Coalition**

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About Western Canadian Shippers' Coalition

Western Canadian Shippers' Coalition (WCSC) represents Canadian based companies that move mainly resource products through the supply chain to domestic and international customers. We are a cross-commodity organization comprised of 12 member companies from across western Canada. Our member companies provide tens of thousands of direct and indirect jobs for Canadians in communities across the west and ship billions of dollars' worth of product annually, including cement/aggregate, forestry, metals, mining, petroleum, potash and sulphur.

Introduction

We are pleased to provide our response to the recommendations put forward in the Canadian Transportation Act Review Report *Pathways: Connecting Canada's Transportation System to the World* (the Report).

As WCSC reviewed and discussed the Report, competitive access to rail, market power of railways, and service and information transparency remained our key focus areas. We approached the CTA Review with the general objective of preserving existing shipper rights and addressing concerns in these areas.

It is imperative that rail freight transportation be safe, efficient, environmentally sustainable and cost effective in order for Canadian shippers to prosper nationally and internationally. WCSC fully supports the Report's recommendation that the National Transportation Policy declaration in section 5 of the *Canada Transportation Act* be amended to include more explicit recognition of the importance of transportation to international trade and our ability to compete in global markets.¹

Canadian shippers rely on the rail freight system to help them succeed in global markets where they are price takers facing fierce competition. The railways' market power is therefore of significant concern to our members. Sensible measures to mitigate the railways' market power and to facilitate access to rail freight transportation on competitive terms are essential.

The decline of service reliability as rail capacity falls well short of the predictable demand from shippers is both an ongoing challenge for current shippers and a significant factor for firms contemplating greenfield/brownfield projects in evaluating investment opportunities in Canada. The result is lower levels of economic activity than would be experienced with more effective mitigation of railway market power.

In terms of transparency, aggregated rail service metrics should be made available not only for the transportation of grain, but for all traffic, to facilitate the efficient operation of the supply chain as a whole.

While WCSC's submissions to the CTA Review Panel² focused primarily on rail freight transportation, we are interested in the Report's recommendations regarding marine fees and charges, the future of Canadian ports and the promotion of short sea shipping.

¹ Report, Chapter 8.1, Recommendation 1.a.

² Copies of WCSC's Submission to the CTA Review are attached as Appendix A.

Responses to Specific Recommendations

1. Metrics, Data and Supply Chain Evaluation

In WCSC's original submission, we recommended that aggregated rail service metrics be made available for not only the transportation of grain, but for all traffic, to facilitate the efficient operation of the supply chain as a whole. In WCSC's second submission to the CTA review panel, we recommended an independent expert study of current and potential pinch points as well as underutilized corridors as an essential preliminary step to inform any initiatives to encourage investment in infrastructure. The collection and publication of aggregated rail service metrics for all commodities is important to facilitate proper monitoring and ongoing identification of necessary investments and to inform evidence based decision-making by public and private sector stakeholders alike.

WCSC accordingly supports the Report's recommendations for more robust data collection and analysis³, including the recommendation that the Agency be provided with access to railway waybill records and any other data it requires in the exercise of its mandate. The Agency should make all relevant information available to arbitrators appointed in freight rate arbitrations (e.g., railway costing information and waybill information) or in arbitrations concerning the terms of a service level agreement (e.g., service performance metrics).

We also strongly believe that whenever possible, information should be made publicly available. While WCSC recognizes the importance of reasonable measures to protect confidential information, it is essential for stakeholders to have access to information they require to make informed market decisions. In the context of regulatory proceedings whether before the Agency or before an arbitrator appointed by the Agency, access to such information is a basic requirement of procedural fairness.

2. Competitive Rates and Service

As the CTA Review Report recognizes, imbalances in market power remain a significant challenge for rail shippers. For those who are able to shift a portion of their traffic to truck, this represents an obstacle to minimizing the environmental impact of their transportation requirements. For those who have no transportation option other than rail it represents a potential impediment to trade. Existing shipper remedies that facilitate access to a second carrier (regulated interswitching) or provide an opportunity to obtain competitive rates (Final Offer Arbitration - FOA) and service (level of service remedies) are essential to counter this imbalance. In WCSC's submissions to the CTA Review, we recommended:

- permanently raising the regulated interswitching limit to 160 km in British Columbia, Alberta, Saskatchewan and Manitoba;
- improving the FOA process by, among other things (i) eliminating the requirement that the arbitrator embark on a detailed analysis of whether effective and competitive alternatives exist, (ii) providing options for containing the cost of FOA proceedings and making it more accessible, and (iii) ensuring that all relevant information, including the cost of providing the transportation service, is available to the arbitrator;
- strengthening the level of service provisions.

³ Report, Chapter 8.1, Recommendation 4.

a. Regulated Interswitching

Regulated Interswitching has been widely recognized as a pro-competitive remedy that has worked well. It gives a shipper who might otherwise have no competitive alternatives the ability to access and negotiate with a second (and potentially competing) service provider. Even if the shipper does not physically use interswitching, the possibility of accessing a second carrier acts as a check on the local railway's disproportionate market power.

The predictability and transparency of interswitching rates (and the rate setting process) are key to the successful functioning of this remedy. Setting rates outside a consultative regulatory process⁴, without an opportunity for shippers as well as railway companies to be heard, could undermine this important aspect of the remedy. The implementation of the Report's suggestion that the regulated interswitching rates should take into account the local railway's "foregone contribution to fixed costs" as well as the "quality or competitiveness" of the local railway's service⁵ similarly would fundamentally alter the nature of this remedy and undermine its effectiveness. Increasing interswitching rates to reflect the rate premium that the local railway is able to extract when there is no competition, would undermine the pro-competitive nature of the remedy⁶. The quality and competitiveness of the service provided by the local carrier could only be considered on a case-by-case basis. This would require additional Agency proceedings and would undermine the effectiveness of the remedy by removing the predictability of interswitching rates.

WCSC supports the Government's decision to extend the temporary provisions allowing for interswitching within 160 km in the Prairie Provinces as a positive first step. In its current temporary form, this expanded limit is already being used by shippers in these Provinces who are benefitting from the increased competition it offers. Many others who would use the remedy are prevented from doing so by the temporary nature of the expanded limit.⁷ This includes, for example, shippers under annual or multi-year contracts, which commit all or substantially all volumes to the local carrier. It also includes those examining potential locations of greenfield developments who need to consider their transportation options over the long term. Making the 160 km limit permanent for British Columbia, Alberta, Saskatchewan and Manitoba would provide a basis for increased intra-modal railway competition throughout Western Canada.

It is essential, however, that such an extension not weaken other existing shipper remedies or make them more cumbersome. In particular, as noted in WCSC's supplementary Submission, the extension of the interswitching limit must be accompanied by the elimination of the mandatory consideration of alternative means of transport in the FOA process.

⁴ Report, Chapter 8.2, p. 164.

⁵ Report, Chapter 8.2, pp.163-164.

⁶ The ordinary practice between railway companies involved in interswitching is that the connecting carrier pays the interswitching rates to the local or terminal carrier and takes this cost into account in preparing its rate offer to the shipper. Increasing interswitching rates would effectively result in increasing the potential competitor's costs and discourage rather than, as suggested on page 164 of the Report, increase competition.

⁷ The rationale offered (on page 164) for the Report's recommendation that the 160 km limit be permitted to sunset because of reports that it has been used only by a handful of shippers, completely disregards this reality as well as the fact even when a shipper's traffic is not actually interswitched, the possibility of access to a competing carrier encourages more competitive service and rate setting by the local carrier.

b. Final Offer Arbitration

Final offer arbitration (FOA) is the only remedy in the CTA on which WCSC members are able to rely in conducting freight rate negotiations with CN and CP. While FOA has been found to work and promote commercial resolution, it is costly and often cumbersome.

In its original submission to the CTA Review, WCSC recommended, among other things, eliminating the requirement that the arbitrator embark on a detailed analysis of whether effective and competitive alternatives exist which adds unnecessary complexity and cost to FOA proceedings.

WCSC also recommended creating the option of having an FOA decision apply for up to 3 years (rather than the current maximum of 1 year). WCSC continues to support this change as a way for shippers to manage the considerable costs typically associated with an FOA and support's the Report's recommendation in this regard⁸.

In our supplementary submission, we also recommended removing the monetary cap that is currently applicable to the shorter and less complex summary process for FOA. While the CTA Review Report recommends raising the cap from \$750,000 to \$2 million⁹, WCSC continues to believe that removing the limit entirely is necessary to make the remedy more accessible for smaller shippers as well as for less complex cases generally.

WCSC does not support the addition of *mandatory* mediation or conciliation¹⁰ as a prerequisite to FOA. Shippers view FOA as a last resort when commercial negotiations have failed. Previous statutory reviews as well as jurisprudence arising from FOA have clearly indicated that the FOA process works precisely because of the dynamic created by the "either-or" nature of final offer selection and the tight timelines prescribed by the Act - forcing each party to temper its own final offer, leveling the playing field and frequently leading to a resumption of negotiations and a commercial resolution. The process itself promotes these outcomes. A prerequisite for mediation would remove the urgency that drives FOA's effectiveness in this respect. Mediation is currently available through the Agency for parties who voluntarily choose it. Mandating it will not turn anyone who no longer wishes to negotiate into a willing participant in further negotiations. Experience since 1988 has shown that the FOA dynamic frequently does.

c. Railway Level of Service

In its original submission to the CTA Review, WCSC recommended amending the statutory level of service provisions to clarify that rail service must meet the shipper's transportation needs. This recommendation is not concerned with optimizing or tailoring rail service to individual shippers' preferences. It proposes an objective measure to ensure that the rail transportation network meets the requirements of trade and the economy rather than constraining them.

While rail service problems can and do arise, not every level of service dispute raises issues that necessarily affect other shippers or other components of the rail network. In many instances, service shortfalls are highly localized and relate to operational matters involving the "first mile/last mile" of rail movement rather than to constraints in the system as a whole.

⁸ Report, Chapter 8.1, Recommendation 7.d.

⁹ Report, Chapter 8.1, Recommendation 7.c.

¹⁰ In its Supplemental Submission, WCSC proposed a form of conciliation as an option that could function both as an alternative to FOA and as a means of making FOA more accessible for smaller shippers. While WCSC's conciliation proposal garnered considerable interest in the context of the Review as well as in discussions with officials at Transport Canada and the Canadian Transportation Agency, WCSC does not believe the process lends itself to being made a mandatory pre-requisite to FOA.

Mandating a review of the system and of all shippers' needs in each and every service-related proceeding would add unnecessary complexity and expense to the process. The Agency needs to retain the ability to respond to service complaints in a timely fashion and on an individual basis in order for this remedy to remain relevant to shippers who experience concrete and often acute service shortfalls.

WCSC strongly believes that systemic problems are better addressed through an expansion of the Agency's mandate to include investigations of such broader issues on its own initiative.

3. Expanded Agency Role

In its original submission to the CTA Review, WCSC recommended expanding the Agency's role to include acting on its own initiative. We also recommended removing the current restrictions on the Agency's mandate to examine unreasonable or discriminatory railway tariff provisions under s. 120.1. We continue to support an expanded role for the Agency, within a context that ensures: fairness and transparency; efficient use of resources; clearly defined roles and expertise; and timely results.

WCSC accordingly supports the Report's recommendation for 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.¹¹ This should include the ability to investigate railway practices such as coercing shippers into contracting out of the basic shipper protection provisions of the Act.

WCSC supports the Report's recommendations for the establishment of a specialized rail unit within the Agency¹² and for measures to ensure that the Agency has broader access to data and analysis relevant to its mandate¹³. It is essential, however, that Agency processes continue to be fair and transparent, providing meaningful opportunities for stakeholders who may be affected by the Agency's exercise of an expanded mandate to know and be heard on matters being investigated by the Agency as well as the information on which the Agency relies in its consideration of such matters.

In addition, WCSC believes that unless the Agency's resources match its mandate, its ability to act in a timely fashion will be compromised.

WCSC is opposed to making mediation or other forms of alternative dispute resolution mandatory.¹⁴ While we firmly believe that commercial solutions should continue to be encouraged wherever possible¹⁵, WCSC believes that the best way to increase the voluntary use of such processes offered through the Agency is to ensure the availability of strong expertise in rail transportation matters and, of equal or

¹¹ Report, Chapter 11, Recommendation 1.a.

¹² Report, Chapter 8.1, Recommendation 5 and Chapter 11, Recommendation 1.e.

¹³ Report, Chapter 8.1, Recommendations 4.a and 4.c

¹⁴ WCSC strongly disagrees with the Report's Recommendation 7.b in Chapter 8.1 in this regard.

¹⁵ It is not at all clear that the current uptake of Agency-sponsored alternative dispute resolution is inadequate. The dispute resolution statistics published by the Agency (<https://www.otc-cta.gc.ca/eng/statistics-2014-2015#resolved>) indicated that of 48 rail related disputes resolved by the Agency in 2014/15, a total of 31 or more than 60% were resolved through facilitation or mediation rather than formal adjudication.

greater importance, specialized skills in alternative dispute resolution¹⁶.

4. Other Areas of Interest to WCSC Members

While WCSC's submissions in the CTA Review process focused on rail transportation issues, the Report contains a number of recommendations in relation to marine transportation that are of interest to our members.

In particular, WCSC supports the Report's recommendations for establishing a uniform and timely process for publicly filing rate and charge increases for all federally-mandated marine services and authorizing the Canadian Transportation Agency to review all of these on a regular basis in terms of their reasonableness and cost competitiveness, as well as in response to complaints.¹⁷ A considerable portion of the charges and costs incurred by port users do not fall within the category of "federally-mandated services", however. In many instances, port authorities are in a monopoly or near-monopoly position in relation to port users with respect to such other services and charges. WCSC accordingly supports the Report's recommendation for the introduction of light-handed regulation covering fees, charges, common use of the facilities, and unfair competition by the port against its tenants to protect users and conferring an oversight and enforcement on the Canadian Transportation Agency in respect of these matters.¹⁸

WCSC also welcomes the Report's recommendation for promoting short sea shipping as a mechanism to alleviate congestion in urban areas and reduce Canada's growing greenhouse gas and air pollutant emission levels.¹⁹ While the Report highlights potential benefits along the Great Lakes-St. Lawrence Seaway System, WCSC strongly believes that short sea shipping presents important opportunities for other gateways as well, most notably the Port of Vancouver. Forest products such as lumber and pulp represent a significant portion of export container traffic in Vancouver. Currently, much of this traffic arrives in the lower mainland on rail cars and is transferred into containers, which are then moved to ocean terminals by truck. Short sea shipping from currently underutilized facilities, for example along the Fraser River, could potentially remove hundreds of trucks from congested roads, significantly reduce greenhouse gas emissions associated with this traffic, and mitigate shippers' exposure to the volatility that has plagued trucking at the Port of Vancouver in recent years.

The Report recommends that periodic, formal reviews of the operation of the Act be replaced with an evergreen process of consultation, dialogue, and adaptation in a National Framework on Transportation and Logistics.²⁰ While WCSC does not disagree in principle with more frequent or ongoing consultations, the practice of holding periodic, formal reviews has provided all interested Canadians and stakeholders with clear terms of reference, an opportunity to bring forward their observations and recommendations and the ability to review and respond to recommendations and concerns put forward by others. These are important elements that must be preserved in any future process.

¹⁶ including, for example, expertise in the "shuttle diplomacy" techniques used by the Surface Transportation Board in the US and referred to on page 250 of the Report.

¹⁷ Report, Chapter 10, Recommendation 1.

¹⁸ Report, Chapter 10, Recommendations 3.c. and d.

¹⁹ Report, Chapter 10, Recommendation 4.a.

²⁰ Report, Chapter 2, Recommendation 1.b.

Conclusion

WCSC recommends that the Government take the following measures:

1. commission an independent expert operational/logistical study of current and potential pinch points in vital supply chains as well as underutilized corridors to inform decisions about strategic investments in infrastructure and incentives related to such investments;
2. provide for improved collection and publication of information concerning rail transportation of all commodities, including aggregated rail service metrics;
3. provide the Agency, as well as arbitrators appointed to deal with rate or service disputes, with access to all information relevant to their mandates, including performance metrics, rail costing information and waybill records;
4. amend the Act to raise the statutory interswitching limit to 160 km throughout Western Canada (in conjunction with recommendation 5(a) below), and ensuring that that interswitching rates continue to be set at pro-competitive levels in a transparent process;
5. amend the Act to make final offer arbitration more accessible by (a) eliminating the requirement that the arbitrator embark on a detailed analysis of whether effective and competitive alternatives exist, (b) giving shippers the option of having the arbitrator's decision to apply for up to 3 years, and (c) removing the monetary cap for summary process final offer arbitration;
6. amend the Act to enable the Agency to act on its own motion in all matters within its mandate;
7. amend the Act to broaden the Agency's ability to address unreasonable tariff provisions and unreasonable railway practices such as coercing shippers to contract out of basic shipper protections;
8. amend the level of service provisions in the Act to provide that a railway company must fulfil its statutory service obligations in a manner that meets the shipper's transportation needs;
9. continue the Agency's mandate to make mediation and other alternative dispute resolution mechanisms available to parties on a voluntary basis and strengthen its ability to fulfill this role through expertise in both subject matter and process, as well as appropriate resource levels;
10. provide for a more uniform regime of fees and charges for federally mandated marine services, subject to regulatory oversight by the Agency;
11. introduce light-handed regulation covering fees, charges, common use of the facilities, and unfair competition by the port against its tenants to protect users and conferring an oversight and enforcement role on the Agency;
12. support short sea shipping alternatives;

13. maintain a transparent process for reviewing the operation of the Act that allows full participation by all stakeholders.

WCSC thanks the Minister of Transport for the opportunity to provide a response to the recommendations made in the CTA Report and looks forward to further discussions as government makes decisions in the areas of interest to our membership.

David Montpetit, Chairman
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