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 *Transportation Modernization Act*

Submitted by the Western Canadian Shippers' Coalition

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Table of Contents

Western Canadian Shippers' Coalition (WCSC) commends Transport Canada for the drafting of Bill C-49: the *Transportation Modernization Act*. We appreciate the government's extensive efforts to consult with stakeholders over the past year following the release of Canada Transportation Act review report, and for tabling a bill with shippers' needs considered.

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 14 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, coal, forestry, metals, mining, petroleum, potash and sulphur. Our current membership:

- Alberta Newsprint (ANC) | Forestry
- Alberta-Pacific Forest Industries Inc. | Forestry
- Atrum Coal NL | Coal for Steel
- Gibson Energy ULC | Petroleum
- Keyera Corp. | Petroleum
- K+S Potash Canada | Potash
- Lehigh Cement | Aggregates | Cement | Fly Ash
- MEG Energy | Petroleum
- Millar Western Forest Products Ltd. | Forestry
- Sherritt International | Mining
- Standard General | Aggregate | Asphalt
- Sultran Ltd. | Sulphur | Petroleum
- Suncor Energy Inc. | Petroleum
- West Fraser Timber Co. Ltd. | Forestry
- Strategic Partnership | WCSC and Pulse Canada – In December 2015 WCSC and Pulse Canada developed a strategic partnership to collaborate on transportation issues of mutual interest.

Introduction

WCSC is pleased to have the opportunity to provide our input on Bill C-49. Through the CTA Review we were able to provide input in the form of written submissions and in-person meetings with the Review Panel.

- CTA Submission 1 – December 2014 / met with CTA Review Panel in March 2015
- CTA Submission 2 – June 2015 / met with CTA Review Panel in August 2015
- Response to the CTA Review Report – June 2016

WCSC has also responded to the government's request for stakeholder input and provided written submissions on:

- Consultation on Transportation of Dangerous Goods (TDG) Regulations – February 2017
- Consultation on the Agency's Regulatory Costing Model – February 2017

Members of WCSC's executive team frequently travel to Ottawa to meet with senior staff from Transport Canada, the Canadian Transportation Agency, the Privy Council, Natural Resources Canada and the Official Opposition to discuss matters of importance to WCSC members and Canada's economic growth and wellbeing.

In addition, WCSC has participated in Transport Canada's stakeholder roundtable sessions and attended Minister Garneau's speaking engagements to hear about and provide feedback on the government's strategies and proposed amendments to the *Canada Transportation Act.*

- Participated in Transport Canada's Trade Corridors Roundtable Session in Winnipeg, MB and provided a written response – July 2016
- Attended the Chamber of Commerce of Metropolitan Montréal to hear Transport Minister Garneau introduce the government's "Transportation 2030 Strategy" and provided a written response – November 2016
- Attended the CEO Roundtable Session followed by the Edmonton Chamber of Commerce Luncheon to hear Transport Minister Garneau deliver his speech on "Picking up Steam: Growing Canada's Economy with Modernized Rail Transportation" – May 2017

Bill C-49: *Transportation Modernization Act*

In November 2016, Transport Canada Minister Marc Garneau announced the Government of Canada's vision of a "cutting-edge transportation system" intended to move Canada into the 21st Century: *Transportation 2030 – A Strategic Plan for the Future of Transportation in Canada*. The plan focused on a safe, secure, innovative transportation system that promotes trade and economic growth, a cleaner environment and the wellbeing of Canadians. The recognized challenge: "to further enhance the utility, the efficiency and the fluidity of Canada's rail system."

The government's focus: "to build a freight rail system for the future…a fair, competitive and commercially oriented freight rail system. One that is productive and efficient…that works well for shippers and railways alike". Among the key measures of Bill C-49 highlighted by the government are:

- New data reporting requirements for railways on rates, service and performance, intended to enhance system transparency;
- A new mechanism, Long-Haul Interswitching, intended to provide captive shippers across all sectors and regions of Canada with access to a competing railway, to ensure they have options;
- A definition of "adequate and suitable" rail service intended to confirm railways should provide shippers with the highest level of service that can reasonably be provided in the circumstances;
- The ability for shippers to seek reciprocal financial penalties in their service agreements with railways, to enhance accountability; and
- More accessible and timely remedies for shippers on both rates and service, to support fair negotiations.

Responses to Specific Sections of Bill C-49

1. Data Reporting Requirements

WCSC strongly supports the use of increased data reporting to enhance the transparency of the transportation system for all stakeholders and looks forward to participating in the consultation process concerning the regulations that will detail reporting requirements going forward.

With respect to rates, Bill C-49 would enable the Agency to draw on waybill information, including rates as well as other shipment characteristics in setting LHI rates. It would not, however, enhance transparency for shippers or other stakeholders. In the context of an LHI application, this would result in an imbalance in the parties' respective ability to make meaningful submissions on the relevant issues.

With respect to service and performance, Bill C-49 adopts, on an interim basis, some of the reporting requirements to which Canadian class 1 carriers are currently subject in respect of their U.S. operations. WCSC questions the need to defer implementation of these interim reporting requirements for a full year after the Bill becomes law as well as the fact that a number of the U.S. reporting requirements relating to commodities other than grain have not been included in these interim measures.

In addition, the interim reporting requirements in Bill C-49 would allow for a two-week delay in weekly reporting by the railways and a further one-week delay in publication by the Agency. Service and performance data relating to a particular service week would not become publicly available until three weeks after that service week. This means the published data would be of limited usefulness to shippers attempting to determine their commercial approaches to service and performance issues as they arise.

WCSC recommends eliminating the one-year deferral of service and performance reporting, including data on non-grain commodities in the reporting requirements and shortening the time frames for reporting and publication of service and performance data.

2. Access to Competing Railways

WCSC strongly supports effective remedies that give shippers served by a single rail carrier the option of accessing a second rail carrier as a means of providing shippers with the benefits of competition.

Bill C-49 would:

(1) allow those provisions of the *Fair Rail for Grain Farmers Act* which allowed the Agency to provide for different interswitching limits in different regions of Canada to sunset, which will have the effect of eliminating Zone 5 regulated interswitching (between 30 km and 160 km) in the Prairie provinces;
(2) repeal the Agency's jurisdiction to prescribe distances longer than 30km for regulated interswitching generally, which is not currently subject to any sunset provision;
(3) repeal the competitive line rate (CLR) remedy;
(4) introduce a long-haul interswitching (LHI) to replace both regulated interswitching beyond the statutory 30 km radius and CLR.

Regulated interswitching has worked well as a pro-competitive remedy because rail carriers have been prepared to compete for traffic using it and because the applicable rates are known to all prospective participants at the time when they are negotiating potential routings, rates and other conditions. CLR, which lacks both of these elements, has been largely inoperative for the past three decades because rail carriers have declined to compete using this remedy. The LHI remedy contained in Bill C-49 is very similar, in concept and overall structure, to the CLR remedy, however includes many provisions that are likely to result in it being even less effective than CLR for many shippers.

The LHI remedy is unlikely to overcome the shortcomings of CLR, because, like CLR, it is ultimately dependent on the willingness of connecting carriers to compete using the remedy. Although CLR's express prerequisite that the shipper have reached agreement with the connecting carrier on applicable rates and conditions would not be continued in LHI, this does not resolve the issue. It simply leaves the captive shipper with the prospect of having to commence adversarial proceedings against both carriers. LHI does not provide either of the two carriers with any greater incentive to compete on service or price for the shipper's traffic.

The requirement that, in order to access the remedy, the shipper must undertake to ship its traffic by rail to the nearest interchange in accordance with the LHI order, has the effect of again restricting the shipper to a *single* option for moving its traffic, rather than creating *additional* options. For all practical purposes, this also means that a shipper is unlikely to apply for LHI without having reached agreement with the connecting carrier on rates and conditions beyond the interchange. This negates any potential benefit from the repeal of CLR's express requirement for such agreement.

For these reasons, WCSC does not believe that the LHI remedy will provide its members with significant new competitive access options.

While there are numerous differences between CLR and LHI, virtually all of these tend to make LHI an even less usable remedy than CLR. They either render captive shippers ineligible to apply for LHI or require them to overcome additional hurdles before applying for the remedy. Most captive shippers in remote regions of British Columbia as well the Northwestern region of Alberta, for example, will not even be eligible to use LHI to obtain a competitive alternative for moving their traffic to port. Similarly, while currently eligible for CLR, certain types of traffic are to be excluded from LHI, such as toxic inhalation and radioactive commodities and containerized traffic moving by rail to or from Canadian ports. Even removing these and other new restrictions, however, would not cure the fundamental shortcoming outlined above.

Regulated interswitching has proven to be an effective pro-competitive remedy not only in those instances where it is used to secure a physical transfer of traffic to a connecting carrier but also, and perhaps more importantly, where the possibility of such a transfer provides the local carrier with an incentive to offer more competitive rates or service levels in order to retain the traffic on its lines.

WCSC therefore renews its recommendation that the 160 km interswitching limit be made permanent for the four Western provinces.

3. "Adequate and Suitable"

WCSC strongly supports the legislative intent of requiring railways to provide shippers with the highest level of service that can reasonably be provided in the circumstances.

The proposed new subsection 116(1.2) would require the Agency to conclude that a railway company is fulfilling its statutory service obligations to a shipper when the Agency is satisfied that the railway is providing the ***highest level of service*** it can reasonably provide in the circumstances. It does not necessarily follow that this is the *minimum* standard a rail carrier must meet. In other words, the proposed text is silent on when the Agency should determine that a railway company is *breaching* its statutory service obligations.

WCSC accordingly recommends that the wording of proposed subsection 116(1.2) be amended to give effect to the legislative intent more clearly.

4. Reciprocal Penalties

WCSC is supportive of the provision in Bill C-49 that give shippers the option of including penalties for non-performance in a Service Level Agreement.

5. More accessible and timely remedies

WCSC is strongly supportive of making remedies more accessible and timely.

With respect to level of service complaints under s. 116 of the Act, WCSC welcomes the provision that would reduce the time frame for the rendering of a decision from 120 days to 90 days. However, WCSC does not believe it is necessary or desirable to stipulate the minimum number of days to be accorded to the railway and the shipper to prepare and file pleadings. The Agency has the power, under s. 17 of the Act, to determine its own procedural rules, and matters like the time for filing a pleading, including the time frames included in Bill C-49, are specifically addressed in those rules. While the Agency routinely grants extensions of filing deadlines, frequently more than one extension relating to the same document, it rarely condenses the time lines contained in its procedural rules. At the same time, the Act requires the Agency to make decisions as "expeditiously as possible". The Agency requires the ability to expedite proceedings before it as well as to issue interim orders which remain in place pending a final resolution of the case. Stipulating minimum time frames for specific types of pleadings by statute would create uncertainty about and potentially limit the Agency's ability to exercise these powers. It would also limit the Agency's discretion to address situations in which a party employs procedural tactics to delay the point from which the time to file a particular pleading runs. **WCSC accordingly recommends removing the subsection that would prescribe minimum time periods for the preparation and filing of pleadings.**

With respect to final offer arbitration (FOA) WCSC supports the measure that would allow a shipper to elect to have the arbitrator's decision apply for up to two years. Bill C-49 also raises the monetary cap applicable to the shorter, more streamlined summary process FOA from $750,000 in total freight charges to $2 million. While this will potentially allow a number of shippers who are currently not able to opt for this process to do so, WCSC continues to be of the view that the total freight charges involved in a dispute are not necessarily indicative of the complexity of the case or even of the amount at issue between the parties. **WCSC accordingly recommends removing the monetary limit and permitting any shipper who wishes to do so, to choose the summary process.**

Conclusion

WCSC recommends that in order to better facilitate the achievement of the stated objectives the Government take the following measures:

1. With respect to the reporting of rail service and performance data:

   a. *Amend Section 13 of Bill C-49 by replacing the proposed subsection 51.4(1) with the following:*

      Publication

      51.4 (1) If the Agency receives information from class 1 rail carriers or the Minister that is related to service and performance indicators provided in accordance with regulations made under paragraph 50(1.01)(b), the Agency shall publish the information on its Internet site within ~~seven~~ two days after it is received.

   b. *Amend Subsection 77(2) of Bill C-49 as follows:*

      Information to be provided

      (2) A class 1 rail carrier shall provide to the Minister, in the form and manner that the Minister may specify, a report containing the information specified in paragraphs 1250.2(a)(1) to ~~(8)~~ (11) of Title 49 of the United States Code of Federal Regulations as amended from time to time.

   c. *Amend Subsection 77(5) of Bill C-49 as follows:*

      Time limit

      (5) The class 1 rail carrier shall provide the report for each period of seven days commencing on Saturday and ending on Friday, no later than ~~14~~ 5 days after the last day of the period of seven days to which the information relates.

   d. Amend Section 98 of Bill C-49 by deleting Subsection (7).

2. With respect to access to competing rail carriers:

   a. Amend Subsections 26(1) and 26(2) of Bill C-49 to read as follows:

      26(1) Subsections 127(2) and (3) of the Act are replaced by the following:

      Order

      (2) If the point of origin or destination of a continuous movement of traffic is within 160 km of an interchange in Alberta, British Columbia, Manitoba or Saskatchewan or within a radius of 30 km of an interchange in any other province, or a prescribed greater distance, of an interchange, the Agency may order

      (a) one of the companies to interswitch the traffic in accordance with the regulations and the interswitching rate; and

(b) the railway companies to provide reasonable facilities for the convenient interswitching of traffic in both directions at an interchange between the lines of either railway and those of other railway companies connecting with them.

Interswitching limits

(3) If the point of origin or destination of a continuous movement of traffic is within 160 km of an interchange in Alberta, British Columbia, Manitoba or Saskatchewan or within a radius of 30 km of an interchange in any other province, or a prescribed greater distance, of an interchange, a railway company shall not transfer the traffic at the interchange except in accordance with the regulations and the interswitching rate.

(2) Subsection 127(4) of the Act is replaced by the following:

Extension of interswitching limits

(4) On the application of a person referred to in subsection (1), the Agency may deem a point of origin or destination of a movement of traffic in any particular case to be within ~~30 km~~ the distance of an interchange referred to in Subsection (3) if the Agency is of the opinion that, in the circumstances, the point of origin or destination is reasonably close to the interchange.

3. With respect to the obligation to provide "adequate and suitable" rail service:

Amend Subsection 23(2) of Bill C-49 by replacing the proposed subsection 116(1.2) with the following):

Considerations

(1.2) The Agency shall not determine that a company is fulfilling its service obligations ~~if~~ unless it is satisfied that the company provides the highest level of service in respect of those obligations that it can reasonably provide in the circumstances, having regard to the following considerations:
(a) the traffic to which the service obligations relate;
(b) the reasonableness of the shipper's requests with respect to the traffic;
(c) the service that the shipper requires with respect to the traffic;
(d) any undertaking with respect to the traffic given by the shipper to the company;
(e) the company's and the shipper's operational requirements and restrictions;
(f) the company's obligations, if any, with respect to a public passenger service provider;
(g) the company's obligations in respect of the operation of the railway under this Act;
(h) the company's contingency plans to allow it to fulfil its service obligations when faced with foreseeable or cyclical events; and
(i) any information that the Agency considers relevant.

4. With respect to improving accessibility and timeliness of remedies:

a. Amend Subsection 23(2) of Bill C-49 by deleting the proposed subsection 116(1.1);

b. Amend Section 46 of Bill C-49 to read as follows;

46 Subsection 161(2) of the Act is amended by adding the following after paragraph (a):

(b) the period requested by the shipper, not exceeding two years, for which the decision of the arbitrator is to apply;

(b.1) if the shipper intends the arbitration to proceed under section 164.1, a statement to that effect;

c. *Amend Section 47 of Bill C-49 to read as follows:*

47 The portion of section 164.1 of the Act before paragraph (a) is replaced by the following:

Summary process

164.1 If the ~~Agency determines that a~~ shipper's submission under section 161 indicates that the shipper intends the arbitration to proceed under this section, ~~final offer submitted under subsection 161.1(1) involves freight charges in an amount of not more than $2,000,000, adjusted in accordance with section 164.2, and the shipper did not indicate a contrary intention when submitting the offer,~~ sections 163 and 164 do not apply and the arbitration shall proceed as follows:

d. *Delete Section 48 of Bill C-49*

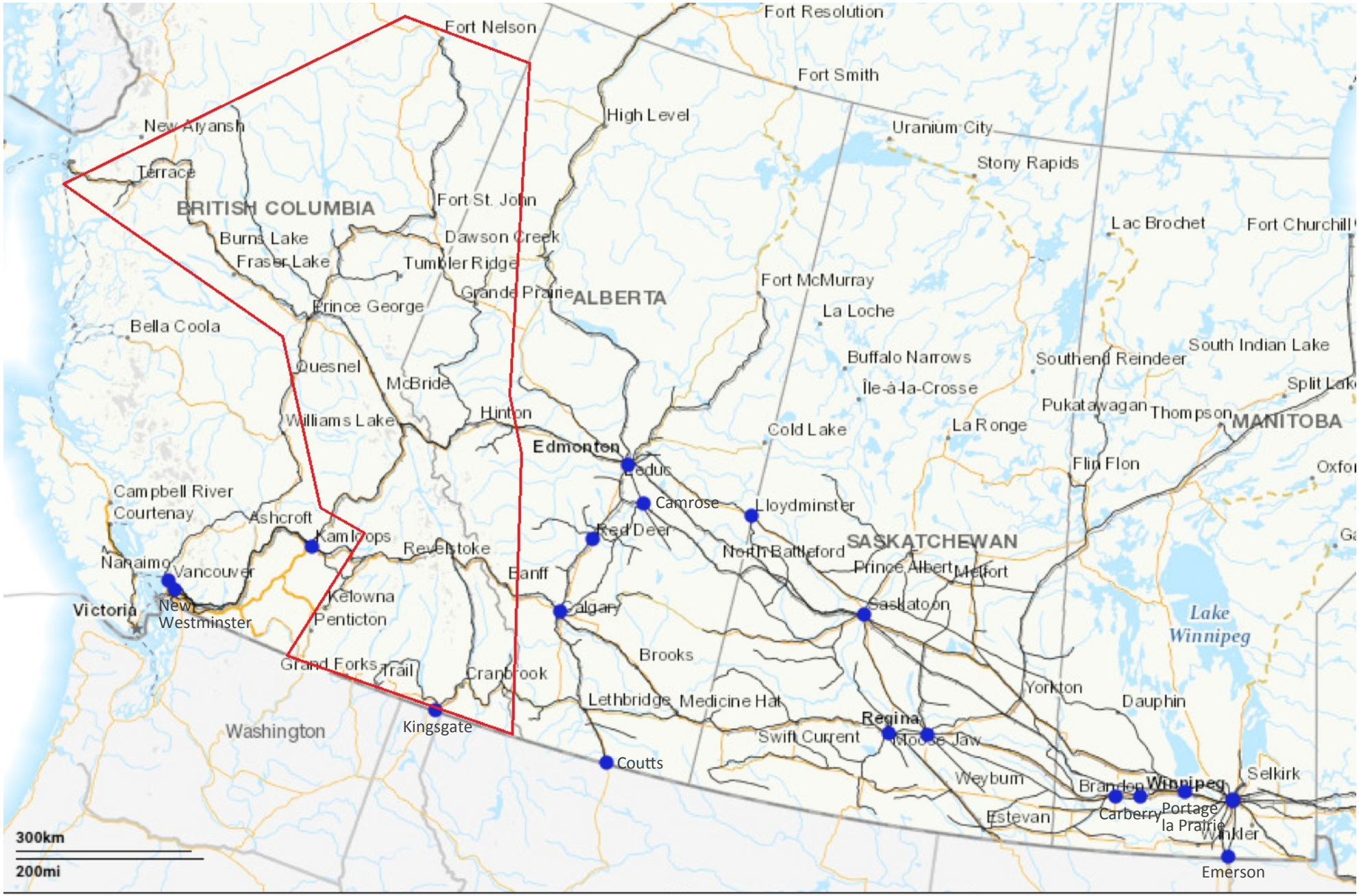
WCSC thanks the Minister of Transport for the opportunity to provide a response to the recommendations made in the *Transportation Modernization Act* and will be reaching out to appropriate contacts for further discussions as government makes decisions in the areas of interest to our membership.

David Montpetit, President and CEO
Western Canadian Shippers' Coalitiion

Appendix

Attached is the following document:

1. **Map:** Rail Interchanges – Western Canada



- **Rail Interchanges – Western Canada**
  BC: CN/CP – Kamloops, New Westminster, Vancouver |CN/BNSF – New Westminster, Vancouver | CP/UP: Kingsgate
  AB: CN/CP – Calgary, Camrose, Clover Bar (Edmonton), Lloydminster, Red Deer | CP/BNSF – Coutts
  SK: CN/CP – Moose Jaw, Regina, Saskatoon
  MB: CN/CP – Brandon, Carberry, Paddington (Winnipeg), Portage la Prairie | CN/BNSF – Fort Rouge (Winnipeg), Emerson | CP/BNSF – Winnipeg, Emerson
- Traffic originating inside area framed in red and destined to Vancouver area is not eligible for Long-haul Interswitching