Western Canadian Shippers' Coalition

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

# The Senate of Canada

# Standing Senate Committee on Transport and Communications

## Brief submitted by

## Western Canadian Shippers' Coalition

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## Introduction

Western Canadian Shippers' Coalition **(**WCSC) is a cross-commodity organization focused on transportation issues affecting member companies based in Western Canada that move mainly resource products through the supply chain to domestic and international customers.

WCSC's goal is a competitive, economic, efficient and safe transportation system in Canada that permits our members to compete both domestically and internationally. Since it was formed, WCSC has supported the need for effective shipper remedies that introduce a measure of balance into shippers' dealings with monopoly rail service providers. WCSC has been actively involved in providing a shipper perspective on numerous amendments to the legislation. WCSC participated in the 1992 Review of the National Transportation Act, the 2000 CTA Review, the Rail Freight Service Review in 2009-2010 and, more recently, the 2015 review of the Act led by David Emerson, as well as the subsequent consultations initiated by Minister Garneau and House of Commons' Standing Committee on Transportation, Infrastructure and Communities (September 12, 2017).

Our members represent a range of commodities but all are heavy users of rail transportation. Their shipping facilities tend to be located close to where the natural resources they process and ship are found. Because of their remote locations and the large volumes of products they ship, they are completely dependent on rail to move their products to market. In the vast majority of cases, they have access to only one rail carrier. That reality gives the railway significant market power even over very large shippers.

While our members would prefer to negotiate commercial agreements for rail freight rates and service in a competitive environment, the reality is that the market in which they buy rail transportation is not competitive. The option of taking their business to a competing railway when faced with excessive freight rates, large price increases or non-performance (or substandard performance) simply does not exist.

David Montpetit has been president and CEO of WCSC since 2014. He is also president of Diadem Group Ltd., a transportation and logistics consulting firm that works primarily in the areas of rail transportation and port logistics. His previous experience includes negotiating rail transportation agreements both as a representative of a Class 1 rail carrier and as vice president Logistics and Government relations for a large mining company.

Our current membership includes:

- Alberta Newsprint (ANC) | Forestry
- Alberta-Pacific Forest Industries Inc. | Forestry
- 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 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.

## Bill C-49: Transportation Modernization Act

WCSC has been actively involved in the consultations leading up to the introduction of Bill C-49, as well as in the recent hearings of the House of Commons Standing Committee. While we have concerns with respect to a number of the other measures contained in Bill C-49, our current focus is on two key areas of the Bill in which our members believe minor adjustments would greatly advance the objective of promoting a more competitive, balanced and efficient transportation system.

## Agency Own-Motion Powers

While the Agency has the jurisdiction to address rail service and other rail-related issues, it can currently only act in response to a formal complaint.[1] This is problematic in two respects: (1) fear of retaliation from the rail carrier discourages shippers from initiating a complaint process; and (2) where a shipper does file a complaint, the Agency is limited to addressing that particular shipper's issues.

Particularly in relation to widespread or systemic problems, the lack of own-motion powers on the part of the Agency in relation to rail hampers the development and implementation of timely and pro-active measures. When compared with the Agency's mandate in relation to air transportation[2] and with the mandate of other federal tribunals, such as the National Energy Board, the absence of own-motion powers is an anomaly that should be rectified.

To address this shortcoming, we recommend the following amendment to Bill C-49:

> **The Act is amended by adding the following after Section 24:**
>
> (24.1) The Agency may of its own motion inquire into, hear and determine any matter or thing that under this Act it may inquire into, hear and determine.

This change is necessary to allow the Agency to respond in a more timely fashion in matters within its existing mandate.

In our discussions with Transport Canada personnel, they raised a concern that giving the Agency own-motion powers would result in the Agency, rather than Transport Canada, setting transportation policy.

We do not believe this concern is well founded. First, the Agency has had own-motion powers in relation to international air transport for years but has used this jurisdiction only sparingly. There is no reason to believe the Agency would depart from this established cautious approach. Secondly, the proposed amendment would not enlarge the scope of substantive issues the Agency can investigate or the range of remedial measures open to it. It would merely allow the Agency to trigger the process.

## Railway Costing in Final Offer Arbitration (FOA)

Under the Act, shippers and railways can enter into confidential rate agreements. In the absence of such an agreement, a railway is free to set rail freight rates unilaterally, subject only to giving 30 days' notice when it wants to increase a rate. FOA is the only mechanism available to a shipper to challenge a rate that it believes is excessive. In this confidential process, an arbitrator selects either the shipper's final rate offer or the railway's final rate offer, and the rate selected by the arbitrator is binding on the parties for up to one year (up to two years under Bill C-49).

The Agency's role in FOA is limited to appointing the arbitrator, facilitating the simultaneous exchange of final offers, ruling on preliminary objections, and providing technical and administrative assistance when requested by the arbitrator.

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[1] Bill C-49 would mandate the Agency to take on an ombudsman-type role in connection with any railway issue raised by an 'interested person" without a formal complaint having been filed. It stops short, however, of allowing the Agency to investigate, make recommendations or take any other action in connection with respect to such issues or to monitor and enforce informal resolutions reached with the Agency's assistance.

[2] Consider, for example, the Agency's recent investigation of Air Transat tarmac delays.

There are a variety of factors that an arbitrator can consider in determining whether the rate offered by the railway is excessive or the rate offered by the shipper unreasonably low and ultimately in selecting one or the other final offer. Whether and, if so, how, these factors affect the final decision is left up to the arbitrator.

The evidence the parties present to an arbitrator in FOA can cover a broad range of topics, including:

1. Alternative transportation options, if any, available to the shipper and the freight rates associated with those options;
2. Rates and rate increases the parties previously agreed to for the same or similar traffic;
3. The magnitude of the rate change proposed by each of the parties;
4. Overall rail freight rate trends;
5. The "workload" the shipper's traffic represents to the railway, including any particular services required by the shipper or challenges presented by the movement of the traffic at issue;
6. The profitability to the railway of handling the traffic (i.e., the difference between the cost to the railway of handling the traffic and the rate to be paid by the shipper);
7. How this compares with the profitability of other traffic being handled by the railway;
8. Rates paid by other shippers for traffic with similar handling characteristics.

In connection with the last three of these factors, shippers are faced with a significant informational imbalance. The data they require to estimate the profitability of their traffic for the railway or to compare the rates they are being offered to other rates in the market place has become increasingly difficult to obtain. For example, due to pressure from one of the railways, Statistics Canada has stopped publishing operational data previously available to shippers. Similarly, while the Agency is able to provide the parties and the arbitrator with a determination of the costs related to the movement at issue using its regulatory costing model and has done so in the past, it will now do so only if the railway consents.

The resulting evidentiary disadvantage restricts the shipper's ability to challenge the railways' case and to present its own case fully. It effectively allows the railway to prevent the arbitrator from receiving all relevant information.

Bill C-49 does not address this serious problem. The amendment WCSC and others have proposed is intended to do so, by allowing the Agency to provide an independent costing determination. How this information is used by the parties or the arbitrator would be left up to them.

We have raised this issue with Transport Canada personnel. They have indicated a concern that simply having this information available could lead an arbitrator to think that the rate should be set only by reference to costs.

We believe that concern is ill founded. First, the Act explicitly requires the arbitrator to have regard to the information provided to the arbitrator by the parties. This means the arbitrator must consider all of the information provided and cannot simply disregard non-costing information. Secondly, unlike the section that requires the arbitrator to consider the availability of competitive alternatives, the proposed amendment would leave the discretion of what to do with the costing determination up to the arbitrator. It would also leave both parties free to address the information and its importance relative to any other information provided by the parties to the arbitrator.

The alternative to making this amendment, the current status quo, would leave the balance tilted decidedly in the railway's favour.