



Western Canadian Shippers' Coalition

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

House of Commons' Standing Committee on Transportation, Infrastructure and Communities

**Brief submitted by
Western Canadian Shippers' Coalition**

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Introduction

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.

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.

WCSC's goal is a competitive, economic, efficient and safe transportation system in Canada that permits our members to compete both domestically and internationally.

Bill C-49: *Transportation Modernization Act*

With respect to the specific measures contained in Bill C-49, WCSC is focusing on the following key areas:

1. Railway data reporting
2. Access to competing railways
3. Railway service obligations
4. More accessible, timely and effective remedies

1. Data Reporting Requirements

Bill C-49 introduces new data reporting requirements for railways on rates, service and performance, that are aimed at enhancing system transparency for all stakeholders. WCSC strongly supports this objective. Policy makers, regulators and users of the rail transportation system need sufficiently detailed data on a timely basis in order to make evidence based decisions.

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's concerns with this approach are:

- a. the information is too highly aggregated

The US regulations require CN and CP to report separately for each of 23 different commodity groups. The provisions in Bill C-49 will aggregate data for all commodity groups other than grain.

For example, railways will need to report on a weekly basis the average number of railcars on line anywhere on their network in Canada. This will be reported by car type, such as box car or covered hopper car or tank car. Taking box cars as an example, in any given week the average number of cars on line could include cars containing refined metal products originating in the Montreal area, cars carrying pulp from Alberta mills north of Edmonton and cars carrying paper being shipped from Nova Scotia, as well as a host of other traffic. The reports will not indicate if box car supply for refined metals is holding steady while supply of the same car type for pulp shippers is tight or if some areas of the network are fluid while others are experiencing bottlenecks and delays. In short, this will produce general, high level statistics that are of little if any practical value.

- b. the information will not be available on a timely basis

Bill C-49 delays implementation of performance metrics reporting by a full year. It would also allow for a three-week delay in the publication of performance data. That is three times as long as the time frames which CN and CP are currently required to meet in respect of their US operations. It may be useful in tracking overall trends or perhaps in assessing past service failures – it would not be useful to shippers in day-to-day decision making with respect to their shipments.

Recommendation 1:

WCSC recommends changes to the wording of Bill C-49 to:

- **eliminate the one-year deferral of performance reporting,**
- **include commodity-specific data (which will bring reporting more in line with what CN and CP are already reporting in respect of their US operations); and**
- **shorten the time frames for reporting and publication of this information.**

In addition to these specific changes, which are set out in section 1 of the Recommendations at the end of this brief, WCSC also supports a requirement for data that is more granular in terms of specific areas or components of the rail network.

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.

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.

The Long-Haul Interswitching (LHI) remedy in Bill C-49 is far less user-friendly:

- It is designed to be short term (1 year). It cannot be used in long-range planning or to establish a base line for greenfield developments, for example.

- It requires an adversarial process in every instance.
- It replaces one kind of captivity with another (because the shipper has to commit to ship via LHI *instead* of using its local carrier beyond the nearest interchange).
- It is subject to multiple exclusions, both in terms of geography and in terms of the type of traffic that is eligible for LHI. This means that a great deal of rail traffic that is among the most captive in Canada will be altogether barred from using the remedy

On a more fundamental level, LHI is very similar, in concept and overall structure, to the Competitive Line Rate (or CLR) remedy that has been in the legislation since 1988. That remedy has been inoperative since the early 1990s because CN and CP have effectively declined to compete for traffic using CLR. That was the conclusion reached in the statutory review of the National Transportation Act in 1992 – twenty-five years ago.

For most shippers in Western Canada, the nearest interchange with a second carrier is an interchange between CN and CP (as illustrated by the map in the Appendix to this brief).. Like CLR, whether LHI provides competitive alternatives to any shipper will depend largely on whether CN and CP are prepared to compete with each other using this remedy. Unless they are, LHI will remain a concept on paper that has little or no practical application.

Recommendation 2:

WCSC therefore renews its recommendation that the 160 km interswitching limit be made permanent for the four Western provinces. The amendments required to accomplish this are set out in section 2 of the Recommendations at the end of this brief.

3. “Adequate and Suitable” Service

Bill C-49 includes an addition to the level of service provisions, which requires the Agency to *dismiss* a complaint if it is satisfied that the railway has provided the highest level of service that is reasonable in the circumstances. Unfortunately, this does not tell shippers what they must prove in order to *succeed* in a level of service complaint. If the intent is that unless the railway has provided the highest level of service that is reasonable in the circumstances, it will be found in breach of its obligations, then the section should be amended to say so clearly. Failing to do so will result in unnecessary litigation about how this clause should be interpreted. It is of little comfort to say that the stricter interpretation would likely win out, if a shipper needs to devote additional time and resources to litigating the issue before the Agency and the Federal Court of Appeal to reach that conclusion.

Recommendation 3:

WCSC recommends that the wording of proposed subsection 116(1.2) be amended to give effect to the legislative intent more clearly. The specific amendments required to accomplish this are set out in section 3 of the Recommendations at the end of this brief.

4. More accessible and timely shipper remedies

In the area of rail service issues, Bill C-49 goes some way to promoting more timely remedies by shortening the time frame within which the Agency must render a decision from 120 to 90 days. In cases involving serious acute shortfalls, however, waiting 3 months for relief is only marginally better than waiting 4 months. In those cases, the Agency's ability to expedite the process or to make an interim protective order that ensures a modicum of service while the process unfolds is crucial. It can mean the difference between continuing to operate and having to idle a facility with all that entails in terms of lay-offs, costs associated with shutting down and later restarting major equipment and loss of business.

The Agency, like most other administrative tribunals, has the ability to make its own procedural rules and control its own process. That is as it should be. In any given proceeding, it has to ensure that each party has a fair opportunity to present its case and challenge the case of its component. It also has to be on guard against and take measures to prevent delay tactics.

Bill C-49 takes the extraordinary step of mandating the *minimum* time frames, which the Agency must allow each party to prepare and file its submissions in a level of service complaint. That means the Agency will no longer be able to expedite urgent level of service cases. It also creates uncertainty and, with that, risk of additional litigation, with respect to how the Agency must deal with requests for interim orders.

Recommendation 4:

WCSC recommends removing the subsection that would prescribe minimum time periods for the preparation and filing of pleadings in level of service complaints. The specific amendment that WCSC is recommending is set out in section 4 of the Recommendations at the end of this brief.

5. Agency Authority

Of the recommendations that WCSC put forward in the CTA Review process and the subsequent consultations, two in particular remain of high importance to our members:

- a. giving the Agency the ability to investigate matters within its jurisdiction on its own initiative; and
- b. providing the arbitrator in a Final Offer Arbitration with the Agency's determination of the cost of moving the traffic to which the arbitration relates.

Both of these measures would go a long way to making the transportation system more transparent, as well as relief more accessible and remedies less complex to use for our members.

The Agency's initiative in investigating Air Transat tarmac delays and the US Surface Transportation Board's initiative in asking CSX to respond to widespread dissatisfaction with changes in service levels are prime examples of own motion powers. They illustrate how including such powers in the

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Agency's mandate in respect of rail could be used to hold railways accountable when issues affecting a broad range of customers arise.

In the context of freight rate disputes in final offer arbitration, a crucial piece of information that is typically not available to the arbitrator is how profitable the shipper's traffic would be to the railway under each of the two final offers. The Agency is the only body with the requisite expertise and independence to determine the railway's variable costs of moving the shipper's traffic. Providing for an Agency costing determination of the shipments submitted to arbitration would ensure this information is available to the arbitrator and would streamline the process.

Recommendation 5:

WCSC recommends:

- a. **enabling the Agency to initiate inquiries into any matter within its jurisdiction under the Act;**
- b. **providing for an Agency costing determination in final offer arbitration.**

6. Mandatory Review of Act

As a final note, one thing that is absent from Bill C-49 is a provision that has historically been included in almost every bill making major amendments to the Act: a requirement that, within a specified time, the Minister initiate a statutory review of the operation of the legislation as amended.

Bill C-49 contains quite a number of changes to rail regulation in Canada and the Committee will hear diverging views on what these amendments will and will not achieve. WCSC recommends adding a section to Bill C-49 requiring a review – at least of the rail-related provisions of the Act – within a reasonable time. WCSC believes that four years would be an appropriate time frame.

Recommendation 6:

WCSC recommends requiring a review of the rail related provisions of the Act within four years of the date on which Bill C-49 takes effect.

Specific Recommendations in respect of Bill C-49:

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 **44 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 preamble to 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:

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

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

5. Agency Authority:

- a. Enable the Agency to initiate inquiries into any matter within its jurisdiction under the Act;
- b. In final offer arbitrations, provide for an Agency costing determination;

6. Add a provision to Bill C-49 to replace subsection 53(1) of the Act with the following:

53 (1) The Minister shall, no later than **four** years after the day this subsection comes into force, appoint one or more persons to carry out a comprehensive review of the operation of this Act and any other Act of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament.

53(1.1) The review under subsection (1) shall include rail transportation.

About Western Canadian Shippers' Coalition

WCSC represents companies based in Western Canada that move mainly resource products through the supply chain to domestic and international customers. Our current membership includes:

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

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.

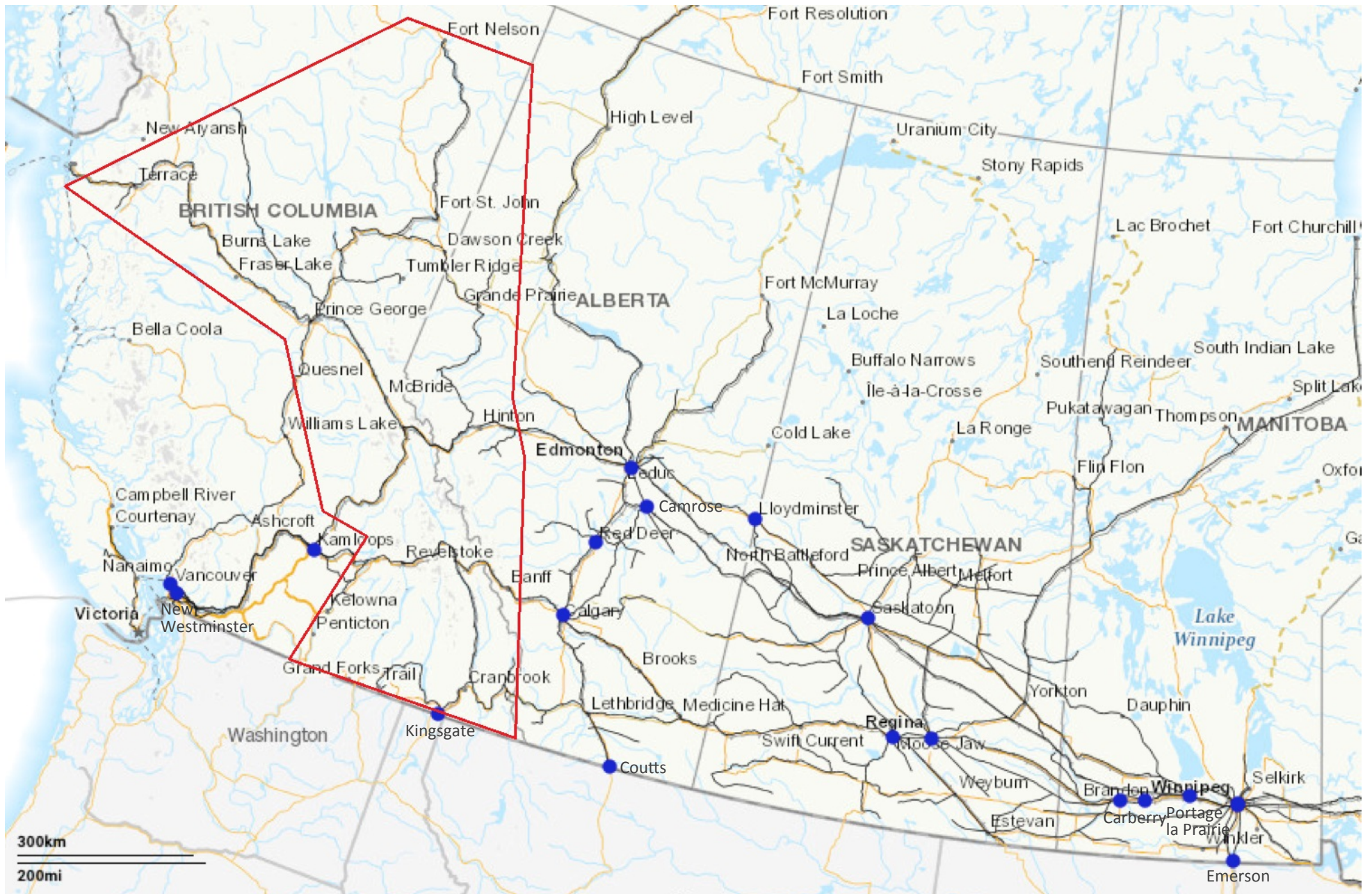
David Montpetit has been president and CEO of WCSC since 2014. He is also president of Diadem Group Ltd., a transportation and logistics consulting firm that works primarily in the areas of rail transportation and port logistics. His previous experience includes negotiating rail transportation agreements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

Lucia Stuhldreier is a partner at McMillan LLP and legal advisor to WCSC. She has practiced rail transportation law since 1998, and has been involved in numerous negotiations and contested proceedings on behalf of shippers in relation to rail freight rates, service levels, competitive access and rail line discontinuance.

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 – Coultts

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