PULSE CANADA

SUBMISSION TO THE SENATE STANDING COMMITTEE ON TRANSPORT AND COMMUNICATIONS

Bill C-49 The Transportation Modernization Act

February 27, 2018
Strengthening the Outcomes from Bill C-49 – Transportation Modernization Act

Introduction

Pulse Canada is pleased to provide this written brief to the Senate Standing Committee on Transport and Communications for the study on Bill C-49 – Transportation Modernization Act.

Pulse Canada is the national industry association that represents over 35,000 growers and 132 processor/exporters of peas, lentils, beans and chickpeas. Canada is the world’s largest producer and exporter of peas and lentils, accounting for over 1/3rd of all global pulse trade. Industry stakeholders rely on an efficient and responsive rail freight logistics system to facilitate global competitiveness in over 150 export markets, making legislative and regulatory improvements that improve the effectiveness of the pulse and special crops supply chain a strategic priority for the sector.

For pulse and special crop shippers, the legislative and regulatory changes introduced in Bill C-49 will be successful if they deliver three key outcomes shippers need from rail transportation: improved levels of rail service, rail capacity and competitive freight rates. Pulse Canada’s assessment of key provisions in the Bill are found in the brief provided to the House Standing Committee on Transport, Infrastructure and Communities (Appendix 1). While the points raised in the brief still stand, Pulse Canada is requesting that the Senate Committee on Transport and Communications consider a key amendment that will provide the Canadian Transportation Agency (the Agency) the ability to investigate systemic issues that arise in the freight rail system that result in chronic service failures and the erosion of Canadian exporters global competitiveness.

Proposed Amendment

Bill C-49 has proposed enhancements to data collection and disclosure within the rail sector, a positive step that will provide more timely access to information on the operation of the rail system. This will allow the Agency, Transport Canada and users of the system to make informed and effective evidence based policy and commercial decisions. The next step however, is to ensure that the Agency can act ex parte to address the systemic issues they see arising in this data and ensure urgent service problems are dealt with quickly and with limited economic harm to shippers and the Canadian economy.

As detailed in a joint industry letter (Appendix 2), Pulse Canada is working with industry colleagues to recommend that the Agency is provided the necessary own motion and ex parte powers to adequately fulfill their regulatory responsibility. Pulse Canada has consistently advocated for this change, including during the 2010 Rail Freight Service Review and during the 2014-15 Canada Transportation Act review process led by David Emerson. Mr. Emerson’s final report recommended that the Canadian Transportation Agency be conferred “investigative powers, and the authority to act on [their] own motion and on an ex parte basis, as well as to address issues on a systemic basis and to issue general orders (these new powers would only be executed on reasonable grounds, on issues related to the Agency’s mandate)”1.

Pulse Canada to views this as an essential change that will help ensure Bill C-49 improves service, capacity and performance in Canada’s freight rail system.

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1 Canada Transportation Act Review, Pathways: Connecting Canada’s Transportation System to the World (2015), Chapter 11, page 248
Agency Inquiry Powers - Background

Bill C-49 clarifies the Minister’s power to direct the Agency to inquire into issues relating to the rail system, however, it has not restored the Agency’s own-motion authority.

There are circumstances where the rail system experiences system wide problems, the 17/18 grain year is an example of this where CN has consistently failed to meet the rail car capacity needs of many in the agriculture sector. However, the current legal requirement that a formal complaint on rail service be made before the Agency may act means that the case is limited to the facts of that complaint brought by a single shipper. It also means that the Agency must wait until the complaint is made, leading to delay in addressing underlying causes and preventing farmers and shippers from receiving relief from urgent service issues. With transparency on the service performance of the rail system increasingly available - both through proposals in Bill C-49 and industry initiatives like the Ag Transport Coalition - emerging service problems are more apparent to all stakeholders. The Agency should be provided the ability to take action to address system backlogs before commercial damage is done to farmers, shippers or receivers - either directly through loss of business or indirectly through damage to Canada’s reputation as a reliable supplier.

Own-motion authority are not exceptional powers in Canadian economic regulation. The Agency’s predecessor, the National Transportation Agency, had broad powers to address problems without a formal complaint by virtue of its ability to make rules, orders and regulations respecting anything within its jurisdiction and to hear and determine on its own motion anything concerning a license or permit issued. The National Energy Board and the Canadian Radio-television and Telecommunications Commission have the power to act without complaint to address things within their jurisdiction. The former National Transportation Agency had power to make interim ex parte orders.

In its annual 2016-2017 annual report, the Agency raised issues with the absence of own-motion investigative power and the impact this has on their ability to discharge their legislative and regulatory responsibility. With the significant policy changes and new responsibilities for the Agency introduced in Bill C-49, providing them with own-motion powers would help ensure the outcomes government has intended with the Act are achieved.

Recommendation - In order to enhance the Agency’s effectiveness, Pulse Canada recommends that the government restore the Agency’s power to act on its own motion to investigate service issues – including systemic issues, to issue general orders and to issue ex parte orders.

Amend section 3 of Bill C-49 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.

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2 National Transportation Act, 1987. (RSC 1985 (3rd Supp.), c.28, ss.27, 35
3 National Energy Board Act (RSC 1985, c.N-7, s.12)
4 Telecommunications Act (SC 1993, c.38, s. 9(2)); Broadcasting Act (SC. 1991, c.11, s.18(3))
5 National Transportation Act, 1987. (RSC 1985 (3rd Supp.), c.28, s.40(3)
7 An ex parte order is one made on the request of and for the benefit of one party only. This is an exception to the basic rule of legal procedure that both parties must be present at any argument before a decision is rendered. As a result, ex parte matters are usually temporary orders made to deal with urgent situations pending a formal hearing or investigation.
PULSE CANADA

SUBMISSION TO THE HOUSE OF COMMONS STANDING COMMITTEE ON TRANSPORT INFRASTRUCTURE AND COMMUNITIES ON:

Bill C-49 The Transportation Modernization Act

Sept 5, 2017
Strengthening the Outcomes from Bill C-49 – Transportation Modernization Act

Pulse Canada is pleased to provide this written brief to the Standing Committee on Transport, Infrastructure and Communities for the study on Bill C-49 – Transportation Modernization Act.

Pulse Canada is the national industry association that represents over 35,000 growers and 132 processor/exporters of peas, lentils, beans and chickpeas. Canada is the world’s largest producer and exporter of peas and lentils, accounting for over 1/3rd of all global pulse trade. Industry stakeholders rely on an efficient and responsive rail freight logistics system to move products to over 150 markets around the world and improvements in the effectiveness of pulse and special crops supply chains is a strategic priority.

Pulse Canada views a common understanding and appreciation of the market power of Canada’s railways as central to any discussion regarding solutions that address users’ needs for rail capacity and service and facilitating economic growth.

Bill C-49 provides the potential to facilitate our sector’s global competitiveness by focusing on achieving a transparent, fair and efficient rail system; drivers that can deliver the three key outcomes shippers need from rail transportation: improved levels of rail service, capacity and competitive freight rates.

These three outcomes have framed Pulse Canada’s assessment of Bill C-49 and we are pleased to offer recommendations to help ensure that the Government’s goal of a more transparent, fair and efficient rail system delivers results to shippers. Specifically, we have focused on:

- Increasing the clarity on the proposed reciprocal financial penalties in Service Level Agreements (SLA), to ensure they effectively incent predictable and reliable service.
- Enhancing the data collection and disclosure sections to increase transparency and data quality so users of the rail system, regulators and policy makers can make informed and effective evidence based policy and commercial decisions.
- Detailing the specific information railways should provide when providing the report to the Minister on how they plan to move grain during the grain year.
- Increasing the clarity on the role of the Canadian Transportation Agency (the Agency) when carrying out their informal dispute resolution powers.
- Ensuring that there are no barriers to shippers accessing the Long Haul Interswitching provisions.
- Providing the Canadian Transportation Agency (the Agency) with the necessary powers to achieve the policy objectives of Bill C-49.
Service Level Agreements – Reciprocal Penalties

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Pulse Canada believes the provisions in Bill C-49 that introduce the right for shippers to request a contract from a railway that includes reciprocal penalties can address the urgent need for more balanced accountability for service performance between shippers and railways. These sections will ensure that some measure of market discipline is introduced, imposing a consequence for failing to meet or make commitments for a variety of service terms.

In setting the criteria for penalties, the government has recognized the need for them to be sufficient to:

- Encourage the efficient movement of the shipper’s traffic;
- Encourages performance of the railway system; and
- is balanced between the shipper and the railway company.

It must be noted that the penalty level amount needed to incent railway behaviour will be different from the level needed to incent shipper behaviour. To ensure that reciprocal penalties result in the performance improvements and system efficiencies they intend, it is important that Government clearly indicate that the penalties need to balance the disparity between the economic power of small shippers and that of the railways.

**Recommendation (Clarification of Intent)** – Provide clarity that the Government’s intent is that penalties which meet the criteria set out in 169.37(3) are those which are sufficient to encourage performance while recognizing the differences in economic power of small shippers compared with that of the railways.

Data Collection and Disclosure

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Pulse Canada supports Transport Canada’s efforts to ensure a “transparent freight rail system that incentivizes commercial relationships” as regulators, policy makers and users of the rail system need timely and accurate information to make evidence-based policy and commercial decisions. As Bill C-49 has introduced a series of significant policy changes, the rail system must be closely monitored to ensure they are encouraging the desired behaviour and delivering the desired results the Government intended. For the grain sector, changes to the Maximum Revenue Entitlement that exclude containerized grain from the MRE calculations are intended to allow railways to increase investment in their intermodal networks and offer innovations in service and capacity to grain shippers.
To fully realize the potential of these new data requirements to assess the outcome of proposed Bill C-49 policy changes and to provide the transparency needed to encourage competitive behaviour and improve service, Pulse Canada recommends the following changes.

**Timing of release of service and performance data**

Bill C-49 contains transitional provisions for the proposed service and performance regulation that will require rail carriers to provide data to the Agency like that currently provided to the US Surface Transportation Board. However, Bill C-49 has:

- extended the time period for submission and publication of this data, resulting in a total delay of three weeks between performance and publication compared to one week in the US.
- proposed that the service and performance data will not be provided publicly until one year after Royal Assent of Bill C-49.

As this data is already provided by Canadian rail carriers to the STB, it should be possible to make this data available soon after C-49 receives royal assent. By making this data available within 60 days of royal assent, Government, academics, shippers and all stakeholders in rail freight logistics will have the opportunity to assess whether it is comprehensive, detailed and timely enough to allow for evidence-based decisions and ensure the subsequent regulations reflect any necessary changes.

**Recommendation (amendment) – Reduce the delay in publication of section 50 (1.01) (b) transitional performance data publication to 1 week.**

**Amend section 13 of Bill C-49 by amending the proposed subsection 51.4(1):**

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.

**Amend subsection 77(5) of Bill C-49:**

77(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.

**Recommendation (amendment) - Eliminate the 1 year waiting period for the publication of section 50 (1.01) (b) transitional performance data and allow stakeholders access to this information within 60 days of royal assent.**

**Amend subsection 98 (7) of Bill C-49:**

98(7) Section 77 comes into force on the first anniversary of 60 days after the day on which this Act receives royal assent.
Use of operational and revenue data for purposes other than establishing an LHIR

Section 50(1.01)(a) of Bill C-49 introduces a provision that will require railways to provide operational and revenue data to the Agency. This type of data collection authority is already available to other arms-length tribunals and regulators in Canada, the Surface Transportation Board in United States, and is an essential element to allow them to carry out their adjudicative and regulatory responsibilities. However, Bill C-49 only allows this data to be used by the Agency to establish Long Haul Interswitching Rates.

Pulse Canada believes that the Canadian Transportation Agency should have the ability to utilize this data to fulfill all of its responsibilities as effective decision making is best facilitated by having the ability to receive and analyze detailed information on all aspects of railway and system performance.

Recommendation (amendment) – Allow the Canadian Transportation Agency to utilize section 50(1.01)(a) data to effectively carry out all their duties and functions.

Amend Section 13 of Bill C-49 by amending the proposed subsection 51.3:

51.3 Information that is provided to the Minister or the Agency in accordance with regulations made under paragraph 50(1.01)(a) is only to be used by the Agency for the purpose of carrying out its powers, duties and functions under an Act of Parliament referred to in paragraph 12(1)(a) and, despite subsection 51(4) and section 51.2, the Agency may, for that purpose, communicate the information in an aggregated form.

Railway Reporting

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Bill C-49 contains provisions that will require prescribed railways to self-assess their ability to move grain during the upcoming crop year, identify the steps they will take to enable them to move the grain and to describe contingency plans they will have in place to move grain and other traffic in winter weather conditions.

Providing transparency into the railway companies’ projections for grain movement, both the total volume and the timing of the movement, provides the opportunity for industry stakeholders, regulators and government policy makers to determine if the railways’ planned handleings are in line with industry/market projections for grain movement.

In addition, the information contained in these reports can establish the basis for measuring railway activities against plan both during and at the end of the grain year. Undertaking such monitoring and measurement will hold the railways accountable to their public commitments to both industry and government with respect to the capacity committed to the movement of grain and the accuracy of their planning assumptions. Furthermore, over time the data collected can help to explain performance after the fact and provide insight for subsequent annual planning exercises.
To strengthen this provision and ensure it delivers the intended outcome, Pulse Canada recommends that the section clearly set the parameters for the type of information railway companies must provide.

For the Pulse and Special Crops sector, better defining these parameters provides a platform for the monitoring and assessment of the impact of the decision to remove containerized grain from the MRE. By clearly defining this section, it will allow for a discussion on the detailed and timely metrics that will be needed to both monitor railway companies increased investment in containerized grain, enhanced levels of capacity and innovations that support capacity and service that meets the needs of the users of the system.

**Recommendation (amendment) – Strengthen the requirement for railway companies to report to the Minister on how they will move grain for the upcoming grain year; establishing a basis for measuring railway activities during and at the end of the grain year.**

*Amend section 42 of Bill C-49 by amending the proposed subsection 151.01(1):*

151.01 (1) Before the beginning of every crop year, a prescribed railway company shall provide to the Minister a report, in the form and manner that may be specified by the Minister, that

(a) assesses the prescribed railway company’s ability to move the grain that it is required to move during the crop year taking into account forecasts the total monthly volume of grain expected to be moved for the crop year by the prescribed railway by commodity and principal destination corridor; and

(b) identifies the operational plans established by steps the prescribed railway company is taking to enable it to move the grain that it is required to move during the crop year, including hopper car fleet size, fleet utilization assumptions and train operations related specifically to the movement of grain.

**Informal Dispute Resolution (Section 5 of Bill C-49)**

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Bill C-49 proposes a general strengthening the Agency’s information and dispute resolution services, a positive step towards improved performance and commercial fairness within the rail transportation sector. This includes a new subsection 39.11(2) that allows the Agency to attempt to resolve an issue a shipper may have with a railway company in an informal manner.

Pulse Canada views this as an important new provision that provides shippers – particularly small and medium sized shippers - with a less confrontational, more cost effective, and timely way to resolve service issues without having to bring a formal level of service complaint to the Agency. Informal resolution has the potential to bring increased efficiency to the rail system through a quicker and more effective resolution of service issues.
Pulse Canada believes the informal resolution process can be strengthened by Government signaling clearly what the intended meaning of section is and the type of actions the Agency is expected to undertake to achieve resolution.

**Recommendation (clarification of intent) – Clearly signal how government intends the Agency to take action on informal resolution introduced in subsection 39.11(2)**

Government should be clear that the intention of subsection 39.11(2) implies the Agency will make an active effort or take actions to resolve issues. These actions might include:

- Questioning
- Meeting
- Site Visits
- Convincing
- Requesting information
- Assessing
- Reviewing
- Examining
- Investigating
- Reaching independent conclusions and sharing those with the railway
- Reporting
- Bringing parties together

**Long Haul Interswitching**

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The Long-Haul Interswitching proposal in Bill C-49 attempts to provide more competition in the railway transportation market while ensuring railway companies are appropriately compensated. The competition this provision intends to produce has the potential to bring significant benefit to the Canadian economy by ensuring rail capacity and service meets the needs of Canadian industry, driving economic opportunities and reducing costs for Canadian firms.

To ensure the most beneficial outcome for individual shippers and the economy, Long Haul interswitching should be available to all shippers to provide them with the flexibility to access the interchange and rail competition that is most effective for their operations, sales programs and market access needs. This is particularly important for the pulse and special crop sector and the wider grain industry as proposed new subsection 129(3) would exclude shippers of containerized grain from having access to the Long Haul Interswitching remedy. In addition, Pulse Canada has concerns that the Long Haul Interswitching rates will not be competitive as they will be derived from comparable traffic that is subject to captivity. The remedy should be reviewed within 1 year of royal assent to ensure that it is effectively introducing competitive forces into the rail market and that the rate setting methodology is not acting as a barrier to shipper access to the remedy.
Recommendation (amendment) – Eliminate barriers to shippers to access Long Haul Interswitching by removing the proposed new subsection 129(3).

Recommendation (amendment) – Transport Canada should review the effectiveness of Long Haul Interswitching after 1 year to ensure that it is resulting in competitive options for shippers at competitive rates.

Agency Inquiry Powers

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Bill C-49 clarifies the Minister’s power to direct the Agency to inquire into issues relating to the rail system, however, it has not restored the Agency’s own-motion authority.

The Agency has the central role in the economic regulation of Canadian railways and in the administration of various shipper protection and dispute resolution processes laid out in the Canadian Transportation Act. However, the current legal requirement that a formal complaint be made before the Agency may act means that the case is limited to the facts of that complaint brought by a single shipper. It also means that the Agency must wait until the complaint is made, leading to delay in addressing underlying causes.

Own-motion authority are not exceptional powers in Canadian economic regulation. The Agency’s predecessor, the National Transportation Agency, had broad powers to address problems without a formal complaint by virtue of its ability to make rules, orders and regulations respecting anything within its jurisdiction and to hear and determine on its own motion anything concerning a license or permit issued.\(^1\) The National Energy Board\(^2\) and the Canadian Radio-television and Telecommunications Commission\(^3\) have the power to act without complaint to address things within their jurisdiction. The former National Transportation Agency had power to make interim ex parte orders\(^4\).

In its annual 2016-2017 annual report, the Agency raised issues with the absence of own-motion investigative power and the impact this has on their ability to discharge their legislative and regulatory responsibility. With the significant policy changes and new responsibilities for the Agency introduced in Bill C-49, providing them with own-motion powers would help ensure the outcomes government has intended with the Act are achieved.

Recommendation - In order to enhance the Agency’s effectiveness, Pulse Canada recommends that the government restore the Agency’s power to act on its own motion to investigate service issues – including systemic issues, to issue general orders and to issue ex parte\(^5\) orders.

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\(^1\) National Transportation Act, 1987. (RSC 1985 (3rd Supp.), c.28, ss.27, 35

\(^2\) National Energy Board (RSC 1985, c.N-7, s.12)

\(^3\) Telecommunications Act (SC 1993, c.38, s. 9(2)); Broadcasting Act (SC 1991, c.11, s.18(3))

\(^4\) National Transportation Act, 1987. (RSC 1985 (3rd Supp.), c.28, s.40(3)

\(^5\) An ex parte order is one made on the request of and for the benefit of one party only. This is an exception to the basic rule of legal procedure that both parties must be present at any argument before a decision is rendered. As a result, ex parte matters are usually temporary orders made to deal with urgent situations pending a formal hearing or investigation.
Summary of Pulse Canada Recommendations

Service Level Agreements – Reciprocal Penalties

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Recommendation (Clarification of Intent) – Provide clarity that the Government’s intent is that penalties which meet the criteria set out in 169.37(3) are those which are sufficient to encourage performance while recognizing the differences in economic power of small shippers compared with that of the railways.

Long Haul Interswitching

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Recommendation (amendment) – Eliminate barriers to shippers to access Long Haul Interswitching by removing the proposed new subsection 129(3).

Recommendation (amendment) – Transport Canada should review the effectiveness of Long Haul Interswitching after 1 year to ensure that it is resulting in competitive options for shippers at competitive rates.

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Recommendation (clarification of intent) – Clearly signal how government intends the Agency to take action on informal resolution introduced in subsection 39.11(2)

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Recommendation (amendment) – Strengthen the requirement for railway companies to report to the Minister on how they will move grain for the upcoming grain year; establishing a basis for measuring railway activities during and at the end of the grain year.

- Amend section 42 of Bill C-49 by amending the proposed subsection 151.01(1)
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Recommendation (amendment) – Reduce the delay in publication of section 50 (1.01) (b) transitional performance data publication to 1 week
  • Amend section 13 of Bill C-49 by amending the proposed subsection 51.4(1)
  • Amend subsection 77(5) of Bill C-49

Recommendation (amendment) - Eliminate the 1 year waiting period for the publication of section 50 (1.01) (b) transitional performance data and allow stakeholders access to this information within 60 days of royal assent.
  • Amend subsection 98(7) of Bill C-49

Recommendation (amendment) – Allow the Canadian Transportation Agency to utilize section 50(1.01)(a) data to effectively carry out all their duties and functions.
  • Amend section 13 of Bill C-49 by amending the proposed subsection 51.3

Agency Inquiry Powers

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