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Submission to

***The Canada Transportation Act* Review**

1. Introduction

The Canadian Canola Growers Association (CCGA) is pleased to have the opportunity to provide this written submission and perspective to *The Canada Transportation Act* Review. CCGA also appreciates the opportunity to have met in person with the Grain Advisor to the Chair, Mr. Murad AL-Katib on September 12, 2014 in Winnipeg.

CCGA represents 43,000 canola growers and is governed by a Board of farmer directors representing all provinces from Ontario west to British Columbia. Approximately 90% of canola grown in Canada is exported (in the form of seed, oil or meal), thus our industry critically relies on the service of Canada's railways to transport our products to export position.

CCGA supports and is encouraged by the forward-looking and pro-competitive lens by which this Review is being undertaken. The international competitiveness of our industry, which contributes $19 billion annually to the Canadian economy, is highly dependent on the railways providing predictable, timely and efficient service. In the 2013-14 crop year, Canadian farmers harvested a record 18 million tonnes of canola. The canola industry has set a strategic goal of sustainably producing 26 million tonnes per year by 2025, a 40% increase over the 2013-14 crop year's record production.

The Government's efforts to expand trade through liberalized trade agreements (such as the Comprehensive Economic Trade Agreement and the South Korea Free Trade Agreement) will play an important role in marketing this expanded production. However, we will not be able to capitalize on the opportunities these agreements provide without a reliable and efficient rail system that global customers have confidence in. Likewise, the ability to transport product domestically for value-added production (such as oil processing) and distribution is important as there is no ability for modal substitution. To accomplish this, there must be a fundamental rebalancing of the relationship between shippers and the railways, and *The Canadian Transportation Act* provides a mechanism to effect the needed change.

The Canada Transportation Act Review provides an opportunity to critically think about the legislative and regulatory framework governing our current transportation system and what actions may be needed now to facilitate the development of a competitive transportation system that our nation requires two or three decades into the future. This is a critical challenge as grains and all export commodity sectors seek to increase their international competiveness and market share.

The Panel will undoubtedly be receiving submissions from the grain and other commodity groups that highlight similar core issues. This is because amongst the grain sector and within the broader shipping community, in spite of some nuances, they are all wrestling with a same set of basic, fundamental concepts which seek to provide a counterbalance to the monopoly positions and immense power imbalance between the Canada's two Class I rail service providers and their shippers (which has been well-documented). Inadequate service and underinvestment are a natural byproduct of this relationship. For a vision of national economic growth, this is unacceptable to shippers and should be to all Canadians.

The remainder of this submission will briefly address three topic areas:

1. The Fundamental Issues of Adequate and Suitable and Service Level Agreements;

2. Specific areas of *The Canada Transportation Act;* and

3. Future Directions.

2. Fundamental Issues

In recent years it has been well documented that the railway-shipper relationship has some inherent shortcomings, with a lack of balanced commercial accountability being cited as a primary issue. This has been discussed in the Rail Freight Service Review, the Bill C-52 and Bill C-30 processes (with several other major prior investigations).

CCGA recommends to the Review that there exist two fundamental issues that require consideration. Addressing them will work to rebalance the commercial relationship between shippers and the railway service provider. These two issues are:

- **Proper definition of "adequate and suitable" service in the common carrier obligations** (Sections 113 – 116). Defining service as that which meets the shippers needs, addresses the capacity issue in a way that is not prescribed by Government, but instead compels the service provider to do what they need to in order to carry the traffic presented to them. A strengthened definition of "adequate and suitable" service in the common carrier obligations contained in *The Canada Transportation Act* is required. Railway service obligations must meet the transportation needs of the shipper.

- **Provision for reciprocal penalties (paid between the contracting parties) within arbitrated Service Level Agreements.** There must be explicit provision for the element of reciprocal penalties in arbitrated Service Level Agreements. Reciprocal penalties (or performance incentives) for non-performance when specific service obligations are breached, will increase the accountability between parties in the supply chain and hold them financially responsible to each other within a commercial agreement. This will bring a commercial framework that will drive more responsive behavior in the supply chain. Contracts are the key to commercial relationships and the long-standing imbalance is a glaring hole in the shipper-rail service provider relationship.

In short, without addressing these two overarching issues, the relationship between shipper and rail service provider will remain commercially unbalanced. This will continue to exert ongoing pressure on the supply chain. Without material change to the legislative framework that will increase railway accountability, there is little that can be done to address chronic service disruptions and practically no means for shippers to hold their rail service providers accountable. In the absence of real commercial competition, it is our view that a legislative approach is appropriate to create accountability. With the recent practical effect of several legislative actions taken to address this issue, the Panel should not be left with the impression that reform has occurred.

3. Specific Areas of *The Canada Transportation Act*

3.1 Common Carrier Obligations: Definition of Suitable and Adequate (§ 115)

As noted above, the current language is vague and requires more specificity. Enshrining the principle in law that rail service provision is demand-driven, as opposed to supply-driven is a key distinction. The nation's economy cannot be expected to fully capitalize on global marketing opportunities when the ability to provide the goods to customers are in effect governed by a rail service provider.

It should be noted that CCGA, through its filing of a Level of Service complaint with the Canadian Transportation Agency (Agency) on May 26, 2014, attempted to have the Agency address this issue. What do the common carrier obligations, as set out in the Act, actually mean? Although the CCGA complaint was technically based on the breakdown of the transportation system in winter 2014, the underlying emphasis was to seek clarification on the above, and to have the Agency provide industry guidance on the issue (as this had not been addressed in previous legislative undertakings). Ultimately, due to procedural tactics related to data, the Agency dismissed the complaint on October 1, 2014. This issue remains unaddressed.

Recommendation:

- Strengthen the definition of "adequate and suitable accommodation" as follows: *"For the purposes of sections 113 and 114, a railway company shall fulfill its service obligations in a manner that meets the rail transportation needs of the shipper".*

3.2 Service Level Agreements: Ability to seek Arbitrated Reciprocal Penalties

Bulk grain shippers and other major actors in the sector (such as canola crushers) have consistently advocated for the ability for a shipper to have reciprocal penalties for non-performance contained within Arbitrated Level of Service Agreements, and this point was acknowledged in the 2011 Final Report of the Rail Freight Service Review (Recommendation 6.5.2).[1] This issue was most recently examined in the Bill C-30 process, and adjustments were made to Regulations on Operational Terms for Rail Level of Services Arbitration, but explicitly did not address this issue.

Service Level Agreements, that through arbitration, include the ability for the inclusion of reciprocal penalties for non-performance when service obligations are breached, will increase the accountability between parties in the supply chain and hold them financially responsible to each other. It is the hallmark

[1] **6.5.2 Implementation of Service Agreements**

- Stakeholders who have an operational or commercial relationship with railways shall have a statutory right to a service agreement with the railway.
- Elements of service agreements include
  - Service obligations of the railway and obligations of the other party
  - Communication protocols and escalation
  - Traffic volumes
  - Key performance metrics
  - Performance standards
  - **Consequences of non-performance (including penalties)** [emphasis added]
  - Dispute resolution; and
  - Force majeure

of a modern commercial relationship, which currently does not exist in Canada. Grain shippers are already bound to performance standards with financial penalty through tariff, conversely there is no mechanism for accountability related to the rail service provider. Railway penalties for non-performance is unable to be commercially negotiated between shippers and rail service providers and requires a legislative backstop.

The Regulations on Operational Terms for Rail Level of Service Arbitration, associated with *The Fair Rail for Grain Farmers Act*, that came in to effect August 1, 2014, came close to, but explicitly did not address this issue. It is somewhat understandable as this regulation was purposely designed to be time-bound, repealing on August 1, 2016. This would affect step change into the commercial relationship, and work to rebalance a system that has been clearly tilted in the favour of the rail service providers for many decades.

Recommendation

- Allow an Arbitrator to include penalties for non-performance of service level obligations in an Arbitrated Service Level Agreement if the shipper seeks it.

3.3 Maximum Revenue Entitlement (MRE) (§ 147-151)

The MRE and railway service have no direct relationship; it is an elastic mechanism, railways earn proportional revenue to the amount of grain moved. The 2011 Rail Freight Service Review noted that "there are no practical ways too directly increase rail competition" and as such, in the absence of a more competitive market for service, the MRE is required to avoid the monopolistic pricing behaviour and service provision that the rail service providers could implement.

Any possible fundamental change to the MRE requires its own specific study and consultation, conducted under reasonable timelines as it could fundamentally alter the global competiveness of Canadian grain and due to the unique structure of the Canadian grain supply chain it will be producers that will bear the true cost of any change. This should not be viewed from a purely ideological lens.

In looking back at the 2013-14 transportation issue, there is no relationship between the cost of freight and the provision of service. Grain has historically been given secondary treatment and, under the current system of operation, this is likely not to change even if freight rates were significantly raised (e.g. the rail freight situation (beyond grain) in the United States Upper Great Plains may clearly be instructive).

Prior to any discussion regarding change to the MRE, the data available to stakeholders (and to government) needs to be critically assessed and improved, as it is currently deficient. Much of the information required to make sound public policy and for affected stakeholders to fully understand implications that deregulation may bring and to engage in the process, is held by the two rail service providers.[2] In this instance it is not operational service data as much as financial and costing data. The publically available data in the United States is far superior and should be examined. Further information on this point is addressed in Section 3.4 below.

[2] This is of critical importance because in the grain sector, as distinctly different from other commodity sectors, the cost of reform or deregulation can be expected to be passed back to, and absorbed by, the producer through the pricing structure of the grain industry.

Recommendations:

- The MRE be maintained.

- Any future review of the program be given adequate time, resourcing and objectivity, to assess the full range of impacts of potential change.

3.4 Transparency: Performance Measurement and Public Reporting

The current Grain Handling Transportation System performance measurement (timeliness and scope) demonstrated its shortcomings in the winter of 2014. The need for the Government to compel the two Class 1 railways to provide basic performance data five months after requesting it via regulation is instructive. The ability for the Government (e.g. Transport Canada and the Canadian Transportation Agency) to receive timely information from the railways is key to understanding the performance of the system and to better assess stakeholder claims (e.g. both shippers and railways). *The Fair Rail for Grain Farmer Act's* Regulations Amending the Transportation Information Regulation addressed this – but it sunsets on August 1, 2016.

It is also instructive to look to the United States on this issue and examine the October 8, 2014 decision of the United States Surface Transportation Board (STB) on the similar issue (Decision 43850 – Docket No. EP 724 (Sub No. 3)).[3] The STB, after hearing from a variety of commodity shippers and stakeholders, has ordered all Class 1 railways operating in the United States to provide specifically outlined data in an effort to "give the **agency and stakeholders** [emphasis added] access to data needed for real-time understanding of regional and national service issues".[4] Furthermore, the STB is considering whether to institute permanent data reporting requirements on service performance. This is above and beyond the weekly public reporting via the Association of American Railroads (which is significantly better than what we have in Canada). It is stunning that in 2014, the federally appointed Grain Monitor has to use proxy calculations to approximate the number of cars unloaded at terminal. Basic timely reporting on operational elements is not available to anyone other than the rail service providers.

Public transparency will be helpful in bringing rationality to the dialogue on rail service in the nation. A trusted, impartial data source, such as Government providing a weekly snapshot (as is done in the United States via the Association of American Railroads and the United States Department of Agriculture), would have likely helped quell much of the conjecture and finger-pointing that was witnessed during the winter of 2014 and around the question of meeting mandated minimum volume movements in the fall of 2014. It is an easy means to bring clarity to the issue.

Recommendation:

- Implement weekly public reporting of status on rail performance.

4. Future Directions

Although inflicting economic hardship on Canadian farmers and their families, in practical terms, the grain transportation crisis of 2013-14 has turned the spotlight onto some operational and broader strategic public policy questions which if addressed could lead to supply chain efficiencies. With many commodity

[3] http://www.stb.dot.gov/decisions/readingroom.nsf/WebDecisionID/43850?OpenDocument
[4] CP and CN are only required to provide information for their operations in the United States.

sectors of the Canadian economy having aggressive plans for growth, future questions regarding the rail service issue in this country will not be going away. Although the problem is vexing, we need to begin charting a path towards solutions now, as 20 years out, it may be too late to reexamine the same issues due to a new crisis situation. How do we drive real advancement in rail system, when the major operators are private companies (some publically-traded, some fully private) and coordinated problem identification solution planning and likely capital investment are required?

For shippers, it is apparent there are no real levers to induce change in the system. A shipper can use the Level of Service complaint through the Canadian Transportation Agency to seek an Order, but typically this is limited to a particular spatial location. As CCGA's recent dismissed Level of Service complaint has demonstrated, there is no practical way to use that avenue to seek fundamental change. Western grain, like several other commodities, has no other real alternative for transport (e.g. for domestic use or export) over the vast distances required due to our geography.

In absence of clear solutions, CCGA can offer a list of principles that could help us strive towards a future state that can keep Canada, its grain sector and all commodity sectors growing into the future. This would be where the transport of Western Canadian grain by rail is:

- Sufficient (adequate and suitable) to move the tonnage offered for carriage;
- Nimble and flexible to respond to shifting market demand (e.g. direction of movement);
- Able to accommodate incremental changes in volumes;
- Free from the need for government intervention (e.g. such as mandated minimum volumes);
- Able to more proactively support Canada's success in a global marketplace; and
- Achieved alongside the growth of all commodity sectors.

The above is the collective challenge and should be contextual background as *The Canada Transportation Act* Review Panel provides its advice to Government. Without material change to legislation and regulation that increases railway accountability, there is little that can be done to systematically address service failure and almost no way for shippers to hold the railways accountable.

Thank you for the opportunity to provide our perspective.

Sincerely,

Rick White
Chief Executive Officer
Canadian Canola Growers Association