



Submission to the Canada Transportation Act Review

April 27, 2015

**Comments submitted by:
Chemtrade Logistics Inc.
Head Office
155 Gordon Baker Road, Suite 300
Toronto, Ontario
M2H 3N5**

We appreciate the opportunity to comment and provide input to the Canada Transportation Act Independent Review (the “Review”). Chemtrade is a Canadian-domiciled publicly traded company listed on the Toronto Stock Exchange. We employ approximately 1200 employees, most of whose continued employment depends upon a safe, efficient and cost competitive transportation system. Our customers are active in a multitude of industries, including mining, pulp and paper, oil refineries, industrial production and also include municipalities, primarily for water treatment. For perspective, in North America we own or lease approximately X rail cars and annually ship about X million tonnes of chemical product by rail. Furthermore we use over X trucking companies to move additional volume across North American roads. We operate more than 60 production facilities across North America, and run the supply chain for our operations seamlessly across the border. We also rely on marine transportation for certain critical raw materials.

We find ourselves in agreement with the main goals of the circulated Discussion Paper regarding the Review – ensuring Canada has an efficient, robust and competitive transportation network both today and for the future.

While Chemtrade’s business extends to several modes of transportation throughout Canada, our key concern for this Review is rail. We are a Canadian company with a large volume of rail exports to the US market which is linked to a substantial percentage of our revenue base. We have therefore focused our comments specifically on the elements that pertain primarily to rail. The issues we would like to comment on are:

1. The national necessity of an efficient, safe and cost competitive transportation network while ensuring ‘*careful stewardship*’¹ of our products in communities and the environment.
2. *‘The CTA sets out the National Transportation Policy which emphasizes that transportation services will be based on competition and market forces.’*²
3. *‘The [National Transportation] policy states that government regulation and intervention should generally be limited to cases where the market cannot otherwise achieve satisfactory economic, safety, security, environmental and social outcomes.’*³

¹ Discussion paper; Section 3, par. 4

² Discussion paper; Section 1, par. 2

³ Discussion paper; section 1, par. 2

Issue 1: The national necessity of an efficient, safe and cost competitive transportation network while ensuring ‘careful stewardship’ of our products in communities and the environment.

Chemtrade is in agreement with the direction the current government is taking with the introduction of strict liability for the railways (Bill C-52). It is incumbent upon the railways, and in fact, any entity while it has the care and control of dangerous goods, to ensure the safe and reliable handling of those goods. Chemtrade has been steadfast in our position as a Responsible Care® company in ensuring that, to the best of our abilities, we manufacture, handle and ship dangerous goods using safe processes and packaging and qualified people. We spend millions of dollars every year for equipment, training, management systems and oversight to ensure we practice what we preach.

The recent initiative by the railways to force third party liability onto shippers through indemnification and other provisions contained in confidential contracts and Tariffs has the undesirable impact of introducing moral hazard into the chain of custody for dangerous goods. During transportation on the rails, the railways have exclusive care, custody and control of the dangerous goods. Enabling them to shift liability to another party (the shipper) removes any incentive for the railways to act in a safe manner and thereby creates a moral hazard. This cannot be allowed. The Federal Government’s proposed legislative scheme of strict liability for the railways is the right stance to take and should be applauded. Chemtrade strongly believes that this must be passed into law.

Furthermore, it is critical that the common carrier obligation that the railways are subject to be re-enforced and upheld. Although ‘open markets’ may be desirable, the fact of the matter is that these rail lines were built by and for the common good of all Canadians. Although the rail lines have been privatized, it does not follow that the railways should have unfettered discretion to choose which products they will or will not carry. Another reason why the common carrier obligation must be strictly upheld is due to the monopolistic nature of the rail companies’ power. Our rail lines give unique access to many locations where there are no viable alternatives for shipping large quantities of bulk goods over long distances. Thus, it cannot be right to give these rail companies the option to not carry certain goods to and from such locations.

Issue 2: “The CTA sets out the National Transportation Policy which emphasizes that transportation services will be based on competition and market forces.”

The notion of open markets or market-based solutions is attractive as largely this mechanism has proven more efficient over time than any other system to appropriately spur competition and set prices on goods and services. In the case of Canadian rail networks however, as discussed above, an open market does not exist, at least as it pertains to moving large quantities of goods over long distances. The lack of viable alternatives is not due to financial burden alone, although

clearly it is a major issue. In many cases from a practical perspective, it is a sheer impossibility to have adequate equipment, trucks, trailers and drivers available on the scale needed to move the necessary volume of goods.

As an example, Chemtrade sources one of our products from (i) our own manufacturing facilities located in eight states and two provinces; and (ii) mines located in northern Ontario where it is produced involuntarily as a by-product to ensure the mine meets environmental compliance regulations; and (iii) other producers located in Alberta, Saskatchewan and two states who manufacture the product for their own use or as by-product and sell us the excess. This product then needs to be moved, by rail, in large volumes, to customers located across North America, who are in industries ranging from mining to chemical manufacturing to oil refineries.

These volumes can only be transported by rail as any other option imposes practical impossibilities due to scale, cost and/or safety concerns. In many situations where commodity chemicals are involved, either the customer or the producer (or both) are captive to one railway. With no viable alternatives, a market-based approach does not work. Regulatory oversight is needed to level the playing field.

The Discussion Paper states, *‘With little or no government capital or operating subsidies, the railways operate in a largely commercial environment, raising capital in financial markets based on profitability and competitive performance.’*⁴ While this is true, it must be acknowledged that the railways’ profitability is arrived at in part by imposing punitive freight rates on the shippers they serve. The Discussion Paper does recognize that *“...by the nature of the rail systems there is an element of ‘natural monopoly’ and ‘captive shipping’ that gives rise to regulatory oversight and intervention. Accordingly the CTA contains a number of ‘shipper protection’ provisions to address concerns about the potential abuse of market power by the railways.”*⁵

Chemtrade would like to make three points regarding these statements:

- (i) In cases where the railways abuse monopolistic powers, there are provisions under the Act to help remedy disputes through the arbitration process, as set out in the Transportation Act, but this appears geared toward a shipper with a critical mass of business that is concentrated on one (or very few) specific lanes of traffic. For a company like Chemtrade who ships more than 20,000 railcars/year across more than 700 lanes which includes 19 Canadian origin locations, the current arbitration process is a ‘non-starter’. It is extremely time consuming and costly to submit a complaint to arbitration. It runs the risk that the challenged railway will extract retribution by increasing our freight rates on other lanes that do not form part of the complaint. And, even if we were to undertake such a costly and risky challenge and even if we were to succeed, the arbitration award will only rectify the situation for a one year period, after which the process must be repeated. With

⁴ Discussion Paper; Section 4.1, par. 1

⁵ Discussion Paper; Section 4.1, par. 2

the odds stacked against us, it makes little commercial sense to commence such a process. By contrast, the railways are incentivized to mount a vigorous defense to any complaint in order to sustain their freight rates and they have the available resources to devote to the effort.

- (ii) The Canada Transportation Act currently treats freight rates, service, other charges and other terms and conditions separately as far as rail regulation is concerned. Were this to truly be an open and fair market, all of these items would be linked as they are all part of a commercial deal. Each of these areas is treated distinctly through the current arbitration process.
- (iii) The railways are able to use to their advantage the difficult path that shippers face in challenging rates. The private contracts offered by railways do not, in our experience, offer significantly superior terms or freight rates (sometimes there is no difference at all) as compared to what is available under Tariffs, with the additional feature that shippers have no ability to challenge the terms of a contract under the scheme set out by the Canada Transportation Act. The theory that private confidential contracts are negotiated under market conditions is simply that, a theory. In practice, these are contracts of adhesion imposed by railways yielding monopolistic power.

Issue 3: “The [National Transportation] policy states that government regulation and intervention should generally be limited to cases where the market cannot otherwise achieve satisfactory economic, safety, security, environmental and social outcomes.”

Chemtrade advocates that the Canadian Transportation Agency be given more latitude and a stronger mandate to balance the playing field in the Canadian rail freight space. The activity is not based on market dynamics; there are very few truly commercial deals and where they exist it is only due to either (i) the availability of alternative transportation modes or competing rail carriage, or (ii) the desire of the railway to generate more revenue through an underutilized lane.

Chemtrade, along with other TIH shippers moving goods under published Tariffs, knows firsthand the time as well as both the internal and external cost and resources required to challenge a rail company through the current processes. Often, our interests are not aligned with those of other shippers and Chemtrade alone does not possess the resources, the commercial position or power to effectively negotiate a commercial deal and so must take whatever is given to us in the vast majority of circumstances.

What we are asking for is a level playing field. We believe only through the Agency with increased oversight authority, as well as more practical processes that are time and cost efficient and which produce rulings with a longer time horizon, can Canadian rail transportation be more effective, cost efficient and competitive.

Summary

Chemtrade welcomes the opportunity to comment on this important Review and recognises the complexity of looking at all transportation modes in the interest of the country as a whole. We hope to at least shine a light on rail as a very important element of the national transportation system.

Chemtrade is not looking for an advantage but just for a level playing field for shippers, which we believe may be achieved through practical oversight that works in a fair, timely and cost effective manner. We believe this can be done through:

1. Ensuring that the common carrier obligation stays intact for safety and environmental reasons, as well as in recognition that there is not an open-market.
2. Ensuring Bill C-52 is enacted, since it clarifies strict liability and reaffirms the principles of Responsible Care[®] (where a party is liable for goods while under its care, custody and control).
3. Overhauling the arbitration processes to ensure they are impactful as well as timely and cost effective for shippers.
4. Giving Canadian Transportation Agency a stronger regulatory mandate to take appropriate actions and be proactive where necessary to create a level playing field.