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

Supplementary Information

Canada Transportation Act Review Panel Submission

Submitted by the Western Canadian Shippers' Coalition

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Introduction

On March 11, 2015 members of the executive team of the Western Canadian Shippers' Coalition ("WCSC") met with the Honourable David Emerson, Chair of the *Canada Transportation Act* ("CTA") Review Panel (the "Panel"), together with Panel Advisors Murad Al-Katib and Marcella Szel and secretariat support staff Randall Meades, Mimi Sukhdeo and Lidija Lebar, at Transport Canada's offices in Vancouver, BC.

The purpose of the meeting was to discuss WCSC's CTA Review submission, a copy of which is attached for ease of reference. As the voice for western-Canadian shippers – for whom safe, effective, competitive and economic transportation is vital to their success – we were pleased to have had the opportunity to highlight the recommendations contained in our submission, as well as to provide examples of the issues faced by our members and respond to the Panel's questions.

The discussion focused mainly on three key areas – interswitching, shipper captivity and capacity issues. The Panel requested supplementary information from WCSC as follows:

1. appropriate interswitching distances to be considered in Manitoba, Saskatchewan, Alberta and British Columbia;

2. views on possible processes for small shippers for whom the Final Offer Arbitration ("FOA") process is expensive and not a viable option; and

3. thoughts about possible ways to encourage the railways to invest in more infrastructure and network capacity, with a focus on geographic areas that are currently and potentially under strain in the future.

The Panel was clear about its mandate – to consider how the national transportation system can best be leveraged to support Canada's continued economic growth in the decades ahead, not the needs of the shippers and/or the railways. WCSC believes that the recommendations contained in its original submission support the Panel's mandate to create a competitive and growth-oriented national transportation system and is pleased to provide the supplementary information requested to expand upon those recommendations.

Interswitching

Following its meeting with the Panel, WCSC approached its members for additional input with respect to the appropriate interswitching distance for each of the four western provinces. WCSC maintains its original recommendation that 160 km is an appropriate statutory interswitching limit for each of the four western Provinces, as it believes that the 160 km limit is large enough to meaningfully increase railway competition in the long term without being so large as to potentially upset the balance of interests between shippers and railways.

WCSC believes that the 160 km statutory interswitching limit for the four western provinces provides competition for significantly more traffic than the 30 km limit. The 160 km limit has been in place now for more than eight months and, despite the railways' initial objections, there has been no "free-for-all" and capital markets continue to view the railways as good businesses. If an issue does arise at some point in the future and evidence suggests that there is a requirement to revisit the 160 km limit, the problem can be addressed in a future review.

However, the appropriateness of a 160 km statutory interswitching limit for each of the four western Provinces is subject to two important conditions, both recommended in WCSC's original submission:

1. the existing sunset clause must be removed, such that the 160 km interswitching limit becomes permanent for Manitoba, Saskatchewan, Alberta and British Columbia. Adding permanency to the interswitching limit creates a level of certainty that encourages capital investment by both shippers and railways to take advantage of the 160 km limit; and

2. the mandatory consideration of alternative means of transport in the FOA process must be eliminated. If it is not, the 160 km interswitching limit will further impair the ability of shippers to access the FOA remedy.

If either or both of those conditions are not met, WSCS believes that the 160 km interswitching limit will not be fully effective and may further weaken the FOA process.

Final Offer Arbitration

The FOA process is expensive and is currently not a viable option for small shippers. WCSC believes that its original recommendations for changing the FOA process will assist in making the FOA remedy a more viable option for those shippers. However, other options may include:

1. further reducing the inefficiencies in the existing FOA process;
2. allowing greater access to the existing summary FOA process in section 164.1 of the CTA; and/or
3. introducing a conciliation process into the CTA.

Each of these options is discussed below.

1. Further Reducing Inefficiencies in the Existing FOA Process

WCSC's original submission suggested reducing inefficiencies in the existing FOA process by:

- removing the mandatory consideration of alternative means of transport;
- providing the arbitrator with information regarding the cost to the railway of providing the service; and
- giving shippers the option to have the arbitrator's decision apply for up to three years.

WCSC continues to support those recommendations and its belief that they will make the FOA process less expensive and a more viable option for all shippers, including small shippers.

In addition, WCSC recommends limiting interrogatories in the FOA process. In the experience of some of our members, interrogatories were primarily used by both the railway and the shipper as an expensive nuisance strategy in which each side was asked to answer several hundred questions within a very short period of time. The result was that the effort, time and resources spent on preparing and responding to those questions were entirely out of proportion to any benefit that may have been derived from the interrogatory process. If the volume of questions was more limited, WCSC believes that only the most useful questions would be asked and the parties would be in a position to provide (and could be required to provide) more useful responses.

Accordingly, WCSC recommends strictly limiting the interrogatories to, at most, two pages' worth of questions and including clear constraints against attempts to circumvent the intent of the page limit.[1]

WCSC believes that limiting interrogatories in this manner will focus the parties and eliminate the abuses that can occur in the current interrogatory process, saving the parties both time and money and making the FOA process as a whole more viable.

2. Allowing Greater Access to the Existing Summary FOA Process

Section 164.1 of the CTA currently provides for a summary FOA process. The summary process eliminates the discovery portions of the full FOA process (i.e., exchange of information and interrogatories) and limits an oral hearing to circumstances in which the arbitrator "considers it necessary". In the usual case, section 164.1 contemplates that the parties would submit their final offers, submit a written response to the other party's final offer within seven days after the matter is referred to an arbitrator, and the arbitrator would make his or her decision based solely on that material. The existing summary FOA process eliminates many of the more expensive and time consuming portions of the full FOA process, such that it might be a more viable option for smaller shippers.

However, the existing summary FOA process is only available in situations in which the shipper's final offer involves freight charges in an amount of not more than $750,000. WCSC believes that limiting the summary FOA process in this manner makes the process inaccessible to the majority of shippers, including small shippers, such that the process has been used sparingly. WCSC recommends eliminating the $750,000 limitation and making both the full FOA process and the summary FOA process open to all shippers, at the shipper's discretion. Doing so would give all shippers, including small shippers, access to a more cost-efficient, less time consuming and potentially less antagonistic option that they may find more viable in their particular circumstances.

WCSC also believes that the summary FOA process would be a more realistic option for shippers to pursue if it included an opportunity to make a brief appearance before the arbitrator to explain the written evidence and conduct a limited cross examination of the railway's representative with respect to the railway's evidence. Instead of giving the arbitrator discretion to hold an oral hearing in the expedited FOA process, as paragraph 164.1(c) of the CTA currently does, WCSC recommends that a limited oral hearing be mandatory in order to provide the arbitrator with a more complete basis upon which to render a decision.

3. Conciliation

WCSC recommends including a conciliation process in the CTA, drawing on some of the elements of conciliation in labour disputes. Under the *Canada Labour Code*, R.S.C., 1985, c. L-2, where parties have negotiated but have been unable to reach a collective agreement, either party can initiate a conciliation process in which a conciliation officer, commissioner or board may be appointed by the Minister of Labour to assist the parties in reaching an agreement. If a commissioner or board is appointed, the commissioner or board must provide a report to the Minister

[1] For example, the pages could be required to follow the standards set out in section 65 of the Federal Courts Rules, SOR/98-106, for printed documents prepared for use in court proceedings, particularly:

- the print must be in 12-point Times New Roman, Arial or Tahoma font; and
- each page of the document must:
  - be 21.5 cm by 28 cm (8.5 inches by 11 inches);
  - have top and bottom margins of not less than 2.5 cm and left and right margins of not less than 3.5 cm;
  - be printed on one side of the paper only; and
  - have no more than 30 lines, exclusive of headings.

within a specified period of time detailing the commissioner or board's findings and recommendations with respect to the dispute.

WCSC recommends including a similar process, with modifications, in the CTA. In particular:

- Where there is an ongoing freight rate negotiation and the parties have negotiated but have been unable to come to an agreement, the shipper could apply to the Canadian Transportation Agency (the "Agency") to have a conciliator appointed.
- The conciliator would be an independent third party, similar to an FOA arbitrator.
- The parties would appear before the conciliator in a hearing of no more than two days to provide background evidence to the conciliator on the matters at issue. During the hearing, the conciliator would have the opportunity to actively ask questions of both parties to fully understand the issues in dispute and the parties' positions.
- Following the hearing, the conciliator would be required to meet with the parties and assist them in their attempt to reach an agreement.
- If, after 14 days, the parties are unable to reach an agreement with the assistance of the conciliator, the conciliator would have a further seven days to prepare a confidential report to the parties setting out his or her findings of fact with respect to the issues in dispute and his or her recommendations with respect to the final settlement of the dispute.
- After receiving the report, the parties could use the conciliator's recommendations to reach a commercial agreement between themselves.
- If the shipper wants to implement the conciliator's recommendations and the railway refuses to do so, the shipper would have the option of bringing the conciliator's report, including the conciliator's findings of fact and recommendations, before an arbitrator as the shipper's offer in the FOA process.
- If neither party wishes to implement the recommendations, the FOA processes would still remain open to resolve the dispute on the basis of the parties' separate offers. However, all aspects of the report of the conciliator would be inadmissible in that proceeding and would remain confidential between the parties.

WCSC believes that such a process could assist the parties to reach a negotiated agreement without the need for an arbitrator and, if an arbitrator is required, could limit the cost and formality of the fact-finding portion of the FOA process by having those facts largely determined and disclosed to the parties by the conciliator in advance of the FOA. WCSC believes that the result will be a more efficient, less costly and more viable dispute resolution process that small shippers will be able to take advantage of.

Railway Investment in Infrastructure

The Panel has asked WCSC to provide thoughts about possible ways to encourage the railway companies to invest in more infrastructure and network capacity, with a focus on geographic areas that are currently and potentially under strain in the future.

Pursuant to section 113 of the CTA, federal railway companies have an obligation to furnish adequate and suitable accommodation for the carriage, unloading and delivering of traffic. The railway companies must invest in the necessary infrastructure and network capacity to meet their statutory obligations. WCSC believes that the railway companies do not lack the financial capacity

and pricing power required to make such investments and that they should not need any further encouragement than their statutory obligations already provide.

In any event, before any encouragement or actual investment is considered, WCSC believes that the specific geographic areas of the national transportation system that are currently and potentially under strain need to be identified.

WCSC recommends that an independent expert, whether the Agency or a third party hired by the Agency, be commissioned to identify the current and potential pinch points for railway infrastructure and network capacity, as well as underutilized corridors that can be maximized in the future. Once the pinch points and underutilized corridors are identified, the question of investment to resolve those specific issues can be addressed, as can decisions about which forms of encouragement, if any, are required to assist the making of those particular investments.

WCSC reiterates its original recommendation that aggregated rail service metrics should be made available not only for the transportation of grain but for all traffic, to facilitate the efficient operation of the supply chain as a whole. Such ongoing monitoring would ensure that the transportation system continues to function properly going forward and necessary investments would continue to be identified.

WCSC also recommends giving the Agency the ability to investigate and address systemic shortfalls in rail service or capacity. Such shortfalls could be identified through the aggregated rail service metrics or through trends observed by the Agency in level of service complaints. Following its investigation, the Agency should have similar powers to those set out in section 116 of the CTA to address the shortfalls, if necessary, and correct them on a system-wide level. Decisions about potential encouragement, if any, for those capital investments identified pursuant to the ongoing monitoring and Agency investigation processes can be addressed as they arise and be tailored to the specific circumstances of the investment.

The capital investments required for the Canadian transportation sector are likely to be large and should not be undertaken without proper identification of where the investments are most needed. WCSC believes that only after the particular investments have been identified should measures to encourage those particular investments, if any, be considered, taking into account the specific circumstances of the investment.

Conclusion

WCSC reiterates each of the recommendations in its original submission, as it believes that they can each help leverage the national transportation system to support Canada's continued economic growth in the decades ahead, in accordance with the Panel's mandate. In addition, in response to the Panel's specific requests for supplemental information, WCSC recommends that:

1. the 160 km statutory interswitching limit is appropriate for each of the four western provinces, provided that the existing sunset clause is removed and mandatory consideration of alternative means of transport in the FOA process is eliminated;

2. processes such as:

    a. a more efficient full FOA process;

b. a more accessible summary FOA process; and/or

c. conciliation;

can assist small shippers for whom the current FOA process is expensive and not a viable option; and

3. consideration about possible ways to encourage the railways to invest more in infrastructure and network capacity should be deferred until the specific geographic areas that are currently and potentially under strain are identified. An independent expert should be commissioned to complete the original identification of those issues, pursuant to which decisions about potential encouragement, if any, for specific initial capital investments can be made based on the circumstances of the investments.

   Following that initial report, aggregated rail metrics should be made publicly available for the ongoing monitoring of the transportation system, and the Agency should be given the ability to investigate and address systemic issues as they arise. Decisions about potential encouragement, if any, for those specific capital investments identified pursuant to the ongoing monitoring and Agency investigation can again be addressed based on the specific circumstances of those investments.

WCSC thanks the Panel for the opportunity to prepare a supplemental submission and looks forward to further discussions with the appointed chair and the members of the Panel on the contents of both WCSC's original submission and this supplemental submission.

David Montpetit, Chairman
Western Canadian Shippers' Coalitiion