WESTERN GRAIN ELEVATOR ASSOCIATION

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January 12, 2024

Treasury Board of Canada Secretariat
Submitted via web platform: Let's Talk Federal Regulations

Re: Supply Chain Regulatory Review

The Western Grain Elevator Association (WGEA) is an association of grain businesses operating in Canada, which collectively handle in excess of 95% of western Canada's bulk grain exports. They pay over $1.5 billion in rail freight, and own grain elevators throughout the country and port terminal facilities in Vancouver, Prince Rupert, Thunder Bay and along the St. Lawrence Seaway. Our members are listed at the bottom of our letterhead.

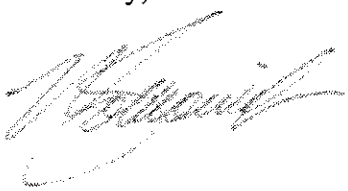
We appreciate that the Treasury Board of Canada will accept and review past correspondence relating to supply chains in its public consultation on regulatory opportunities to improve the efficiency and resiliency of Canada's supply chains relating to transportation. In this regard, the WGEA is making a multi-document submission of recent supply chain correspondence to the federal government, as part of the Supply Chain Regulatory Review. The content of our documents is multi-faceted and relates to serious and recent grain supply chain issues in Canada.

In addition to the topics covered in these documents, we would like to add that having the Canadian Food Inspection Agency expedite the process to for the issuance of electronic phytosanitary documents would help with supply chain related issues. The added timelines associated with the physical nature of phyto documentation in Canada is a clear example of a regulatory barrier the negatively impacts supply chains from functioning as efficiently as they otherwise could. Furthermore, it is important to ensure the CFIA, and other government agencies involved in regulatory approvals that facilitate trade, are properly resourced to provide their services in a timely and efficient manner.

Furthermore, it is critical that going forward the federal government look for mechanisms and processes to allow it to promptly respond to supply chain related issues as they arise in real-time. Regardless of whether the issue is a blockade, work stoppage, poor rail service, weather-related events, congestion issues, or regulatory hurdles associated with individual shipments, the federal government should stand ready to deploy resources in an efficient, timely and organized way to assist industry in executing on the movement of commodities to customers.

Thank you in advance for considering the documents put forward by the WGEA as part of this consultation process. We look forward to seeing the outcome in due course.

Yours truly,



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Executive Director

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July 17, 2023

The Honourable Omar Alghabra
Minister of Transport
House of Commons
Ottawa, ON
K1A 0A6

The Honourable Marie-Claude Bibeau
Minister of Agriculture and Agri-Food
House of Commons
Ottawa, ON
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The Honourable Mary Ng
Minister of International Trade
House of Commons
Ottawa, ON
K1A 0A6

The Honourable Seamus O'Regan
Minister of Labour
House of Commons
Ottawa, ON
K1A 0A6

Dear Ministers,

Re: Grain Supply Chain

The Western Grain Elevator Association (WGEA) is an association of grain businesses operating in Canada which collectively handle in excess of 95% of western Canada's bulk grain exports. Our members are listed at the bottom of our letterhead.

The WGEA is writing with respect to different but related policy issues of importance to the grain industry. It is difficult to parse these issues out into different portfolios, however, they all relate to the proper functioning of the grain supply chain with significant potential impact on the economic health of Canada's grain producers on one end of the chain, and Canada's international customers on the other.

PSAC Work Stoppage

The stoppage of work initiated by the Public Service Alliance of Canada from April 19th to 30th had minimal impact on the grain supply chain, in of itself. However, certain actions undertaken by government workers while on strike were alarming. It is clear PSAC understood it would maximize its impact by disrupting supply chains, a tactic we all learned during the rail blockades of 2020/21. Certain grain terminals experienced picketing outside their facilities to dissuade terminal employees from working, grain from being unloaded from railcars and loaded into vessels, and generally disrupt operations.

There have been significant and, in some cases, crippling grain supply chain disruptions in recent years. Rail blockades, rail strikes, washouts, fires, and chronic poor rail service being the most notable. Public service workers recently used the same lever in an attempt to influence outcomes associated with collective bargaining. This activity has an immediate impact on the health and safety of all Canadians, as it damages and disrupts the 'just-in-time' nature of the food supply chain. This is particularly true of the grain sector which supplies staple food products such as wheat, canola, soybeans, oats, corn, barley, lentils and peas that are the basic ingredients for the food Canadians require from coast to coast.

The WGEA is asking the federal government to clarify the rules on maintenance of activities requirements to explicitly include the need to provide ongoing service for the transportation of food and feed products to protect this critical supply chain from variables within human control and no longer allow them to be impeded by political, social or labour disputes. There is precedent for the grain supply chain to be protected in this respect. Clause 87.7 of the Canada Labour Code already requires longshore workers to continue services for the tie-up, let-go and loading of vessels at grain terminals, and the movement of the grain vessels in and out of a port. This clause recognizes that grain is a food ingredient, is subject to quality degradation over time, and is critical for sustaining human health and lives not only in Canada but around the globe. It also recognizes that grain is produced by farm families across Canada whose livelihood depends on the timely sale and delivery of their produce. This same recognition also underpinned the determination of the movement of grain and grain products as an essential service by both federal and provincial governments during the pandemic.

However, clause 87.7 of the Canada Labour Code only addresses one component of the supply chain. For grain to be loaded onto a vessel, it needs to first be delivered to an elevator in the prairies and transported to the terminal, typically by rail. We respectfully ask that the federal government clarify the rules to deem the transportation of grain and grain products as a regular part of maintenance of activities requirements as it relates to labour disruptions.

Canadian Grain Commission Inspectors

As mentioned in our opening sentence in the above section, the stoppage of the Canadian Grain Commission from providing inspection services did not have a negative impact on the grain supply chain. The Commission provided exemptions to licensed terminal elevators from the statutory obligation of requiring inspections be done by federal workers. As a result, grain exporters were able to continue to load vessels with the use of third-party inspection companies, which they were already using anyway. Most of the grain that leaves Canada is currently double inspected – once by a third party to fulfil the terms of the sales contract, and once by the Commission solely to meet the statutory obligation.

The two-week reprieve from requiring government inspectors can be analysed as a roadmap for how to transition away from retaining the Commission as the service provider. The WGEA has advocated for years for changes to the Canada Grain Act to retain the Canadian Grain Commission as the regulator, but not the service provider. The PSAC work stoppage is a success story and can be instructive for the migration of inspection services to third parties.

Replacement Workers

It is critical that supply chains continue to function even during times of collective bargaining. Lack of stability creates uncertainty, which adds costs to any supply chain, which adds to inflationary pressures, which increases the costs of goods for Canadians and abroad. Increases to the cost of living adds pressure to increase wages, and the spiral continues. Ironically, impacts to supply chains that reduce an employer's earnings, create pressure to cut costs, and the most significant portion of costs are wages.

The most likely first scenario where the ban of replacement workers would impact the grain sector relates to *railway* work stoppages. The WGEA respects the current collective bargaining legislation where the effected stakeholders are limited to the decision-making parties, namely the company on behalf of its owners, and the union on behalf of its members. In a *competitive* environment, customers can find other providers to minimize disruptions along the supply chain. This is not possible as it relates to railways in the movement of grain. Since railways in the grain sector are *monopoly* service providers, the same threat of loss of business is not present. The true sufferers in a railway strike or lockout are grain shippers and exporters who cannot move the grain, their customers who are waiting for product to arrive in the country of import, and grain producers who are not able to get paid because they cannot deliver. Vessel wait times increase, demurrage charges and contract extension penalties accrue. Contract defaults are real consequences, as is harm to Canada's reputation as a reliable supplier of grains throughout the world. It creates uncertainty, adds inflationary pressure, and increases global food security risk.

Due to the uniqueness of Canadian grain as a vital food ingredient around the globe, and a vital source of income for farm families, should the government proceed with the banning of replacement workers, we strongly urge you to exempt the grain supply chain from the decision. Just like the legislation mentioned above for the longshore sector, railways and railway workers should be required to move grain trains during a strike or lockout. In our experience with the longshore industry, there is a benefit to the labour side for such a provision. It allows them to cycle their members into paid work while still going on strike, which alleviates their financial hardship during a stoppage.

Stacking of Medical Leave Benefits

The federally mandated policy for ten medical leave days requires clarification about stacking. In essence, clarification is required that an employee is not entitled to a medical leave of absence with pay if they are entitled to rights or benefits under a collective agreement, contract, custom, or arrangement that are at least as favourable to the employee as the medical leave of identified in the regulation.

Grain terminals have seen a spike in absenteeism for unionized grain workers that correlates with the commencement of the federal sick day allowance, with increases of over 200% in some sub-groups, indicating large areas of abuse of the provided benefits. It would help to avoid unnecessary additional conflict on this matter, if the federal government were to provide clarification through a regulatory amendment that it is not a requirement for employers to *add* the ten days of medical leave on top of what is already provided under previously negotiated

collective agreements. Alternatively, the regulatory amendment could clarify that employer be allowed to provide only the greater of benefit regardless of what is provided within an applicable collective agreement and there be no stacking.

Extended Interswitching

The WGEA applauds the Government of Canada's announcement in Budget 2023 to bring back extended interswitching in the prairies. This measure gives shippers who are physically located on a single rail line the ability to automatically seek competing service from the next closest railway within a certain distance at a guaranteed rate.

Canada had extended interswitching in place from 2014 to 2017. During that time, we discovered it as a policy tool that can created competitive options for shipper business. The intent of extended interswitching has always been to give all shippers the opportunity to have at least one other competitive shipping option. For that to happen in the grain sector, the distance will need to be 500km to allow for the Peace River and Carrot River growing regions to participate.

The 18-month duration of the pilot program is problematic. Grain exporters make sales six to nine months in advance of execution. Therefore, once the provision comes into affect, they will only have the last nine to twelve months of usage, given that the nearer term sales have already been made and logistics planned.

It is conceivable and in fact likely that interswitching will not be *actively* used at all, or if so, only in very limited circumstances. However, the importance of the *passive* use of the provision cannot be overstated. In our experience it creates competitive tension, and motivates the primary carrier to bring better service forward, to avoid an interswitch from taking place. This is the real value of the provision. Its success or failure cannot be measured based on how often an interswitch occurs. We urge the government to make the provision permanent at a range of 500 km.

Interswitching is one tool and one provision, however, further measures that address the imbalance in the business relationship between railways and shippers are also needed, such as automatic demurrage penalties associated with railcar supply and service level performance. We look forward seeing these measures adopted in the government's full response to the National Supply Chain Task Force Report (NSCTFR) as soon as possible.

Anchorages & Bill C-33

The NSCTFR does an excellent job framing the issues with Canada's supply chains, and identifies viable solutions if implemented properly. It refers to Canada's competitiveness and prosperity, the need to create a competitive transportation system to achieve that goal, and the need to address the power imbalance between the transportation service provider and shippers. It rightly positions shippers and exporters as drivers of the national economy, and places the needs of those who produce and sell Canada's resources as paramount.

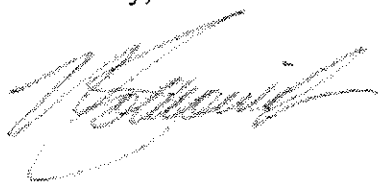
However, the language and premise behind much of Bill C-33 is in stark contrast to that of the NSCTFR. It changes the composition of Port Authority Boards of Directors to facilitate an increased focus on local interests. It suggests that increased government and Port Authority intervention is required in managing vessels and therefore the supply chains in Canada's ports. The Bill will allow for the government to restrict vessel activity to match the restrictions already in place due to the rail monopoly environment, as opposed to liberating supply chains to maximize their flows through placing disciplines and competitive measures on the rail freight market. Due to the absence of provisions to address root cause issues, there are likewise no provisions that will situate marine in a way to help improve Canada's *competitiveness*. The disconnect between the NSCTFR and Bill C-33 is concerning.

On February 6, 2023, Transport Canada wrote a letter to the Chamber of Shipping which in essence invites the Chamber to develop a proposal that defines a workable anchorage policy for the South Coast of British Columbia. The Chamber reached out to other industry groups, including the BC Marine Terminal Elevator Association, Shipping Federation of Canada, and WGEA, and we created a joint industry working group for this purpose. On March 16, 2023, these industry groups provided a comprehensive industry report, along with tangible, realistic and supply-chain focussed solutions.

We are extremely disappointed that, even though the request came from Transport, no response has been received to our March 16th letter. Instead, the proposals being put forward by the Vancouver Fraser Port Authority are not considering the serious concerns being expressed by industry, and assume that time at anchor can solely be addressed at the vessel end of the supply chain. This is erroneous, and any solutions based on this premise will be ineffective, as the WGEA has been stating all along.

The federal government can curb inflationary pressures, repair supply chains, and grow the Canadian economy in a significant way by addressing the above items. Should you have any questions about our views, or if you are open to meeting with us to discuss them, please do not hesitate to contact me. We look forward to your reply.

Yours truly,



Wade Sobkowich
Executive Director

Western Grain Elevator Association

Position Paper on Bill C-33 and the National Supply Chain Task Force Report

October 27, 2023

The Western Grain Elevator Association (WGEA) is a national association of grain companies that handle in excess of 90% of our country's bulk grain shipments. WGEA members own and operate almost all of Canada's large, commercial scale grain terminal operations with port facilities in Prince Rupert, Vancouver, Thunder Bay, Sarnia, Goderich, Hamilton, Montreal, Trois-Rivieres, Sorel, Quebec City, and Baie Commeau. Canada's bulk grain shipments make up approximately 20% of total railway volume and revenue for both CP and CN each year, making WGEA members some of the largest single users of Canada's railways and ports.

I. Bill C-33 (Proposed legislative changes to the Port System and Railway Safety in Canada) in the context of the National Supply Chain Task Force Report - Preamble

The Ports Modernization Review was launched in 2018, and the *Railway Safety Act* Review was launched in 2017. Both reviews are now complete and Bill C-33 represents the full and complete set of amendments the government is proposing stemming from these two reviews.

Concurrently, the Supply Chain Task Force was commissioned in June 2022 and its report was tabled on October 6, 2022 during which time the drafting of Bill C-33 was on its way to completion. Transport Canada has said that more targeted measures will be brought forward to respond to the Task Force Report.

General Premise and Positioning of Issues

The National Supply Chain Task Force Report (NSCTFR) positions its recommendations in the right context. For example:

> *International trade has contributed to more than half the value of Canada's gross domestic product (GDP) every year since 1992....*

> *Canada's trading opportunity has never been so great. The world wants and needs Canadian natural resources and products, including critical minerals, potash, energy and grains. But we can capitalize on that opportunity only if those resources and products can be delivered competitively, efficiently and reliably.*
>
> *Ideally, there would be sufficient competition and capacity to produce low-cost, efficient options, as well as motivation and mechanisms for service providers to work together to improve traffic flow. Without these, intervention may be required to ensure the transportation supply chain operates smoothly.*

Other language throughout the NSCTFR refers to Canada's competitiveness and prosperity, the need to create a competitive transportation system to achieve that goal, and the need to address the power imbalance between the transportation service provider and shippers. In the WGEA's view, the NSCTFR promotes the creation of legislated remedies and solutions that; (a) look at the need for critical infrastructure; (b) allow the marketplace to prevail in situations where the marketplace is functioning normally in a competitive environment, and; (c) where competition is insufficient, to simulate an outcome where service providers would *behave* as though they were competing for business. It rightly positions shippers and exporters as drivers of the national economy, and in recognizing this immutable fact, places the needs of those who produce and sell Canada's resources as paramount.

The summary and overview language accompanying Bill C-33 includes the following statement:

> *The Government of Canada has committed to develop a long-term National Supply Chain Strategy, take steps to enhance the reliability and efficiency of Canada's supply chains, and to act on the recommendations released in the Supply Chain Task Force Report. Vital to our national success is the recognition that supply chain challenges are multi-modal. Solutions need to be strategic and consider the entirety of the supply chain from end to end. (emphasis added)*

The underscored portions of the above statement are critical. To the casual observer, Bill C-33 and the future outcomes of the Supply Chain Task Force Report will fit hand in glove, but other than the above statement there is no evidence that there is a true desire by government to address the root causes of supply chain disruptions.

The language and premise behind much of Bill C-33 is in stark contrast to that of the NSCTFR. Of particular concern, it does not contain measures which will correct imbalances in market power between exporters and rail service providers, nor will it remove obstacles and enabling competitive industries to manage the functioning of their own supply chains. Rather, it solely addresses the symptom of vessel wait times and number of vessels at anchor, ignoring the root cause of unreliable rail service. Bill C-33 suggests that increased government intervention is required in managing vessels and therefore the supply chains in Canada's ports. It provides significantly more power to the Minister of Transport and Port Authorities in the management of vessels, without the commensurate level of authority to dictate the terms of rail service. This disconnect is concerning:

Sets out that port authorities are responsible for managing traffic and create regulatory authorities respecting fees and information and data sharing in respect of that management.

Authorizes the Minister to make interim orders and give emergency directions and modify the Minister's power to give directions to vessels;

Create new offenses, increase certain penalties and extend the application of offenses and the administration of monetary penalty regime to vessels.

Rather than enabling supply chains to function to maximize trade, as recommended by the NSCTFR, Bill C-33 proposes to restrict the normal functioning of supply chains. These measures are not expected to increase capacity. Instead, it will reduce the grain sector's ability to respond to global market forces as it will constrain 'on demand' access to anchorages and vessels. The WGEA has long advocated for Transport Canada to put proper disciplines in place to make the rail freight market behave as though it were a competitive industry. Many of the problems associated with vessel traffic congestion are directly related to poor rail service. Trying to facilitate change through only the management of ships will decrease the flexibility of terminals and increase charter costs. It may also force vessels to remain at sea as they wait for access to anchorages or berths, burning up millions of litres of fuel and congesting the same safe harbour waterways that they would otherwise be at anchor at under current circumstances. In Bill C-33, the government has given the Minister and Port Authorities the authority to manage the symptoms but not root cause of the vast majority of grain sector's supply chain problems.

And finally, the language around Bill C-33 contains the following statement:

Collectively, these measures would situate these two interdependent modes—rail and marine—to be better positioned to help improve the competitiveness of Canada's transportation supply chains.

The amendments will provide modern and flexible tools that will allow rail companies to remain competitive, efficient, and sustainable, and to support the resiliency of Canada's supply chain. (emphasis added)

The Bill implies that rail companies are already competitive and, that through the passage of this legislation, would remain so. However, the railways hold dual monopolies (as opposed to duopolies) for the grain sector. This is a fundamental flaw in the positioning of the Bill, and choice of language crystalizes the difference between the way Transport Canada and Canada's shippers view the root problem.

While the Bill contains provisions associated with the *Railway Safety Act*, there is nothing in the proposed legislation that will place rail in a better position to improve the *competitiveness* of the supply chain. Due to the absence of provisions to address root cause issues, there are likewise no provisions that will situate marine in a way to help improve Canada's *competitiveness*. The Bill will allow for the government to restrict vessel activity to match the restrictions already in place

due to the rail monopoly environment, as opposed to liberating supply chains to maximize their flows through placing disciplines and competitive measures on the rail freight market.

Bill C-33 enables more government oversight on those commercial activities that should operate on market driven forces. It positions the federal government and Canada's ports to select winners and losers in Canada's primary commercial sectors, be it within a sector, between sectors, or imports versus exports.

II. Clause by Clause Analysis of Bill C-33

General Descriptions – Proposed Amendments to the *Customs Act*:

- Improve screening by expanding authority to require and enforce the delivery of containers for inspection to reduce the impact on, and costs to, importers as a result of delays.

General Descriptions - Proposed Amendments to *Canada Marine Act:*

- Expand Canada port authorities' mandate over traffic management in support of gateway efficiency and resilience. This would include establishing a regulatory authority for traffic management to enable port authorities to institute practices and systems, including in respect of anchorages and vessel management, and data sharing in support of their role as enablers of supply chain fluidity.

- Enable the development of inland terminals that would enhance gateway throughput and alleviate congestion.

- Establish a streamlined review process for port authorities' borrowing to strengthen their financial position and ability to respond to development needs and opportunities.

- Improve the government's ability to have insight into ports and their activities to help ensure supply chain fluidity through informed decision-making.

- Governance and financial management of Canada port authorities: Enable well-functioning, diverse, and proficient boards by expanding eligibility, amending the membership of some boards, and taking steps to strengthen strategic planning and decision-making for port operations.

- Further promote sound governance by establishing periodic reviews and a regulatory authority to ensure efficient and transparent operations.

- Working with Communities and Indigenous Groups: Seek to recognize Indigenous groups alongside users and communities to further support meaningful local and community engagement. Establish new advisory bodies or mechanisms to enable

structured, transparent engagement with Indigenous communities, local stakeholders and local governments.

- Environmental sustainability of port infrastructure and operations: Better integrate environmental considerations into port authority planning and decision-making and enhancing transparency on environmental performance, including a regulatory authority to advance climate objectives and set targets.

Specific Amendments to the *Canada Marine Act*:

Works for the general advantage of Canada

New Provision

172.5 The terminals situated within a *port*, within the meaning of section 5 of the *Canada Marine Act*, are declared to be works for the general advantage of Canada.

WGEA response:

The Canada Grain Act already contains the following clause:

Works for the general advantage of Canada

55 (1) All elevators in Canada heretofore or hereafter constructed, except elevators referred to in subsection (2) or (3), are and each of them is hereby declared to be a work or works for the general advantage of Canada.
(2) and (3) [Repealed before coming into force, 2008, c. 20, s. 3]

Grain terminals situated within a port are licensed elevators, and are already declared to be a work for the general advantage of Canada. At face value, a redundant clause in a different Act would not be required. It is assumed that the proposed inclusion in the *Canada Marine Act* is for a different purpose that remains unknown. It then becomes possible that different government entities, under different pieces of legislation, can direct the activities at licensed grain terminals in different and perhaps conflicting ways. This clause has the potential of placing grain elevators in port terminals in impossible situations. The WGEA cannot support this clause for this reason, and without understanding its true purpose.

Canada's port authorities are statutory entities that enjoy singular control and power over most aspects of strategic importance to Canada's marine gateways to the world. Grain terminals have experienced abuse of regulatory power, leading to unbalanced and inequitable decisions from some port authorities across several important areas such as rent increases, extraordinary fees, infrastructure priority setting and execution, land development challenges, and lease renewal concerns.

This new provision gives Canada's ports new authority over terminals situated within their jurisdiction. Given the conflict of interest and monopoly-like behaviour the WGEA companies have experienced at the Port of Vancouver, we are gravely concerned about a vague provision

that provides for more authority over commercial enterprises operating in a competitive marketplace.

Purpose of the Act

Current Wording

4 In recognition of the significance of marine transportation to Canada and its contribution to the Canadian economy, the purpose of this Act is to

(a) implement marine policies that provide Canada with the marine infrastructure that it needs and that offer effective support for the achievement of national, regional and local social and economic objectives and will promote and safeguard Canada's competitiveness and trade objectives;
(a.1) promote the success of ports for the purpose of contributing to the competitiveness, growth and prosperity of the Canadian economy;
(b) base the marine infrastructure and services on international practices and approaches that are consistent with those of Canada's major trading partners in order to foster harmonization of standards among jurisdictions;
(c) ensure that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users;
(d) provide for a high level of safety and environmental protection;
(e) provide a high degree of autonomy for local or regional management of components of the system of services and facilities and be responsive to local needs and priorities;
(f) manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users and the community in which a port or harbour is located;
(g) provide for the disposition, by transfer or otherwise, of certain ports and port facilities; and
(h) promote coordination and integration of marine activities with surface and air transportation systems.

Proposed Wording

4 In recognition of the significance of marine transportation to Canada and its contribution to the Canadian economy, the purpose of this Act is to

- **(a)** implement marine policies that provide Canada with the marine infrastructure that it needs and that offer effective support for the achievement of national, regional and local social and economic objectives and will promote and safeguard Canada's competitiveness and trade objectives;
- **(a.1)** promote the success of ports for the purpose of contributing to the competitiveness, growth and prosperity of the Canadian economy;
- **(b)** base the marine infrastructure and services on international practices and approaches that are consistent with those of Canada's major trading partners in order to foster harmonization of standards among jurisdictions;
- **(c)** ensure that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users;

- **(d)** provide for a high level of safety and environmental protection;
- **(e)** provide a high degree of autonomy for local or regional management of components of the system of services and facilities and be responsive to local needs and priorities;
- **(f)** manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users, **Indigenous peoples** and the community in which a port or harbour is located;
- **(f.1) manage the marine infrastructure and services, including through the participation of port authorities, in a manner that maintains the security and enhances the resiliency of supply chains, safeguards national security and promotes healthy competition dynamics;**
- **(f.2) manage traffic, including mooring and anchorage, in order to promote the efficiency of supply chains**
- **(g)** provide for the disposition, by transfer or otherwise, of certain ports and port facilities; and
- **(h)** promote coordination and integration of marine activities with surface and air transportation systems.

WGEA Response:

This section enables the government and port authorities to manage vessel traffic. The WGEA perceives a high number of challenges associated with this concept. The federal government has the objective of increasing Canadian agricultural exports to $85 billion by 2025. In partnership with the private sector, government is investing in infrastructure projects to facilitate an increase in the flow of goods. At the same time, grain farmers, through better agronomic practices, have increased production. In the last ten years, farmers in western Canada have grown the seven largest crops on record [Table 1]. This increase in production and in agricultural exports allows producers to receive a higher return on investment. This is a good news story for Canada.

The grain industry is well on its way to meeting the government's target of $85 billion in part due to an increase in production, but more-so due to the increase in global value of crops. With a growing crop, the challenge remains in evolving the supply chain to move more product within a shorter time window. This is not a situation of trying to find ways to do more with less. In practical terms we need to find a way to have more vessels ready to load in the Port of Vancouver. It is Canada's largest working port designed for commerce, and must first and foremost be viewed through that lens.

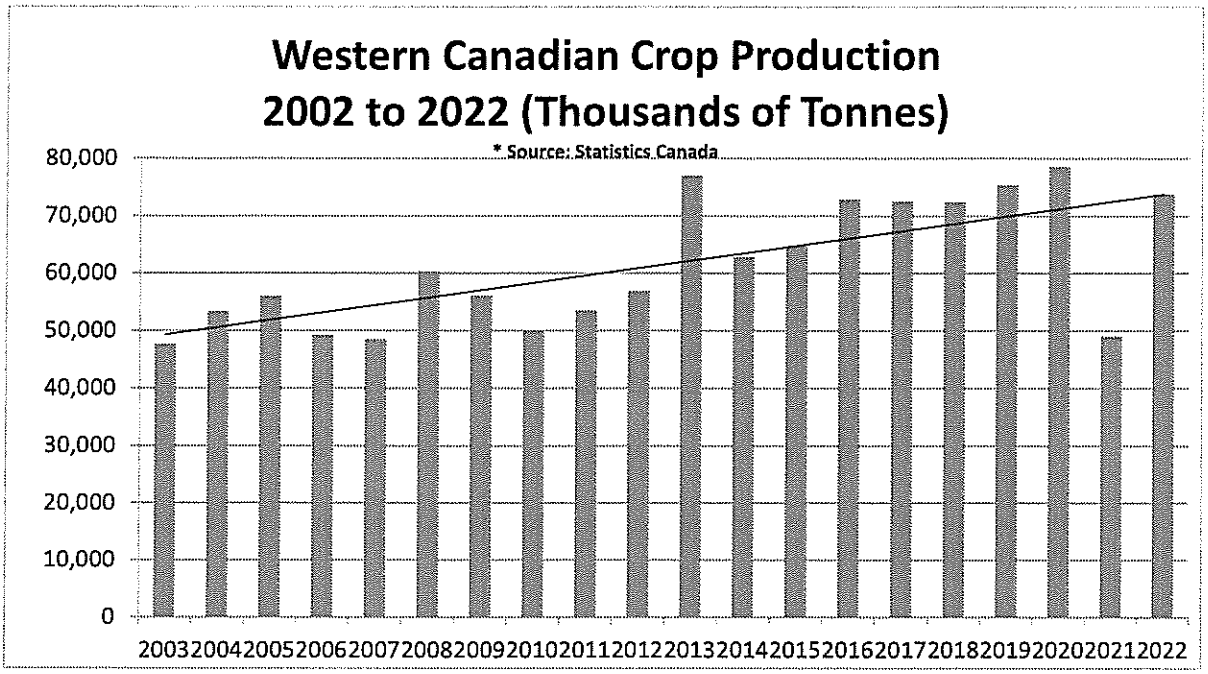


Table 1

In the past few years, grain companies have added over eight million tonnes of incremental export capacity for grain through Vancouver, alongside the growth of other sectors including a huge expansion at Neptune terminals for coal, major expansions and large new terminal projects for containers at Roberts Bank and South Shore, and a major investment in petroleum product export through Kinder Morgan. It is counterintuitive to reduce anchorages, rather than increase them, to service this additional capacity. The reality for the grain sector, and the Canadian economy as a whole is that we need more anchorages, not less.

Grain handlers and exporters already pay demurrage and penalties when they keep vessels waiting. The incentive already exists in the supply chain to have these vessels move in and out as efficiently as possible. In addition, exporters very frequently sell Free on Board (FOB), which means buyers are in control of the freight and many times purchase from multiple exporters. With FOB sales it is impossible to avoid multiple berth calls, which require vessels to frequently move in and out of nearby anchorages.

A major contributor to increased days at anchor for any given vessel is the ongoing challenge for the railways to deliver grain trains in the appropriate sequence. For example, if a port terminal is loading a #1 Canadian Western Red Spring wheat vessel and has ordered the requisite five or more 110 hopper car unit trains from different origins across the prairies to load the vessel, but in between wheat trains the railway delivers a canola train, then the vessel may have to go back out to anchor before finishing its loading while we wait for the trains with the right commodity to show up. In addition, that can also lead to increased days at anchor for other vessels that may be just arriving as there would have been no way to predict that the wrong train was delivered at the wrong time. Even with advance notice, it simply would not relieve the vessel lineup without first solving the issue of rail service, capacity and correct sequencing of trains arriving at the port.

In our view, the model is a recipe for a much more significant incident. It is not likely that our communities, including indigenous peoples, would appreciate ships sailing in circles off our coast risking collision and possible disruption of a much larger geographical region. In addition, it is not humane to the ship's crew to force them to remain at sea for undetermined periods of time.

In the past the notion of implementing policies to motivate vessels to arrive 'just in time' has been raised. The idea of vessels controlling speed (slowing down) to hit loading windows and reduce anchorage times may seem like a practical solution on paper but in practice is problematic. Vessel owners are obligated to arrive according to the laycan window in the charter party regardless of the terminal loading situation. Typically, in the grain trade, congestion occurs in winter months. While it seems logical to simply require ships to slow down to avoid the 'hurry up to wait' scenario, the reality is that vessels arriving at the Port are typically ballasting to Vancouver, and the North Pacific in winter is not a friendly environment. Vessel owners are obligated to put safety first and for this reason are anxious to find a safe harbor especially during months with more inclement weather. Solutions must be inclusive of, but not limited to, the issues of rail capacity, rail service, train sequencing, loading in the rain, work stoppages, blockades, and weather-related disruptions such as cold weather, washouts, avalanches and fires.

A natural consequence of increasing imports and exports is an increase in vessel activity. As a country, it will not work to have the conflicting objectives of growing exports, while reducing the presence of vessels to move product.

Contents of letters patent
(issued by the Minister)

Current Wording

(2) The letters patent shall set out the following:

(a) the corporate name of the port authority;

(b) the place where the registered office of the port authority is located;

(c) the navigable waters that are within the port authority's jurisdiction;

(d) the federal real property and federal immovables under the management of the port authority;

(e) the real property and immovables, other than the federal real property and federal immovables, held or occupied by the port authority;

(f) the number of directors, between seven and eleven, to be appointed under section 14, to be chosen as follows:

- **(i)** one individual nominated by the Minister,
- **(ii)** one individual appointed by the municipalities mentioned in the letters patent,
- **(iii)** one individual appointed by the province in which the port is situated, and, in the case of the port wholly or partially located in Vancouver, another individual appointed by the Provinces of Alberta, Saskatchewan and Manitoba acting together, and

- **(iv)** the remaining individuals nominated by the Minister in consultation with the users selected by the Minister or the classes of users mentioned in the letters patent;

(g) a code of conduct governing the conduct of the directors and officers of the port authority;
(h) the charge on the gross revenues of the port authority, or the formula for calculating it, that the port authority shall pay each year to the Minister on the day fixed by the Minister to maintain its letters patent in good standing;
(i) the extent to which the port authority and a wholly-owned subsidiary of the port authority may undertake port activities referred to in paragraph 28(2)(a) and other activities referred to in paragraph 28(2)(b);
(j) the maximum term of a lease or licence of federal real property or federal immovables under the management of the port authority;
(k) the limits on the authority of the port authority to contract as agent for Her Majesty;
(l) the limits on the power of the port authority to borrow money on the credit of the port authority for port purposes or a code governing that power, as the case may be; and
(m) any other provision that the Minister considers appropriate to include in the letters patent and that is not inconsistent with this Act.

Proposed Wording

(2) The letters patent shall set out the following:
(a) the corporate name of the port authority;
(b) the place where the registered office of the port authority is located;
(c) the navigable waters that are within the port authority's jurisdiction;
(d) the federal real property and federal immovables under the management of the port authority;
(e) the real property and immovables, other than the federal real property and federal immovables, held or occupied by the port authority;
(f) the number of directors, between seven and eleven, to be appointed under section 14, to be chosen as follows:
(i) one individual nominated by the Minister,
(ii) **up to two individuals** appointed by the municipalities mentioned in the letters patent,
(iii) in the case of a port wholly or partially located in Vancouver, **Prince Rupert or Thunder Bay**, one individual appointed by the province in which the port is situated and another individual appointed by the Provinces of Alberta, Saskatchewan and Manitoba acting together, and, **in any other case, up to two individuals appointed by the provinces mentioned in the letters patent**, and
(iv) the remaining individuals nominated by the Minister in consultation with the users selected by the Minister or the classes of users mentioned in the letters patent;
(g) a code of conduct governing the conduct of the directors and officers of the port authority;

(g.1) the principles and guidelines governing the port authority's advisory committees established under section 33.1, including their composition and administration;
(h) the charge on the gross revenues of the port authority, or the formula for calculating it, that the port authority shall pay each year to the Minister on the day fixed by the Minister to maintain its letters patent in good standing;
(i) the extent to which the port authority and a wholly-owned subsidiary of the port authority may undertake port activities referred to in paragraph 28(2)(a) and other activities referred to in paragraph 28(2)(b);
(j) the maximum term of a lease or licence of federal real property or federal immovables under the management of the port authority;
(j.1) the schedule for the development of the port authority's land-use plans, setting out intervals of no more than five years;
(k) the limits on the authority of the port authority to contract as agent for Her Majesty;
(l) the limits on the power of the port authority to borrow money on the credit of the port authority for port purposes ~~**or a code governing that power, as the case may be;**~~
(l.1) the schedule for the submission of the port authority's borrowing plans, setting out intervals of no more than three years; and
(m) any other provision that the Minister considers appropriate to include in the letters patent and that is not inconsistent with this Act.

WGEA response:

The WGEA has advocated for changes to Port Governance in a way that provides more representation from Port tenants on the Boards. But maybe more importantly, there will be increased representation from local municipalities and the Provinces in which those ports are located (British Columbia and Ontario) - which brings the very real concern that port operations will be governed by local concerns rather than national interest.

The majority of products shipped through the Port of Vancouver originate from the four western provinces. Annually, they are the source of approximately 100 million tonnes of cargo at a value of 80 billion dollars and growing. For the grain sector, the vast majority comes from the three prairie provinces. It cannot be overstated how important the Pacific Gateway is to the Western Canadian economy. Put simply, the Port of Vancouver is a critical entity for western provinces and the success of all of their largest export-oriented sectors.

One of the key goals of Transport Canada's Port Modernization Review was to optimize governance and fiscal management. In the fall of 2020, the prairie provincial Ministers of Agriculture and Transport/Infrastructure sent a joint letter to the federal Ministers of Transport and Agriculture with a governance proposal that each of the provinces of BC, Alberta, Saskatchewan and Manitoba each appoint two members as recommended by Port users. In February 2021, the Premiers of the three prairie provinces wrote a follow up letter to the Prime Minister of Canada, expressing that the Western provinces should be fairly represented in the governance of the VFPA. We are disappointed to see that Bill C-33 has not accepted the Premiers' proposal in any measure.

In the Canada Marine Act consultations, the WGEA recommended the following changes to governance:

i. Overhaul nominating committee membership to reflect actual users,
ii. Remove outside interference with Nominating Committee decision making,
iii. Allow people who actively work in industry to sit on port authority Boards, and
iv. Redesign appointments to adequately reflect provincial economies who rely on the port.

The WGEA adds one more recommendation to the above as follows:

v. Provide term limits for Chief Executive Officers of Canada's port authorities. Renewal of terms should be, in large part, based on a satisfactory evaluation from port users administered through an independent third party.

The changes in Bill C-33 are not in line with any of the above recommendations, and runs counter to the thrust of the NSCTFR, which recommends that Port Modernization include governance with:

> *".... more user representation and more effective dispute-resolution mechanisms (for disputes between port authorities and their tenants or other stakeholders over whom authorities have influence)."*

The amendment to governance in Bill C-33 ignores this recommendation, and does not place the right focus on the economy through representation from the users who move the goods, or provincial jurisdictions that represent these industries.

Clarity in the legislation is required to require accountability associated with decisions made by Boards of Directors, and how their decisions are in the best interest of the national economy. In the past, port authorities would simply make such a statement on the heels of their decisions, without backing it up. Almost any decision made by a port authority can be supported with a vague statement of this nature. It is incumbent on port authorities to defend their decisions, including the provision of empirical evidence with clear explanations. Decisions that are disruptive to existing tenants, and existing major sectors, are not in the best interest of the economy.

Activities

Current Wording

28(2) The power of a port authority to operate a port is limited to the power to engage in
(a) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent; and
(b) other activities that are deemed in the letters patent to be necessary to support port operations.

Proposed Wording

28(2) The power of a port authority to operate a port is limited to the power to engage in
(a) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, **including activities carried on in relation to real property and immovables that are not adjacent to navigable waters,** to the extent that those activities are specified in the letters patent; and
(b) other activities that are deemed in the letters patent to be necessary to support port operations.

WGEA Response:

It is not clear what problem this proposed amendment is intending on addressing. It could encompass all manner of activities including requiring port users to make investments inland, both within and outside their jurisdiction, as a condition of maintaining their lease. Does this mean a port can take over railway operations? Does it mean it can require the building of elevator capacity both within its jurisdiction and in Saskatchewan? The statement provides port authorities with powers that are excessively broad and vague. The WGEA recommends this statement be amended to limit the scope and provide clarity as to its intent.

Governance

New Provisions

Advisory Committees
33.1 (1) A port authority must establish a community advisory committee, an Indigenous advisory committee and a local government advisory committee, in accordance with its letters patent.

Purpose
(2) A port authority must consult its advisory committees regularly with respect to issues related to port activities.

Assessment
33.2 At least once every three years, a port authority must conduct an assessment of its governance practices in accordance with the regulations and submit a report to the Minister.

WGEA Response:

Port authorities already have numerous advisory committee structures that give all stakeholders a voice on various matters. For example, the Vancouver Fraser Port Authority has a stakeholder committee for each geographical region within the port that includes local community, municipality, Indigenous, port user and service provider representation. We believe these committees are important to allow for different perspectives to be voiced and represented on port activity considerations. By creating multiple committees for each stakeholder group, we believe the government will create seriously problematic divergence between advisory committee

perspectives on various activities, making it even more difficult than it already is for port authorities to find the appropriate balance on a given matter.

Moreover, we find it completely nonsensical that port authorities would have an advisory committee for every conceivable stakeholder, except the actual tenants of the port! There is no port without tenants, and vice versa, and it should be a primary objective of all port authority management and Boards of Directors to have standing committees seeking the views of its tenants on port operations, investment, community outreach, among other considerations. The provincial governments that serve as the origin and destination for goods should also have their own advisory committees.

Regardless of all these advisory groups, the determining factors associated with port decisions must be primarily associated with the purpose and objectives of the port and the users within it. The opinions of outside advisory groups cannot ultimately be allowed to take precedent over the needs of port users to move goods through the lens of what is in the best interest of the national economy.

Regulations

Current Wording

62 (1) For the purposes of this Part, the Governor in Council may make regulations respecting

(a) the navigation and use by ships of the navigable waters in a port, including the mooring, berthing and loading and unloading of ships and equipment for the loading and unloading of ships;

(b) the use and environmental protection of a port, including the regulation or prohibition of equipment, structures, works and operations;

(c) the removal, destruction or disposal of any ship, part of a ship, structure, work or other thing that interferes with navigation in a port and provision for the recovery of the costs incurred;

(d) the maintenance of order and the safety of persons and property in a port;

(d.1) the information or documents that must be provided by the owner or the person in charge of a ship to the port authority;

(e) the regulation of persons, vehicles or aircraft in a port;

(f) the regulation or prohibition of the excavation, removal or deposit of material or of any other action that is likely to affect in any way the navigability of a port or to affect any of the lands adjacent to a port;

(g) the regulation or prohibition of the transportation, handling or storing, in a port, of explosives or other substances that, in the opinion of the Governor in Council, constitute or are likely to constitute a danger or hazard to life or property; and

(h) the obligations of a port authority in respect of federal real property and federal immovables under the management of the port authority.

Proposed Wording

62 (1) For the purposes of this Part, the Governor in Council may make regulations respecting

(a) the navigation and use by ships of the navigable waters in a port, including the mooring, berthing and loading and unloading of ships and equipment for the loading and unloading of ships;
(a.1) the management of marine traffic, including mooring and anchorage, and the fees to be paid and the sharing of information and data by users and port authorities in support of that management;
(a.2) the regulation of activities carried out by or on a vessel moored or at anchor in a port;
(b) the use and environmental protection of a port, including the regulation or prohibition of equipment, structures, works and operations;
(c) the removal, destruction or disposal of any ship, part of a ship, structure, work or other thing that interferes with navigation in a port and provision for the recovery of the costs incurred;
(d) the maintenance of order and the safety of persons and property in a port;
(d.1) the information or documents that must be provided by the owner or the person in charge of a ship to the port authority;
(e) the regulation of persons, vehicles or aircraft in a port;
(f) the regulation or prohibition of the excavation, removal or deposit of material or of any other action that is likely to affect in any way the navigability of a port or to affect any of the lands adjacent to a port;
(g) the regulation or prohibition of the transportation, handling or storing, in a port, of explosives or other substances that, in the opinion of the Governor in Council, constitute or are likely to constitute a danger or hazard to life or property; and
(h) the obligations of a port authority in respect of federal real property and federal immovables under the management of the port authority.

WGEA Response:

Measures that facilitate ease of movement for vessel traffic is important, and there are opportunities for gains in efficiency in a way that preserves the existing ability of exporters to make commercial decisions to manage their inbound and outgoing vessels to and from anchor.

The following are examples of positive initiatives to manage vessel activities within the Port of Vancouver:

- Implement a revised vessel Code of Conduct that puts on obligation on reducing impacts on both the vessel operator and terminal.
- Continue to move to virtual inspections within the framework of maritime digitalization, such as drone or camera-based remote examinations by CFIA.
- Remove the requirement that vessels wait at anchor for 24 hours after vessel fumigation.
- Provide support for Single Point Mooring
- If anchorages are going to be removed or if their usage is going to be reduced, they must first be replaced with new anchorage sites.

An outcome that results in a reduced number of anchorages, or reduced vessel presence, would result in additional delay and higher costs, which would result in a lower return for grain producers.

Unfortunately, Bill C-33 has a short-sighted focus on the symptoms of supply chain problems, rather than the cause. Vessel presence at anchor is a direct result of inadequate, unpredictable, and/or poorly executed rail service. The WGEA has seen little evidence that the intention behind this provision is to get at root causes. If the federal government intends on passing legislation that positively impacts supply chains, it must primarily look at railcar order fulfillment (i.e. railcar supply versus railcar demand) on a week-to-week basis, and introduce legislation to maximize fulfillment to as close to 100% as possible. Demand levels must be set by customers, not service providers. So far, we have seen the wrong focus in the details associated with the Active Vessel Traffic Management System, and the Port of Vancouver's Supply Chain Visibility Project, neither of which intend on considering the impact of railcar order fulfillment.

Ministerial Order

New Provision

107.1 (1) If the Minister is of the opinion that there is a risk of imminent harm to national security, national economic security or competition that constitutes a significant threat to the safety and security of persons, goods, ships or port facilities or the security of supply chains, the Minister may, by order, require a port authority or a person in charge of a port facility to take any measure, including corrective measures, or stop any activity that the Minister considers necessary to prevent that harm.

WGEA Response:

Once again, the WGEA is concerned about the lack of detail. In particular, we are concerned with the inclusion of the wording *person in charge of a port facility* in this section. We cannot envision what action the Minister may require if a port facility, however, we do not believe this section is required to give the Minister powers to pass an order down the road. The WGEA proposes that the wording *in charge of a port facility* be stricken from this clause, and that the direction be limited to *person*.

It appears this clause may be intended, in part, to provide the Minister with the authority to take action as it relates to blockades. For grain handlers, strikes, lockouts and work stoppages are as significant of an issue as blockades as it relates to impacts on the supply chain. The wording should be amended to directly reference both blockades and work stoppages.

As it relates to port authorities, while this new provision does work towards establishing additional checks and balances on decisions by port authorities, it falls short of established dispute resolution, appeal and arbitration processes that are typical of legislation when faced with similar imbalance of power circumstances.

In addition to a Ministerial 'override' as being proposed by the government, Bill C-33 should include an accessible and effective means for tenants of port authorities to challenge or appeal unfair or unreasonable decisions, activities or approaches made by a port authority. These mechanisms exist in the rail and air sectors, but there are none for the marine sector. The risk of abuse of power situations arising is quite high vis-à-vis port authority-tenant relationships, and the government should include measures in Bill C-33 to counteract questionable or abusive behaviour that might arise through port authority actions.

In addition, Bill C-33 should address the obvious conflicts of interest that arise in port management's dual role as developer and regulator/administrator by removing the former from the mandate of port authorities and placing the goal of port development into a separate entity. This becomes particularly problematic if one considers that the port would have control over a) what land get developed, b) who gets to develop it, c) who gets to operate it, d) the lease arrangements for the use of it, e) the rents and fees related to it, and f) the day-to-day management of the flow of vessels to service it. As a result, port authorities would have complete control over the commercial success or failure of any of their tenants, which would be a highly undesirable outcome.

General Descriptions - Amendments to *Marine Transportation Security Act:*

- Protect marine transportation, critical infrastructure, and the promotion of marine transportation resilience.

- Enable the Minister of Transport to enter into agreements to leverage expertise to address security risks and threats, including cyber security.

- Enable the Minister to issue Emergency Directions to persons onboard a vessel or at a marine facility if immediate action is required to mitigate a direct or indirect threat to marine transportation security or to public health.

- Provide the authority to establish Interim Orders to mitigate threats or risks to marine transportation security or to public health.

- Integrate risk-based decision-making, including for vessel directions, to enable Transport Canada to react quickly and effectively to situations of unacceptable security risk.

- Establish new regulatory authorities respecting threats or risks to public health to enable Transport Canada to react effectively to potential emerging threats in the marine mode and support current and future pandemic responses.

- Establish new regulatory authorities to support Transport Canada's robust administration and oversight of Canada's marine security framework.

- Amend regulatory authorities to support information sharing with federal and provincial partners.

- Seek to modernize enforcement by revising penalties for violations to align with Transport Canada's marine safety legislation.

Specific Amendments to *Marine Transportation Security Act:*

Directions to Vessels

Current Wording

16 (1) Where the Minister has reasonable grounds to believe that a vessel is a threat to the security of any person or thing, including any goods, vessel or marine facility, the Minister may direct the vessel

(a) to proceed to a place specified by the Minister in accordance with any instructions the Minister may give regarding the route and manner of proceeding and to remain at the place until the Minister is satisfied that the security threat no longer exists;
(b) to proceed out of Canada in accordance with any instructions the Minister may give regarding the route and manner of proceeding; or
(c) to remain outside Canada.

Proposed Wording

16 (1) If the Minister has reasonable grounds to believe that a vessel is a threat, **or poses a direct or indirect risk to the security of marine transportation,** including to any person, goods, vessel or marine facility **or to the health of persons involved in the marine transportation system,** the Minister may direct the vessel

(a) to proceed to a place specified by the Minister in accordance with any instructions the Minister may give regarding the route and manner of proceeding and to remain at the place until the Minister is satisfied that the threat **or risk** no longer exists;
(a.1) to remain outside of any area specified by the Minister;
(b) to proceed out of Canada in accordance with any instructions the Minister may give regarding the route and manner of proceeding; or
(c) to remain outside Canada.

WGEA Response:

The quarantining of vessels at the onset of COVID-19 was problematic in application and resulted in significant costs to the grain supply chain.

We will provide an example with respect to the Public Health Agency of Canada (PHAC) process for clearing vessels so they can come ashore under Free Pratique. When a vessel arrives into a Port in Canada, it must send a report to Transport Canada when 96 hours out. Transport Canada then replies requesting that the ship "kindly confirm all crew are healthy." Upon arrival, PHAC sends a questionnaire to the ship, where the ship reports on the health of the crew.

At times the process was followed and Notice of Readiness (NOR) was tendered, but the first crew members became ill after PHAC issued clearance and the after the pilot, port warden/agents

and CFIA had been on board. These ships were ordered to do PCR tests for COVID, which were confirmed. The results were automatically sent to PHAC. The federal rules applied by PHAC require 10 days isolation with the ship at anchor for those who tested positive and 14 days for all close contacts (longer to allow incubation time). After 10 days, a health officer comes back on the ship, tests again, and if anyone new tests positive the quarantine timeframes start anew.

This puts shippers in a difficult position. The NOR starts the laytime which starts the demurrage clock. The ship must obtain Free Pratique to have a valid NOR to start laytime but the current system of Free Pratique in Canada is basically the honour system. They ask the ship to "kindly confirm all crew are healthy" and accept whatever the ship comes back with as fact and issues free pratique. When COVID is subsequently discovered and the vessel is required to quarantine, it puts the shipper in the difficult position of having to argue about whether the NOR was in fact valid or not.

The following options should be utilized in these circumstances:

> Option 1: PHAC recognize that circumstances have changed with respect to free pratique in a pandemic scenario. If they intend on quarantining ships they should not be issuing free pratique immediately upon arrival as a mere formality, but rather, upon testing of the crew.
>
> Option 2: Physical distancing is not a problem once the ship has berthed. The ship can open the holds and do all other required activities for loading from the helm of the ship. PHAC needs to allow the crew to come to berth and quarantine in their cabins rather than quarantining the entire ship at anchor.

We provide this example and solutions so it may be considered by our legislators and policy makers in the context of proposed clause 16 (1).

General Descriptions - Proposed Amendments to the *Transportation of Dangerous Goods Act*:

- Modify and provide new Ministerial and inspector authorities to provide greater flexibility to address ongoing and emergency safety risks.
- Create an Administrative Monetary Penalties regime to address a significant enforcement gap in the Transportation of Dangerous Goods Program.
- Create a client registration requirement to provide Transport Canada with a reliable and comprehensive inventory of stakeholders who import, offer for transport, handle, or transport dangerous goods in Canada.

General Descriptions - Proposed Amendments to the *Railway Safety Act*:

- Allow the Minister to request any relevant information when assessing rule exemption requests.

- Provide the Minister the ability to consult broadly in rule decision-making.

- Require a review of the *Railway Safety Act* on a five-year cycle, ensuring an adaptive legislative framework.

- Provide more flexibility associated with rules and exemptions. This will support the continued fluidity and efficiency of rail operations while reducing administrative burden.

- Provide a broad definition of "safety" to include "security" throughout the Act.

- Authorize the Minister of Transport to negotiate assurances of compliance and enter into compliance agreements before or after the issuance of an Administrative Monetary Penalty.

- Add prohibitions related to unruly or dangerous behaviour on-board trains or at stations; and unlawful interferences such as tampering, and destructive acts with railway operations.

- Provide authorities to require railway companies to create security management systems and for the Minister to order corrective measures regarding those systems.

- Create the authority for the Minister of Transport to grant, cancel, and suspend transportation security clearances under the *Railway Safety Act*.

Specific Amendments to the *Railway Safety Act*:

Interference, damage or destruction

New Provisions

26.3 No person shall, without lawful excuse, interfere with any railway work, railway equipment or railway operation, or damage or destroy any railway work or railway equipment, in a manner that threatens the safety of railway operations.

Unruly or dangerous behaviour

New Provision

26.4 No person shall behave in a manner that endangers or risks endangering the safety of a station, railway equipment or individuals who are at the station or on board the railway equipment, or behave in an unruly manner toward employees or agents or mandataries of a company.

Obstruction of officers

New Provision

(6) No person shall, while an enforcement officer is carrying out their functions under this Act, fail to comply with any reasonable request of the officer or otherwise obstruct or hinder the officer.

WGEA Response:

The WGEA proposes the wording *or delivery of goods* be added after *railway operations* in proposed section 23.6. Railways operate to deliver goods, however, the focus must equally be placed on both the railways' and the shippers' needs. In other words, it could be argued that a track impediment may not impact railway operations broadly, but would impact the delivery of an individual shipper's product to a specific destination.

In the past decade Canada has faced unprecedented use of civil disobedience to block and disrupt Canada's national railway network. Each day in which those unlawful activities are allowed to remain constitutes significant loss to the economy. In the case of grain shipments, when faced with a blockade or similar disruption we are simply unable to 'catch up' on shipments once fluidity resumes as railways have historically not been able to recover lost volumes. As such, the WGEA is very supportive of these new provisions. Enforcement of these rules has also been a major concern in the past, and we would encourage the government to consider how these new provisions can be successfully enforced and what additional measures may be needed to see that successfully happen when faced with interference, unruliness or obstructive behaviour.

As stated earlier in this document, it is important to note that railway labour disputes which threaten to result in work stoppages have the same impact to the supply chain as blockades, yet there are no measures within Bill C-33 that avoids strikes or lockouts.

General Descriptions - Amendments to the *Canada Transportation Act*:

- Reduce the Investment Notification and Review threshold to better ensure competition and national security.

- Provide for the use of automated systems in decision making.

Expressly authorize the use of telecommunications by Transport Canada inspectors, investigators, and enforcement officers for the purpose of verifying compliance or preventing non-compliance with other Acts for which the Minister of Transport is responsible.

WGEA Response:

Our concerns with the amendments to the Canada Transportation Act are about what is absent. Root causes associated with rail service need to be addressed for the supply chain to function properly, or improvements to vessel traffic management will further hamper the upstream supply chain. Provisions are required that both hold the railway companies accountable to meeting shipper demand, and incentivize the railways through competitive access provisions to compete

for business. It is not possible to fully comment on the extent to which Bill C-33 will impact Canadian supply chains without understanding how root causes will be addressed in the Canada Transportation Act.

III. National Supply Chain Task Force Report Recommendations

As stated in the opening comments, there is nothing in Bill C-33 that addresses root causes for supply chain issues. Most of these issues can only be addressed through amendments to the Canada Transportation Act. Again, this dovetails into the recommendations made in the NSCTFR. In this section, the WGEA provides comments on the most important of these recommendations. The WGEA will not comment on every recommendation from the NSCTF Report and instead will focus on the ones that are of most importance to grain shippers, handlers and exporters.

Immediate Action Recommendation #2 **- Expand the 30 km interswitch distance across Canada to give shippers more rail options and to address shipper – railway power balance issues. The switch zone rates should be mileage-based and set annually by the Canadian Transportation Agency (CTA). The CTA should also monitor and review the effectiveness of this change - Timing – By May 1, 2023.**

The nature of a dual monopoly setting means that shippers are captive due to the grain elevator having to locate on one or the other of Canada's two main Class 1 railways. As a result, most grain elevator locations have only one choice of railway to use (the one they are located on) and there is an obvious lack of competition. Interswitching would create a semblance of normal competition into some parts of the rail system where there has not been competition before. It is important to note that shippers and ultimately farmers need to retain the combined protection of the Maximum Revenue Entitlement as well as meaningful service to ensure grain gets to where it needs to be on time and on budget.

In the WGEA's view this recommendation is important. The Task Force recognizes that rail freight pricing and service is not balanced by normal market forces and an expanded interswitch distance option would provide increased competition by offering shippers more than one choice. Since the NSCTFR was issued, the railway companies have vocally opposed this recommendation, which speaks volumes in terms of its expected impact to the competitive landscape.

Grain shippers have made significant use of interswitching when the distance was extended temporarily between 2014 and 2017. Its greatest use was leverage in negotiations with the originating carrier who does not want to lose business to a competing railway via extended interswitching. For example, several shippers report that after using the alternate rail line to move a number of shipments, the originating carrier came forward to offer better service and/or rates, thus eliminating the need to interswitch. When looking closely at this time period, it shows that a relatively small amount of grain was moved through an interswitch. In reality, the very presence of an interswitch option has achieved exactly what the provision had intended to do - create competition between Canada's two major railways.

This underscores the real benefit of extended interswitching limits. While shippers may not choose to ship with the competing carrier, the fact that the option exists encourages a better level of service and more competitive pricing from the rail lines that exist in an effective monopoly without it.

> *"As designed, extended interswitching should not only encourage more competitive freight rates through some actual movements initiated by a competing carrier, but also through simply the threat that this could happen if freight rates are allowed to grow to unreasonable levels."* ***James Nolan and Steven Peterson – University of Saskatchewan and Oak Ridge National Laboratory***

To ensure it is a viable tool the Act should require railways to publish the regulated interswitch-service rates, produce maps that detail which elevators fall within which zones, capacities of interchanges and level/frequency of service. The CTA can add further clarity by publishing regulations including eligibility for the interswitch block rate and guidance documents that outline how interswitching should operate.

Interswitch Service Performance Measures

Most grain companies have experienced inappropriate behaviour by an originating carrier when trying to exercise the 30km interswitching distance as well as the previous 160km extended interswitching distance when it was in place from 2014 to 2017. We are building experience with the current 160 km extended interswitching pilot project in the prairie provinces. Such behaviour includes foot dragging (e.g., sometimes weeks on end) on pick up and/or delivery of empty equipment from the competing carrier at the interchange as well as foot dragging on pick up and/or delivery on loaded equipment which the competing carrier has requested to be presented back at the interchange. The combined effect of this bad behaviour is an erosion of the benefits of interswitching, with the clear intent by the originating carrier of stopping the customer from using interswitching with the competing carrier. This behaviour is a very obvious abuse of monopoly power, and yet government has neither monitored interswitching performance effectively in the past nor enforced the requirements in the Transportation Act that interswitching service be provided in a similar manner to direct service.

With this in mind, the WGEA believes an effective measure to ensure adequate interswitching performance occurs would be to allow the competing carrier to directly deliver and/or pick up the cars on the originating carrier's railway track if the originating carrier does not provide service within 48 hours of it being requested by either the customer or competing carrier. The government should also consider requiring that punitive demurrage or late service fees be adopted directly into the regulated interswitching rates to further underscore to the originating carrier that it must provide efficient and effective service for interswitching requests.

Setting Interswitching Rates

The CTA calculates interswitching rates using railway provided cost data, and these rates include all variable costs and a fair contribution to railway constant costs. Without this regulatory

protection, interswitching rates would be set far above current levels reflecting railway monopoly pricing power. Rates should fully compensate the railways for interswitching services performed, as does the current rate setting formula.

Regulating the rates for the portion of a shipment from a shipper's or receiver's facility to the interchange is desirable and has helped increase competition for some rail traffic in some circumstances. The Agency's costing group uses the Agency Regulatory Costing Model ("ARCM") to determine regulated interswitching rates annually. CN and CP regularly challenge the Agency's ability and competence to determine rail long run variable costs, as well as the robustness of the ARCM itself. However, it is clear the Agency has adapted to changes in CN's and CP's infrastructure and operations to adjust the mechanics of determining interswitching rates, providing both railways with the profit necessary to cover all of their costs, including elements of profit such as cost of capital. There is a need for greater scrutiny, transparency, and disclosure to rail users on an annual basis, at the very least consistent with what CN and CP already are required to disclose in the United States. For the narrow purpose of extending interswitching limits, even modest disclosure of contribution bands would be helpful.

Data

The CTA should collect data to track the use of interswitching, by commodity, interchange, railway, service type (single or block). The CTA, shippers and the railways all stand to benefit from a better understanding of the volume of traffic that is sent through an interswitch. This should be part of increased data gathering by the CTA, and should include operational data from the railways, i.e. car order placement, car spotting and interchange, to have real evidence on how interswitch traffic is being handled relative to line haul traffic. Regulations should also include a quick claim/complaint process for shippers to challenge interswitch service and rate concerns.

Furthermore, interchange sizes should not be reduced by railways, and should be expanded to accommodate modern unit train lengths to ensure that efficiencies in the movement of unit trains of the future are not lost through interswitch moves.

Authority

Giving the Agency the power to expand distance is administratively preferable to the use of a cumbersome legislative process, especially if the Agency were to have the mandate recommended by the Task Force to "increase competition." The power is not useful without data and information disclosed in a transparent environment, however. The Agency should be provided with authority to not only demand and receive relevant data and information from CN and CP, but also the authority to disclose that information to rail users and stakeholders on regulated terms. The Agency should establish annually the contribution margin above variable cost required by CN and CP, separately, to cover all of their respective costs (variable and constant). The Agency should determine the percentages of traffic in at least two bands below and two bands above that level, and determine the average contribution margin above variable cost earned by each of CN and CP from traffic in each band.

It will be important that provisions be written to make certain the competing railway provides railcars as requested, just like they are compelled to do on their own lines. Monitoring by the Agency will be required in order to ensure railways are actioning interchange requests.

Distance

The Task Force was challenged in finding the optimal distance to achieve competitive outcomes. The right radial distance limit could provide duopolistic competition for more shipments than today. Today, a shipper within close proximity to an interchange between CN and CP can create some commercial tension where CN and CP otherwise monopolize origin-destination pairs and exercise market power over rates and conditions of service. With the Task Force's recommendation that government "increase competition and balance negotiating power," the Task Force has identified one obvious remedy that could provide some of that balance to at least some traffic that is otherwise exposed to monopoly market power.

The WGEA proposes that the regulated interswitching distance be increased into two additional radial zones, upon application of a railway company or interested person (as defined in the Act), without geographic discrimination. The two additional zones should be; (1) the previous Zone 5 of up to 250 kilometres as was available under Bill C-30, and; (2) another of up to 1200 kilometres as found in Bill C-49.

Immediate Action Recommendation #11 **- Establish, fund and hire staff for a Supply Chain Office - Timing – Within 12 months.**

Long-Term Strategy Action Recommendation #1 **– Establish a Supply Chain Office to unify the federal government's responsibility/authority over transportation supply chain management across departments.**

The positioning of Canada's transportation related problems as "Supply Chain" issues is worthy of additional scrutiny. On one hand, it is obvious that the entire movement of a product from originating source to final destination is critical. On the other hand, a chain is only as strong as its weakest link, and for the bulk grain sector the weakest link is chronic rail service failures.

Producers, shippers, handlers and exporters of goods are already motivated to optimize their behaviour for the supply chain, for they are the very parties that agreed on the transaction and *want* to move their own product. To use an analogy, when a consumer orders an online item from a company somewhere in the world, both the buyer and seller of the product are motivated to enact the transaction. It is the performance of the courier company in this example that constitutes the supply chain, the performance of which must be measured. If a homeowner must be present to let in a plumber, both parties have to uphold their part of the transaction – the homeowner needs to be home, and the plumber needs to show up at the agreed upon time. However, it makes little sense to measure the performance of the homeowner in this scenario. If they do not uphold their part of the bargain, they will not have their faucet repaired, which is why they hired a plumber in the first place. It is the performance of the plumber in this scenario that needs to be measured.

More specificity is required on the function of a Supply Chain Office. If the intent is for better coordinating among government departments on supply chain related issues, then there could be some benefit, so long as it is not housed within the department of Transport. It would have to be crystal clear that Supply Chain Office's purpose, first and foremost, is to facilitate solutions that are accretive to the national economy, as opposed to solutions that look for "balance".

Absent these details, the WGEA has concerns with the notion of a Supply Chain Office for three main reasons; (1) the title itself suggests disciplines could be placed on the shipper (homeowner) in the above example, when really disciplines on the monopoly service provider is what is required; (2) we wonder why the Canadian Transportation Agency is not already supposed to carry out functions that are envisioned for a Supply Chain Office; and (3) that it will be duplicative, add to bureaucratic complexity, and become a parking lot for railway related problems for government.

Immediate Action Recommendation #13 **- Develop a transportation supply chain labour strategy – Timing: Begin immediately.**

Long Term Strategy Action Recommendation # 7 **– Protect corridors, border crossings and gateways from disruptions to ensure unfettered access for commercial transportation modes and continuity of supply chain movement.**

Human-caused mischief

The recommendation to provide law enforcement and the judiciary with tools and resources to pre-empt blockades and expeditiously remove individuals or objects intending to be used to disrupt nationally critical transportation supply chain infrastructure or operations is good. In fact, Bill C-33 contains new provisions that appear designed to accomplish this very recommendation. This is positive.

Labour dispute delays

There is a need to address long-term labour management in an era where innovation disruption can be developed to facilitate greater efficiencies in particular in improved productivity. As with other sectors, unpredictable labour developments and disruptions can wreak havoc on a supply chain's ability to function. Furthermore, workforce issues call into question the ability of the Canadian grain supply chain to move both current and future volumes.

The WGEA agrees with the development of a transportation supply chain labour strategy and the development of a new collaborative labour relations paradigm that would reduce the likelihood of strikes, threats of strikes or lockouts that risk the operation or fluidity of the national transportation supply chain. We have seen through the pandemic and the War in Ukraine how critical the food supply chain is and in particular staple food stuffs like grain. As such, the government should explicitly include the movement of grain as a legislative and automatic part of any maintenance of service provisions with any rail strike or lockout actions in Canada.

In addition, by the end of 2023, the Government of Canada has committed to introduce legislation to prohibit the use of replacement workers when a unionized employer in a federally regulated industry has locked out employees or is in a strike. This legislation will affect the balance of power at the negotiating table. As a result of this legislation, an employer's ability to continue operations during a work stoppage at its location(s) will be reduced and/or eliminated in most cases. As a result, it is anticipated there will be more threats of a strike by unions and potentially more strikes. Anti-replacement worker legislation results in increased work stoppages and for a longer duration. The ultimate result is an increased risk to grain supplies and global food security. The government should not introduce legislation which has been shown to increase workplace and economic disruption.

Railway Work Stoppages

Rail strikes are among the increasing list of issues that handlers and exporters face in getting goods to market. As government is well aware, grain shippers are beholden to dual monopolies. If a strike or lockout situation occurs with respect to a business in a competitive environment, the customers of that business (third parties to the labour dispute) can avail themselves to the products and/or services of another provider to minimize disruption to the third-party company, and their producers and customers along the supply chain. For example, if there were a work stoppage situation with a particular courier company, shippers would have the ability to use a different courier to ensure their businesses are not disrupted, or that the disruption is minimized. The courier experiencing the work stoppage has the added pressure of loss of business to motivate it to reach a settlement with its employees.

This is not possible as it relates to railways in the movement of grain, as well as for the movement of many other bulk goods produced in Canada. Since railways in the grain sector are monopoly service providers, the same threat of loss of business is not present in a labour disruption scenario. They know they will move the grain eventually, and can "hold out" longer than if they were subjected to competitive pressures. The true sufferers in a railway lockout or strike are grain shippers and exporters who cannot move the grain, their customers who are waiting for product to arrive in the country of import, grain producers who are not able to get paid because they cannot deliver, and ultimately consumers who end up paying more at the grocery store. Grain sales are pushed outside of peak periods which diminishes the value the grain sector is able to command for the crop. Vessel demurrage charges, contract extension penalties and contract defaults are real consequences, as is harm to Canada's reputation as a reliable supplier of grains, oilseeds and pulse crops throughout the world. None of these consequences apply to the railway. They will eventually move the grain when their workers are back, and earn the same revenue they otherwise would have.

With respect to the union, the goal of any collective bargaining process should be a fair outcome. When a party refuses to submit to an arbitrated decision it is primarily because it does not feel a fair and impartial arbiter will reach a finding in its favour. This is equally as unreasonable as the railway's approach of subjecting its customers to commercial harm in order to maximize the returns of its own shareholders.

When Canada declares an Event of Delay in our sales contract with our trading partners due to a railway strike (as has occurred during the CN strike) it hurts our reputation and affects future contract negotiations. Normally, less sophisticated and developing countries are the ones that enact such clauses due to poor logistics systems and political unrest. That Canadian exporters are increasingly triggering these provisions reflects poorly on Canada as a reliable supplier. While we respect the collective bargaining process, a strike or lockout is intended to be used as a tool of last resort for the parties making the decisions. Surely, it is not intended to be used to hold hostage the entire grain sector, and indeed, major portions of Canada's economy as we saw during the latest railway labour disruption.

Loading in the Rain

Due to outcomes based on grievances from the ILWU, the timelines and costs for grain terminals to set up for loading in the rain through feeder holes are significant, and there is no longer an ability to load with the use of a tarping system. While feeder hole loading does still occur under certain circumstances, loading in the rain is no longer a common practice in the Port of Vancouver. Safety must be paramount in any solution, however, we cannot stop there. It must also enable the fluidity of the supply chain and be economically viable. The current process significantly reduces the efficiency of vessel loading, exacerbating the challenges with vessel wait time and number of vessels at anchor.

The WGEA views it as the role of the federal government to look for collaborative solutions to accommodate capacity growth for import and export volumes. Today, the main thrust on widening the pipeline takes the form of addressing infrastructure bottlenecks. We see opportunities for lower cost solutions that add incremental capacity in terms of process improvements, one of which is the establishment of a reasonable, safe and efficient way to allow longshore workers to load vessels during inclement weather. At current Panamax daily hire rates, the cost for a vessel to sit idle when loading could be occurring through feeder holes is approximately $2,000 per hour. These costs are ultimately borne by farmers and consumers and add significantly to supply chain costs.

Decisions made through a narrow lens that impact the collective system jeopardizes the entire supply chain. We find that government departments and agencies use the right language around looking for solutions that drive economic growth, but often offer little more than explanations about why solutions cannot be achieved due to regulatory barriers. If Canada truly wants to facilitate economic growth, we cannot allow the national interest to be obstructed by the roadblocks put in place by the few.

Given the Port's position and mandate to create efficiencies and improve upon the flow of goods, we believe the VFPA is uniquely and properly suited to lead a process to find a solution that works for all parties. Improvements in vessel loading will result in more efficient use of anchorages in the port, Nanaimo and throughout the Southern Gulf Islands.

Long Term Strategic Action Recommendation #3 – Digitalize and create end-to-end supply chain visibility for efficiency, accountability, planning, investment and security.

Car Order Fulfillment

Order fulfillment is a measure of the timeliness of hopper car supply by the railways in response to orders placed by shippers through the railways' car ordering systems each week. When shippers receive empty hopper cars from CN and CP each week, they electronically submit data to the ATC measurement system regarding those cars that have been supplied including the specific car numbers, the date cars were spotted and released loaded, the origin station and destination corridor and the week for which those cars were ordered. This data is matched to previously captured order data yielding the order fulfillment success rate each week.

This metric is generally regarded by industry as the most critical indicator of railway performance as the timely provision of rail cars by the railways is the first critical step in successful supply chain execution. Grain shippers plan their supply chains including the execution of sales contracts, producer delivery contracts and ocean vessel freight months in advance of the actual physical movement of grain by rail. These plans are established within the context of expected railway capacity and performance each week throughout the grain year. Thus, when grain shippers order rail cars each week they do so to meet established sales and logistics commitments in often very narrow time sensitive windows. The failure of railways to supply the cars ordered by shippers at the desired locations in a timely manner each week introduces risk to the supply chain and can lead to service failures and sub-optimization of other supply chain components. More importantly, sustained failures in timely car supply, a common occurrence particularly during winter months, result in lost sales capacity to the industry which often cannot be recovered and which ultimately harms Canada's reputation as a reliable global supplier of agricultural products. Grain shippers require these percentages to be 85% or higher on an ongoing basis. If they drop below 85% for three weeks in a row for any one railway, the problem is systemic.

It is clear that Transport Canada believes that digitization and creation of supply chain visibility will solve supply chain problems. This will only be possible if car order fulfillment is included in the measurements, as also recommended by the NSCTFR in Strategic Long Term Action Recommendation #5.

Railway Financial Accountability to Shippers

As is the case with all private sector entities, railways are first and foremost accountable to their shareholders and the returns of those shareholders. The difference is that in every other part of the supply chain, customers and clients have contractual obligations to one another that are disciplined by financial accountability provisions should one or the other party fail to meet their obligations. These can take the form of demurrage charges, late penalties, contract extension payments, offset fees, among other tools. They are purposefully punitive in nature. In other words, if one party does not deliver on the promised good or service, they are held financially accountable in a way that compels them to do whatever they can to meet the original obligation. The goal is not to collect penalties or fees, but rather for the failing party to immediately correct their performance or face stiff penalties. For every other part of the supply chain, these monetary penalties for failure to deliver cut into returns. Because railway shareholders want to maximize returns, we are confident this same foundational approach to contracting would fundamentally

change railway behavior, forcing them to put plans into place to avoid performance penalties (by providing adequate service in the first place) and robust plans in the event of failures (to bring them back into compliance with the contract when things do not go as planned). Without financial accountability, there is no market signal for the railways to address service performance failures.

The ability to charge a penalty for performance failures must be put directly into regulation (like Interswitching rates) and make it immediately available to shippers (like Interswitching). Any other approach (e.g., upon application, or the ability to arbitrate them in service level agreements) will result in no material change as individual shippers face an imbalanced power relationship with railways and cannot afford drawn out processes that would allow railways to leverage their monopolistic position in the interim in an untoward manner as those processes drag out.

Grain Plans

Bill C-49 passed into law in May 2018, which required the Class 1 carriers to produce annual Grain Plans, which contain expected weekly railcar volumes for grain shippers, and annual Winter Plans. The provision is deficient in two ways; (1) the government does not measure how well the railways perform against their Plans, and; (2) there is no provision to hold the railways accountable for any deficiencies relative to their Plans. The WGEA is of the strong view that the railways should be held accountable to their Grain and Winter Plans through direct and automatic penalties.

Another initiative created by the Minister of Transport is the Active Vessel Traffic Management process. The Canadian government believes there are too many vessels waiting for too long at anchor in Vancouver, Nanaimo, and the Southern Gulf Islands. Grain vessels stay longer and berth more times than planned primarily due to poor rail service. Yet the Agency has determined that measuring success in car order fulfillment is not limited to the week the railcars are ordered but rather that having railcars arrive one, two and even three weeks late is acceptable (even though there is nothing in the legislation or regulations that would support such a notion). Grain shippers require railcars the week they were ordered and late railcars result in longer vessel wait times. There is a disconnect between what the Agency sees as a reasonable window, and the Minister of Transport's objectives regarding vessels.

The Agency should be considering rail service data as the primary indicator, not the fact that shippers chose not to use an ineffective tool. For the grain sector, the Ag Transport Coalition data measures railcar demand versus supply on a week-to-week basis.

Shippers are being squeezed between government objectives that are diametrically opposed. The government is telling us there are too many vessels and will therefore place disciplines on terminals and exporters through the measures contained in Bill C-33. Yet, with the lack of rail service measures, the government is also saying rail service levels are acceptable. There is a requirement for the railways to publish grain and winter plans, but nothing in place to hold them accountable to meeting them. Government talks about the need for Canadian businesses to grow

the economy, yet is not prepared to give these same enterprises effective tools to accomplish that very thing.

Long Term Strategic Action Recommendation #5 – Revise the Canadian Transportation Agency's mandate and provide independence, authority and commensurate funding needed to delivery on that mandate.

The WGEA wholeheartedly agrees with this recommendation, in particular the following specific recommendations from the NSCTFR:

> *The regulatory should have the authority to address unfettered competition that negatively affects the national public interest. This negative impact is often illustrated when there is a power imbalance between the transportation service provider and the shipper.*
>
> *The revised mandate should reflect the intent to support the creation and maintenance of an efficient, productive and competitive transportation system focused on the national public interest.*
>
> *The revised structure should enhance the investigative and dispute resolution authority of the CTA (like the U.S. Surface Transportation Board and the Canadian Radio-television and Telecommunications Commission.*
>
> *The revised structure should remove the requirement for Ministerial approval to be secured for the CTA to initiate an investigation.*
>
> *The revised structure should improve the ability to address systemic issues in the Canadian transportation supply chain by amending the CTA's own-motion capabilities to allow for investigations longer than 90 days to provide for the collection and analysis of transportation supply chain data.*
>
> *The revised structure should support a robust and proactive use of own-motion investigations to address systemic issues in the Canadian transportation supply chain (many of them highly commodity specific). To this end, empower the CTA to collect and use KPI metrics and evolving data to move from a siloed industry to total end-to-end transportation supply chain visibility, starting with: (1) order fulfillment (the number of cars supplied by the railway versus what was ordered by the shipper), (2) origin and port inventory levels, (3) car cycle times, (4) out of car time at port terminals, (5) vessel time in port, (6) recovery time to average weekly performance, (7) shortline railway switch volumes, and (8) weekly interchange traffic by location, shipper and railway.*
>
> *Mechanisms to achieve balanced negotiating power should include prohibiting parties from contracting out of the provisions of the Canada Transportation Act.*
>
> *Mechanisms to achieve balanced negotiating power should include the changing of arbitration rules to include both service and rates.*

Mechanisms to achieve balanced negotiating power should include requiring Class 1 railways to strengthen interchange points to handle all traffic, including unit trains and manifest trains.

Mechanisms to achieve balanced negotiating power should include implementing regulatory tools to achieve balance in the market power between shippers and Class 1 railways, and ensuring those regulatory powers provide timely and effective methods for enforcement and support efficient and effective rail service delivery.

Between January and March 2022 rail service for the grain industry was experiencing extremely low levels of weekly railcar order fulfillment, which had already been significantly rationed due to a smaller crop size. Dwell time for railcars sitting loaded on country elevator sidings was extremely high, and there was a general lack of available rail capacity in the system. Service levels were at approximately 10-25% of the capacity numbers projected in each of CN and CP's annual Grain Plans, depending on the week and the railway company. Grain shippers and exporters use the Grain Plans to identify how much rail capacity will be available in a given week, and undertake a calculation to predict how many railcars they will receive on an individual company basis. The exporter then puts on a sales program commensurate with the amount of capacity they expect. When the railways fall short, in this case significantly short, it has an extremely detrimental impact to farmers who deliver, grain companies who handle, and customers who have purchased the product. Exporters had been forgoing additional sales, paying contract extension penalties, paying exorbitant vessel demurrage rates, and sailing vessels light. The issues were systemic, and in March, the WGEA wrote to the Canadian Transportation Agency to request that it undertake an Own Motion Investigation.

In the same time period, the U.S. Surface Transportation Board conducted hearings on rail service at which time they called the railways before them to answer questions, collected testimony from shippers, and analyzed data. These hearings resulted in new requirements forcing Class I carriers to submit several reports on rail service, performance and employment. Canadian Class I carriers operate both in Canada and the U.S., and they are not running different operating models. Yet our regulatory counterpart in Canada had made the decision to not take action. The STB held hearings to extract data, as opposed to requiring this data before deciding to use the legislative tools available to it. The members of the WGEA were disappointed the Agency chose not to undertake an investigation. During this process it became clear that the Own Motion Investigation tool is yet another example of an ineffective remedy. The WGEA therefore strongly agrees with the suite of recommendations from the NSCTFR in this space.

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Western Grain Elevator Association

Submission to
Supply Chain Task Force

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July 31, 2022

The Western Grain Elevator Association (WGEA) is a national association of grain companies doing business across Canada that handle in excess of 90% of our country's bulk grain shipments. WGEA members own and operate almost all of Canada's large, commercial scale grain terminal operations with port facilities in Prince Rupert, Vancouver, Thunder Bay, Sarnia, Goderich, Hamilton, Montreal, Trois-Rivieres, Sorel, Quebec City, and Baie Commeau. Canada's bulk grain shipments make up roughly 20% of total railway volume and revenue for both CP and CN each year (as reported in their annual reports), making WGEA members some of the largest single users of Canada's railways and ports.

Grain and grain product shipments are truly national in scope, and account for a large share of cargo volumes of any given major port in Canada[1]. For example, in Canada's busiest port in Vancouver from 2019 to 2021, grain and grain products accounted for on average 28% of all bulk exports, 25% of all container exports, 13% of all container movements, and 20% of all cargo volumes (inbound and outbound, foreign and domestic). For Prince Rupert, grain represented 16% of total cargo volumes over the two-year period from 2020 to 2021. In Thunder Bay, grain accounted for 87% of total cargo volumes from 2018 to 2020 and 90% in 2020. In Hamilton, the port recently indicated grain shipments were its largest export category of over 1 million tonnes in 2020 on a total cargo volume (inbound and outbound) of 10 million tonnes. In Montreal, grain was the largest export item by volume and the second largest import item by volume constituting 45% of all cargo at the port over the two-year period of 2020 to 2021. Grain figures prominently in every other major Canadian port as well.

While the United States is our most important customer, Canadian grain and grain products are a key part of most of Canada's important current and emerging bilateral trading relationships. Using Canada's "Trade Data Online" Tool, we are able to search up the top 25 most important products Canada exports to other countries (HS 6 digit). The following is a summary of some key relationships in the year 2020 and where grain figures in them:

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[1] All port statistics sourced from websites of the various port authorities quoted – a detailed summary of those can be provided on request.

China

- *7 of the top 25 products are grain related (#3 Canola Seed, #5 Canola Oil, #7 Wheat, #8 Peas, #13 Barley, #14 Canola Meal, #21 Soybeans)*
- *These top 7 grain exports represented 23% of the total value of all Canadian exports to China (roughly $1 in every $4 is from grain)*

Japan

- *6 of the top 25 products are grain related (#2 Canola Seed, #6 Wheat, #11 Soybeans, #15 Barley, #22 Durum, #23 Malt)*
- *These top 6 grain exports represented 19% of the total value of all Canadian exports to Japan (roughly $1 in every $5 is from grain)*

Mexico

- *4 of the top 25 products are grain related (#1 Canola Seed, #5 Wheat, #9 Canola Oil, #23 Malt)*
- *These top 4 grain exports represented 17.5% of the total value of all Canadian exports to Mexico (roughly $1 in every $6 is from grain)*

India

- *3 of the top 25 products are grain related (#1 Lentils, #15 Peas, #19 Canola Oil)*
- *These top 3 grain exports represented 19.4% of the total value of all Canadian exports to India (roughly $1 in every $5 is from grain)*

Indonesia

- *5 of the top 25 products are grain related (#1 Wheat, #4 Soybeans, #14 Durum, #23 Canary Seeds, #25 Peas)*
- *These top 5 grain exports represented 45% of the total value of all Canadian exports to Indonesia (roughly $1 in every $2 is from grain)*

France

- *2 of the top 25 products are grain related (#1 Canola Seed, #25 Soybeans)*
- *These top 2 grain exports represented 17.5% of the total value of all Canadian exports to France (roughly $1 in every $6 is from grain)*

Italy

- *6 of the top 25 products are grain related (#4 Durum, #5 Soybeans, #10 Wheat, #15 Kidney/White Pea Beans, #16 Lentils, #20 Other Beans)*
- *These top 6 grain exports represented 23% of the total value of all Canadian exports to Mexico (roughly $1 in every $4 is from grain)*

It is within this context that the WGEA is pleased to provide a grain shipper perspective on Canada's national supply chain. We have used the framing questions provided to our association by the Task Force to shape our submission, with an emphasis on item *ii*. These responses are clearly not exhaustive, but purposefully focus on priority issues and suggested solutions we believe could have a demonstrable and positive impact on the performance of Canada's supply chain.

Developing a National Supply Chain Strategy: Framing Questions

i. ***What industry-driven actions (e.g., shifting production, new input sources, near-shoring, exploring new markets, building new partnerships) are your members contemplating or taking to respond to existing or emerging supply chain challenges or disruptions? Are these temporary fixes or longer-term responses?***

WGEA members have for several decades been implementing strategies and investments to mitigate the perennial risk of inadequate rail service.

The most frequently used tactic, used by all grain companies every crop year, is to reduce the volume of their export programs to match expected rail car and service supply. In other words, grain companies sell grain to foreign customers based on what service they believe rail companies will give to them in the various weeks throughout the year. This is a direct result of the dual monopoly that CN and CP enjoy in the Canadian marketplace, as they routinely provide service and equipment to customers that maximizes their capacity month to month (and therefore shareholder returns) as opposed to providing the service required by their customers at various times of the year.

From an investment point of view, grain companies have built highly efficient inland and port terminal operations that result in load and unload rates that are significantly higher than rail service capacity. The results of these efficiencies have been scrutinized by the grain sector for the past 9 years under the industry-government funded Ag Transport Coalition which tracks both rail and industry demand and supply performance metrics, including dwell times at country and port. In short, grain companies load and unload grain trains as quickly as possible to try and increase the cycle times of the railways thereby attempting to increase the rail capacity volume available to them in a given month. Grain companies consistently meet 24-hour load/unload requirements, and routinely have load/unload times of less than 12 hours. In addition, grain companies have also invested in private rail car fleets alongside uptake of dedicated train programs offered by the rail companies in attempt to not have trains broken up or delayed at staging yards across the country.

Grain shippers and processors have also invested heavily in value-added processing facilities. The North American marketplace is the largest consumer of primary processed grain products (e.g., canola oil/meal, soybean oil/meal, wheat and oat milled products, renewable fuels, etc.) This has shifted the nature of the grain industry's proportionate demand by corridor for rail service. Nevertheless, overall volumes of bulk grain and grain product exports via the west coast have continued to grow as Canada's farmers have consistently improved grain yields by roughly 3% per year over the past 20 years, and expect to do so into the future. That means that while the proportionate amount of grain delivered to west coast has dropped over time, the actual volume delivered has increased.

In terms of exploring new markets, Canada's grain shippers have for many years sold grain products to well over 70 countries around the world. The grain market is global in scale and fiercely competitive (most of the WGEA members and their shareholders have operations in numerous grain-producing regions around the world), and WGEA members aggressively pursue higher margin opportunities wherever they may be found. This reality is underscored by grain shipper investments in grain port terminals in both Eastern and Western Canada. As noted in our preamble above, grain is the largest cargo by volume in almost all of Canada's major port areas.

That being said, the vast majority of global demand for Canadian bulk grain and grain products outside of North America comes from the largest population centers in the Asia Pacific Region. This includes North East Asia (China, Japan, South Korea), South Asia (India, Pakistan, Bangladesh, Sri Lanka), South-East Asia (Indonesia), and Latin America (Mexico, Peru). Given the geographical proximity of other grain producing countries (Russia, Kazakhstan, Australia, Brazil and Argentina) to these demand centers, and the fact that Canadian grain production is predominantly located thousands of kilometres from the closest tide water, Canadian shippers must choose the most efficient and cost-effective routes in order to remain competitive. Vancouver and Prince Rupert are by a wide margin the most cost effectives routes for transporting grain in the case of all Asia Pacific destinations. In addition, many other destinations that may seem geographically closer to Eastern Canada such as the Middle East (Turkey, Dubai), are in many instances more cost effectively served by West Coast ports.

Grain shippers have also invested in delivering grain through containers. However, those volumes are not materially significant to the overall sales of bulk grain and grain products, are also dependent on the same rail routes and service, and would never be able to efficiently move the bulk of Canada's grain production. Container movements are by their nature niche product and market opportunities.

ii. What are your members'/industry's most critical short-term, medium-term and longer-term supply chain challenges and how can they be addressed?

1. Rail Service and Rail Capacity

a) Rail

The quality and volume of rail service is by far the largest short, medium and long-term supply chain challenge. The monopolistic nature of Canada's rail network and the behavior that results from it have never been properly addressed in the transportation legislative and regulatory framework. Above all else, financial accountability and enhanced competitive access provisions are required to address service performance failures. These two concepts are fundamental parts of almost every open and competitive marketplace in Canada, but they do not exist to any great extent in the current rail service market. These shortcomings must be corrected through regulatory measures.

The WGEA sees the following as among the solutions to provide the right discipline in the rail freight market:

1. Enhance Rail Competition – Competitive access provisions work. Bring Extended Interswitching back and expand the limit to 1200 km (or unlimited). Consider Joint Line Running Right.

2. Penalties for poor service - Hold the railways accountable to their Grain and Winter Plans through direct and automatic penalties. Fix problems with the Service Level Agreement process and timelines.

3. Data - Understand that shipper demand versus railway car supply on a week-to-week basis is the core measurement of importance.

4. Labour - Make rail an essential service – There are mechanisms to resolve labour disputes that do not involve strikes or lockouts, in a way that minimizes harm to the national economy. Fix labour issues with the longshore industry in terms of loading in the rain, etc.

Regarding financial accountability, railways are first and foremost, as private sector entities, accountable to their shareholders and those shareholders care about returns. In every other part of the supply chain, customers and clients have contractual obligations to one another that are disciplined by financial accountability provisions should one or the other party fail to meet their obligations. These can take the form of demurrage charges, late penalties, contract extension payments, offset fees, among other tools. They are purposefully punitive in nature. In other words, if one party doesn't deliver on the promised good or service, they are held financially accountable in a way that compels them to do whatever they can to meet the original obligation. The goal is not to collect penalties or fees, but rather for the failing party to immediately correct their performance or face stiff penalties. For every other part of the supply chain, these monetary penalties for failure to deliver cut into returns. Because railway shareholders want to maximize returns, we are confident this same foundational approach to contracting would fundamentally change railway behavior, forcing them to put plans into place to avoid performance penalties (by providing adequate service in the first place) and robust plans in the event of failures (to bring them back into compliance with the contract when things don't go as planned). Without financial accountability, there is no market signal for the railways to address service performance failures.

The ability to charge a penalty for performance failures must be put directly into regulation (like Interswitching rates) and make it immediately available to shippers (like Interswitching). Any other approach (e.g., upon application, or the ability to arbitrate them in service level agreements) will result in no material change as individual shippers face an imbalanced power relationship with railways and cannot afford drawn out processes that would allow railways to leverage their monopolistic position in the interim in an untoward manner as those processes drag out.

Hand in glove with financial accountability in the private market is the threat of loss of business. In today's rail network, only regular 30km Interswitching provides a small measure of competitive access, but is really only effective in major urban centres. Even then, we note that Interswitching performance is dismal. Originating carriers often make it seriously unattractive to

shippers to use this measure (usually by long delays in delivery or pick up of rail cars involved in Interswitching) and the government should be putting into place a rigid compliance regime to ensure Interswitching is carried out in both the spirit and letter to which it was intended in the Act.

However, by limiting Interswitching (i.e., competitive access) to only 30km, the vast majority of Canada's shippers remain captive to one carrier. Long-Haul Interswitching (the current measure for so-called access for facilities farther afield from an interchange) has proven to be a complete failure, with zero applications made to the Canadian Transportation Agency for this program since its inception 5 years ago. By contrast, its predecessor, Extended Interswitching to 160km, was frequently used by grain shippers and was having a positive impact on the quality and quantity of rail service being provided by railways. Again, the reason for this is Extended Interswitching was immediately available for any proposed shipment, with full transparency on the regulated published rate, and no limitations on the timeframe in which it could be used. We believe the re-introduction of Extended Interswitching, out to 1200 km (which is the current distance threshold for Long-Haul Interswitching), would have a demonstrable impact on railway behavior due to the immediate threat of loss of business.

b) Anchorages

A subset of issues relating to rail have recently emerged, which pertain to anchorages in Vancouver and the Southern Gulf Islands. In August of 2021, the Minister of Transport announced the commencement of vessel management consultation process. The Canadian government believes there are too many vessels waiting for too long at anchor in Vancouver, Nanaimo, and the Southern Gulf Islands.

Earlier this year the WGEA wrote to the Canadian Transportation Agency, asking them to do an investigation into systemic rail service issues being experienced by the grain sector. The CTA refused, stating that it is acceptable when railcars arrive one, two and even three weeks late (even though there is nothing in the legislation or regulations that would support such a notion). Grain shippers require railcars the week they were ordered and late railcars result in longer vessel wait times. Grain vessels stay longer and berth more times than planned primarily due to poor rail service. There is a disconnect between what the Agency sees as a reasonable window, and the Minister of Transport's objectives regarding vessels. In addition, the WGEA engaged with Transport Canada to help them understand this reality (see attached grain industry Supply Chain presentation, delivered in May 2022).

The Minister of Transport created the Supply Chain Task Force to determine causes and solutions associated with Canada's imports and exports. At the same time, the Vancouver Fraser Port Authority initiated a process to look at anchorage management at the behest of the Minister. This work has not yet been completed, yet Transport Canada is circumventing both processes, ignoring root causes, and is indicating it will impose maximum vessel stay rules and maximum transits by October 2022.

Shippers are being squeezed between government objectives that are diametrically opposed. The government is telling us there are too many vessels, but is also saying this winter's rail service

was acceptable. There is a requirement for the railways to publish grain and winter plans, but nothing in place to hold them accountable to meeting them. Government talks about the need for Canadian businesses to grow the economy, yet is not prepared to give these same enterprises effective tools to accomplish that very thing. Instead, the powerful rail lobby has our policy makers helping to maximize railway shareholder returns at the expense of the economy. When ineffective tools are not used, the first reaction is that there must not be a problem, versus a genuine intent to understand why they are not being used in the first place.

2. Ports Modernization

Port-related issues are a close second to rail concerns, and there is a need for significant changes to the Canada Marine Act to address significant problems, most of which relate to port governance.

The Ports Modernization Review was launched in March 2018 by the Minister of Transport, with an aim to optimize their role in the transportation system as innovative assets that support inclusive growth and trade. The Review focuses on how ports can make progress on five key goals:

- Supporting the competitiveness of Canada's economy by facilitating the movement of goods;
- Strengthening relationships with Indigenous peoples and local communities;
- Promoting environmentally sustainable infrastructure and operations;
- Enhancing port safety and security; and
- Optimizing governance and financial management.

The Western Grain Elevator Association agrees with all of the above five principles at a high level, but the devil will be in the details. WGEA members have over the past decade struggled with a number of port-related policy, governance and administration headaches that remain unresolved. As the association representing the vast majority of Canada's bulk grain exporting companies, it would come as no surprise that the first and last goals from the above list are the focus of this submission. The Canadian grain industry is facing a multiplicity of important issues both with and in Canada's Ports, and with the Vancouver Frazer Port Authority in particular.

a) Importance to the Grain Sector and National Economy

The Port of Vancouver is home to 29 terminal operations serving 10 sectors of the Canadian economy that can be categorized into 5 key shipping segments: Bulk, Break Bulk, Container, Auto, and Cruise. Bulk operations are by far the largest category where coal and grain products alone accounted for 62% of all bulk shipments (grain alone is 25% of all bulk shipments). The top five bulk commodities (Coal, Grain, Min-Metal, Potash, and Forest Products) represented 88% of all bulk exports. Break Bulk is dominated by forest products and min-metal, the two sectors combined represent 79% of outgoing Break Bulk tonnage. Total container shipments were 26.9 MMT (vs Total Bulk Grain of 23.4 MMT). As stated above, grain products represented 28% of all outbound container tonnage.

The vast majority of products shipped through the Port of Vancouver originate from the 4 western provinces. It cannot be overstated how important the Pacific Gateway is to the Western Canadian economy. Put simply, the Port of Vancouver is a critical entity for western provinces and the success of all of their largest export-oriented sectors.

Canada's port authorities are legal monopolies with sole decision-making power over most aspects of strategic importance to Canada's marine gateways to the world. At times, monopoly-like behaviour is leading to clearly unbalanced and inequitable decisions from some port authorities across several important topics such as rent increases, extraordinary fees, infrastructure priority setting and execution, land development challenges, and lease renewal concerns. Alongside these, we have also experienced serious negative outcomes on topics where port authorities have been reluctant or unwilling to become involved where they quite clearly have a role to play including some port-related labour challenges and jurisdictional concerns. It is our opinion that material improvements to the port governance model under the Canada Marine Act and the Letters Patent of various authorities would go a long way towards resolving a number of the foregoing challenges.

b) Infrastructure Setting Priorities

Canada's ports must set infrastructure projects in a way that prioritizes existing users over speculative expansions. That is not to say that port expansions are not important, however, support for actual business and current must supersede that of potential business.

Below is a list of the projects contained in Greater Vancouver Gateway 2030, for example, that are supported by the WGEA:

- Burnaby Rail Corridor Improvement Project/Holdom Overpass (Thornton Rail Tunnel Ventilation Improvements, Rail Corridor Improvements, and Holdom Road Overpass)
- Harris Road Underpass and Kennedy Road Overpass Project
- Bell Road Overpass Project
- Mountain Highway Underpass Project
- Whistle Cessation and Rail Crossing Information System
- Portside Blundell Overpass and Upgrade Project
- Pitt River Road and Colony Farm Road Rail Overpasses Project
- Westwood Street and Kingsway Avenue Grade-Separations Project

Unfortunately, we are currently seeing infrastructure projects relating to T2 Roberts Bank take priority over the above, where the Port of Vancouver has spent over $100 million promoting its own idea without a proponent. Current tenants at T1, Global Container Terminals (GTC), wanted to expand its operations but was blocked by the Port who turned down their pre-permit application. As it has been communicated to us, when GCT Canada attempted to enter into leasehold renewal discussions, the Port of Vancouver leveraged its landlord powers to control the timing and operational planning of existing tenants to achieve commercially desirable outcomes in support of the project they were acting for as a proponent. Then, throughout the leasehold renewal process, it was unclear what methodologies the Port was using for rent setting, or if the

Port Authority was in fact setting necessary commercial pre-conditions it needed for their own green-field project to succeed.

To make matters worse, as GCT began advancing its next set of expansion projects at GCT Deltaport that appeared to be in competition with the Port of Vancouver's commercial plans, the Port leveraged its regulatory powers to control the GCT project advancement, as well as leveraged its permitting role in extracting additional benefits from unrelated projects or permits at other GCT leaseholds.

In the above case, the Port of Vancouver is actively competing with an existing container exporting business, and paying for it with rent increases, fees and levies to existing users such as grain terminals who will never benefit from the project. Grain terminals in Vancouver are currently experiencing exorbitant rent increases and Gateway Infrastructure Fees which are in part due to the cost recovery required by the funding of other projects such as the Roberts Bank T2 development. In other words, a portion of the fees being applied to established grain terminals are intended to generate funds to develop a separate area of the port completely unrelated to the movement of grain through the Port of Vancouver. This is extremely inappropriate, yet the Canada Marine Act allows it to occur. The Port of Vancouver is within its authority under the Canada Marine Act to operate in this manner, which is a significant and valid reason for legislative amendment.

Furthermore, the federal government has stated its position is to facilitate trade through the Port of Vancouver. However, these rent increases will in fact decrease the competitiveness of the Port, and grain exporters will look for lower cost options when competing to secure overseas sales. This means there is a likelihood that volumes of Canadian grain will move through the terminals in the US Pacific Northwest. The grain that does move through Vancouver will need to be priced higher than our competitors in other exporting nations, and therefore Canada runs the risk of losing markets.

It is not and should not be the role of Port Authorities to create enterprises to compete with existing users. Capacity demands are best addressed by private sector market forces and they should be enabled and supported by relevant government policy. The WGEA submits that grain sector investments in grain handling infrastructure in Canada's ports have, for the most part, occurred in spite of port authority decisions, not because of them.

c) Land Development Challenges and Lease Renewal Issues

The Port of Vancouver's decision to prioritize cargo container expansion over the western Canadian agricultural industry puts the viability of Canada's food sector at risk. By favouring a contingency plan for a massive cargo container terminal on the south shore of Vancouver Harbour, the Port is needlessly jeopardizing the operational future of certain companies. For example, the Port of Vancouver's refusal to grant West Coast Reduction an extension to its lease, simply to hold the land as a possible future terminal for overseas cargo containers, creates needless risk for certain agricultural producers and threatens the long-term viability of the food chain.

This example demonstrates the absolute power of Canadian ports to dictate winners and losers in the Canadian economy. The WGEA is gravely concerned that grain terminals could be next on the chopping block if the inherent conflict of interest as speculative developer and regulator is not addressed. Otherwise, the Canadian grain sector runs the ongoing perpetual risk of losing terminal capacity, which means slowing the flow of grain exports and losing market share to other jurisdictions.

Canadian should strive to increase export capacity for all sectors while maintaining capacity for existing sectors. The objective must be to increase the size of the export pie while giving existing businesses the option of continuing to exist and operate. Efforts which are designed to divide the export pie differently among sectors, and force long-standing enterprises out of business, are unacceptable. That the Canada Marine Act would allow this to occur is an extreme problem that cannot be overstated.

d) Labour Concerns

There is a need to address long-term labour management in an era where innovation disruption can be developed to facilitate greater efficiencies in particular in improved productivity. As with other sectors, unpredictable labour developments and disruptions can wreak havoc on a supply chain's ability to function. Furthermore, workforce issues call into question the ability of the Canadian grain supply chain to move both current and future volumes. Rail strikes and blockades are among the increasing list of issues that handlers and exporters face in getting goods to market.

The practical inability to load in the rain is another. WGEA members have been engaged in a multi-year battle with the union on what constitutes safe operation in the rain and how that can be administered. This work follows the protocols and requirements of these types of disagreements within the context of the collective agreements, which has not surprisingly yielded a burdensome, costly and inefficient 'solution' to loading in the rain.

While port governance reform has been identified as a priority under the 2016-17 Transportation Act Review, the Port Modernization Review, and ultimately by the Prime Minister of Canada, no changes have been made to address the deficiencies described in this submission. A bill to amend the Canada Marine Act is needed that reflects the following principles:

1. Overhaul membership in the User Nominating Committee to properly reflect those organizations and sectors that operate the 29 port terminal facilities in Vancouver.
2. Amend the Canada Marine Act to allow individuals directly employed by port terminals to sit on the Board of Directors of Canada's Port Authorities.
3. Remove any management or government interference with the User Nominating Committee's decision-making process.
4. Redesign appointments to increase accountability to provincial economies that use the Port (i.e. the four western provinces).
5. Address conflicts of interest that arise in port management's dual role as developer and regulator/administrator.

6. Provide a dispute resolution mechanism for users to challenge and appeal port authority decisions.

The Government of Canada (Canadian Transportation Agency, Transport Canada, Industry Canada, Port Authorities, etc.) should be working for the economy, not railway shareholders, unions or special interest groups. Canada must supply its customers in a price competitive way, or other countries will. If Canada expects to grow exports of potash, coal, oil, forest products, manufactured goods, grain, and other commodities from numerous industries, then we must find a way to do so in a cost competitive manner as we are seeing an ever-growing distortion of the free flow of goods.

iii. What specific supply chain challenges (in your industry/sector) could be addressed by pursuing greater innovation in the transportation sector?

The reduction in service volumes in the critical winter months due to inefficiencies in air brake performance at cold temperatures has plagued Canada's railways for decades. Cold weather performance, which seems obvious for a northern country such as Canada, should be a priority area for railway innovation. This could single handedly dramatically increase rail capacity if winter performance could be brought into line with summer performance.

Railways and shippers have pursued a number of other innovations to good effect (e.g., high efficiency rail cars, loop tracks, improved switching, etc.) Longer term, driving more automation in rail service delivery would be beneficial and would require innovation. The threat of labour disruption is a risk every year and has resulted in major rail service shortfalls in the past.

iv. What rules-based, regulatory, or other barriers are impeding your members'/industry's ability to achieve the transportation outcomes you require?

See financial accountability and enhanced competitive access provisions in *ii* above.

See proposed amendments to Canada Marine Act listed in *ii* above.

v. Where are the most critical investments needed in supply chain infrastructure for increasing capacity, reducing congestion and improving resiliency – especially in light of changing climate and economic shocks?

Resolving bottlenecks and risks to service in the Lower Mainland BC region is of critical importance. An example of this would be the potential upgrade of the North Shore railway bridge, a project that should be a priority but does not seem to enjoy that status by virtue of the relative lack of resources and emphasis currently being placed on it. Ensuring that grain exporters, and other Canadian shippers, are considered priority stakeholders by Canada's port authorities in infrastructure discussions should be underscored. As noted, Vancouver Fraser Port Authority has a clear priority to expand container terminal capacity for imports (the majority of which are destined for the U.S. market), and at the same time has no tangible plan to enhance service and opportunity for Canada's bulk shippers which are the backbone of our economy.

vi. Where are your members'/industry's best opportunities for new collaboration, innovation and leveraging digital solutions (e.g., data visibility, digital tools) to optimize existing infrastructure, increase capacity and improve system performance?

The measurement of rail service versus shipper demand on a daily and weekly basis is of critical importance, as it can immediately point to trends in service performance issues. Relying solely upon railway data to determine performance is fundamentally flawed as it does not speak to the critical metric of rail service demand (it only provides insight into the supply, which is important but not the complete picture.) WGEA members are one of several grain associations currently supporting the Ag Transport Coalition (ATC) data project. The ATC is the undeniable gold standard for rail service performance data in a single sector. The fact that it does not have the long-term support of government, and that government has not encouraged similar adoption in other sectors, is a serious shortfall in our estimation. Given that the life blood of Canada's economy is dependent on the performance of our rail sector, we believe rail service demand data is a prerequisite to determining what capacity is required now and into the future.

vii. ***What are the most critical Canada-US barriers or opportunities to act on in the near term to improve the movement of Canada's trade to US and international markets?***

The vast majority of grain and grain product exports to the US are conducted by rail. Enhancing car cycle times and the more efficient movement of grain to various US destinations could be accomplished through the same financial accountability and competitive access measures discussed in ii. above.

TRANSPORT CANADA
DISCUSSION TOPICS
Rail Review

(WGEA responses embedded)

Administrative Monetary Penalties

An Administrative Monetary Penalty (AMP) is an administrative penalty imposed by a regulator for a contravention of a provision of an Act or regulation. The primary objective of an AMP is to promote compliance with the relevant regulations, while not acting as a form of punishment for non-compliant activity. It achieves this by offsetting any potential economic gain from engaging in non-compliant activity, while offering flexibility to regulators to employ progressive enforcement tools such as cautionary notices or notices of violation that include AMPs.

The Canadian Transportation Agency (Agency) is provided the power to designate any provision within the Canada Transportation Act (CTA) to be subject to an AMP. Similarly, the Agency is empowered to consider contraventions of other key regulations made pursuant to the CTA as subject to an AMP, including the Railway Third Party Liability Insurance Coverage Regulations and the Railway Interswitching Regulations. Contraventions related to freight rail are primarily limited to compliance with requirements related to liability and insurance, certificates of fitness and operating authority, rate and tariff procedures, discontinuance, and adherence to Agency regulations related to interswitching. A listing of different obligations (Designated Provisions) that may be subject to an AMP are found on the Agency website.

Although the Agency may designate provisions subject to an AMP, enforcement will depend on the severity of the violation, the resources of the Agency to monitor compliance, and the type and nature of the provision. Currently, the provisions to which AMPs apply have little to no effect on interswitching, level of service, or confidential contracts. Additional Designated Provisions relating to rail service or confidential contracts could be identified, which may require legislative or regulatory changes.

Historically, there have been very few AMPs issued to freight rail carriers. Furthermore, most AMPs that are applicable to rail carriers have a maximum penalty of $25,000, a value that is set out within the CTA. The decision to impose an AMP and the amount of monetary penalty is at the discretion of the Designated Enforcement Officer in line with the Agency policy on enforcement.

In comparison to the operating income and revenues of the major rail carriers in Canada, these maximum penalties may not pose a significant deterrent to non-compliance with the CTA, or any regulation, order, or direction made under the CTA. Increasing the maximum penalties for AMPs may help to further incent compliance by rail carriers for both current Designated Provisions as well as any future provisions that could be identified as enforceable by AMPs.

Transport Canada is seeking stakeholder feedback on the following questions:

1. Given the objective and definition of an AMP, are there any additional provisions within the CTA that should be subject to an AMP, and why?

   As stated in the body of the discussion, AMPs are generally ineffective against railways as a means of ensuring compliance because (a) the potential financial gain for non-compliance far surpasses the penalty amount; and (b) there is a general reluctance by the regulators to impose AMPS against railways. As a result, since they are generally ineffective, there is little reason to seek an expansion of areas where they could be applied unless they are significantly increased in value and there is a real intention to have them enforced.

   The railways constantly adjust their processes to gain an advantage over shippers. One of the more recent and egregious changes is being pushed forward by CPKS. They will be changing their railcar ordering system so grain shippers can no longer directly enter their orders (which are reflective of true demand) into CPKS's system. Instead, CPKS will require shippers to e-mail their orders to their account manager, who will then enter them into the system. On the surface it seems little more than odd, that CPKS would add a layer into the process of this nature, which serves to consume additional CPKS resources for the manual order entry process. However, this change will result in a time-lag for official railcar order entry on a timeline now controlled by CPKS. This will affect the orders in CP's system at any given time, and provide a plausible new and artificially low measurement of demand in CP's railcar ordering system. When CPKS looks at "official orders in the system" it will show a reduced number and therefore serve to show better performance on a week-to-week basis.

   This is an example and only one of many process and tariff changes that occur regularly. Other examples of tariff changes are designed to offload responsibility, cost and workload to shippers. It all depends on what they see as being in their best interest. The WGEA believes there should be objective standards set for process and tariff related items, and that AMPs should be used to hold railways to account in meeting and maintaining these standards in their processes. As it relates to the above example, the Class I railways should be required to maintain systems for any shipper to directly place an order, and have it reflected in real-time.

2. Are AMPs the right tool to enforce any provisions identified under Question 1, or are there better alternatives?

   With respect to service failures, AMPs are currently ineffective because the penalties are too low (they pale in comparison to the financial gains that can result to the railways from rationing service and are a very small fraction of the economic harm that results from service failures) and they are rarely enforced. Furthermore, none of the AMPs are paid to the shippers who suffer the consequences of service failures. The better alternatives would be (a) much greater monetary penalties, to be diligently enforced and/or (b) the payment of liquidated damages to shippers who suffer losses because of service failures.

   Aside from service, as stated above the WGEA contemplates if there are certain circumstances where AMPs discipline has the opportunity to bring forward benefit

through influencing railway behaviour. Where railways have not followed proper procedure or notice periods for filing tariffs, administrative failures, inclusion of "contracting out" clauses in confidential contracts, or behaviour that attempts to mask data, as examples.

The problem with AMPs as a true discipline for service is they do not cover lost opportunity and damages associated with specific level of service failures associated with their common carrier obligations or the terms of a confidential contract. The AMP is paid to the federal government, and is not useful in compensating shippers for service deficiencies.

3. Should the maximum penalties for AMPs be increased?

Only if there is an equivalent intention to pursue enforcement. Otherwise, increasing the maximum penalties without an intention to enforce them is a hollow exercise.

A $25k penalty to a railway company is not an effective deterrent and the amounts should be raised. The higher the AMP, the greater the likelihood it will influence behaviour, so in the WGEA's view there should be constant pressure to maximize the penalty amount. Freight rates, surcharges, ancillary charges, penalties to shippers, etc. all escalate with the passage of time. Keeping AMPs at the same level is equivalent to an annual reduction when balanced against these increases applied to shippers.

4. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Currently the risk is when you challenge the railway in this particular manner (AMPs, FOAs, etc.) the shipper could be exposed to retaliation via alternative methods (i.e denied contract freight needs, overly aggressive ancillary penalties for dem/holdex). This is the reason why so few brought forward.

Grain shippers would prefer that Transport Canada had objective data and metrics on railroad performance that industry and shipper could agree to and if the railroad is not meeting KPIs. Transport Canada and associated regulatory bodies would hold the railroad accountable for their performance vs individual shippers.

Transport Canada has highlighted an important drawback of current measures that do not compel a change in behaviour from railways when service failures arise stating "In comparison to the operating income and revenues of the major rail carriers in Canada, these maximum penalties may not pose a significant deterrent to non-compliance with the CTA, or any regulation, order, or direction made under the CTA." In any other competitive marketplace the world over, the parties would set out the penalties for not meeting their obligations (i.e., service failures) that typically carry damaging amounts. This commits, in a firm and fair financial manner, both parties from the outset of their business relationship to following through on the terms that they have otherwise set out in their contract. In the logistics world, demurrage charges and other contract extension related deterrents are universally used by both Canadian and international actors to ensure that goods are delivered

on time, in the volumes agreed upon and at the quality set out in contractual understanding. Unfortunately, this is not the case in the Canadian railway service market.

The WGEA has long argued that the absence of such terms in the contractual relationship between railways and shippers, coupled with the reality that large railways in Canada have de facto geographic monopolies and therefore face no threat of loss of business, means there are no effective mechanisms to change commercial behaviour *on any given shipment*. This emphasized wording is important because shippers require rail service partners to react quickly, decisively and positively to service failures on all shipments, not just systemic failures, because shippers have most certainly entered into third party contracts for the successful delivery of those goods (e.g., vessel owners, end use customers, transloaders, etc.) It is not enough for railways to simply move all of the grain in a given year on a schedule of their own choosing. That quite bluntly is akin to a centralized economy approach which very clearly falls seriously short of the daily demands of a robust global marketplace.

Moreover, as a result of the power imbalance between shippers and railways in Canada, it is also not enough to expect that these parties will arrive at such terms in their own 'confidential contract' negotiations. Government must expect that dominant actors will lever such dominance in those discussions; the historical record very much supports this point. The only measures guaranteed to change behaviour are those that are automatic and do not provide opportunity for potential abuse of dominance (i.e., they require no 'negotiation' between shipper and railway). As such, the WGEA proposes that the government should legislate that every rail tariff must carry demurrage rates for failure to provide service. Failure should constitute non-delivery/pickup of the agreed upon number and volume of rail cars either at origin or destination. Timing for what constitutes a service failure should take into consideration timing of when similar demurrage charges typically apply for shippers in their contracts if they do not deliver (e.g. with vessel owners) which for demonstrative purposes should be in the range of 48-72 hours. Finally, demurrage rates should be reviewed and set by the Canadian Transportation Agency on an annual basis. This removes, once again, the ability for railways to abuse a dominant position by setting out demurrage rates that are not reflective of the actual loss suffered by shippers in the event of a service failure. We would note that railways have long set out demurrage rates and other penalties for shippers within tariffs, without a corresponding obligation on their own part.

The above approach is also valuable because it sets the bar for confidential contract negotiations.

Contracting Practices

Contracting out

The ability for parties to negotiate confidential agreements on fair and commercially reasonable terms is a cornerstone of Canada's approach to the regulation of freight rail. In recent years, a number of shipper associations have expressed concerns regarding the confidential contract negotiation process.

Specifically, shippers claimed that CN and CPKC are requiring a clause in confidential contracts precluding them from using remedies available under the Canada Transportation Act (CTA) (e.g., level of service complaints, regulated interswitching). This practise is referred to as "contracting out". This was raised by the Canadian Transportation Agency (Agency) in its 2020-2021 Annual Report, as well as in the National Supply Chain Task Force Final Report, which recommended prohibiting contracting out from provisions of the CTA.

Shippers have noted concern that, without a contract in place, the number of railcars available to them through general allocation will be insufficient to meet their transportation needs. They therefore feel pressured to sign a contract containing contracting out clauses.

Given the confidential nature of these contracts, Transport Canada is currently unaware of the exact nature, wording, and effect of the clauses in question. As shippers are unable to share copies of these contracts, it is uncertain whether and to what extent shippers are in fact foregoing the ability to use remedies in the CTA, what alternatives may be in place under these contracts, and whether there may be any benefits associated with these provisions. Additional information is therefore required before determining whether to act upon the Task Force's recommendation.

Transport Canada is seeking stakeholder feedback on the following questions regarding the nature and prevalence of these clauses, their potential benefits, and any concerns or noteworthy points related to these clauses:

1. In your view, what are the potential benefits or drawbacks of implementing the Task Force's recommendation to prohibit these clauses, as well as the most appropriate mechanism for doing so?

   The WGEA agrees with prohibition in use of contracting out clauses. Our experience is that the railways do attempt to include these clauses (e.g. as it relates to new interswitching rules). Railways also include clauses that allow them to cancel rail contracts with the introduction of any new government regulation relating to minimum thresholds in movement of grain or changes that govern railway operations. The use of such clauses inserts uncertainty in the contract if new regulations are adopted – which is effectively used as a means to limit the extent to which shippers may advocate for regulatory changes.

   The nature of the imbalanced relationship between railways and shippers is such that legislation must protect shippers from abuse of dominance. If it were true that shippers could gain some advantage by signing away their right to use the

provisions of the Canada Transportation Act, then it might be a different story, but there is never anything gained by a shipper by signing a contract with such a clause. In addition, that isn't the purpose of legislation. Any individual shipper should not (and does not) receive a better freight rate, or better service provisions, simply because they sign a service contract that prohibits their ability to avail themselves to certain rights under the Canada Transportation Act. The law should not be a playground for finessing competitive pricing or service, despite what railways (and shippers sometimes and to some degree) might attempt.

The correct mechanism for the prohibition of "contracting out" is a legislative amendment connected to an AMP. An item should be added to section 126, perhaps under "Restrictions" that makes it clear that contracting out of the provisions of the Canada Transportation Act is prohibited. Confidential contracts should be required to be filed with the Agency so they can monitor compliance with the new clause. It must have the effect that the law prevails and if any contract or commercial agreement between any class 1 railway and a shipper contains language that intends for a shipper to no longer have certain rights under the Act, that that particular clause is null and void in the contract. If a railway company attempts to bring forth the contract provision in any proceeding under the CTA, it will be disregarded by the Agency, and the railway will be subjected to an Administrative Monetary Penalty for admitting they contravened the new clause in the Act which prohibits it. This solution will only work if the AMP is actually enforced.

2. With respect to the contracting process, what is your experience with the timeliness of contract offers and responses on the part of railways and shippers (for example, how far in advance of the contract period do shippers initiate negotiations, and whether railways provide offers within 30 days of the request, as required by section 126 (1.3) of the CTA)?

The timelines for contract offers are long and drawn out. Railways undertake contract negotiations far too early each year, typically starting in the May to June time period when the current year's crop has only just been planted and is in its early development stages. Grain shippers are then pressured to sign something prior to the crop size being known. In our view the approach being taken by the railways is to seek to have a contract signed early and before harvest in order to force grain carriers to lock in car supply and take the risk of any crop issues which may negatively affect crop harvest and in turn volume of grain shipped. The grain car supply contracting process should occur in the July / August time period. As far as the 30-day time period upon request - this never happens. Railways always offer contracts in advance of request from grain rail shippers. Contracting the railcar allocation 90 days prior to harvest puts industry at risk.

Shippers then individually establish their lists of concerns and proposed changes. While discussions continue sporadically, railway staff do not provide definitive responses to these requested amendments for months afterwards. Grain shippers find themselves in a position of either having to accept the initial program terms (or something very close to it), or not sign the contract. They either have to initiate the arbitration process with through the CTA, or accept the terms offered by the railway. Because it is a confidential process, and because they do not know how their

competitors will respond, they accept the terms. Initiating the arbitration process means not having a service contract in place, while competing grain shippers do. The threat of loss of business and associated potential cost to a single grain shipper for taking their service contract(s) to arbitration is simply too high. It could mean not being able to execute on sales made in the fall period 9 months ago. The process is problematic.

3. In your view, do the confidential contract provisions of the CTA (in particular section 126), succeed in setting the right conditions for fostering commercially fair and reasonable negotiations?

   The confidentiality component of contracting is good. But the issue is the inability to negotiate fairly because of the imbalance in negotiating power. There needs to be a much more efficient (less costly and faster) mechanism to reach a commercially fair agreement.

4. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

   The grain car supply contracting process is non-reciprocal in many ways and is biased to the railways favor. Examples include that the railways take a winter car supply reduction of -25% each year yet refuse to provide grain rail shippers with similar reductions for spring / summer months when grain shipping tends to be lower. The contracts also require shippers to load rail carriers in 24 hours under penalty for failing to do so but the railways are permitted 48 hours to lift the loaded railcars. Also, car supply contracts do not have any performance standards that the railways need to comply with in terms of key performance indicators (like origin dwell / transit times / last mile service). In our view this is a significant omission. The negotiation process also tends to end with the railways using "take it or leave it" position to conclude the process and there is little if any recourse to the shipper in this situation because the arbitration process would be too long, costly and uncertain to pursue.

Surcharges

We understand confidential contracts entered into between shippers and railways typically incorporate railway tariffs on a variety of issues. For example, they may incorporate tariffs relating to ancillary services, or other items like fuel surcharges. While the CTA does include oversight mechanisms for some charges, it is also possible that some gaps may exist. Transport Canada has heard concerns from stakeholders about the nature of some of these charges (e.g., fuel surcharges), and whether they have risen to an unreasonable level.

Subsection 120.1(1) of the CTA empowers the Agency to investigate, upon receipt of an application by a shipper, whether any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff, are unreasonable. If the Agency finds that they are, it may establish new charges or associated terms and conditions. This review mechanism, however, does not apply to rates for the movement of traffic as noted in subsection 120.1 (7) since other mechanisms exist for that purpose, namely through final offer arbitration (FOA).

In considering what constitutes a charge versus a rate, the Agency has held that a charge is incidental, optional, or ancillary, and relates to specific activities or transactions that are debundled from the rate for the movement of goods (e.g., car cleaning services). This interpretation would not appear to capture charges like fuel surcharges. Even though they are debundled from the rate, they are not incidental, optional, nor ancillary.

A shipper or shippers seeking to challenge railways' application of fuel surcharges would appear therefore to be limited to making an application under FOA. This process may not be well suited, particularly as these surcharges represent only a small portion of the rate for a given movement, and also apply to virtually all traffic. This latter point means not only that the burden of challenging a surcharge that may apply to a broad cross section of traffic falls to an individual shipper, but also that any remedy would apply only to the shipper making the application for the duration of the FOA decision, making it an ineffective mechanism for addressing a systemic issue.

1. Given the above, do existing mechanisms provide adequate oversight of surcharges that are tied directly to the movement of traffic? Are additional oversight mechanisms (or changes to existing mechanisms) to allow for the review of these tariffs, outside of the FOA process, warranted? If so, what would those mechanisms be?

   Tariffs are publicly posted charges. They should be reviewed and approved by the CTA prior to becoming effective. In its review of the tariff, the CTA should consider the reasonableness of the charge, taking into account whether it is commensurate of reciprocal obligations/consequences for similar carrier events. For example, tariffs relating to hold charges in instances where railcars cannot be unloaded due to weather events such as rain in Vancouver such be evaluated against the charges (if any) that the railway pays to shippers (if any) when it is unable to deliver cars due to weather events (such as cold weather, or otherwise).

   It would be beneficial if all shippers clearly understood the equation that railways use to calculate a fuel surcharge. This would give the shipper more insights in whether the fuel surcharge is warranted. With increased train lengths, improved efficiency of equipment, there has been no improvement in the calculation of cost of fuel versus surcharge per mile. Although railways claim improved fuel efficiency, the tariff schedules have not been adjusted in years. With railway continuing to improve fuel efficiency the schedule for carbon tax should also be looked at.

   Provisions that work best in the rail freight market are those that are automatic, and do not require a shipper or anyone to file anything or go through an individual process with the Canadian Transportation Agency. In this regard, existing oversight mechanisms fall short. Surcharges should be set at a level that account for direct cost recovery only, as determined by the Agency. It is not the purpose of surcharges to result in financial gain for a railway company, even if the level is set by the railway with the stated purpose of influencing behaviour as opposed to generate a revenue stream. Dominant players such as railway companies should earn revenue from freight rates, not surcharges.

2. The ability to challenge the terms of a tariff under 120.1 is limited to shippers. Would it be reasonable to allow any person to file a challenge under 120.1?

   Tariffs should relate to obligations and consequences that flow between shipper and carrier. Whatever party deemed to be the direct payor of freight should have ability to challenge 120.1. As a result, in a normal commercial relationship, the ability to challenge the reasonableness of tariffs should likely be limited to shippers. However, if the commercial relationship is unbalanced (as is currently the case), then the fairness of tariffs should either be pre-determined by the CTA (as stated above) and/ or by third parties representing the interests of shippers.

3. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

   It would be preferred if Transport Canada had KPIs on railway performance/service levels that are visible to industry and shippers. If the railroad's performance is below target (i.e., Service level & Performance Metrics) Transport Canada and associated regulators can hold railways accountable vs. individual shippers.

   Key concern for surcharges is there is no oversight or regulatory structure for these charges. Railways can charge whatever dollar amount they please for any service they deem to be chargeable. The tariffs also come into effect with little or no advance notice that would allow them to be reflected in the shippers' own costing rates to their customers.

   Also car Hold Charges are a significant issue for grain rail shippers – these are charges levied by the railways for delays caused by grain shippers. The main problem with Hold Charges is that in many instances, the delay was the result of direct or indirect railway operations (e.g. spotting unloaded cars all at one time at various shipper locations and expecting the shipper to load them within 24-hours; or spotting cars all at one time at a terminal position and expecting them to be unloaded within the time period required by the railways; or the railways breaking up trains and spotting cars at destination out of sequence). In all of these cases the railways will levy a hold charge on the shipper and it is then left up to the shipper to negotiate/argue with the railway that the charges are not proper since they were caused by the railway's actions.

Final Offer Arbitration (FOA)

Final Offer Arbitration (FOA) provides shippers a dispute resolution mechanism when they are unable to come to an agreement with a carrier on the rates to be charged and the conditions associated with the movement of goods. Although it is available to shippers for the domestic movement of goods by air, for the movement of goods for northern marine resupply purposes by water and the movement of goods by rail, it has exclusively been used by rail shippers. FOA is supported and facilitated by the Canadian Transportation Agency (Agency), and the arbitrator's decision is enforceable as if it were an order of the Agency. It is part of a suite of dispute resolution mechanisms set out in the Canada Transportation Act (CTA) to address the potential market imbalance between shippers and carriers which, for rail, also includes the remedies associated with level of service and the arbitration of service level agreements. FOA has been available in its current form since 1987 with minor changes to allow for joint FOA (FOA involving multiple shippers), summary FOA (expediated FOA for situations involving charges of $2 Million or less) and to extend the period of the arbitrator's decision to 2 years. The FOA process is set out in the CTA and is intended to be efficient and effective where the shipper and the carrier present their offers, and the arbitrator chooses one of the offers presented.

FOA has been consistently but infrequently used by shippers, however, its infrequent use is not necessarily an indication of its usefulness as shippers note that the option of going to FOA provides them leverage in their negotiations with railway companies. FOA for all intents and purposes is an effective tool for shippers. However, a review to ensure that it is as effective as possible is merited.

As part of its examination of Canada's supply chains, the Supply Chain Task Force set out several rail-specific recommendations, one of which is to permit FOA to include both service and rates. Although the provisions do not refer to service specifically and instead speak to conditions, specific service requirements have been addressed as part of an FOA in some cases.

- Would there be a benefit from amending the language to refer specifically to level of service?

- If so, how would this impact use of the current Arbitration on Level of Services provisions that provide shippers a mechanism to have a service level agreement with the carrier that covers how the carrier will fulfill its level of service obligations (as set out as operational terms) and any reciprocal penalties but cannot address the rate for the movement of traffic?

Another issue that has been raised by shippers is the arbitrator's use of the Agency's technical assistance to calculate the costs associated with the movement of traffic to which the rate will apply. The Agency maintains a sophisticated costing model, the Regulatory Costing Model, that uses specific costs, when known, unit costs based on system level data and the details of the rail movement to develop the total variable cost associated with a specific movement to which a contribution to constant costs is added. Other than the details of the specific movement, all the costing information is exclusively in the possession of the carrier. Railways can, and rightly so, set their rates based on any number of criteria, and it is

well known that costs are not the principal driver for rate setting but instead more likely, among other things, a consideration of the Ramsey pricing model that is demand based.

- Would there be a benefit if, for all FOAs, the Agency provided the arbitrator costing information associated with the movement based on the Regulatory Costing Model?

Another element that may be worth examining is the criteria that the CTA sets out that the arbitrator must consider in selecting an offer. The CTA sets out that the arbitrator will consider anything that appears relevant to the arbitrator and specifically, unless the shipper and carrier agree otherwise, they will also consider whether the shipper has an alternative, effective, adequate, and competitive means of moving the goods. For the first, and broader criteria, this will likely be dictated by the arguments put forward by the shipper and carrier during the arbitration proceedings that relate to the specific circumstances of the movement in question. However, the second appears to be aimed at the question of shipper captivity which will be influenced by not only the shipper's captivity to a single rail carrier but also its captivity to rail as the mode of moving the goods. The arbitrator is only required to provide reasons for their decision if both parties request it, therefore it may not be clear to the parties to what extent, if any, this question is considered.

- Is this consideration, as it is currently framed, helpful in the FOA process?

- Are there any other criteria that would merit being included as a consideration by the arbitrator in selecting between the shipper's and carrier's offers?

Both the Agency and the arbitrator are required to keep matters related to FOA confidential unless both parties agree otherwise. The Agency is required to report annually on applications to the Agency and the findings on them, but only publishes information on the number of arbitrations conducted each year. However, to better inform policy decisions to ensure that FOA is meeting its objectives and remains in line with the National Transportation Policy, Transport Canada may benefit from more visibility on the use of and outcomes from FOA.

Transport Canada is seeking stakeholder feedback on the following questions:

1. Should the Arbitrator, on a confidential basis, provide to the Agency for confidential reporting to TC the outcome of the FOA, that is, the names of the parties and which party's offer was selected?

   While the WGEA can see how this information could be instructive to Transport Canada in having this information when making policy decisions, we can also see some shippers being sensitive to their names being shared. Because of this, names should not be included.

2. Should the Agency, on a confidential basis, annually provide to TC information with respect to FOA, specifically:
   a. the number of FOAs conducted; Yes
   b. the type of FOA, i.e., joint FOA and summary FOA; Yes
   c. the names of the shipper(s) and carrier; and No

d. identify the party whose offer was selected by the arbitrator? Yes, but just say "Shipper" or "Railway," not the specific company name.

Yes. The WGEA can how this information could be instructive to Transport Canada in having this information when making policy decisions.

3. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

The fact of the matter is that FOA (like most shipper remedies) are rarely if ever used because the process is much too complicated/expensive, not timely, and adversarial (seen by the railways as being an attack which will have retaliatory consequences). Unfortunately, in many cases, the lack of recourse to shipper remedies is interpreted as being a signal that the shipper/carrier relationship is working well – which is not accurate. It is evidence that the remedies are ineffective.

Grain and Winter Contingency Plans

Under the Canada Transportation Act (CTA), both CN and CPKC are required to each produce two plans on an annual basis: (1) a Grain Plan, which provides an assessment of each carrier's ability to move grain within the crop year as well as steps taken to enable these movements; and (2) a Winter Contingency Plan, which describes that carrier's contingency plan to move grain along with other traffic when faced with winter weather conditions.

These requirements were introduced as part of the Transportation Modernization Act in 2018, with the intention of demonstrating the government's ongoing commitment to ensuring adequate and suitable rail transportation for the grain sector. The objective of these plans was to encourage rail carriers to increase transparency around their annual planning efforts. By encouraging open communication on planned levels of service, these plans were envisioned to improve planned and anticipated levels of service iteratively in each successive year.

Railways have had strong winter performance in some years since the requirement was introduced, there have also been some challenging winter seasons where service and performance levels experienced a relative decline.

Many within the grain industry have also commented that the plans do not go far enough in providing enhanced visibility or value to grain shippers. Stakeholders have called for the plans to be expanded and include additional details, such as service and performance information, detailed analysis of past performance and mitigation steps, forecasting, planned weekly rail car capacity, asset utilization targets, and mandated monthly performance reporting. In their final report, the Supply Chain Task Force also called for a new requirement for railways to prepare annual capacity plans for major commodities that they haul, and report on their progress weekly. However, the 2023 Budget Implementation Act amended the CTA to enable TC to permit the sharing of information on the national transportation system to increase its efficiency, which could include real time operational data for rail carriers. As TC considers new regulations to establish a data sharing framework, these advancements are expected to increase joint planning initiatives across the supply chain, and therefore may reduce the need for rail carrier creation of annual capacity plans. Furthermore, the creation and updating of these capacity plans would be an administrative burden for carriers.

Transport Canada is seeking stakeholder feedback on the following questions regarding the Grain and Winter Contingency Plans:

1. What do you see as the primary objective of the Grain and Winter Contingency Plans, and how do you see them contributing to that objective?

   Both annual grain plans and winter contingency plans were put in place to:
   1. Ensure railroads are publishing available capacity for rail.
   2. Publish enhancements that have been put into place to increase capacity / efficiencies.
   3. Allow shippers a baseline of projected grain movement by corridor to begin planning monthly capacity.

4. Flag any risk such as labour agreements for the upcoming year

The primary purpose is to understand availability of the railway fleets and what potential actions the railroad is planning to take if we experience seasonal challenges (winter storms, forest fires, etc.). This is information useful to shippers to use when determining their individual shipping plans. The purpose should also be to hold railroads accountable for their performance. However, the Grain and Winter Contingency Plans have become marketing pieces for CN and CPKS rather than an operational focus so today information is of limited usefulness. It would be beneficial if they re-focused as a set of legitimate plans for the provision of overall rail capacity throughout the year.

We would suggest that these plans have clear KPIs (i.e. volume of grain shipped by month by pipeline, etc.). Ideally the railroads would send out a performance report (maybe quarterly) highlighting their action plan to address challenges. It is important key stakeholders are clear on the actions being taken to address seasonal challenges (i.e. forest fires).

2. How useful and valuable are the Grain and Winter Contingency Plans to your operations, in terms of planning your shipments? What elements of the Plans do you find most useful?

Usefulness exists, but could be improved. Today, the verbiage in the plans provide hosts of reasons the railways probably won't meet the numbers they project, all of which won't be their fault. Even if none of the cautionary statements come to fruition, there is no accountability to the railway companies for meeting the numbers in their plans. There is some value in comparing the numbers from one year to another, to understand if a railway plans in increasing or decreasing its capacity offering overall – all things being equal. There is also value to an individual shipper in being able to see how the capacity offered in their individual service contracts, as a portion of the overall projected capacity, changes from year to year (i.e. whether it has been increased or decreased).

3. Are there any additions or enhancements you would like to see within future releases of the Grain and Winter Plans?

In producing their Grain and Winter Plans, the railways should be obligated to populate a template provided by government. The template should allow for some flexibility to report in different ways (i.e. railcars versus tonnage), but essentially require railways to publish their capacity offering in the same way (private cars versus common fleet, grain versus processed oil) and any other necessary stratifications to provide a proper comparison. Both railways should publish data on a railcar basis. This could be easily done by including a conversion factor.

Recommendations include adding: performance information for the prior year (actual results) versus performance standards for the current crop year for origin dwell, trip / cycle times, and last mile service. The plan should also include projected crew / locomotive allocation plans by region / hub rather than just overall numbers. Monthly mandated performance reporting versus the standards established for origin dwell,

trip / cycle times, and last mile service should also be mandated (see comments below relating to the STB). Quarterly audits between the railways and Transport Canada should be done and available to shippers.

Shippers need better visibility of; 1) Performance on Service KPIs, 2) Projected delays attributed to Weather (& Action Plan) and 3) Any potential labour concerns impacting level of service, in a fact-based way.

4. Would the introduction of annual capacity plans prepared by rail carriers for other major commodities, as recommended by the SCTF, benefit the supply chain? If so, what elements would they need to include, and how could these plans be used? Given the complex and dynamic nature of the supply chain, do you think that an annual capacity plan can be useful? Please explain.

   The WGEA agrees with the following statement;

   "Many within the grain industry have also commented that the plans do not go far enough in providing enhanced visibility or value to grain shippers. Stakeholders have called for the plans to be expanded and include additional details, such as service and performance information, detailed analysis of past performance and mitigation steps, forecasting, planned weekly rail car capacity, asset utilization targets, and mandated monthly performance reporting. In their final report, the Supply Chain Task Force also called for a new requirement for railways to prepare annual capacity plans for major commodities that they haul, and report on their progress weekly. However, the 2023 Budget Implementation Act amended the CTA to enable TC to permit the sharing of information on the national transportation system to increase its efficiency, which could include real time operational data for rail carriers. As TC considers new regulations to establish a data sharing framework, these advancements are expected to increase joint planning initiatives across the supply chain, and therefore may reduce the need for rail carrier creation of annual capacity plans. Furthermore, the creation and updating of these capacity plans would be an administrative burden for carriers."

   Any further detail that can be provided as part of this process would be useful relative to what is supplied today. However, the publication of plans without ongoing monitoring of performance against the plan, and consequences for failing to meet the plan, is of limited value.

   For the grain industry itself, rather than create additional plans for other sectors, there would be more value in the railways referencing the impact of other commodities and sectors and their impact on grain. This is a grain specific comment.

5. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

   Speaking for shippers in the grain sector, an important improvement would be the development of tracking and reporting of actual performance against these plans. There should be a financial discipline in place associated with a railway not meeting

its Grain Plan numbers, regardless of the reason for the failure. Triggers should be established upfront and what actions will be taken by the government if thresholds are not met.

Transport Canada should review the reporting requirements that the STB implemented in the USA in 2022 for class 1 rail carriers relating to performance reporting and adopt similar standards in Canada. It does not make sense that there would be different approaches on this item when both CN and CP are already required to prepare this reporting for their USA operations but not for their Canadian operations, particularly given the extent to which product moves by rail across the border.

Extended Interswitching

Background

In response to the recommendation of the Supply Chain Task Force, the 2023 Budget Implementation Act (Bill C-47), which received Royal Assent on June 22, 2023, includes an 18-month pilot project for extended interswitching in Alberta, Saskatchewan, and Manitoba. Once it enters into force in September 2023, shippers between 30km and 160 km of an interchange in the provinces of Alberta, Saskatchewan, and Manitoba will be eligible for extended interswitching to a competing railway at regulated rates set by the Agency. Transport Canada is continuing work to develop an approach for assessing the effectiveness of extended interswitching, which will help inform next steps when the pilot project concludes.

Canada's Rail System

Class I railways play a pivotal role in Canada. They support our urban and rural communities and are essential to the Canadian economy. Canada's Class I railways helped keep the economy moving early in the pandemic during a period of great uncertainty, reconnected the rest of Canada to the Port of Vancouver in record time after an atmospheric river in the fall of 2021, and helped relieve supply chain congestion during a period of significant global supply chain imbalance, which is to name just a few of the challenges Class I railways have helped Canada overcome in recent years.

However, while Canada benefits from two generally high performing railways, challenges remain. A defining characteristic of Canada's freight rail network is that its two dominant railways, Canadian National Railway (CN) and Canadian Pacific Kansas City Railway (CPKC), operate on geographically distinct networks, with many areas where shippers have realistic access to only one rail carrier, particularly for bulk shippers for whom trucking to another carrier is not a cost-effective option (nor one that is desirable from an efficiency or environmental perspective). Access to only one carrier means many shippers miss out on the benefits that would exist in a more competitive marketplace, such as greater competition on the basis of rates and service. This dynamic may be particularly pronounced for more isolated shippers who have fewer viable transportation alternatives.

Current Competitive Access Remedies

Canadian transportation policy has grappled for many years with how best to stimulate competition. At present, two such measures exist: Regulated interswitching and Long-Haul Interswitching (LHI). Originally introduced to prevent the proliferation of rail lines in urban areas, regulated interswitching has since become viewed as an important competitive access measure, providing access to a competing carrier at regulated rates, up to a distance of 30 km from an interchange. Interswitching is available automatically, without application, which makes it easy to use, provides cost-certainty, and enhances leverage in negotiations.

LHI provides shippers beyond the 30 km interswitching radius with the option to apply to the Agency for a rate to access a competing carrier at the nearest interchange, up to a distance of 1200 km or 50% of the total length of haul in Canada, whichever is greater. The rates are

determined by the Agency based on rates charged by the railway for comparable traffic. Unlike regulated interswitching, LHI is an application-based process, which appears to have undermined its effectiveness. Unfortunately, since its introduction, the measure has not been used, with shippers fearing the uncertainty of the application process, the risk of committing to a movement without first knowing the rate, and the fear that comparable traffic means rates that similarly captive traffic receive. Shippers have also cited exemptions that preclude certain traffic and certain regions from using LHI as another reason it has not been used. The uncertainty of the outcome, coupled with the fact the remedy has not been used, means that LHI may not have been leveraged by shippers as effectively in negotiations with railway companies.

Pilot Project

The limited geographic coverage of interswitching at a distance of 30 km coupled with LHI having not met its objectives, led to the Supply Chain Task Force's recommendation to reintroduce extended interswitching, which the government responded to with the inclusion of a pilot project in Bill C-47. These developments have intensified public dialogue over the scope, form, and manner of an ideal competitive access remedy. This public dialogue has made clear that railways and shippers have strongly held divergent views on the impacts of interswitching.

Railway views

According to Canadian Class I railways, extended interswitching has considerable risks, including
that:

- Interswitching is inefficient because it increases dwell, transit, and overall cycle times, which reduce supply chain throughput and leads to congestion;
- It is being implemented in spite of Canada having among the lowest freight-rail rates in the world, as outlined in a CPCS report that was commissioned by the Railway Association of Canada;
- There is another competitive access remedy available – long-haul interswitching (LHI) – that is not being used, which railways argue is evidence of the low rates already being offered to shippers;
- CN and CPKC will be at a competitive disadvantage to U.S. railways that will be able to solicit Canadian traffic, but the reverse will not be true, and this diversion of traffic may lead to lost jobs in Canada;
- Extended interswitching will be available to all shippers within 160 km of an interchange, even shippers that already have access to more than one railway; and,
- Rates calculated for extended interswitching will not be compensatory, risk disincentivizing investment, and will be market distorting.

Shipper views

For their part, shippers have also expressed strong views about extended interswitching. Most of these views have so far been communicated via associations, which have generally expressed support for the pilot project. In communicating their support, shipper associations have suggested that:

- The primary benefit of extended interswitching is that it can be leveraged during negotiations to obtain better rates and service;
- Without competitive access, captive shippers are forced to accept "monopoly" rates, rather than market rates;
- Many of the inefficiencies associated with interswitching can be avoided by the railways competing to retain their customers;
- Shippers are aware that interswitching is generally less efficient than a continuous line-haul movement and, for this reason, would prefer to keep their business with the originating carrier, provided they receive competitive rates, and their service needs are met;
- Extended interswitching can actually create efficiencies if it permits a more direct routing to locations in the United States to which neither CN nor CPKC have physical access;
- LHI is not being used due to "flaws" with the remedy and not because the railways are
  already offering competitive rates and service; and,
- Regulated interswitching rates are fully compensatory insofar as they are commercially fair and reasonable to all parties.

While shipper associations appear to be generally supportive of extended interswitching, some question whether 160 km is a sufficient distance. They note that a considerable portion of shippers in Alberta, Saskatchewan, and Manitoba are not within 160 km of an interchange and are therefore not eligible for extended interswitching. Some shippers have suggested that the distance should be increased to 500 km while others have suggested 1200 km with caveat that traffic would have to interchange at the nearest competitor's interchange. Finally, shipping associations have raised concerns about the length of the pilot project, suggesting that many shippers, given the lengths of some commercial agreements, might not be able to leverage extended interswitching during negotiations, as their commercial agreements will not be up for negotiation before the conclusion of the pilot project.

Evaluation Criteria

As Transport Canada proceeds with evaluating the interswitching pilot, we have identified a number of areas to explore that could potentially help to assess the net impacts of extended interswitching. These include (in no particular order):

1. Impacts on supply chain efficiency;

2. Impacts on investment;

3. Improvements to negotiating outcomes for shippers (on both service and rates);

4. Impacts on rates of shippers within 160 km interswitching zone;

5. Impacts on service; and,

6. Impacts, if any, on shippers that are not eligible for extended interswitching.

The above represents a preliminary list of areas that could be explored in order to evaluate the pilot project. Transport Canada is seeking feedback from stakeholders on:

1. Ways the above impacts could be evaluated; and,

The Grain Monitor has a template for measuring EI usage during the term of the pilot project. In our view, that template is as close to relevant as possible for this purpose.

Frequency of use of interswitching should be measured in numerical terms (as it was in 2014 to 2017) but also anecdotal comments relating to the extent to which the existence of the interswitching rules has had on ability of rail shippers to negotiate better service by their existence also needs to be considered as this has a multiplier effect on better service. A comparison should also be made of service provided to areas where interswitching is available vs. areas where interswitching is not available – which would likely be explained by the lack of competition.

2. Any other impacts or considerations that stakeholders feel would be relevant to evaluating the pilot project.

The WGEA has provided its views on the value of extended interswitching over an extended period of time. The value of it was explained in the steps leading up to the sunsetting of the provision in 2017, and again leading up to the passage into law of the second pilot project we are now embarking upon. Copies of past correspondence can be provided upon request.

Measuring how much it is used over an 18-month period can be compared to measuring Canada's climate by recording the temperature in Calgary on one particular day. Regardless of how much EI is used, either directly or as leverage for more competitive service and/or rates, the provision is useful. In principle, it should be available to shippers as a mechanism to provide some measure of counter-balance to the railways' market power over shippers. Furthermore, the short duration of the pilot in of itself will curb its usage and effectiveness. Grain companies sell product 3, 6 and 9 months into the future. EI came into

effect on September 20, 2023, meaning that grain handlers and exporters can take it into consideration in their service and pricing expectations starting approximately in the Jan-Jun 2024 timeframe. Then, it is set to expire on March 20, 2025 and usage would naturally taper off toward the end of the timeframe, given the lack of precision associated with rail service. There is approximately a 9-month window where EI can have some use for grain shippers. If it were permanent, we might see capital investments made by grain companies to take greater advantage of the provision in an attempt to gain markets, market share, and/or value for grain products. Because it is set to expire, these benefits are not possible and won't be until the provision is permanent.

Transport Canada should consider the newly issued draft reciprocal switching rules published by the STB and what impact this has on the Canadian regulatory reform in the future. Rules should be consistent given the fact that CN and CP operations extend into USA. Also important to note the benefit of interswitching is also to a certain extent reliant on shippers having their own rail car fleets as if this does not exist the ability to force carriers to interswitch is lessened.

The Surface Transportation Board recognized the benefits to shippers and the US economy in its September 7, 2023 Decision (Docket No. EP 711) on Reciprocal Switching for Inadequate Service that would provide a new set of regulations for the prescription of reciprocal switching agreements to address inadequate rail service, as determined using objective standards based on a carrier's original estimated time of arrival, transit time, and first-mile and last-mile service. The Decision contains important statements throughout that is also applicable and relevant in Canada. We specifically draw your attention to the following:

> *Poor performance by rail carriers can substantially impair shippers' ability to operate their businesses on an economic basis. That impairment in turn harms the United States' economy as a whole. Inadequate service, particularly when it can be avoided or mitigated, is therefore contrary to the public interest.*
>
> *Indeed, in choosing to focus reciprocal switching reform on service issues at this time, the Board does not intend to suggest that consideration of additional reforms geared toward increasing competitive options….is foreclosed, whether in this subdocket or otherwise.*

In addition, Transport Canada should consider whether providing running rights to a competing carrier (or short line railway) is a more effective long-term strategy in situations where the servicing carrier is reluctant or does not respond in a timely manner to an interswitching request from a shipper. While in theory a carrier's refusal to respond to an interswitching request from a shipper could be addressed through a complaint to the CTA, such remedies are always problematic given the cost/time/consequences involved. Competitive commercial solutions are always much better.

The value of Extended Interswitching is that it is an automatic competitive access provision, and does not require a shipper to apply to the Agency for relief. The WGEA does not see Long-Haul Interswitching ever being useful to shippers for this reason. When the LHI provisions were set by Transport Canada, 1200 km was selected for a reason. We urge Transport to expand the maximum distance for EI to 1200 km which we believe is

necessary for some locations in sectors other than grain to gain access to an interchange point. For the grain sector, 500 km would be an acceptable distance and would allow each elevator in the prairies to have access to at least one interchange point, which is our goal. Likewise, crop growing regions of British Columbia should have access to EI for the same reason – to allow all elevators in western Canada to access the provision. It is arbitrary to cut off access at the Alberta/BC border. In doing so, the LHI provisions could be removed from the legislation for the same reason as the CLR provisions have been.

Finally, Transport Canada or the Canadian Transportation Agency should also be analyzing whether the existing interchange points are serving the best interest of the Canadian economy. Is it reasonable that Lloydminster has a 23-car interchange? Is it reasonable that Camrose is an 8-car interchange? There needs to be a strategic study of large-scale interchanges in Canada with appropriate sizes determined based on commercial needs of shippers.

Maximum Revenue Entitlement (MRE)

The Maximum Revenue Entitlement (MRE) limits the total revenue per tonne mile for a given distance and quantity of grain that CN and CPKC can each earn from transporting regulated, non-U.S.-bound Western grain. The MRE adjusts the maximum revenue that railways can earn for grain transportation in line with a legislated formula that is administered by the Canada Transportation Agency (the Agency). This formula is calculated at the end of each crop year and takes into account railway revenues, volumes of grain moved, average length of haul, and a Volume-Related Composite Price Index (VRCPI) as per Section 151 of the Canada Transportation Act (CTA). The VRCPI is a rail-related inflation index that forecasts changes in costs related to labour, fuel, materials, and capital purchases. The MRE only applies to Western Canadian bulk grains listed in Schedule II of the CTA that are moved in Canada's Western Division (i.e., primarily export shipments from Western Canada handled through West Coast ports, as well as those exported through Thunder Bay). Should CN or CPKC's revenues exceed their MRE for that year, that carrier must pay the amount above their MRE cap, plus a penalty, to the Western Grains Research Foundation (WGRF). The WGRF research priorities, and the financial position of its research fund, are accessible by reviewing its 2022 annual report.

The MRE was introduced in 2000 to replace the Agency's maximum rate system, with the intention of providing a price protection mechanism for grain shippers, while also meeting the economic needs of railways by ensuring they are compensated fairly for the movement of grain based on volume and distance. However, the MRE has since been criticized as a specific price protection mechanism that is only available for a specific subset of Western grain products. The MRE does not apply to all commodities and is only used within limited circumstances, it does not include grain transported in containers, nor grain moving eastward beyond Thunder Bay or to the United States. Previous reviews of the CTA have cited feedback from stakeholders that the MRE can act as a barrier to carrier investments within their networks unless such investments are specifically accounted for under the VRCPI. The 2016 CTA Review Report recommended that the Government consider modernizing and eventually eliminating the MRE, and that doing so will ultimately enhance competition and improve railway service, since shipments of grain would not be disadvantageous to ship for revenue generation as compared to other commodities. However, many within the grain sector and in academia contend that the elimination of the MRE will ultimately only result in higher shipping rates with no improvement in service, since most grain shippers are generally captive to a single rail carrier.

With the passage of the Transportation Modernization Act in 2018, the Government adjusted the VRCPI – which is provided in advance of the crop year to allow all parties to make information decisions – to allow for individual adjustments to the MRE for each carrier for their individual costs, related to the purchase and maintenance of new hopper cars. Subsequently, both CN and CPKC announced major investments in revitalizing their hopper car fleets, which has resulted in significant efficiency gains as the new cars are shorter, lighter, and have higher capacity. There may be opportunities to provide incentives to investment in the supply chain network through further changes to the VRCPI.

Transport Canada is seeking stakeholder feedback on the following questions:

1. In your view, what is the primary objective of the MRE? Is the MRE policy currently achieving that objective? If possible, please provide data and/or point to evidence that supports your position.

   The MRE is designed to make sure railways are compensated fairly for the volume of grain they transport in a crop year (August 1 to July 31) and the distance they carry it, within a service provider environment that is absent effective competition. It allows railways price flexibility. They can increase their rates in line with prices for the goods and services they use (inflation), but not higher than this. In this way, the MRE offers shippers (and western farmers) some price protection to ship grain to an export market.

   Both (1) the high number of elevator points that are serviced by only one rail carrier and (2) the vast distance between elevators - in of themselves are two very unique characteristics of the grain sector. Each of these locations is captive. Without the ability to negotiate with competitors, there is no way for grain shippers to ensure a competitive, commercial rate for rail service.

   The grain sector is particularly unique in that the shipper of goods is not the same party as the producer of goods. It is also important to note that despite paying the majority of the shipping fee, grain producers have no ability to negotiate with railways to secure competitive rates. The MRE is critical to ensuring the primary producer has some measure of protection.

   The nature of commerce is such that costs are passed through to either the producer or the consumer. Since grain exporters compete on a global basis with other geographies that produce grain and grain products, the main segment that ultimately pays the cost of rail freight is the farmer, through the price offered by the grain company for their crop. The MRE provides rail freight price protection for Canadian grain farmers.

   Its secondary benefit is to provide predictability to grain handlers and exporters on freight rates. As mentioned previously, grain companies sell product 3, 6 and 9 months in advance of execution. Pricing is established with both the end use customer wherever they may be in the world, and the producer. Predictability on rail freight costs is a critical component of pricing and the MRE helps to provide certainty in this regard.

   In terms of predictability, the railways only have to provide 30-days notice when making a change to their freight rates under the MRE. After grain exporters have booked business, it is not commercially reasonable for expected freight rates to change. The WGEA proposes that a 90-day notice period be implemented instead.

2. In your view, what are the impacts of the MRE on broader freight rail network service and performance, for both the grain sector and across different commodities? Are there advantages and disadvantages to the current MRE policy? If possible, please provide data and/or point to evidence that supports your position.

The argument raised by the railways (and others) that the MRE impacts service levels is inaccurate as evidenced by the fact that some grain shippers have other businesses that are not covered under an MRE for rail freight movement (i.e. movement of canola oil) and these businesses also suffer from poor rail service. Other sectors outside grain also experience poor rail service.

While all shippers are captive to the railways to varying degrees, grain shippers are particularly hamstrung in that they have no negotiating leverage at their disposal. The grain sector is obliged to move each years' production to port or for processing before the beginning of the next crop year. Whereas other shippers have some flexibility to scale back production and reduce shipments to put pressure on the railways to secure better rates, grain shippers do not.

In the absence of a true competitive market, and with the structure of the Canadian grain supply chain and the distances required to move grains and oilseed product from country to export, the MRE is intended to keep Canada competitive in global markets and to provide a degree of price protection to grain producers – while ensuring a reasonable return to the rail service providers.

The grain sector would not receive better rail service without the MRE. Canada's rail system is not driven by normal market forces and the two major railways wield significant market power. Of the current 403 primary and process elevators in the prairie grain handling system, only ten are served by both Class 1 railways. This situation can be described as the operation of two monopolies. Where a business has no effective competition, there is no motivating factor for improving the provision of service, even with higher rates. The fundamental issue of railway market power and its negative effects on commercial relations was clearly identified in the Rail Freight Service Review in 2010, and the Panel noted: "there are no practical ways to directly increase rail competition."

The assertion, by some, that grain shippers would see improved service if they paid higher freight rates is patently false.

- Grains and oilseeds shipped within Canada (i.e. to destinations other than export port) and to the U.S., along with some special crops, are not covered by the MRE. Freight rates are higher for these shipments, but the service is not better than for shipments covered by the MRE.
- Almost all other commodities moved by rail have seen their rail rates climb over the years but service continues to deteriorate.
- Many Canadian grain shippers are also active in the U.S. where rates are significantly higher, with no evidence of better performance over the Canadian service levels.

3. What are your views on further adjusting the VRCPI in a manner to incentivize CN and CPKC to invest in new capacity enhancements, such as expanding or upgrading interchanges that would benefit the grain handling transportation system? Are there other changes to the VRCPI that could provide these incentives?

Grain Shippers understand and appreciate that the MRE must be structured in such a way that the railways are fairly compensated for moving grain. Shippers want to ensure that the railways are given every incentive to invest in infrastructure and grow capacity. After all, both shippers and the railways stand to gain from investments in improved efficiency.

The WGEA was supportive of the legislative change in 2018 that allowed the VRCPI to be calculated separately for each rail company. We do not believe other changes are needed. The MRE has built-in flexibility that accounts for changes in inflation on items such as labour, fuel, and, importantly, on material and capital purchases.

The MRE structure, in fact, encourages railway investment to improve railway efficiencies, because those efficiency improvements accrue entirely to the bottom-line benefit of the railways. Reductions in the numbers of leased railcars, locomotives, and train crew employees, in fuel consumption rates, in track ownership and maintenance requirements, and in many other railway operational activities translate directly into cost savings for the railways.

Railways earn the same revenue per tonne today as they did in 2000-01, adjusted for inflation, but do so at significantly reduced cost per tonne because of efficiency improvements in the grain handling and transportation system. Hence, the railway margin for grain has been greatly improved over time.

Since the MRE base year, 2000-01, the number of elevators has reduced to 370 from 876, and the number of 100+ car elevators has more than doubled, from 51 to 135. Grain companies have, in that time frame, invested billions in elevator storage, rail track and handling/loading equipment at country and port elevator facilities to increase unit train shipping and loading/unloading speed and capacity. The outcome is a shift from mostly single-car shipments in the 2000-01 year to, today, approximately 80% of all western Canada grain shipments originating in trains of 100 cars or more to single destination unloading facilities. Unit train movement results in much quicker car turn-around times and reduced railway handling of railcars between load and unload points. This has allowed railways to reduce car and locomotive fleets, reduce yard and road crews and associated management activities, and remove tracks throughout the west.

Additionally, the MRE allows for railway revenues to increase to compensate for additional railcars brought into the fleet to replace government grain cars that are being retired. The MRE is unquestionably creating the type of revenues and investment paybacks that the railways need to reinvest back into grain related rail infrastructure.

We are opposed to expanding the application of the MRE to include investment in rail track and interchanges. We do not believe these types of investments in real estate improvements have been considered in the past and would not recommend that they are considered in the future as it opens the door for other track type investment requests to be considered.

4. When revenues for CN and CPKC exceed their MRE in a crop year, the amounts exceeding the cap must be remitted to the WGRF for grain and crop research. For stakeholders within the grain sector, how does your organization benefit from research conducted through the WGRF? Are there different alternatives to deploy these amounts that would better enhance grain supply chain capacity?

   In the late 1990's when it was decided that the excess MRE funds would go to the WGRF, there weren't any other suitable alternative organizations directly related to the movement of grain. However, the WGEA doesn't believe that the WGRF is the appropriate target for the surplus given the lack of connection between shipping charges and the WGRF's activities/mandate. The surplus should be directed to initiatives that help improve the efficiency of the grain supply chain network including investments in better reporting of performance versus established standards and research into help improving the efficiency of the rail network in Canada.

   In 2014 the Ag Transport Coalition was created, and it measures rail performance relative to shipper demand in a unique way. Rather than only measuring absolute movements, it compares movement against demand, and puts percentages to performance. In the WGEA's view, excess MRE funds should be remitted to the ATC going forward so it can continue to provide this important service for industry and policy makers alike. It is a natural fit more closely tied to rail movements.

5. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

   There is no evidence to show that grain movement is a money loser for the railways or that other commodities are cross subsidizing grain movement. In fact, evidence shows that grain is foundational to the railways' profitability. We would be remiss if we did not draw your attention to the FAIRR Coalition report developed in response to the RAC/CPSC report on rail freight rates.

   Shippers can see dramatic freight rate swings within a crop year +20% from beginning of crop year in fall when railways maximize earnings by keeping rates high and at their MRE threshold but the rates can drop dramatically towards the end of the crop year – this creates volatility for shippers and places them at financial risk on any grain inventory purchased at one rate and shipped at another rate. Within the MRE, Transport Canada should regulate extent to which railways can change rail freight tariffs during a crop year to minimize change from beginning of year to end of year – e.g. regulate changes by quarterly time period within the crop year.

Canadian Transportation Agency – Own Motion Powers

Certain provisions in the Canada Transportation Act (CTA) empower the Agency to investigate complaints directly when specific language is provided e.g., complaints regarding level of service obligations under section 116. The Agency can also investigate complaints indirectly through section 37 which allows the Agency to inquire into any matter under its jurisdiction following a complaint.

With the passing of the Transportation Modernization Act (TMA) in 2018, the Agency was empowered to initiate investigations to determine whether a railway company is fulfilling its service obligations. However, the Agency must first seek authorization from the Minister and must conclude its investigation within 90 days. Prior to the TMA, the Agency could only investigate whether a railway was meeting its level of service obligations if a complaint was filed with the Agency. This new power allows the Agency to pursue not only shipper specific service issues but also systemic ones impacting multiple shippers with similar or varied commodities, over entire regions, or multiple regions, without relying on a complaint.

As the Agency's own motion powers are limited to the level of service provisions, it cannot proactively address other issues that impact the freight rail network's ability to be competitive, economic, and efficient. Consistent with the National Transportation Policy, competition and markets forces must be the prime considerations to meet those objectives. When these forces fail to achieve those objectives, however, strategic public intervention by the Agency may be necessary.

Issues related to filing a complaint with the Agency have long been raised by shippers, including the costs associated with participating in a formal process and the time it takes for the Agency to decide the matter together with the unpredictability of the outcome. The most significant reason that shippers are hesitant to file a complaint is the impact it has on its relationship with the railway since these formal processes are adversarial in nature. Shippers consistently express fear of retaliation in the form of less favorable rates and/or service from the railway. This concern is of increased significance where the shipper is captive to only one railway company.

The CTA, in addition to the level of service obligations, has several other provisions that are intended to balance the relationship between shippers and railways. In addition to the work currently underway to pilot an extension of the interswitching limit from 30 km to 160 km in the prairie provinces, there are tools in the CTA that relate to regulated interswitching, allowing the Agency to deem a point of origin or destination as reasonably close to an interchange and resolve disputes on the question of whether certain traffic is entitled to regulated interswitching.

In January 2019, the Agency launched an own-motion rail service level investigation, which concluded within the prescribed 90 days. This investigation focused on freight rail service issues involving CN, CPKC and BNSF in the Vancouver area affecting shippers across a variety of commodities. There were mixed opinions on the relative success of this investigation (e.g., some saying it took too long, others saying the process was rushed). Furthermore, concerns were raised related to the Agency acting as "investigator", "judge", "jury" and "prosecutor". Despite these concerns, the results of the investigation demonstrated the benefits of a process that allows the Agency to investigate issues that are

not limited to a single shipper. Through the use of its own-motion powers, the Agency was able to examine issues that affected multiple shippers across various commodities and that were related to the operations of the three main railway companies operating in that area. As a result, the Agency was able to make findings and issue an order that addressed a systemic issue, namely the use and application of rail traffic embargoes.

As part of the recommendations made by the Supply Chain Task Force in its Final Report, several focused on the powers and tools available to the Agency to engage in own-motion investigations. Many of the recommendations were concrete (e.g., remove the requirement for Ministerial approval and empower the Agency to collect and use Key Performance Indicators (KPIs)). The advantage gained from empowering the Agency to collect KPIs is that the activity of monitoring the health of the freight rail network will no longer expose shippers to possible retaliation. KPIs would be collected from railways, rail network users, and rail partners and therefore not rely on information voluntarily provided by shippers. In addition, several recommendations were broader in nature, (e.g., support more robust and proactive use of own-motion investigations and enhance the investigative and dispute resolution authority of the Agency similar to the US Surface Transportation Board (STB)).

Although the STB and the CTA each have different legislative frameworks, the STB has a similar mandate and suite of responsibilities as the Agency. This includes the power to initiate own-motion investigations into any freight rail matter under its jurisdiction. However, the STB has more guidance in how it conducts an investigation. It may only investigate matters that are of national or regional significance and, to the extent possible, the investigative and decision-making functions of staff are kept separate.

The STB is required to provide written notice to the parties under investigation, explain the reason for and purpose of the investigation, and allow the parties to file a written statement setting out any or all facts concerning the matter. The STB must provide its recommendations and the summary of findings supporting those recommendations to the parties and STB Board members. Finally, an investigation must be dismissed if not concluded within 1 year, and no later than 90 days after receiving the recommendations and summary, the Board must either dismiss the investigation if no action is warranted or initiate a proceeding to determine if a provision has been violated.

Given how crucial and significant a role the Agency plays in regulating, monitoring, and resolving disputes related to complex freight rail matters, before implementing the Task Force's recommendations regarding the mandate and powers of the Agency, Transport Canada is seeking input from freight rail service providers and users. In order to focus any feedback you may have, we are posing the following questions:

1. Would removing the requirement of Ministerial approval affect the usefulness of the Agency's own motion powers?

   Yes - we support the idea of the Agency having the flexibility to launch its own investigations on issues that are potentially impacting multiple shippers. It would remove one step of the process which currently causes delays and potentially political considerations to come into play with respect to addressing issues that are of national importance and should be beyond political considerations. While the

Minister could request that the Agency pursue an investigation, Ministerial approval should not be a pre-requisite.

Shippers have to have working relationship with railroads and relying on shippers to signal the need to trigger an investigation has historically challenged this relationship. Ideally it would be best if there were alignment on a common set of service level metrics and the CTA/Transport Canada would have the autonomy to review their performance on as needed basis.

2. Should the Agency be provided more time to investigate matters during an own motion process?

   No. Investigations must be current. When a serious rail transportation issue is occurring, time is of the essence, with each day of delay resulting in millions of dollars being lost. Investigations must move as swiftly as possible with a view to quickly identifying the issue and enforceable orders being made to correct the situation. That means speed, and having pre-determined thresholds as to what constitutes a service failure. The length of the investigation should depend on the issue being investigated; however, would not want to see investigations span a time period longer than 2 months from start to finish.

3. Are there specific criteria the Agency should use to determine when to launch an own-motion investigation on level of service issues? Should the power be used to proactively monitor and report on rail performance?

   Yes. High-level railroad performance metrics should be established and proactively monitored by the Canadian Transportation Agency and Transport Canada. Reporting should be established and reported on regularly. Own-motion investigations should be launched when the Agency realizes, through its own observations through the monitoring of accurate rail service data, that rail service has been insufficient over an extended period of time or has sharply dropped over a shorter period of time. Own-motion investigations should also be launched where shippers bring to the Agency's attention a situation that is systemic in nature that negatively impacts more than one shipper.

4. Should the Agency be able to initiate an own motion investigation into other freight rail matters currently under the Agency's authority? If so, what other matters?

   Given the imbalance in commercial power between railways and shippers, and in the absence of effective competitive remedies, the Agency's authority to investigate and remedy service issues should be very wide. Any rail freight matter that has a negative impact on fluidity or capacity should be eligible for an investigation to determine severity.

5. In addition to the data recently made available through the Transportation Information Regulations, is there other information or data (e.g., KPIs) that the Agency should have access to or collect in support of monitoring the health of the freight rail network?

The STB has laid out the beginnings of how to identify service failures in its September 5, 2023 Decision Docket No EP 711 Reciprocal Switching for Inadequate Service. The Agency should use this decision as inspiration as to how to define when to undertake an Own Motion Investigation.

In Canada today, the ATC and GMP data is critical to measuring rail performance that is expected by shippers.

6. How should the investigative and decision-making functions be organized within the Agency?

Investigations should be led by a department within the Agency that does not have day to day relations with the railways. They should be properly resourced to understand service issues, the information required to properly investigate, and have the ability to compel railways and shippers to provide the information required to determine the causes of rail service failures and identify adequate remedies to correct the situation. Investigative and decision-making functions should be independent of each other.

7. How should parties implicated in freight service issues under investigation by the Agency be engaged to ensure an efficient and effective investigation?

In an own-motion investigation, the Agency should be pro-actively leading the investigation rather than being passive and waiting for shippers to provide information that will lead it to take action. The Agency should be meeting with the parties privately to ensure full disclosure of the facts, and be equipped with the ability to compel disclosure of information where a shipper or railway refuses to voluntarily provide information that is directly relevant to the issue under investigation. There are a number of regulatory investigative processes that could serve as a basis for the investigatory process (i.e. Competition Bureau investigations).

If a formal investigation is launched the Agency should reach out to implicated parties and give them the projected timeline of the investigation and what support they need (if any). This will give the Agency a better understanding of the availability of resources to support the investigation.

8. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Own-motion investigations should be pro-active investigations led by the Agency. That is not the case currently. The most recent and only example of an own-motion investigation was disastrous. It was, for all intents and purposes, a formal level of service complaint, requiring complex submissions and legal support rather than a true investigation. That could not have been the legislative intent of the remedy and needs to be corrected.

Shortlines

Canada's shortlines – both those that are federally regulated, and those that are under provincial jurisdiction – are a critical part of Canada's supply chain transportation network and growing a strong and resilient economy. Shortlines originate approximately 20 percent of rail traffic bringing $36.5B in goods to market. Across the country, and in a wide variety of sectors, there are small, medium and large companies (situated in urban centers, rural and remote communities across Canada) for whom shortlines are essential to deliver their goods to market. Without shortlines many companies would have far more expensive (and in some cases, cost-prohibitive) and less sustainable transportation alternatives to move their goods to their destinations.

Canada's shortline railways come in a variety of sizes, from large conglomerates to small independent organizations and serve as an important element of Canada's freight rail network. In general, they operate over short distances and serve a number of roles, including: first-mile and last-mile of rail movements; connecting shippers to Class I railways, other shortlines and ports; switching and carstorage service; passenger transport and resupply to remote communities; and supporting local and regional economies in places with limited transportation options by connecting into the broader international supply chain.

Beyond their economic impact, shortlines help Canada fight climate change and contribute to cleaner air by avoiding 1 to 3 MT of GHGs and $23M worth of air pollution a year by diverting trucks off Canada's roads and highways. Shortlines also support inclusive communities as a key social and economic generator in rural and remote regions where they provide access to other parts of the country and well-paying local jobs.

Although they can access federal programs such as the National Trade Corridors Fund, Rail Safety Improvement Program and the Rail Climate Change Adaptation Program, Canada's shortlines face some key challenges, including the following:

- Infrastructure investment, adapting to more frequent, extreme weather events.
- Shortlines are usually dependent on a few key shippers to generate revenue, and struggle with poor financial health as a result.
- Many shortlines inherited infrastructure deficits when they purchased rail lines from Class I railways and have been unable to invest in capital expenditures.
- Integration into the national rail network.
- Given the challenges with upgrading their infrastructure, and the relative infrequency of their operations, many shortlines continue to be less well integrated into the national rail system (physically and operationally).
- Rising insurance costs.

- Shortline railways have identified both a general lack of availability of insurance and high premiums as an irritant – both to continuing operations and to growing their business and serving new markets.

- Regulatory requirements.

- Shortline railways have noted that federal requirements, including those set under the Canada Transportation Act (CTA), seem designed for high-frequency and high-volume operations.

- For example, Final Offer Arbitration (FOA) is a rate remedy available to shippers on application, intended to be quick and efficient, where the sole consideration set out in the CTA that the arbitrator must consider is whether a shipper has access to alternative, effective means of transporting their goods.

- Many shortline railways are smaller organizations and face power imbalances when dealing with larger organizations, which could lead to hesitation in using available remedies, or a disparity in their capacity to present their arguments.

Beyond the issues noted above, there may be other areas that the federal government can assist shortlines, such as issue facilitation and information sharing across all shortlines, business development, and exploring ways shortlines can assist in making Canada's supply chain more efficient and resilient.

Transport Canada is seeking stakeholder feedback on the following questions:

1. How is the global insurance market impacting shortlines? What potential options should Transport Canada consider to assist?

   When it comes to insurance, liability exposure, and safety all must be held to the same standard.

2. What are the regulatory challenges faced by shortlines and what potential options could be considered by Transport Canada to foster a more efficient and effective shortline sector?

   The cost per mile on maintaining and operating shortlines continues to increase. If shortlines cannot generate the basic carloads per mile, per year, a feasibility study should be completed to determine if longer term value is there.

3. How can the remedies available under the CTA, such as Level of Service or FOA, be better adapted to address the context of shortline railways, including power imbalances?

   Established metrics should be in place for each shortline outlining basic service obligations, frequency of service, and per diem charges for railway fleet and power.

   In the WGEA's view, Extended Interswitching should be available to shortlines, as

they are fundamentally captive to the connecting carrier. Facilities located on shortlines should not be at a disadvantage because they do not have access to interswitching.

4. What other measures or considerations should Transport Canada or the federal government undertake to improve shortlines' better integration into the national rail network to increase rail shipping capacity? Examples could include fostering collaboration opportunities, identification of barriers, etc.

   The use of shortlines as part of interswitching (particularly where the originating carrier refuses or is reluctant to move the railcars to the interswitching point) could be valuable.

5. What unique challenges do Indigenously owned shortlines face, either on the business side, attracting customers and increasing their competitiveness, or on the regulatory side?

6. Any comments or views on the recent round of federal funding programs administered by TC e.g., NTCF, RSIP, RCCAP? How effective have these programs been in addressing issues within the shortline sector?