



CHEMISTRY INDUSTRY  
ASSOCIATION OF CANADA

# Balancing Provisions in the Transportation Modernization Act, Bill C-49

August 2017



**SUBMISSION TO**  
House of Commons Standing  
Committee on Transport,  
Infrastructure and Communities



## **CHEMISTRY INDUSTRY ASSOCIATION OF CANADA**

The Chemistry Industry Association of Canada (CIAC) is the voice of Canada's \$53 billion chemistry industry and represents more than 50 members and partners across the country.

Members of CIAC are signatories to Responsible Care® – the association's U.N.-recognized sustainability initiative. Responsible Care® inspires its members to take actions that improve the sustainability of their operations and reduces harm throughout the entire life cycle of their products.



## ➤ Introduction

On behalf of the members of the Chemistry Industry Association of Canada (CIAC), we are pleased to share with you our views on Bill C-49.

CIAC applauds the government's efforts and is supportive of the rail freight measures outlined in *Transportation 2030* for advancing a "long-term agenda for a more transparent, balanced and efficient rail system that reliably moves our goods to global markets." Regarding Bill C-49, CIAC believes the government has correctly identified the key areas requiring attention to address issues of transparency, fair access, efficiency and long-term investment and is supportive of the expedited approach being taken to address them. However, we wish to address several areas that would benefit from amendments to better align with the stated intent of the proposed measures.

- **Our Industry**

Canada's chemistry industry is an important contributor to our nation's economy. It converts and adds value to raw resources such as natural gas, crude oil, minerals, and biomass, creating intermediate products that are used as inputs in other areas of the industry, and by almost all other manufacturing sectors. Shipments in 2016 were \$53 billion, making chemicals Canada's third largest manufacturing sector; exports were \$39 billion, second only to the automotive sector. The chemistry industry is our country's seventh largest manufacturing employer, directly responsible for 86,700 jobs and supports an additional 520,000 jobs in other sectors.

CIAC members produce goods that are essential to the quality of everyday life, and to the Canadian economy. This includes hundreds of dangerous goods that are shipped across Canada daily, two examples are: chlorine, used to purify drinking water for millions of Canadians; and, sulphuric acid, used to manufacture agricultural fertilizers, synthetic fibres, batteries and pharmaceuticals (including chemotherapy drugs). In addition, the chemistry sector is the single most important solutions provider to the climate challenge.

- **Rail is Critical to the Chemistry Sector and the Economy**

Canada's chemistry industry comprises only one per cent of the \$5.2 trillion global industry, and we must work hard to attract international investment. The American Chemistry Council estimates that \$250 billion in new chemistry industry investments are announced or underway in North America. Only a small share of this investment is happening in Canada – we believe there is strong potential to attract a much larger share. But doing so will require that all investment decision factors be made as attractive as possible. Access to reliable and competitively priced rail service is critical to the success of the Canadian chemistry industry. CIAC member-company executives now identify rail service as a key factor in deciding whether to locate a new facility or expand operations in Canada, second only to feedstock availability.

The chemistry sector depends on effective, efficient, low-cost rail service. Canada's chemistry industry makes three-quarters of its annual shipments by rail. Chemicals account for 13.7 per cent of all Canadian rail traffic. For many chemicals, rail has proven to be the safest mode of transportation.

Safety is a top priority for Canada's chemistry industry, both at plant sites and along transportation routes. During the past 25 years, CIAC members have invested hundreds of millions of dollars in transportation-related research and upgrades; and have set the gold standard for transportation safety through the TRANSCAER® (Transportation Community Awareness and Emergency Response) and TEAP® III (Transportation Emergency Assistance Program) initiatives.

Canada has a world-class transportation system; however, CIAC is of the view that the rail freight market is not a functioning competitive market. It is a dual monopoly. This is a fundamental issue underlying all rate and service challenges encountered by our members. CIAC believes that government, Transport Canada and the Canadian Transportation Agency must constantly seek to provide a needed balance for level and cost of service where a working market environment does not exist. By taking account of the impacts of rail service providers on our global competitiveness, you can provide the necessary balance in issues and considerations such as reciprocity of penalties, market power, rates for service provided, and the effectiveness of measures such as interswitching.

CIAC has conducted a detailed review of the Bill C-49 legislation, and have identified several key areas where we believe amendments are warranted in order to meet the stated intent of the measures.

## CIAC Detailed Recommendations

### › Data Transparency and Timeliness

Transparency is fundamental in ensuring a fair, competitive, market-driven and commercially-based system that supports growth and prosperity in Canada and its trading partners. Also key, is that this data needs to be made publicly available. While carriers know the rates they are charging shippers, shippers do not have the ability to benchmark their rates in the marketplace. This gives rail carriers an unfair advantage in negotiations and commercial dealings. A shipper's ability to benchmark its rates against competitors is one of the most important factors in being able to ensure reasonable rates for its captive and competitive rail movements.

CIAC is encouraged by Transport Canada's commitment to put in place "a new data regime to support evidence-based decision-making by government and all stakeholders that is available to all who operate, oversee, analyze and use the transportation system." CIAC believes Transport Canada has correctly identified the key to achieving this by having more confidential carrier data submitted to the Canadian Transportation Agency (the Agency) and Transport Canada for policy and regulatory purposes and by making publicly available more data and metrics on performance, service, and rates. While there are aspects within Bill C-49 that move in the direction of increased transparency of information, there are also areas that are concerning which CIAC wishes to raise particularly regarding the timeliness and availability of data.

Understanding that specific requirements will ultimately be set out by regulation, CIAC is supportive of Transport Canada's modeling after aspects of the U.S. reporting requirements. Availability of this information in the short-term is concerning as the reporting requirements will take effect a full year after Bill C-49 becomes law. CIAC encourages setting an early timeframe for implementation of data related regulations. Additionally, regarding the granularity of the data, CIAC believes commodity

specific reporting for products other than grain is required.

If this type of information were available in Canada, as it already is in the U.S., it would help in ensuring a fair, competitive, market-driven and commercially based system that supports growth and prosperity in Canada and with its trading partners. The importance of commodity specific data being available to the broader shipping community is essential since the data from these processes can be used to determine:

- The profit a railway makes from movements to see if the mark-up above cost is reasonable.
- How a shipper's rates compare to a competitor's rates in markets to see if its rates put it at a competitive disadvantage.
- How a shipper's rates have increased over time in relation to the average rate change for a commodity to determine if a rate increase proposed by a railway is reasonable.
- If a shipper represents a larger portion of a carrier's revenue than it does a carrier's volume for a commodity to determine if a shipper is being disadvantaged by the rates being charged.

### **Recommendation:**

1. **Expedite the availability of information accessible to shippers, ensuring it is also commodity specific and set an early timeframe for the implementation of regulations.**

## **➤ Canadian Transportation Agency Powers and Informal Resolution Processes**

It must be noted that CIAC welcomes the clarification Bill C-49 offers regarding the Agency's powers in the unilateral imposition of onerous liability terms through tariff publications through the amendments to Section 137 of the Canada Transportation Act.

Regarding increasing transparency in the rail transportation supply chain Bill C-49 addresses issues related to the Agency's inquiry powers. CIAC recommends empowering the Agency to act on its own initiative to investigate and address systemic shortfalls in rail service, capacity and infrastructure. To support an investigative mandate, the Agency should establish a continuing monitoring function to: establish service standards; have the authority to collect and publish data from the railways and others in the supply chain; issue periodic public reports; and, impose penalties and award compensation where appropriate. While CIAC is encouraged by the intent to more frequently use the existing Ministerial Inquiry Powers, CIAC also believes there would be increased opportunity, balance, and reliability if the Agency was also provided the ability to act on its own initiative to investigate and address systemic shortfalls, not only when directed to do so by the Minister.

While Bill C-49 does not currently provide the Agency with general powers to address unreasonable railway practices or systemic issues, CIAC was pleased that it did give the Agency a mandate for informal resolution of issues between shippers and railways. The informal resolution process is appreciated by shippers who are reluctant to start an adversarial process. However, it must be noted that if an issue is

not resolved informally, there is nothing further the Agency can do in the absence of an actual complaint or application. Additionally, there is no mechanism for holding anyone accountable for implementing informal resolutions and without oversight important systemic trends could remain hidden from stakeholders and policy makers. CIAC asks that these issues be addressed to ensure these intended Agency powers are effective.

**Recommendation:**

2. **Increase the Agency's power to investigate issues on its own initiative and ensure informal resolutions are implemented, effective and that policy makers and stakeholders are able to see broader trends in the system.**

## ➤ Definition of Adequate and Suitable Service

As noted in speeches prior to the introduction of the legislation, CIAC is pleased to see Bill C-49 addresses the question of what constitutes “adequate and suitable” rail service. CIAC is also pleased that the factors to be considered in the Agency determining, “if it is satisfied that the company provides the highest level of service in respect of those obligations that it can reasonably provide in the circumstances” includes a number of network considerations that currently apply in the service level agreement (SLA) remedy as well as shipper’s service requirements and requests. However, CIAC believes the current legal text establishes a “safe” zone for railways and stops short of equating “adequate and suitable” with the highest reasonable level of service. In other words, it does not follow from the proposed wording that providing the highest reasonable level of service is the only way for a railway to meet its service obligations. CIAC asks that the text be amended to clarify that a railway must provide, at a minimum, the highest level of service that it can reasonably provide in the circumstances.

**Recommendation:**

3. **Amend legal text to ensure railways are required to provide the highest level of service they can reasonably provide.**

## ➤ Captivity and Long-Haul Interswitching (LHI)

CIAC applauds Transport Canada for their efforts to address the difficulties faced by captive shippers from all sectors, across the country, in a permanent manner. However, there are serious concerns regarding if captivity challenges can be addressed within the current provisions outlined in Bill C-49. For several reasons, CIAC does not believe the LHI provision will meet the stated intent of providing relief to captive shippers. These reasons include: the multiple exclusions that will make the remedy unavailable to many shippers, the pre-requisite that the shipper attempt to resolve the issue with the carrier which could lead to increased tension, the dependence on the competing carrier to make a competitive offer, and the imbalance of rate information by the carriers. Furthermore, there are many aspects of LHI which mirror the competitive line rate (CLR) remedy currently in place. However, the CLR has largely been ineffective as the Class 1 carriers have declined to compete for traffic using this

remedy and it is feared that LHI will also suffer the same fate.

Regarding the multiple exclusions to LHI including toxic inhalation products (TIH), radioactive materials, traffic originating within 30 km of a different interchange and certain corridors, etc. It should be noted that certain CIAC members can be considered doubly captive since they will only ship certain TIH products, such as chlorine, by railcar, meaning that a shift in mode to road transport is not an option.

The pre-requisite that shippers attempt to solve the issues with the carrier prior to requesting an LHI is unnecessary and can lead to increased tensions. Formal complaints and requests are only commenced after shippers' efforts to resolve the issues commercially have failed. Additionally, in the required negotiations, shippers will need to attempt to negotiate a rate for the LHI portion of the movement. This would often be the carrier's least preferred routing and requiring the shippers to propose and negotiate such a rate – after having been unsuccessful in negotiating acceptable rates and conditions for the carrier's preferred routing does not add value and can increase tension.

Additionally, regarding rates, the LHI rate would be determined by the Agency based on similar traffic and many factors within the carrier's knowledge but outside that of the shipper. This makes it extremely difficult for shippers to estimate the outcomes in advance of taking this adversarial action or to challenge or contest the information.

Finally, CIAC asks that the Agency maintain the power to extend the 30 km interswitching limit by regulation for all shippers. Understanding the measures introduced in the *Fair Rail for Grain Farmers Act* (Bill C-30) with extended interswitching were meant to be temporary and were only applicable to several provinces, CIAC members did see significant benefits in this measure for increasing competition. While this power is seldom used it could potentially offer a policy lever if exceptional cases were to arise again in the future.

Many CIAC members are captive shippers. These provisions are important in addressing challenges they often face. CIAC also asks that after any LHI provisions are passed into law that they be evaluated approximately two years after initiated to see if they are addressing the intended challenges faced by captive shippers. It is also recommended to build-in and maintain the ability to make adjustments as necessary in an expedient manner in this area.

### **Recommendation:**

- 4. Eliminate the pre-requisites for using LHI as well as many of the exclusions (such as toxic inhalation products, radioactives, traffic originating within 30 km of a different interchange and certain corridors) and allow the Agency to maintain the ability to extend regulated interswitching beyond the 30 km limit by regulation for all shippers.**

## ➤ Conclusion

The items addressed in C-49 are key for advancing a “long-term agenda for a more transparent, balanced and efficient rail system that reliably moves our goods to global markets.” However, as outlined, there are several areas that warrant review in ensuring they can meet the intent of the legislation. CIAC looks forward to continuing to work with you and your staff, with Transport Canada, and with the Canadian Transportation Agency to support opportunities for growth in the economy, and to ensure the chemistry sector’s competitiveness in Canada.

## ➤ Summary of CIAC Recommendations:

1. Expedite the availability of information accessible to shippers, ensuring it is also commodity specific and set an early timeframe for the implementation of regulations.
2. Increase the Agency’s power to investigate issues on its own initiative and ensure informal resolutions are implemented, effective and that policy makers and stakeholders are able to see broader trends in the system.
3. Amend legal text to ensure railways are required to provide the highest level of service they can reasonably provide.
4. Eliminate the pre-requisites for using LHI as well as many of the exclusions (such as toxic inhalation products, radioactives, traffic originating within 30 km of a different interchange and certain corridors) and allow the Agency to maintain the ability to extend regulated interswitching beyond the 30 km limit by regulation for all shippers.



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