Legislative Summary **LS-569E**

BILL C-8: AN ACT TO AMEND THE CANADA TRANSPORTATION ACT (RAILWAY TRANSPORTATION)

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LEGISLATIVE HISTORY OF BILL C-8

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	29 October 2007
Second Reading:	29 October 2007
Committee Report:	5 December 2007
Report Stage:	10 December 2007
Third Reading:	28 January 2008

SENATE	
Bill Stage	**Date**
First Reading:	29 January 2008
Second Reading:	12 February 2008
Committee Report:	14 February 2008
Report Stage:	
Third Reading:	14 February 2008

Royal Assent: 28 February 2008

Statutes of Canada 2008, c.5

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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BILL C-8: AN ACT TO AMEND THE CANADA TRANSPORTATION ACT (RAILWAY TRANSPORTATION)*

BACKGROUND

On 29 October 2007, the Honourable Lawrence Cannon, Minister of Transport, Infrastructure and Communities, introduced Bill C-8, An Act to amend the Canada Transportation Act (railway transportation), in the House of Commons. Bill C-8 was previously introduced in the 1st Session of the 39th Parliament as Bill C-58. Pursuant to a motion adopted by the House of Commons on 25 October 2007, Bill C-8, when introduced in the House, was deemed to have been read a second time and was referred to the Standing Committee on Transport, Infrastructure and Communities. The proposed amendments concern rail transportation, most notably the rail freight provisions.(1)

Departmental sources point out that a thorough statutory review of the *Canada Transportation Act* was completed in 2001, and that the proposed amendments are the culmination of extensive discussions and consultations aimed at updating the legislative framework that governs significant components of Canada's national transportation system. Bill C-8 is the third and final element of the federal government's legislative strategy for amending the *Canada Transportation Act*. The first, Bill C-3, the *International Bridges and Tunnels Act*,(2) received Royal Assent on 1 February 2007 and came into force on 25 April 2007 (S.C. 2007, c. 1). The second, Bill C-11, *An Act to amend the Canada Transportation Act and the Railway*

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) For general background information regarding protections in the *Canada Transportation Act* for rail shippers and further protections proposed in Bill C-8, see Allison Padova, *Rail Shipper Protection Under the Canada Transportation Act*, PRB 05-73E, Library of Parliament, Ottawa, revised 16 July 2007, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0573-e.asp.

(2) For a description and analysis of Bill C-3, see David Johansen, *Bill C-3: International Bridges and Tunnels Act*, LS-524E, Library of Parliament, Ottawa, revised 19 April 2007, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/ls3911000/391c3-e.asp.

Safety Act and to make consequential amendments to other Acts,[3] contains amendments to the general, air and railway transportation provisions as well as an adjustment to the calculation of the grain revenue cap. It received Royal Assent on 22 June 2007 and came into force on the same day (S.C. 2007, c. 19).[4]

A. Highlights

The highlights of the bill are that it:

- removes the requirement for the Canadian Transportation Agency (the Agency) to be satisfied that a shipper would suffer substantial commercial harm before imposing a remedy for disputes relating to level of service, interswitching rates and competitive line rates;
- increases the notice period for augmentations in rates for the movement of traffic from 20 to 30 days to ensure that shippers receive adequate notice of rate increases;
- permits the Agency, upon complaint by a shipper, to investigate charges and conditions for incidental services and those related to the movement of traffic contained in a tariff that are of general application, and to establish new charges or terms and conditions if it finds those in the tariff to be unreasonable;
- ensures that the discontinuance process set out in the *Canada Transportation Act* provisions applies to railway lines that are leased to local railway operators and subsequently revert to a federal railway at the end of the lease, including the obligation to honour contracts with public passenger service providers;
- requires railways to publish a list of rail sidings available for grain producer car loadings and to give 60 days' notice before removing such sidings from operation;
- extends final offer arbitration to groups of shippers on matters relating to rates or conditions for the movement of goods, provided the matter submitted for arbitration is common to all and the shippers make a joint offer that applies to all of them; and
- allows for the suspension of any final offer arbitration process, if both parties consent to pursue mediation.

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(3) For a description and analysis of Bill C-11, see David Johansen and Allison Padova, *Bill C-11: Transportation Amendment Act*, LS-527E, Library of Parliament, Ottawa, revised 27 September 2007, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/ls3911000/391c11-e.asp.

(4) The only exception is section 27 of the Act, which comes into force on a day to be fixed by order of the Governor in Council. Section 27 will result in the addition of sections 86.1 and 86.2 (concerning regulations for the advertising of prices for air services) to the *Canada Transportation Act*.

DESCRIPTION AND ANALYSIS

A. Rail Disputes: Elimination of Commercial Harm Test (Clause 1)

The *Canada Transportation Act*, in section 27(2), currently requires that where an application is made to the Canadian Transportation Agency by a shipper in respect of a transportation rate or service, the Agency may grant the relief sought, in whole or in part, but in making the decision must be satisfied that the applicant would suffer substantial commercial harm if the relief were not granted. Clause 1 amends section 27 so as to remove the substantial commercial harm test, which has proven to be onerous.

Clause 1 also repeals section 27(5), which stipulates that section 27 does not apply to final offer arbitration under Part IV of the Act.

B. Notification of Changes to Tariffs (Clause 2)

For purposes of Part III, entitled Railway Transportation, of the *Canada Transportation Act*, a "tariff" is defined in section 87 to mean a schedule of rates, charges, terms and conditions applicable to the movement of traffic and incidental services. "Traffic" is defined in the same section to mean the traffic of goods, including equipment required for their movement. The Act, in section 119(1) in Part III, currently requires a railway company that proposes to increase a rate in a tariff for the *movement of traffic* to publish a notice of the increase at least 20 days before its effective date. (The notice obligation does not apply to charges for incidental services nor to the terms and conditions related to the tariff item.) Clause 2 amends section 119(1) by increasing the notice period from 20 to 30 days, the reason being to ensure that shippers receive adequate notice of increases in rates for the movement of traffic.

C. Charges for Incidental Services (Clause 3)

Transport Canada officials point out that although railways generate revenue primarily from freight rates for the movement of customers' traffic they also apply charges for activities that are incidental or not directly related to the movement of traffic. These are referred to as incidental or ancillary charges, examples of which include demurrage (i.e., additional charges to the shipper for taking longer than the permitted time to load or unload a railcar), cleaning and/or storing railcars and weighing goods.

Departmental officials note that incidental charges have become of concern to shippers in recent years. However, they note that there are limited ways for an individual shipper to address these concerns, given that final offer arbitration (in Part IV of the *Canada Transportation Act*) has never been used as a stand-alone remedy to incidental charges and their associated conditions.

Clause 3 therefore adds a new provision, proposed section 120.1, to the *Canada Transportation Act*. Proposed section 120.1(1) generally provides that if, on complaint in writing to the Agency by a shipper who is subject to certain charges and associated terms and conditions,[(5)] the Agency finds that the charges or terms and conditions are unreasonable, the Agency may, by order, establish new charges or terms and conditions. The order remains in effect for the period specified in it by the Agency, but cannot exceed one year (proposed section 120.1(2)). Proposed section 120.1(3) enumerates certain factors that the Agency must take into consideration in determining whether any charges or associated terms and conditions are unreasonable. Any charges or associated terms and conditions established by the Agency must be commercially fair and reasonable not only to the shippers who are subject to them but also to the railway company that issued the tariff containing them (proposed section 120.1(4)). Once the Agency has established any charges or associated terms and conditions, the railway company must, without delay, vary its tariff to reflect them (proposed section 120.1(5)). The railway company must not vary its tariff with respect to any charges or associated terms and conditions established by the Agency until the period referred to in the order has expired (proposed section 120.1(6)). **The House of Commons Standing Committee on Transport, Infrastructure and Communities added proposed section 120.1(7) to provide that, for greater certainty, proposed section 120.1 does not apply to rates for the movement of traffic.**

D. Leased Railway Lines (Clauses 4, 5)

Under the *Canada Transportation Act* there is a process, set out in sections 141 to 146.1, that a federally regulated railway company must follow before it can formally transfer or discontinue operating a railway line. A railway company that no longer wishes to operate a railway line may sell, lease or otherwise transfer it to another party for continued operation (section 143). In the case of a *lease*, the railway company remains the infrastructure owner;

(5) Any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a general tariff that applies to more than one shipper.

however, as the Act is currently written, the railway company has no obligations under the Act in respect of the operation of the line as of the date of the lease (section 146(2)). Transport Canada officials point out that this means that once a lease runs out or is terminated, the line reverts back to the railway owner and is considered an unregulated asset. They note that, as the legislation is currently written, a railway line that is leased out and reverts back to the railway owner after the lease has ended can, in effect, circumvent the transfer and discontinuance process (set out in sections 141 to 146.1 of the Act), a process that is intended to offer opportunities to affected communities.

Departmental officials note that the government is aware of the importance of shortlines to many communities and local shippers and appreciates the need to preserve these railway lines. As they point out, for some communities lease arrangements with shortlines can be the only economically viable way to maintain rail service on very low-traffic lines. Therefore, amendments are proposed to provide opportunities for shortline operators or governments to acquire a railway line in respect of which a lease has been terminated.

Accordingly, clause 4 adds proposed section 146.01 to the Act. Proposed section 146.01(1) provides that if the railway line or an operating interest in it is transferred through the process set out in sections 143 to 145 or otherwise and subsequently returns to the railway company that transferred it (as in the case of it having been leased), the railway company must, within 60 days, resume operations on the line *or* follow the process set out in sections 143 to 145; in other words, the company must advertise the line for sale, lease, etc., for continued operation and, if there is no interest or an agreement does not take place, offer it to governments for not more than its net salvage value for any purpose prior to dismantling the line.

Proposed section 146.01(2) provides that if a railway line or an operating interest in it returns to a railway company that transferred it and the railway company decides to follow the process set out in sections 143 to 145, the company is not subject to section 142(2) in respect of the railway line or operating interest and has no obligations under the Act in respect of the operation of the line. (Section 142(2) prohibits a railway company from taking steps to discontinue operating a railway line before the company's intention to discontinue operating the line has been indicated in its plan referred to in section 141. That plan, which must be kept up to date, indicates for each of the railway company's railway lines whether it intends to continue operating the line or whether, within the next three years, it intends to take steps to discontinue operating the line.)

Section 146.1 currently requires a railway company that discontinues operation of a grain-dependent branch line that is listed in Schedule I to the Act and is in a municipality or district to make three annual payments to the municipality or district of $10,000 for each mile of the line or portion in the municipality or district. The payments commence on the date notice was given under section 146(1). That section provides that where a railway company has complied with the process set out in sections 143 to 145 but there is no agreement for the sale, lease or other transfer of the railway line, the railway company may discontinue operating the line on providing notice to the Agency.

Clause 5 renumbers current section 146.1 as section 146.1(1) and adds new section 146.1(2) to provide that if a railway company to which proposed section 146.01(1) applies does not resume operations on a grain-dependent branch line listed in Schedule I within the 60-day period specified in that section and does not enter into an agreement for the sale, lease or other transfer of that railway line, after following the process set out in sections 143 to 145, the railway company must make the annual payments referred to above.

E. Producer Car Sidings (Clause 6)

Transport Canada officials point out that, during consultations, some stakeholders requested greater control over discontinuance of Prairie rail sidings used for loading grain in producer railcars. (Rail sidings are not subject to the transfer and discontinuance provisions of the *Canada Transportation Act*.) Departmental officials further note that complaints about closing producer railcar sidings stem in part from the shippers' lack of knowledge about which sidings are in operation. This situation arises because railways are not currently obliged to inform interested parties which sidings are in service.

Clause 6 addresses this situation by adding a proposed new section, 151.1, to the Act. Proposed section 151.1(1) requires a prescribed railway company to prepare and maintain a list of the sidings that it makes available in the Western Division where railway cars allocated by the Canadian Grain Commission under section 87(2) of the *Canada Grain Act* can be loaded. The list must be published on the railway company's website (proposed section 151.1(2)). The railway company cannot remove a siding from the list until the expiry of 60 days from the publication of a notice of its intention to do so in a newspaper of general circulation in the area where the siding is located (proposed section 151.1(3)).

F. Final Offer Arbitration (Clause 7)

Final offer arbitration is a process generally available to a shipper who is dissatisfied with the rates or conditions of service proposed by a railway company. The final offer arbitration process requires an independent arbitrator to review the final offers made by the shipper and railway company and to select one or the other.

Clause 7 adds proposed sections 169.1 to 169.3 to the Act. Proposed section 169.1 provides that the parties to a final offer arbitration may, by agreement, refer to a mediator (which may be the Agency) a matter that has been submitted for a final offer arbitration under section 161. It also stipulates that the Agency may establish a roster of persons, which may include members and staff of the Agency, to act as mediators in any matter referred to it under proposed section 169.1. All matters relating to the mediation must be kept confidential, unless the parties otherwise agree, and information provided by a party for purposes of mediation cannot be used for any other purpose without the consent of that party. Unless the parties otherwise agree, the mediation must be completed within 30 days after the matter is referred for mediation. The mediation has the effect of a) staying the conduct of the final offer arbitration for the period of the mediation and b) extending the time within which an arbitrator must make a decision in the matter of the final offer arbitration by the period of mediation. The mediator may not act in any other proceedings in relation to any matter that was at issue in the mediation.

Proposed section 169.2 permits two or more shippers to join in one proceeding and submit one offer for arbitration in respect of rates, charges, terms or conditions specified in a tariff when the matter submitted to the Agency for final offer arbitration is common to all the shippers. However, the shippers may not submit a matter to the Agency for final offer arbitration unless they demonstrate, to the satisfaction of the Agency, that an attempt has been made to mediate the issue. As well, time limits pertinent to the final offer arbitration application are set out in proposed sections 169.2 and 169.3.

Departmental officials note that allowing multiple shippers with a common complaint to join in one proceeding would not only reduce costs to individual shippers but would also strengthen shippers' leverage in negotiations with the railways.

G. Bill C-11 – Now S.C. 2007, c. 19 (Clause 8)

Clause 8(1) of Bill C-8 stipulates that clauses 8(2) to 8(4) will apply only if Bill C-11 receives Royal Assent. Bill C-11 received Royal Assent on 22 June 2007; consequently, clauses 8(2) to 8(4) of Bill C-8 apply.

According to clause 8(2), section 36.2 of the *Canada Transportation Act*, concerning mediation and arbitration, is amended by the addition of a new subsection (1.1) to provide that the Agency may establish a roster of persons, which may include members and staff of the Agency, to act as mediators and arbitrators.

Clause 8(3) adds a proposed new section 146.02 to the Act. This section pertains to the return of a railway line or operating interest therein, notwithstanding proposed new section 146.01, which also concerns railway company obligations on the return of a leased line. Proposed section 146.02 specifies that if, on the day before the return, an agreement exists between the owner or operating interest and a public passenger service provider (as defined in section 87) to provide public passenger service on the line, then unless that service provider indicates otherwise before that day, the railway owner or operating interest must assume the rights and responsibilities of that service provision and accordingly resume operation of the line.

Clause 8(4) replaces section 160 of the Act so as to provide that sections 160 to 169 (concerning final offer arbitration) also apply, with any necessary modifications, in respect of the rates charged or conditions imposed by a railway company to any other railway company engaged in passenger rail services, except a public passenger service provider as defined in section 87.

H. Coordinating Amendments (Clause 9)

According to clause 9(1), clauses 9(2) and 9(3) apply only if Bill C-11 (1st Session, 39th Parliament) receives Royal Assent. Because Bill C-11 received Royal Assent on 22 June 2007, clauses 9(2) and 9(3) apply.

Clause 9(2) replaces section 36.2(1) so as to add a reference to section 169.1; in other words, the section now states in part, “If sections 36.1 and 169.1 do not apply … .”

Clause 9(3) replaces the wording of section 146.1(1) of the French version of the Act.

Clause 9(4) is no longer relevant because Bill C-11 has come into force.

COMMENTARY

As previously noted, Bill C-8 is in the same form as its predecessor, Bill C-58 in the 1st Session of the 39th Parliament, which died on the *Order Paper* with the prorogation of Parliament. During second-reading debate of Bill C-58 in the House of Commons, Opposition spokespersons were generally supportive of the bill.

An article in the *National Post*(6) on 1 June 2007 quoted CN sources as saying the railway was "disappointed" with the government's plans to change how it reviews disputes over rail fees and services between the country's railways and the shippers. The move to allow shippers to enter into final offer arbitration over disputes as a group rather than individually was welcomed by shippers. However, CN said its "chief objection" to the bill was the group arbitration rule, which it argued has no process in place to prove that shippers constitute a "legitimate group with identical issues." CN also argued that the proposed provision would discourage shippers from seeking individual settlements with the railway. "CN believes the existing regulatory regime provides ample protection to shippers, and that commercial forces should continue to rule the marketplace for transportation services," said CN spokesperson Mark Halmann.

The departmental news release accompanying Bill C-8 mentioned that the Government of Canada has made a commitment to commence a review of railway service within 30 days of the rail freight amendments contained in Bill C-8 being enacted into law. The government will consult with the shippers and the railways on the scope and terms of reference for the review. According to an article that appeared in the *National Post*(7) on 31 May 2007, Ian May, Chair of the Western Grain Shippers' Coalition, while welcoming a number of amendments contained in the bill, stated that he was "particularly encouraged that we're going to get a review of railway service."

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(6) Scott Deveau, "Railway rule regime not broken, so why tinker, CN tells Ottawa," *National Post*, 1 June 2007, p. FP6.

(7) Scott Deveau, "Shippers hail railway rule changes; amendments tabled, Transport Minister promises review of rail services," *National Post*, 31 May 2007, p. FP4.