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Client Update

March 27, 2014

Client Update: Fair Rail for Grain Farmers

On March 26, 2014 the Government of Canada tabled Bill C-30 "*The Fair Rail for Grain Farmers*" in the House of Commons.¹

Bill C-30 constitutes the second action undertaken in recent weeks by the Minister of Transport and Minister of Agriculture and Agri-Food to address Western Canada's record grain crop and recent decreases in rail service. The first such action was the issuance of an Order in Council under section 47 of the *Canada Transportation Act* on March 7, 2014.² The Order set out minimum volumes of grain that Canadian Pacific Railway Limited ("CP") and Canadian National Railway Company ("CN") are required to move. Such volume requirements increased over four weeks, to a combined target of 1,000,000 metric tonnes per week, doubling the volume currently shipped by the two railways. The Order further requires the companies to provide weekly reports to the Minister of Transport on

shipment volumes. Railways could face penalties for non-compliance of up to \$100,000 a day.³

The proposed legislation makes permanent the Order and amends both the *Canada Grain Act*⁴ ("CGA") and the *Canada Transportation Act* ("CTA").⁵ With respect to the CGA, Bill C-30:

- Establishes the authority to permit future regulation of mandatory grain contract provisions. Such future regulations will be prescribed only where shippers and producers do not voluntarily develop contracts with appropriate performance and compensation requirements and where shippers fail to properly honour contracts with producers;
- Allows the Canadian Grain Commission ("CGC") to regulate compensation the grain company will pay to a farmer if the delivery dates set out in the contract are not honoured in a timely fashion; and
- Enables the CGC to provide arbitration or direct that arbitration be undertaken.

With respect to the CTA, Bill C-30:

- Provides the Governor in Council, upon recommendation of the Minister of Transport and the Minister of Agriculture and Agri-Food, the authority to set minimum volume requirements for the movement of grain by CN and CP, with

¹ Bill C-30 "An Act to amend the Canada Grain Act and the Canada Transportation Act and to provide for other measures", 62-63 Eliz.II was tabled by the Minister of Agriculture and Agri-Food and received first reading March 26, 2014 ["Bill C-30"]

² *Order Imposing Measures to Address the Extraordinary Disruption to the National Transportation System in Relation to Grain Movement*, SOR/2014-55 ["Order"]

³ For a comprehensive overview of the OIC of March 7, 2014, please see the previous client update entitled "Rail Update - Government of Canada Issues Grain Transportation Order in Council" prepared by Conlin Bedard LLP and available online [here](#).

⁴ *Canada Grain Act*, RSC 1985, c G-10

⁵ *Canada Transportation Act*, SC 1996, c 10



penalties for non-compliance of up to \$100,000 per day;⁶

- Requires that CN and CP address the current backlog by each moving a minimum of 500,000 metric tonnes of grain each week beginning April 7, 2014 and ending August 3, 2014;⁷
- Requires the Canadian Transportation Agency (“Agency”) to make annual recommendations to the Minister of Transport on or before the July 1 that precedes each crop year with respect to the minimum amount of grain that each of CN and CP should move during each month of the crop year.⁸
- Provides the Agency with the authority to regulate to further clarify and define certain elements of Arbitrations on Level of Services as provided for under section 169.31 of the CTA.⁹
- Provides the Agency with regulatory authority to significantly extend interswitching radiuses for prescribed regions, namely Alberta, Saskatchewan and Manitoba. The current interswitching distance of 30km will increase to 160km for all commodities in those regions, thereby increasing competition between railways and grain companies in the new radius.¹⁰ The government estimates that this change will increase to 150 the number of primary grain elevators being served by more than one railway, up from 14.

⁶ Bill C-30, supra, at 6(1), amending section 116.2(2) of the CTA

⁷ Bill C-30, supra, at 6(1), amending section 116.2(1) of the CTA

⁸ Bill C-30, supra, at 6(1) defines crop year as meaning “the period that begins on August 1 of each year and ends on July 31 in the next year.”

⁹ Bill C-30, supra, at 8(1), amending section 169.31 of the CTA

¹⁰ Bill C-30, supra, at 7(1), amending section 128 of the CTA. Railway interswitching operations apply where one carrier performs the pick-up of cars from a shipper and hands off these cars to another carrier that performs the movement on the line.

Analysis and Next Steps

By virtue of section 47 of the CTA, the Governor in Council (“GIC”) is provided with special powers to take any step that it considers essential to stabilize the national transportation system. In addition, while orders made under section 47 are limited to 90 days, subsequent orders or renewals are permitted so long as the GIC remains satisfied that an extraordinary disruptions to the national transportation system exists or is imminent and that failure to act would be contrary to its users and operators.

Despite the significant powers afforded by section 47, it would appear that the Minister of Transport and the Minister of Agriculture and Agri-Food were unconvinced that the future Orders in Council could be a valid and lasting solution to Canada’s rail freight transportation system. By introducing legislative provisions mirroring a remedy already available to the GIC, the Ministers have indicated their reluctance to avail themselves of section 47 except in the rarest of circumstances. In effect, upon passage of Bill C-30, the Government will have automatically extended the application of its Order to August 3, 2014 without resorting to further orders or opening itself up to potential statutory appeals by the railway companies.

Bill C-30 also proposes a significant increase of the Government’s mandate in respect of data gathering and monitoring of railway supply chains. In particular, both the proposed requirement that the Agency make annual recommendations to the Minister of Transport on the minimum amount of grain that each of CN and CP should move during each month of the crop year, as well as the Agency’s new regulatory powers with respect to level of service obligation arbitrations, will



require changes to the Government's data collection and monitoring capabilities as well as to its stakeholder outreach procedures.¹¹

Finally, Bill C-30 also provides an important and rarely used "sunset" mechanism by which all of the new amendments described above relating to the CTA will be automatically repealed on August 1, 2016 unless expressly postponed by resolution of both Houses of Parliament.

Legislative Review of the *Canada Transportation Act*

The ministers also announced an acceleration of the statutory review of Part III (i.e. "Railway Transportation") of the CTA. Originally scheduled to begin in June 2015 the accelerated review of the CTA will begin immediately, thereby allowing the Government to consider making further amendments to improve Canada's railway supply chain. The House of Commons Standing Committee on Transport, Infrastructure and Communities will form an integral component of the review and will provide an additional opportunity for stakeholder consultations in the coming months. In particular, we expect that certain consultations will focus on the use of service level agreement arbitrations. Indeed, under

the *Fair Rail Freight Service Act*,¹² the Government added a mechanism by which shippers desiring to enter into service level contracts with railways could require them to provide an offer within 30 days, and where no agreement is reached, a final offer arbitration mechanism is provided for.¹³ No use has been made of these new provisions since their enactment in June 2013.

The Government has also stated that consultations relating to the legislative review may take place in relation to the railways' maximum grain revenue entitlements, thereby opening up the Act for comprehensive amendments.

Finally, the Agency will be required to consult with stakeholders in relation to new regulations relating to level of service obligation arbitrations, thereby providing industry an important opportunity to shape the future of Canada's rail freight regime.

Should you have any questions, please contact either Ian MacKay or Ben Bedard.

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¹¹ It is also possible that Quorum Corporation, a third-party which currently provides the Government with a series of quarterly and annual reports and tracks overall changes in the structure of the grain handling and transportation system may see its mandate increased to enable the CTA to properly meet its new mandate.

¹² *Fair Rail Freight Service Act*. SC 2013, c 31.

¹³ See CTA at sections 126(1.1) and (1.3) and 159.