

CTA Amendment Bulletin

June 12, 2018

On May 23, 2018, the *Transportation Modernization Act* received Royal Assent, amending the *Canada Transportation Act* (“the *Act*”) by introducing new measures relating to railway and air transportation. All amendments to the *Act* described in this bulletin came into force on May 23, 2018, with the exception of sections 14 and 15, pertaining to the Ministerial review and authorization process for joint ventures of air services providers, and to Canadian ownership and control of air carriers. See below for more details.

Noteworthy Changes to the *Act*

Rail Transportation

With respect to rail transportation, the most pertinent amendments to the *Act* concern access to public information, adjudicating level of service disputes, long-haul interswitching, maximum revenue entitlement, and final offer arbitration.

Rail Information and Informal Dispute Resolution Services

The Canadian Transportation Agency (“CTA”) must now make information on railway transportation and remedies available to the public. This includes guidance to anyone who wishes to access those remedies.

In addition, a member of the CTA may attempt to resolve any issues raised by an interested person in an informal manner with the railway company in question.

Finally, in its annual report to Parliament, the CTA will need to include information about rail applications, complaints, mediations, and submissions for arbitration, including the manner with which they were dealt and the observed systemic trends.

Rail Service and Performance Data

Class 1 rail carriers may be required to provide information other than personal information to the Minister or CTA for the purposes of:

- determining the long-haul interswitching rate; and
- communicating service and performance indicators to the public.

Level of Service Applications: Timeline and Criteria for Adjudication

The CTA now has ninety days, as opposed to one hundred and twenty days, to complete an investigation after the receipt of a complaint that a railway company is not fulfilling its service obligations. The company in question will then have twenty days to file an answer and complainants will have at least ten days to file a reply.

The amended *Act* also provides more clarity as to the criteria to be considered by the CTA when assessing whether or not a railway company has provided the highest reasonable level of service. The new criteria includes, among other things:

- traffic to which the service obligations relate;
- the reasonableness of the shipper's requests with respect to the traffic;
- the railway company's and shipper's operational requirements and restrictions;
- the railway company's obligations, if any, to a public passenger's service provider;
- the railway company's contingency plans to allow it to fulfill its service obligations when faced with foreseeable or cyclical events; and
- any other information that the CTA considers relevant to the application.

Own Motion Authority

The CTA may now launch its own investigations into a rail level of service issue, with authorization of the Minister of Transport, and subject to any terms and conditions that he or she considers appropriate. It will have ninety days to make its determination.

Interswitching Rates

The CTA will now set the interswitching rate no later than December 1 every year and will publish an explanation of the method that it followed in determining the rate.

Long-Haul Interswitching

A remote shipper, with access to only one railway company's line at the point of origin or destination, may request the CTA to set a rate and the terms under which a local carrier must transport the shipper's goods to a connecting carrier that will perform the rest of the journey. The nearest interchange may be up to 1200 km away or fifty percent of the total haul distance in Canada, determined by whichever is greater.

The CTA will issue its determination of the rate within thirty days of receiving an application for a long-haul interswitching order. The order will be applicable for up to one year unless the parties agree otherwise.

Maximum Revenue Entitlement ("MRE")

The *Act* places a limit on the maximum revenue that the Canadian National Railway Company and the Canadian Pacific Railway Company can earn for shipping regulated grain from specific origins. Amendments to the *Act* introduce new limits to the MRE including the establishment of a volume-related composite price index set at 1.3275 for the 2016-2017 crop year.

This change will be effective for the upcoming 2018-2019 crop year.

Final Offer Arbitration (“FOA”)

In this confidential process, the arbitrator must resolve rates and service disputes between carriers and shippers who submit their final offers for decision. The arbitrator’s decision is enforceable.

The amendments to the Act introduce two changes to the FOA process:

- The threshold for summary FOA has increased from \$750,000 to \$2 million, meaning an expedited process will be triggered if a shipper’s final offer involves freight charges in amounts no higher than \$2 million and when the shipper did not indicate any contrary intention when submitting the offer. This new ceiling is subject to change every three years.
- Shippers can now request the arbitrator’s decision to apply for up to two years rather than one.

Air Transportation

Regarding air transportation, the notable amendments to the *Act* pertain to changes to the Ministerial review and authorization process for joint ventures between air services providers, Canadian and foreign ownership and control of carriers, and a new air passenger rights regime.

Ministerial Review and Authorization Process for Joint Ventures

Section 14 of the *Transportation Modernization Act* establishes a Ministerial review and authorization process of joint ventures of air services providers. This process will be triggered if the Minister, upon notice of intention to enter into an arrangement to provide air services, believes that the proposed arrangement raises significant considerations with respect to the public interest.

Under the review process, the Commissioner of Competition will report to the Minister and the parties on any concerns affecting competition that may result from the proposed joint venture within one hundred and twenty days of receiving notice of the intention to enter into the arrangement, after which the Minister will report his or her concerns to the parties. The parties will then have thirty days to respond to the Minister’s concerns and inform him or her of the measures they intend to undertake to address the concerns.

The Minister can ultimately authorize or reject the proposed arrangement and is required to publicize a summary of that decision. He or she may also subject it to terms and conditions.

Section 14 will come into force on a date fixed by an order from the Governor in Council. At the time of writing, no date has yet been established.

Canadian and Foreign Ownership and Control of Canadian Air Carriers

Section 15 of the *Transportation Modernization Act* modifies section 55(1) of the *Act*, increasing foreign voting interests in Canadian air carriers from 25 to 49 per cent.

However, no single non-Canadian may own or control, directly or indirectly, more than 25 per cent of the voting interests in a corporation. Finally, one or more non-Canadians cannot own more than 25 per cent of voting interests if they are authorized to provide an air service in any jurisdiction.

Section 15 will also come into force on a date fixed by an order from the Governor in Council. At the time of writing, no date has yet been established.

Air Passenger Rights Regime

The amendments to the *Act* now require the CTA to make regulations establishing a new air passenger rights regime by defining airlines' minimum obligations to passengers with respect to:

- the carrier's obligations to communicate to passengers their rights and recourse options against the carrier;
- the carrier's obligations in the case of a flight delay, cancellation or denial of boarding with regards to:
 - minimum standards of treatment of passengers and compensation it is required to pay when the aforementioned inconveniences are in the carrier's control;
 - minimum standards of treatment when the aforementioned inconveniences are in the carrier's control but are necessary for safety purposes, including mechanical malfunctions;
 - its obligation to ensure that its passengers complete their itinerary when the aforementioned inconveniences occur;
 - the need for timely information and assistance to passengers;
- minimum compensation for lost or damaged baggage;
- the carrier's obligation in cases of tarmac delays of over three hours including the obligation to provide timely information and assistance to passengers;
- the carrier's obligation to ensure that children under the age of fourteen are seated in close proximity to a parent, guardian or tutor at no additional cost;
- the carrier's obligation to establish terms and conditions for transporting musical instruments;
- respecting any of the carrier's other obligations that the Minister may issue directions.

The new regime will apply to flights from, to and within Canada, including connecting flights.

The CTA has launched public consultations to support the drafting of new air passenger protection regulations with regards to the aforementioned list of obligations. In-person sessions will take place in eight cities over the summer. The public is also encouraged to share its opinion online via the CTA's website. View more information on the consultation process. Feedback may be submitted until August 28, 2018.

Sources consulted:

Transportation Modernization Act, SC 2018, c. 10.

[Canada Transportation Act](#), SC 1996, c. 10.

Canadian Transportation Agency, [Implementation of Recent Amendments to the Canada Transportation Act](#), May 23, 2018.

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