BRIEF ON BILL C-49
THE TRANSPORTATION MODERNIZATION ACT

Submitted to the House of Commons Standing Committee
on Transport, Infrastructure and Communities

SEPTEMBER 18, 2017

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1. INTRODUCTION

The Shipping Federation of Canada is the voice of the owners, operators and agents of the foreign flag ships that carry Canada's imports and exports to and from world markets. Our members represent over 200 shipping companies whose vessels make thousands of voyages between Canadian ports and international markets every year, carrying hundreds of millions of tonnes of cargo, ranging from dry bulk commodities such as grain and coal – to liquid bulks such as crude oil and oil products – to containerized consumer and manufactured goods.

These ships play an essential role in the Canadian economy by facilitating the movement of Canada's international trade, and they do so safely, securely and efficiently day in and day out. Indeed, ocean shipping is one of the world's most highly regulated industries, and foreign flag ships are subject to a stringent regime of environmental, safety and crewing regulations when sailing in Canadian waters, which are based on the framework of international conventions that has been developed by the International Maritime Organization (IMO) and the International Labour Organization (ILO). Those conventions establish detailed technical regulations on the safety and security of every aspect of shipping activity, from navigation and seaborne operations - to the prevention of maritime pollution – to the training and certification of seafarers and the labour standards on board. National governments, which form the membership of the IMO, are required to implement and enforce those rules through domestic legislation and regulations.

One key way of ensuring compliance with these conventions is through a country's flag state responsibilities. As flag states, countries must ensure that the ships flying their flag (i.e. ships registered in their national registries) meet the international standards set out in the conventions they have ratified and possess all the relevant certifications. An equally, if not even more, important way of ensuring compliance with international standards and navigational safety is through a country's port state obligations. As a port state, Canada has both the right and the responsibility to police foreign flag ships sailing in Canadian waters, which includes boarding and inspecting ocean-going vessels in order to verify their compliance with the safety, security and environmental standards established under IMO conventions.

Although any industrial activity – including both domestic and international shipping operations – comes with a level of risk, the available data on accidents and incidents indicate that we have a history of safe shipping in Canada, and that vessels operating in Canada are governed by a stringent and effective regulatory framework. The fact of the matter is that shipping has become safer, more environmentally responsible and more tightly regulated than ever before, and the greatest strides in this respect have been made in the last few decades, during which time world trade volumes – and the number of ships plying our waters – have increased exponentially.

2. BILL C-49'S COASTING TRADE PROVISIONS

Canada's coasting trade regime has historically played an important role in preserving and supporting the growth of Canada's domestic marine industry, and we have no interest in advocating for the abolition of that regime. We do, however, believe that there must be an ongoing assessment of the capacity of that regime to meet the evolving realities of the Canada's importers and exporters, and of the need to introduce some flexibility into the *Coasting Trade Act* and its related processes if and when warranted. In this respect, we reject the argument put forth by some groups that any move to amend the Act represents the "thin edge of a wedge" that will inexorably lead to the destruction of the Act over time. Periodic review of the Act's ability to meet the needs of Canadian importers and exporters, and ongoing efforts to ensure a strong domestic marine industry in Canada, are not mutually exclusive objectives and should not be treated as such.

The Repositioning of Empty Containers

We are particularly interested in subsection 70(1) of Bill C-49, which proposes to amend the *Coasting Trade Act* to allow all foreign flag ships to reposition their empty containers between Canadian ports on a non-revenue basis. This is an amendment that our association has been advocating for over the last decade. Indeed, discussions on this subject between the government and our industry had advanced to such a degree that in 2011, Transport Canada was on the verge of proposing an amendment to the *Coasting Trade Act* that would have exempted the repositioning of empty containers by foreign flag ships from the Act's prohibitions. However, those discussions were placed on hold when empty container repositioning became part of the CETA trade negotiations between Canada and the European Union. Now that the CETA negotiations are over, Bill C-49 seeks to complete the discussions that were paused in 2011, when there was general agreement – including from some domestic shipowners - that empty container repositioning should be open to all ships, regardless of flag or ownership.

This change is important because a significant aspect of the container shipping industry involves moving empty containers from locations where they are not needed – where the carrier has a surplus of empty containers - to locations where they are needed – where, for example, a carrier has a Canadian customer who needs the empty containers for export cargo. Because foreign flag carriers have been prohibited from engaging in this activity under the *Coasting Trade Act*, they have had no choice but to employ alternative solutions, such as moving the empty containers via truck or rail, or importing them from overseas. However, none of those solutions represent the most productive use of the carrier's transportation assets, and all of them come at a price, not only for the carrier, but also for the exporter (in the form of higher transportation costs and fewer options for getting goods to market), as well as for the logistics chain (in the form of reduced fluidity and overall efficiency). Bill C-49's provisions on the repositioning of empty containers would address these issues by giving carriers the flexibility to use their transportation assets (their ships and their empty containers) in the most productive and cost-effective manner possible, for the ultimate benefit of everyone who relies on the availability of an efficient and well-functioning Canadian supply chain.

Although some groups who oppose this amendment have argued that allowing foreign flag ships to reposition empty containers would take business away from domestic shipowners to the detriment of the Canadian marine industry overall, this is simply not borne out by reality. As an example, we are aware of an international shipping line which applied for a coasting trade waiver to move 400 empty containers from Montreal to Halifax. A domestic vessel operator opposed the waiver, saying that the containers could be moved on their vessel. However, the rate the domestic operator would have charged ($2,000 per container for a total cost of $800,000) was simply irreconcilable with the cost of moving the containers on the shipping line's own vessel, which was $300 per container for a total cost of $120,000. The fact of the matter is that the repositioning costs charged by domestic carriers are so prohibitive that the use of domestic vessels to reposition empties is simply not a viable option. As a result, such activity does not exist, and empty containers are either repositioned by truck or rail or they are imported from overseas aboard the foreign carrier's ship.

The Role of Vessel Sharing Agreements

Although we very strongly support Bill C-49's provisions to extend the ability to reposition empty containers to all ships, we are concerned that the actual wording the bill uses to define the party which is eligible to do so may be too narrowly focused, and that this may make it difficult to achieve the full benefits of liberalizing this activity. More specifically, subsection 70(1) of Bill C-49 provides that the party which may reposition its empty containers is the "owner" of the ship, which the *Coasting Trade Act* defines as the party which has "the rights of the owner with respect to the ship's **possession and use**" (our bold). We

see a potential problem with respect to how this definition will be applied in cases involving vessel sharing agreements, in which a number of container carriers enter into an agreement to share space on board one another's vessels along certain trade routes, with each line deploying a certain number of vessels on a rotating basis in order to prevent over capacity on those routes. These agreements are used extensively in the container shipping industry, and enable carriers to offer more frequent service with a greater number of port call than would be possible on an individual basis.

It is our view that the current wording of subsection 70(1) of Bill C-49 creates a question as to whether each of the partners in a vessel sharing agreement would have the rights of the owner with respect to the ship's "possession," other than in cases where it is their ship that is being used to transport the containers. As a result (and depending on how the ships in a given vessel sharing arrangement are allocated), a shipowner may only have the ability to reposition its empty containers on every fourth or fifth voyage, which would significantly reduce the potential benefits of liberalizing this activity for all of the parties involved.

We believe that if Bill C-49's provisions on the repositioning of empty containers are to be fully and effectively implemented for the benefit of all parties, then it must be made clear that **any partner** in a vessel sharing agreement may reposition **its own empty containers**, as well as those of the **other partners** in the agreement, using **any of the vessels** named in that agreement. Although there may be various ways of achieving this, including through additional guidance and clarification from Transport Canada, it is our view that the optimal solution is to amend subsection 70(1) of Bill C-49 to clearly indicate that the party which is eligible to reposition empty containers encompasses not only the ship "owner" (as defined in subsection 2(1) of the *Coasting Trade Act*), but all of the partners who share operational control and use of that vessel as part of a vessel sharing agreement.

More specifically, we recommend that subsection 70(1) be amended as follows (highlighted text is new):

> *70 (1) Subsections 3(2.1) and (2.2) of the Coasting Trade Act are replaced by the following:*
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> *Repositioning of empty containers:*
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> *(2.1) Subsection (1) does not apply in respect of carriage between one place in Canada and another, without consideration, of empty containers that are owned or leased by the ship's owner or by any of the partners who share operational control and use of that ship as part of a vessel sharing agreement, and of any ancillary equipment that is necessary to ensure the safety, containment, and preservation of the goods that may be carried in those containers.*

It is worth noting that such an amendment would put the Canadian approach to the repositioning of empty containers on similar footing to that of the U.S., where foreign flag ships are permitted to engage in this activity under the *Jones Act* (the legislation governing cabotage in US waters). The U.S. customs administration (which enforces the *Jones Act*) has issued a number of rulings over the last decade, which have consistently stated that shipowners who are members of vessel sharing agreements in which all of the partners share joint **operational control** of the vessels involved (i.e. they agree and consult on issues related to the deployment and use of those vessels) may reposition their empty containers between U.S. ports, regardless of whether the empty containers are being repositioned on their ship or on a partner's ship.

3. BILL C-49'S RAIL PROVISIONS

Although we have focused the majority of our comments on Bill C-49's proposed amendments to the *Coasting Trade Act,* we also wish to take this opportunity to highlight our strong interest in the bill's proposals to amend the *Canada Transportation Act* in order to increase the efficiency and transparency of the rail freight transportation system overall.

Ocean carriers interface with railways in two ways - as the railways' clients (shippers) when they provide door-to-door service for the carriage of intermodal containers, and / or as connecting carriers supplying one another with cargo and / or interfacing within the same terminal. Even when the ocean carrier is not a "client" of the railway (i.e. when the parties are not linked by a contractual relationship), they are nevertheless key stakeholders in the logistical chain. As such, they are positioned at either the beginning of the Canadian trade route (as receivers of foreign-bound cargo) or at the end of the Canadian trade route (as unloaders or foreign-sourced cargo), and have a strong interest in ensuring the efficient flow of cargo and of avoiding port or terminal congestion.

Given the above, we are generally supportive of Bill C-49's provisions to enhance the government's ability to monitor the performance of the rail system and its various components, with a view to identifying developing issues before they become increasingly entrenched. We also note the bill's provisions to enhance the remedies that are available to shippers in their disputes with the railways, and would recommend the need for greater outreach on the part of the Canadian Transportation Agency on the availability of these remedies and how they may be accessed.

Finally, we support the provisions which sunset the government's authority to establish minimum volumes of grain that the railways must carry (as established under the *Fair Rail for Grain Farmers Act*). In previous submissions on this matter, we have underlined our discomfort with a public policy approach that grants grain (or other commodities) statutory priority over other cargoes carried by rail, and have expressed our support for a more balanced approach to transportation that does not favor the carriage of one cargo over another through legislation. We take this opportunity to reiterate that view, and to underline the importance of ensuring that our rail transportation network be optimized to work efficiently and effectively for **every** type of cargo that it handles.

4. BILL C-49'S INFRASTRUCTURE PROVISIONS

We are pleased to note that Bill C-49 proposes to amend the *Canada Marine Act* to enable Canada Port Authorities to access funding under the new Canada Infrastructure Bank. This proposal also underscores the need for a comprehensive public policy discussion on Canada's transportation infrastructure needs, with a view to ensuring a strategic (rather than piecemeal) approach to infrastructure investment. This approach should be framed by a gateway / trade corridor perspective, and should also make an explicit linkage between trade and transportation while positioning transportation needs within a larger supply chain context. Indeed, we believe that such a discussion should be one of the next major components of the government's "Transportation 2030" agenda, and look forward to a fulsome exploration of this subject in the months ahead.

Respectfully submitted,

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President
SHIPPING FEDERATION OF CANADA