Comments on Proposed Options
for Modernizing the Regime Governing Liner Shipping Services in Canadian Waters
Submitted February 23, 2022

Introduction

The Shipping Federation of Canada is the national association that represents the owners, operators and agents of the ocean ships that carry Canada's world trade. We are writing to provide input into Transport Canada's proposals to modernize the Canadian regime governing liner shipping services in Canadian waters. This subject is of keen interest to our association, and to our container carrier members in particular, who are major participants in Canada's international shipping industry.

We are aware that a primary impetus for this review is the high level of frustration and discontent that the current supply chain challenges have created for exporters and importers in Canada and elsewhere in the world, and the resulting call for greater scrutiny of the marine transportation sector and the providers of containerized shipping services in particular. Although we acknowledge that these are unprecedented times for all supply chain stakeholders, we cannot overstate the danger of drawing hasty and erroneous conclusions regarding the causes and remedies of the challenges we are currently seeing, which are primarily due to the impacts of the Covid-19 pandemic and the extraordinary increase in demand for imported goods it has created. Given the foregoing, we reject any attempt to link Canada's current supply chain issues to the way in which the liner shipping industry is organized and regulated - or to the ability of shipping lines to enter into alliances and operational agreements without the threat of anti-trust investigation. Indeed, we view such efforts as being misguided, totally unsupported by evidence, and potentially harmful in terms of the counter measures they might generate.

This being said, we do believe that a review of the Canadian regime is long overdue, not because such action will resolve the bottlenecks, delays or pricing issues that supply chain stakeholders are currently experiencing (nor could it reasonably be expected to do so), but because the *Shipping Conferences Exemption Act* (*SCEA*) - which is the prevailing legislation governing the operation of liner shipping in Canada - is sorely outdated (it underwent its last major revision in 2001) and no longer relevant to the realities of the container shipping industry and the way it operates. It is our view that the government's failure to update *SCEA* over the last two decades has made Canada's regime increasingly inconsistent with the regimes of other maritime trading nations, and created an unnecessary level of legal uncertainty for the container shipper lines that call Canadian ports and serve the needs of Canada's importers and exporters.

It is with the above in mind that we offer the following views on the specific proposals that are under consideration by Transport Canada, as set out in the question guide provided to us in early January. Please note that we have not commented on all of Transport Canada's proposals, but have focused on those with the most significant potential impacts from a shipping line perspective.

Option 1: Modernize the Current Regime by Reforming the *Shipping Conferences Exemption Act (SCEA)*

Our major concern with *Shipping Conferences Exemption Act* as currently written is that it has created a highly uncertain legal environment with respect to the provision of liner shipping services in Canadian waters. This is due to the fact that *SCEA*'s provisions, and the anti-trust exemptions they confer, are linked exclusively to shipping conferences, despite the fact that shipping lines have long since transitioned to more effective models of cooperation in the form of carrier alliances, vessel sharing agreements and other types of operational collaboration. Consequently, although container carriers generally presume that *SCEA*'s anti-trust exemptions extend to these types of agreements, they have no legal certainty as to whether this is actually the case, as this question has never been formally raised or tested in court. This represents a major gap in the Canadian regime and is, in our view, the most significant issue that needs to be addressed in any discussion on how to reform Canada's approach to the regulation of liner shipping for the future.

If Canada is to have sufficient liner shipping capacity to transport its current and future trade volumes in the most efficient and flexible manner possible, it must ensure that shipping lines have the ability to enter into cooperative agreements without being subject to the threat of anti-trust investigation. It is therefore essential that Canada modernize (and rename) *SCEA* in order to affirm its commitment to the fundamental principle of anti-trust immunity, and (just as importantly) that this principle be clearly extended to vessel sharing agreements (or consortia), which are by far the most ubiquitous of the various types of agreements container carriers use to maximize efficiency. Under such agreements, carriers cooperate to share space and load cargo on one another's vessels, thereby enabling them to offer scheduled services to more ports, and to deploy larger, more efficient vessels than would be possible if they were all operating individually. Given the prevalence and role of these agreements, it is important that a modernized *SCEA* make explicit reference to VSA's as forms of carrier cooperation that are exempt from Competition Bureau investigation. This would represent an important step forward in modernizing Canada's outdated regime, and ensuring it is consistent with the regimes of other maritime trading nations, including the U.S., all of which provide legal certainty for vessel sharing agreements in their domestic legislation.

It is worth noting that although most maritime trading nations recognize vessel sharing agreements as legitimate and necessary forms of cooperation that should be exempt from anti-trust investigation, the specific form that such exemptions take and the conditions under which they are conferred and maintained varies from country to country. We believe that Canada must undertake a cautious approach with respect to establishing such conditions, with a view to avoiding the implementation of an overly prescriptive regulatory regime that could become a factor that disincentivizes some container carriers from calling Canadian ports altogether. This is also important in a context where U.S lawmakers have been moving aggressively to introduce even more regulatory oversight to the container shipping sector in response to a strong (and we would argue, misguided) advocacy effort from shipper interests, potentially raising concern that Canada may be moving towards the implementation of a similar approach.

Although we look forward to engaging in a more substantive discussion with Transport Canada on the specific conditions under which anti-trust exemptions should be granted under a modernized *SCEA*, the key points we wish to underline at this stage is the need for Canada to develop a framework that is clear, simple and flexible, and enables carriers to adopt (and amend) cooperative agreements such as VSA's in a manner that reduces administrative burdens, minimizes compliance costs, and provides assurance of exemption from unwarranted anti-competitive investigation.

Option 2: Repeal the *Shipping Conferences Exemption Act* and Transition to a *Competition Act* Regime

As previously noted, we view the maintenance and clear expression of anti-trust exemption for cooperative agreements among ocean carriers as the most essential element of Canada's liner shipping regime, and indeed, as the most essential element for any country that relies on the availability of efficient liner shipping services to transport its international trade. Not only would a "repeal *SCEA*" scenario place Canada's approach to anti-trust immunity at complete odds with the approaches of other maritime trading nations, it would also create an unprecedented, and potentially untenable, level of legal uncertainty for shipping lines calling Canadian ports, who would find themselves potentially subject to investigation under the *Competition Act* at any time and with highly uncertain outcomes.

It is worth noting that the *Competition Act* was amended in 2009 to provide a targeted criminal enforcement regime for the most egregious forms of anti-competitive behavior (price fixing, market allocation, etc.), while removing the threat of criminal sanctions for legitimate collaborations such as joint ventures and strategic and collaborative alliances. Such collaborations are permitted under the *Competition Act*, but may nevertheless be subject to review in cases where they are seen to (or are likely to) prevent or lessen competition in a substantial way. We know that there is an extensive body of evidence which clearly demonstrates that cooperative working agreements among ocean carriers do NOT lessen competition, and that they actually increase efforts among agreement partners to differentiate themselves on specific competitive elements. This being said, there exists very little jurisprudence on this matter from a *Competition Act* perspective, making it very difficult to predict how the Act's provisions related to permissible collaborations would be interpreted in practical terms, and as relates to shipping line agreements in particular.

Consequently, a "repeal *SCEA*" scenario would create a significant legal vacuum for carriers and potentially introduce an unacceptably high level of risk into their Canadian port calls. As a result, Canadian exporters and importers could find themselves having to seek transportation services from shipping lines that serve the North American market exclusively via US ports, and this in a context where the Federal Maritime Commission already has a mandate to protect the interests of U.S. exporters and importers as relates to the operation of ocean shipping in its waters, and where steps are currently being taken to strengthen that mandate even further.

As previously noted, virtually all of the world's major maritime trading nations provide some form of anti-trust immunity for shipping line agreements. Although the form and extent of such immunity may differ depending on the needs and realities of the country involved, the principle itself remains entrenched as the optimal tool for ensuring the ability of shipping lines to provide stable, efficient and cost-effective transportation services for the movement of the world's trade. Given the foregoing, we cannot overstate our profound concern over any scenario in which Canada would discard or otherwise move away from this fundamental principle, nor can we overstate the irreparable harm that such action would do to Canada's status as a trading nation and to the Canadian economy overall.

Option 3: Rethink the Role and Powers of the Canadian Transportation Agency (CTA)

Given the Canadian Transportation Agency's role as an independent entity with oversight over the efficient functioning of Canada's national transportation system, we believe it has a potentially important role play in modernizing the regime governing the operation of liner shipping in Canadian waters, particularly as pertains to the shipper / carrier relationship. We have read with interest the proposals that Transport Canada has put forward in this respect, and offer the following comments.

Implementation of a CTA-Managed Dispute Resolution Process

One option proposed by Transport Canada is to establish a dispute-resolution mechanism managed by the CTA which shippers could use to file and potentially resolve complaints regarding ocean carrier issues. Although it is proposed that such a mechanism would be similar to what is currently found in the rail sector, we strongly disagree with the notion that the dispute resolution processes available to rail shippers are appropriate for, or transferrable to, shippers moving goods via ocean borne liner shipping services, particularly in a context where Canadian rail carriers have specific obligations under the *Canada Transportation Act* to provide service to shippers who wish to move freight by rail. The introduction of a legislated dispute resolution mechanism for shippers would not only inject another element of uncertainty for shipping lines calling Canadian ports, but also raise questions regarding regulatory efficiency and contractual certainty in a Canadian context.

Although it is our understanding that the proposed dispute resolution mechanism is mainly envisioned as an element of a "repeal *SCEA*" scenario (under which shippers would have the ability to file a complaint about a shipping line practice or contractual term as an intermediary step before the complaint is taken up for investigation by the Competition Bureau), we cannot see how this would allay any of the previously-noted concerns regarding such a scenario. Indeed, the introduction of a dispute resolution option for shippers under a "repeal SCEA" scenario would only serve to create additional uncertainty for any container carrier looking to assess the relative risks and benefits of calling a Canadian port(s), particularly in a context where their longstanding – and globally held – assurance of anti-trust immunity for shipping line agreements would no longer exist as far as their Canadian ports call are concerned.

Enhance CTA Powers to Monitor and Initiate Investigations into Shipping Line Agreements and their Impacts on Shippers

Although we do not view the the introduction of a CTA-managed dispute resolution mechanism for shippers of ocean-borne containerized cargo as an appropriate or useful tool for the Canadian market, we do believe that the CTA could play a more active role in tracking and understanding the concerns not only of cargo owners using liner shipping services, but also of carriers providing those services. The CTA could conceivably be tasked with such a role under a "modernize *SCEA*" scenario, with a view to tempering the highly adversarial – and ultimately counterproductive - dynamic that currently exists between these two groups by providing a neutral forum in which to raise issues and explore possible solutions.

Although we would be open to having a future discussion with Transport Canada as to the specific types of information elements that carriers might be comfortable providing to the CTA as part of such a forum, we do wish to make it clear that we could not support a scenario in which the CTA's role would extend beyond that of collecting, interpreting and sharing information to include regulatory decisions or enforcement actions as relates to these issues, as this would again introduce an unacceptably high level of uncertainty into the Canadian regime. Another caveat we would add is that the CTA would likely have to invest in upgrading its marine and liner shipping expertise in order to ensure its ability to provide ongoing value, creativity and thought leadership to this undertaking – the payoff being that the Agency could then continue to expand and leverage this expertise as time goes on.

As a final point, we also believe that the work of a CTA-led forum could provide input for some form of supply chain working group or advisory panel that could work to address issues from an industry-wide perspective, with an overall view to creating a more collaborative approach than currently appears to be possible.

Concluding Remarks

Although we do not share the view that this study of Canada's approach to the regulation of liner shipping will address the supply chain challenges that Canadian shippers are facing (given that these challenges are largely due to the unprecedented increase in demand for imported goods created by the Covid-19 pandemic), we nevertheless believe that the time for a review is long overdue.

As noted in our submission, the government's failure to amend the *Shipping Conferences Exemption Act* to reflect the realities of how shipping lines cooperate today has created an unacceptable degree of legal uncertainty for container carriers calling Canadian ports, and called into question Canada's commitment to the fundamental principle of anti-trust immunity that is the underpinning of the liner shipping industry's ability to provide stable, efficient and cost effective transportation services to Canadian exporters and importers. Given the foregoing, we fully reject any scenario under which Canada would transition away from this principle in favor of a *Competition Act* regime, and believe that Canada must, as a matter of priority, modernize its current regime by reforming *SCEA* and extending its anti-trust exemptions to the forms of carrier cooperation that are most commonly used today, and to vessel sharing agreements in particular.

As a final note, and given the challenges that are created when legislation is not updated in order to keep pace with external developments, we would also recommend that a reformed *SCEA* contain a review mechanism under which Transport Canada would be required to submit a report to Parliament every five years, assessing the effectiveness of the existing regime in delivering Canada's waterborne trade and meeting the needs of its exporters and importers. This would provide a much-needed tool for ensuring that the Act remains relevant in a rapidly changing world, and for monitoring the operation of liner shipping activities in Canadian waters in a much more systematic and granular way than is currently the case.

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We trust that these comments will be useful to this review and look forward to engaging further with Transport Canada as it identifies its next steps with respect to the review process.

Sincerely,

Karen Kancens

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Vice President
SHIPPING FEDERATION OF CANADA