



Comparison of Canadian & U.S. Regulation Impacting Shippers & Carriers

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OVERVIEW

I. Rail Freight Overview U.S./Canada

II. Rail Regulation 101

III. Major Regulatory Distinctions: U.S. v. Canada

A. Rates

B. Access

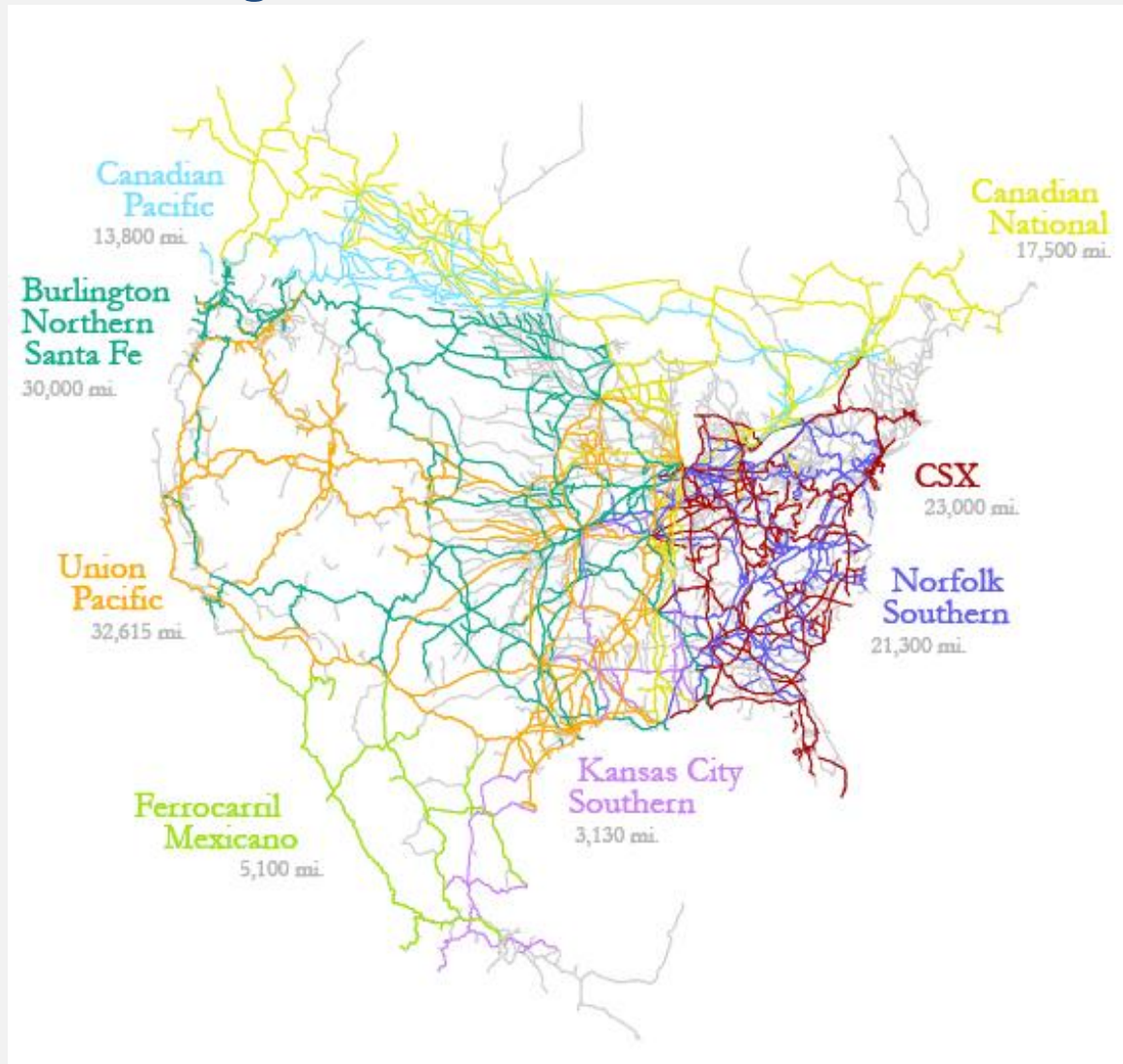
C. Service

D. Liability (Hazmat)



I. Rail Freight Overview U.S./Canada

Freight Railroads in North America



Transborder Traffic of Canadian Railroads

CN

CP

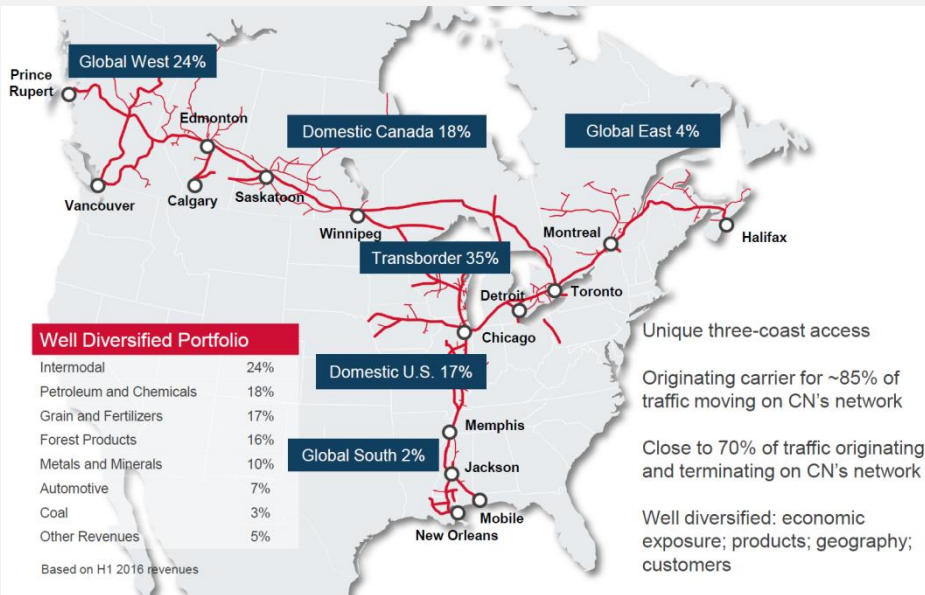
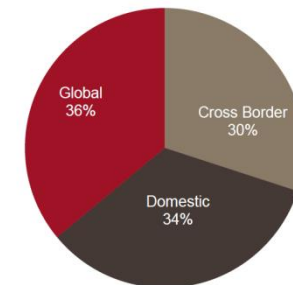


FIGURE 1: CP NETWORK



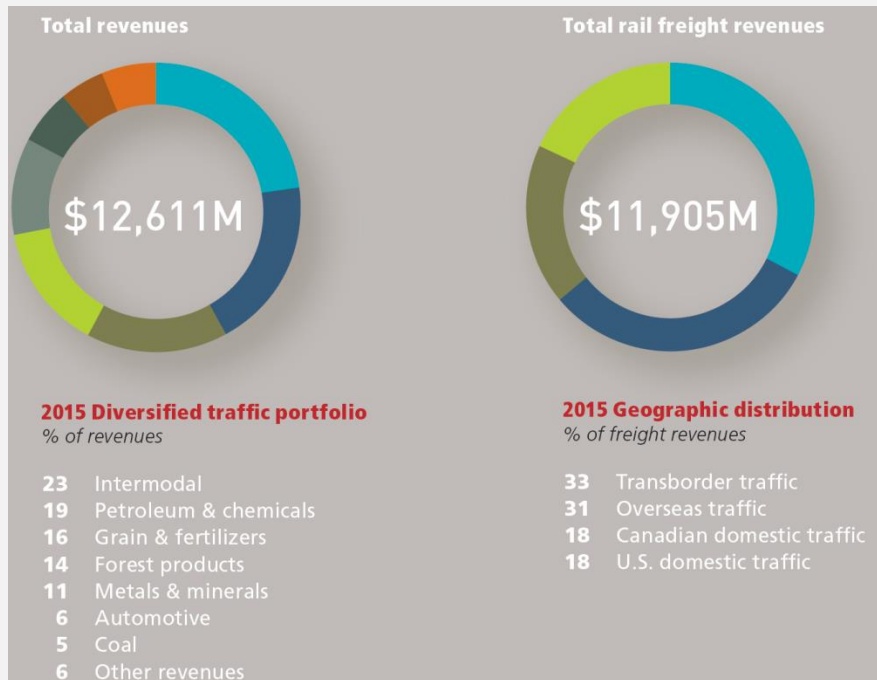
FIGURE 2: CP'S TRAFFIC BASE (2013)



- Canada was the 2nd largest supplier of goods to the US in 2015 (\$295B)

- United States was largest supplier of goods to Canada in 2015 (\$280B)

CN



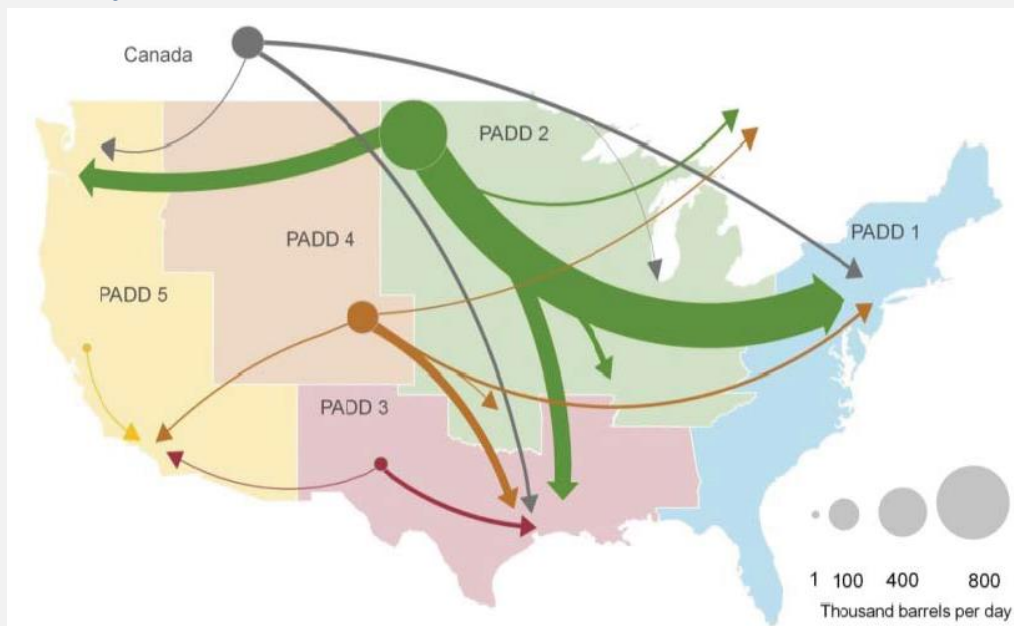
Source: CN 2016 Investor Fact Book

CP



Source: CP 2016 Investor Fact Book

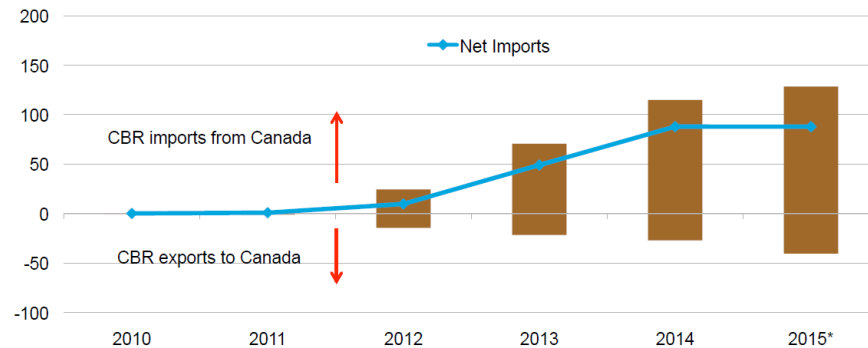
Crude-By-Rail flows, 2014



Source: EIA, (PADD= Petroleum Administration for Defense Districts)

Canada-U.S CBR trade is still modest in both directions

Crude-by rail movements between the U.S. and Canada
thousand barrels per day



* 2015 data are averaged through March

Source: EIA estimates based on data from the Surface Transportation Board and other information

II. Rail Regulation 101

Principal U.S. Railroad Regulators



Economics,
Service and
Other Railroad
Practices



Rail Safety



Hazardous
Materials

Principal Canadian Rail Regulators

Canadian
Transportation
Agency

Transport
Canada

Economics, Service
and Other Railroad
Practices

Rail Safety

Economic Regulators

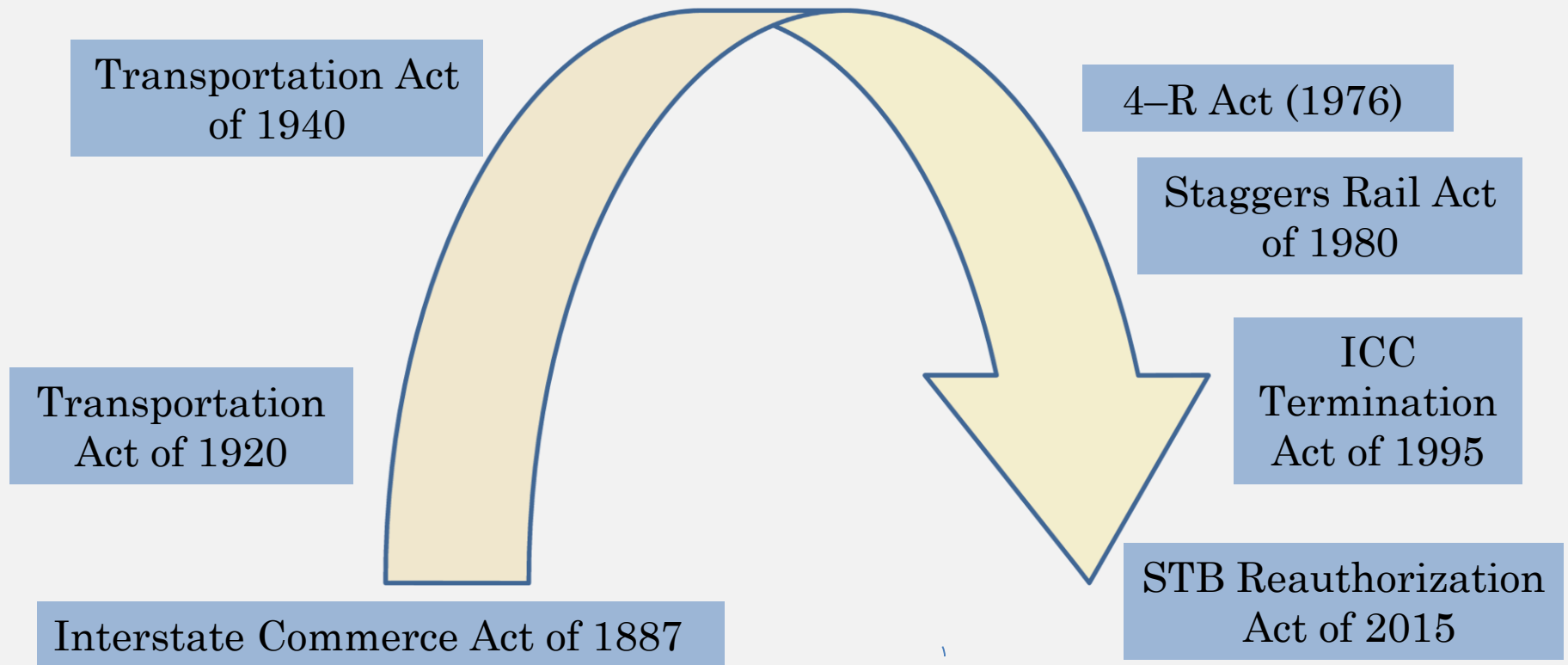
Surface Transportation Board (STB)

- An independent federal agency
- The three STB members (authorized to be five) are appointed by the President for five year terms, subject to Senate confirmation
- The current STB members are: Daniel R. Elliott, III (Chairman); Deb Miller (D); and Ann D. Begeman (R)
- STB has exclusive jurisdiction over common carrier freight railroad economic regulatory issues
- Adjudicatory/regulatory authority

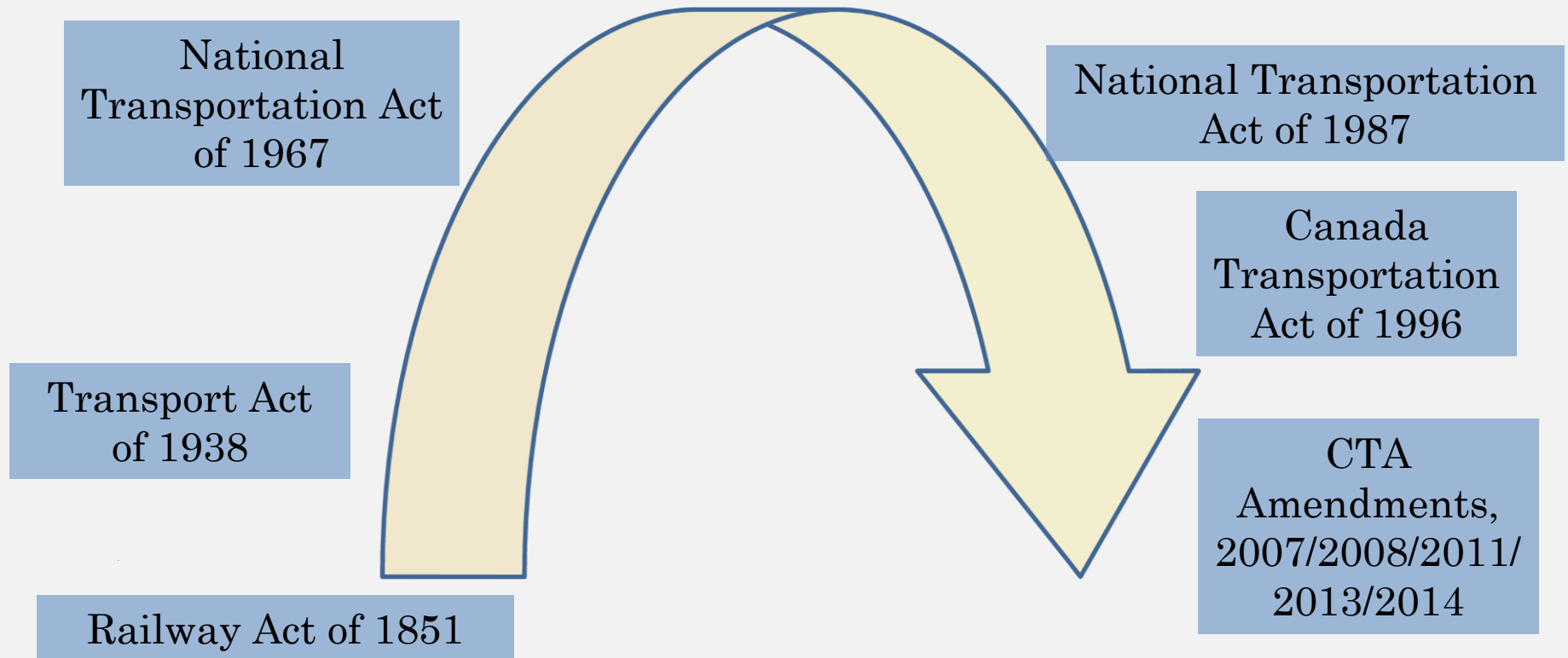
Canadian Transportation Agency (CTA)

- An independent administrative body of the Government of Canada
- The five members are appointed by the Governor-in-Council
- The current CTA members are: Scott Streiner (Chair and CEO); Sam Barone; Stephen Campbell; Peter Paul Fitzgerald; and William G. McMurray
- CTA has jurisdiction over railroad economic regulatory issues within the specific powers assigned to it by legislation
- Adjudicatory/regulatory authority

A Historical Overview U.S. Regulation



A Historical Overview Canadian Regulation



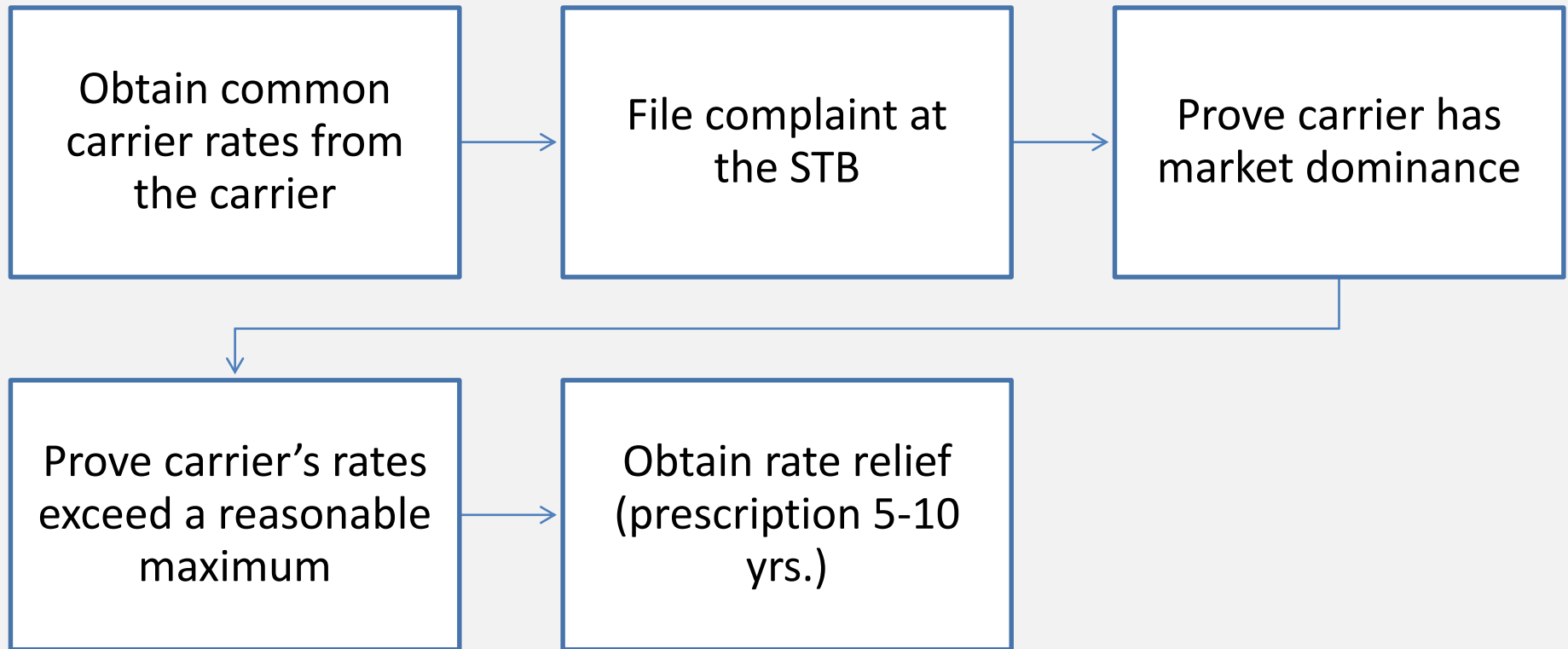
III. Major Regulatory Distinctions: U.S. v. Canada

- The STB has authority to regulate a railroad's common carrier activities in various respects:
 - **Rates**: Carrier has duty to provide rates for service to any person, on reasonable request, and rates for captive customers “must be reasonable” 49 U.S.C. §10701(d)(1)
 - **Practices**: “A rail carrier providing [common carrier rail service] shall establish reasonable . . . rules and practices related to that transportation or service” 49 U.S.C. §10702
 - If the STB finds that a practice is unreasonable, it can order the railroad to desist and to adopt a reasonable practice 49 U.S.C. §10704
 - **Service**: Generally, common carrier obligation includes duty to provide service on reasonable request and adequate track and other service equipment and facilities

- The STB has implemented rules of general applicability with respect to the common carrier obligation when warranted
 - *E.g.: Fuel Surcharges. STB in *Ex Parte No. 661* determined that it was an unreasonable practice for railroads to compute fuel surcharges as a percentage of existing rates, and ordered carriers to change practices*
- Often, disputes are resolved through individual adjudications, upon complaint, or through petitions for declaratory order

A. Rates

STB Maximum Rate Regulation



Pending/Recent STB Rate Cases

- **Several coal (SAC) rate cases have been adjudicated/filed:**
 - *WFA v. BNSF* (No. 42088)(2009, settled/dismissed 2015)
 - *AEPCO v. BNSF & UP* (No. 42113) (STB served Nov. 22, 2011)
 - *Consumers Energy v. CSXT* (No. 42142) (filed Jan. 2015) (includes Rev. Adeq. Count)
- **Recently – chemical rate cases:**
 - *Total Petrochemicals v. CSXT* (No. 42121) (STB served Sept. 14, 2016)
 - *SunBelt v. NS* (No. 42130) (STB served June 20, 2014)
 - *DuPont v. NS* (No. 42125) (STB served Oct. 3, 2014)
 - *Canexus v. BNSF* (Three-Benchmark) (No. 42132) (Settled)
- **SAC chemical rate case issues – enormous complexity/costs**
 - Multiple commodities
 - Multiple Origins/Destinations
 - Massive stand alone railroad systems
 - Massive burdens/expenses to litigate
 - Chemical (and other carload) shippers have been wholly unsuccessful in bringing these large rate cases

Canada Maximum Rate Regulation



- **Final Offer Arbitration (“FOA”), CTA § 161:**
 - Application filed with CTA, adjudicated by arbitrator(s)
 - Matter can involve carrier rates and/or practice matters
 - FOA, like in U.S. complaint proceedings, involves filing of complaint by a shipper(s)
 - » **No explicit market dominance test**
 - Arbitrator must choose between the final offers
 - Decision in effect for one year
 - Expedited process (30-60 days)
 - Decisions are confidential
 - Approx. 30 FOAs have been filed since they were authorized (1987)

Canada Maximum Rate Regulation (continued)

- **Western Grain, CTA, §§ 150, 151:**
 - CTA annually determines a maximum revenue entitlement or “revenue cap” for shipment of western grain by CN and CP, Maximum Grain Revenue Entitlement (“MRE”)
 - If the carrier’s revenues in crop year exceed max. revenue entitlement for the year, excess shall be paid out, and a prescribed penalty
 - » **Payments made to Western Grains Research Foundation**
 - Replaces maximum freight rate regulation for western grain

5.0 CN'S AND CP'S CALCULATED 2014-2015 MRE AND REVENUE

[58] The Agency has determined the western grain MRE and revenue for CN and CP for crop year 2014-2015 as set out below. Each of CN and CP is above its MRE.

Crop year 2014-2015	MRE	Table 2	Amount above MRE	Amount below MRE
		Revenue		
CN	\$738,202,311	\$745,068,906	\$6,866,595	
CP	\$721,908,606	\$724,045,774	\$2,137,168	

B. Access

U.S. Railroad “Access”



- STB has the authority to grant a carrier trackage rights or direct reciprocal switching in a terminal area to deliver freight (49 U.S.C. § 11102)
- Test generally is whether use is “practicable and in the public interest” or “necessary to provide competitive rail service”
- However, since 1986, STB will grant access relief only if the incumbent carrier has engaged in “anticompetitive conduct” (*Midtec* case)
 - The Board will not grant requests for access solely to create or promote competition, or to enable a shipper to obtain lower rates

Reciprocal Switching, EP 711 (Sub-No. 1) (STB served July 27, 2016)

- Board proposes to remove “anticompetitive conduct” test
- Shippers generally argue that proposal will have a modest impact on business (affect only 4% of all carloads), but will result in some meaningful competitive benefits
- Railroads generally argue that proposal will have significant impact on business and will unreasonably disrupt rail service/operations
- Comments due on Oct. 26, 2016 and Jan. 13, 2017

Canada “Access”



- **Regulated Interswitching, CTA §§ 127, 128:**
 - Form of reciprocal switching (at origin or destination)
 - Regulated since 1904
 - Interswitching within a radius of 30 km of an interchange, or a prescribed different distance (Fair Rail for Grain Farmers Act (2014) extended the distance to 160 km in Prairie Provinces)
 - Agency sets rates on a per car basis for distinct interswitching distance zones, and type of carload service (largely formulaic)
- **Running Rights, CTA § 138**
 - Form of long distance trackage rights, beyond interswitching limits
 - CTA authorizes carriers to apply to operate trains “over and on any portion of the railway of any other railway company”
 - Rights have never been exercised
 - Early decisions in 2000s stating that remedy “requires actual evidence of market abuse or failure” for the granting of access
- **Competitive Line Rates, CTA §§ 129-136**
 - Form of bottleneck rate relief, beyond interswitching limits (seeking rates from originating carrier to interchange points)
 - Few applications brought/rarely used: shipper must first enter into arrangements for non-bottleneck routings/connecting carrier

Railway Interswitching Regulations
SCHEDULE

Règlement sur l'interconnexion du trafic ferroviaire
ANNEXE (anglais)

SCHEDULE

(Sections 8 to 10)

INTERSWITCHING RATES

	Column I	Column II	Column III	Column IV	Column V
	Interswitching distance zone	Rate per car for interswitching traffic to or from a siding (\$)	Rate per car for interswitching a car block (\$)	Additional rate per kilometre for interswitching a car (\$)	Additional rate per kilometre for interswitching a car in a car block (\$)
1	Zone 1	229	46	N/A	N/A
2	Zone 2	248	55	N/A	N/A
3	Zone 3	284	65	N/A	N/A
4	Zone 4	251	74	3.38	1.20
5	Zone 5	325	118	2.10	1.60

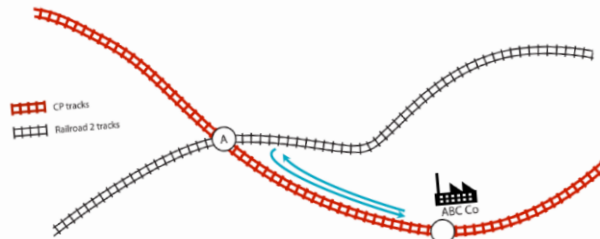
SOR/88-113, s. 1; SOR/90-36, s. 1; SOR/91-12, s. 2; SOR/92-39, s. 1; SOR/92-738, s. 1; SOR/93-614, s. 1; SOR/94-786, s. 1; SOR/95-596, s. 1; SOR/97-84, s. 1; SOR/97-519, s. 2; SOR/2004-201, s. 1; SOR/2013-28, s. 1; SOR/2013-207, s. 1; SOR/2014-193, s. 4.

Consider: CP 2015 NS Merger Proposal

ENHANCED COMPETITION: MODIFIED TERMINAL ACCESS

In order to provide alternatives to shippers and enhance competition:

- CP will allow another railroad access to CP served shippers in terminal areas when service is not adequate and/or rates are non-competitive



- In order to serve ABC Company, a train from Railroad 2 could access CP rail at connection point A and then take the traffic back to connection A to move on their rail network at a predetermined rate.

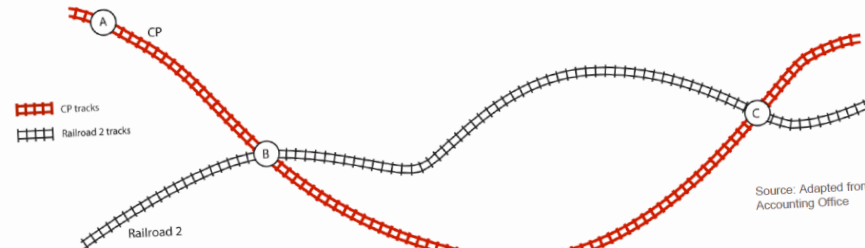
CP

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ENHANCED COMPETITION: BOTTLENECK PRICING

In order to provide alternatives to shippers and secure regulatory approval:

- CP will not use the "bottleneck approach" when quoting rates and will instead quote rates to which gateway the shipper requests



- Bottleneck pricing allows an originating railroad to only quote a rate from A to C
 - The originating railroad is under no obligation to provide a rate from A to B
- To ensure competition is enhanced going forward, CP would provide a rate to either connection point B or C

CP

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C. Service

U.S. Railroad Service



- Carriers must provide service upon reasonable request; provide safe and adequate car service (49 U.S.C. §§ 11101; 11121)
- What's reasonable is fact specific
- STB may issue directed service orders when immediate action is needed to serve the public (*see* UP/SP merger service crisis)
 - A Board service order is initially effective for 30 days, but can be extended for an additional 240 days
- The STB has broad authority to order carriers to produce reports and other data
- 2013-14 railroad service crisis: STB holds hearings, requires carriers to attend/submit service recovery plans; requires additional service-related reporting by carriers (Ex Parte No. 724)

Canada Railroad Service



- **“Level of Services” (LOS) requirements, CTA §§ 113-116**
 - A similar form of “common carrier obligation” to that in the U.S.
 - Carriers generally must provide adequate and suitable accommodation for the receiving, loading, carrying, unloading and delivering of all traffic offered; and shall, without delay and with due care and diligence receive, carry and deliver the traffic
 - Like in U.S., fact specific notions of “reasonableness”
 - Complaint proceeding – investigation and decision within 120 days
- **Service Agreements/Arbitration (2013), CTA § 169.31**
 - Requires carriers to offer a service agreement if requested by shipper
 - Service agreement requests must include the traffic and services requested, and any associated shipper undertakings
 - Provides binding arbitration process option for shippers who are unable to agree on a level of service contract, also covers incidental services (completed within 45-65 days)
- **Fair Rail for Grain Farmers Act (2014), CTA §§ 116.1-116.3**
 - Traffic of grain (arising from 2013 service crisis)
 - Imposed new grain service obligations/quotas on CN and CP
 - Governor in Council may, by order, specify minimum grain volume requirements that must move during crop years

D. Liability/Hazmat

1. Traffic Control Systems, U.S.



PTC – Integrated technologies capable of automatically controlling train speeds and movements

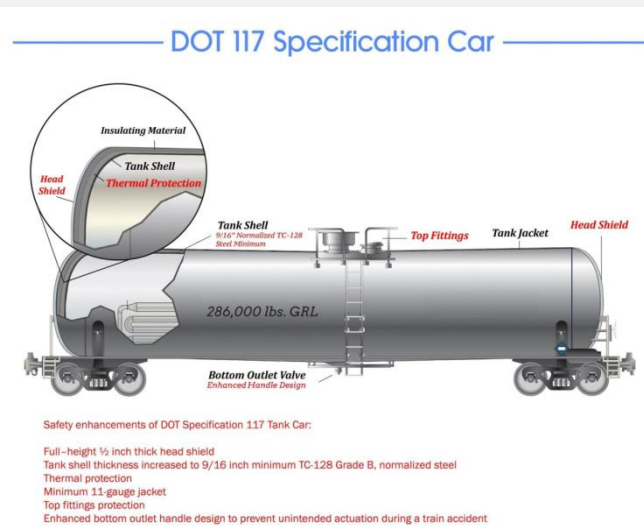
- Implemented by Rail Safety Improvement Act of 2008; FRA issues final rules in 2010/no Canadian equivalent requirement
- Designed to supplement existing train control systems
- Required to be installed on Class I RR main lines in U.S. with
 - (i) > 5 million gross tons of TIH shipments; or
 - (ii) any railroad's main lines over which regularly scheduled intercity passenger or commuter operations are operated
- Approx. 62,000 route miles and 22,000 locomotives to be equipped with interoperable PTC technology
- Implementation due date: end of 2018 (Congressional extension)
- Implementation costs estimated by Railroads to exceed \$10 billion

2. Equipment/Operations:



FRA/PHMSA/Transport Canada issue final tank car rules in May 2015, codified/revised in U.S. by Congress in FAST Act

- New Tank Cars (DOT-117; TC-117) required to meet enhanced design/performance criteria for use in a High Hazard Flammable Trains
- Existing tank cars must be retrofitted/retired in accordance with the prescribed standards
- Benefits: Improved puncture resistance; increased thermal survivability; enhanced protection of top fittings
- Retrofits must be completed based on a prescriptive retrofit schedule focused on two risk factors, the packing group/commodity and car type
- Reduced Operating Speeds: 50-mph for trains



Crude & Ethanol Tank Cars:

Table 6: Estimated Quantity of DOT-111 Tank Cars in Need of Retrofit	
Tank Car Type / Service	Fleet Size
Non-Jacketed DOT-111 tank cars in PG I service	11,637
Non-Jacketed DOT-111 tank cars in PG II service	18,493
Jacketed DOT-111 tank cars in PG I and PG II service	2,356
Non-Jacketed CPC-1232 tank cars in PG I and PG II service	15,895
Jacketed CPC-1232 tank cars in PG I, PG II service, and all remaining tank cars carrying PG III materials in an HHFT (pressure relief valve and valve handles).	24,933
Total	73,314

Other Flammable Liquid Tank Cars:

Table 8: PHMSA Projected Flammable Liquids Tank Car Fleet Used for FAST Act Cost Determination	
Sub-Fleet	Other Flammable Liquids
Non-jacketed DOT-111s	16,577
Jacketed DOT-111s	6,294
Non-jacketed CPC-1232s	1,969
Jacketed CPC-1232s	1,321
Total	26,161

Compare (1) Original Rulemaking/Canada Deadlines

Timeline for the Retrofit of Affected Tank Cars for Use in North American HHFTs			
Tank Car Type / Service	US Retrofit Deadline*	Tank Car Type / Service	TC Retrofit Deadline
Non Jacketed DOT-111 tank cars in PG I service	(January 1, 2017) January 1, 2018	Non Jacketed DOT-111 tank cars in Crude Oil service	May 1, 2017
Jacketed DOT-111 tank cars in PG I	March 1, 2018	Jacketed DOT-111 tank cars in Crude Oil service	March 1, 2018
Non Jacketed CPC-1232 tank cars in PG I service	April 1, 2020	Non Jacketed CPC-1232 tank cars in Crude Oil service	April 1, 2020
Non Jacketed DOT-111 tank cars in PG II service	May 1, 2023	Non Jacketed DOT-111 tank cars in Ethanol service	May 1, 2023
Jacketed DOT-111 tank cars in PG II service	May 1, 2023	Jacketed DOT-111 tank cars in Ethanol service	May 1, 2023
Non Jacketed CPC-1232 tank cars in PG II service	July 1, 2023	Non Jacketed CPC-1232 tank cars in Ethanol service	July 1, 2023
Jacketed CPC-1232 tank cars in PG I and PG II service and all remaining tank cars carrying PG III materials in an HHFT (pressure relief valve and valve handles).	May 1, 2025	Jacketed CPC-1232 tank cars in Crude and Ethanol service and all remaining tank cars carrying PG III materials in an HHFT (pressure relief valve and valve handles).	May 1, 2025

* The January 1, 2017 date would trigger a reporting requirement, and shippers would have to report to DOT the number of tank cars that they own or lease that have been retrofitted, and the number that have not yet been retrofitted.

Note: On July 25, 2016, Transport Canada directed the accelerated phase out of all DOT-111s in crude oil service to **Nov. 1, 2016** (Protective Direction 38)

with . . . (2) U.S. Fast Act Deadlines

Table 1: Comparison of HM-251 Tank Car Phase-out Schedule vs. FAST Act Phase-out Schedule (Tank Cars in Class 3 Flammable Liquid Service)		
Tank Car Type / Service	HM-251 Phase-out Deadline ⁴	FAST Act Phase-out Deadline ⁵
		Crude ⁷ – January 1, 2018 Ethanol – May 1, 2023
Non-jacketed DOT-111s	PG I – January 1, 2018 ⁶ PG II – May 1, 2023 PG III – May 1, 2025	Flammable PG I – May 1, 2025** Flammable PG II/III – May 1, 2029*
	PG I – March 1, 2018 PG II – May 1, 2023 PG III – May 1, 2025	Crude – March 1, 2018 Ethanol – May 1, 2023 Flammable PG I – May 1, 2025** Flammable PG II/III – May 1, 2029*
Non-jacketed CPC-1232s	PG I – April 1, 2020 PG II – July 1, 2023 PG III – May 1, 2025	Crude – April 1, 2020 Ethanol – July 1, 2023 Flammable PG I – May 1, 2025** Flammable PG II/III – May 1, 2029*
	Jacketed CPC-1232s	May 1, 2025
**Extendable up to May 1, 2027, if the Secretary finds that insufficient retrofitting shop capacity will prevent the phase-out of tank cars not meeting the DOT-117, DOT-117P, or DOT-117R by the deadline.		
*Extendable up to May 1, 2031, if the Secretary finds that insufficient retrofitting shop capacity will prevent the phase-out of tank cars not meeting the DOT-117, DOT-117P, or DOT-117R by the deadline.		

3. Shipment Obligations/Liability Issues



a. U.S. – Issues decided at STB/Regulatory Litigation

- Railroad Common Carrier Obligation to Move HAZMATs (FD 35527, *E. Strohmeyer and J. Riffin – Acquisition and Operation Application – Valstir Industrial Track in Middlesex and Union Counties, NJ*)
- Railroad Indemnity/Liability Tariffs (FD 35504, *UP – Petition for Declaratory Order*; NOR 42145, *Agrium Inc. v. Canadian Pacific Ry.*)
- Tariffs Addressing Operations (e.g., use of dedicated trains, special notification requirements, reduced train speeds) (NOR 42129, *American Chemistry Council et al. v. Alabama Gulf Coast Ry.*)
- Railroad “Short Haul” Interchange/Routing Cases (NOR 42131, *Canexus Chemicals Canada L.P. v. BNSF Ry.*)
- Railroad Surcharges for Use of DOT-111s in Crude Oil Service (NOR 42146, *Am. Fuel & Petrochemical Mfrs. v. BNSF Ry.*)
- Many interested stakeholders and their trade associations involved
- Railroads: TIH shipments constitute a “bet the business” proposition
- Hazmat shippers: initiatives constitute unreasonable practices/ improper attempts to undermine the common carrier obligation

b. Canada – Regulatory Litigation/Legislation



RR Indemnity/Liability Tariffs

- Matters initially litigated before CTA, decisions 202-R-2013; CTA 388-R-2013, and then appeal to Fed. Ct. of Appeal
- June, 2015: Safe & Accountable Rail Act (“SARA”)
 - Subsection 137.(1) of the Canada Transportation Act provided (until June, 2015):

“137.(1) A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers”
 - SARA repealed and replaced section 137:

*“137.(1) The railway company’s liability, including to a third party, in respect of the movement of a shipper’s traffic shall be dealt with between the company and the shipper **only by means of a written agreement that is signed by the shipper** or by an association or other body representing shippers.*

137.(2) If there is no agreement, the railway company’s liability to the shipper in respect of a loss of or damage to a shipper’s traffic in the company’s possession or for any delay in its movement shall be dealt with between the company and the shipper, (a) on the application of the company, by the Agency; or (b) if there is no application or, if there is an application but the Agency does not specify any terms or conditions with respect to the matter, in the manner set out in the regulations.”

b. Canada – Regulatory Litigation/Legislation (continued)

- SARA also creates new Required Insurance obligations (eff. June, 2016)
 - Minimum insurance for regulated railways ranging between \$25 Million (CAD) to \$1 Billion (CAD), depending on quantities of goods transported
 - Strict liability for carriers for accidents involving designated goods (presently only for crude oil) up to the amount of their minimum insurance limits, subjected to limited defenses (e.g., accidents caused by terrorism, acts of war)
 - Supplementary shipper-financed compensation fund for victims/environmental clean-up (presently only for crude oil) (per ton fees)

Table of Minimum Liability Insurance Coverage (volumes expressed in tonnes per year)			
Minimum required insurance	Crude oil	Toxic inhalation hazard	All other types of dangerous goods
	0	0	< 40,000
\$25M	> 0 - < 100,000	> 0 - < 4,000	≥ 40,000
\$100M	100,000 – < 1.5 million	4,000 – < 50,000	–
\$250M	≥ 1.5 million	≥ 50,000	–
\$1B			

Thank You

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