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Chair

Mr. Larry Miller

Standing Committee on Transport, Infrastructure and Communities

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● (1530)

[*English*]

The Chair (Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC)): I call our meeting to order.

This is just a reminder that this meeting is televised.

I'd like to thank Minister Lebel, Mr. Langlois, and Ms. Gibbons very much for being here. We look forward to your presentation first, and then I'm sure you're looking forward to questions.

With no further ado, Mr. Lebel, I'll turn it over to you.

[*Translation*]

Hon. Denis Lebel (Minister of Transport, Infrastructure and Communities): Thank you very much, Mr. Chair.

Members of the committee, I am very happy and honoured to be here with you.

[*English*]

Mr. Chair, thank you for having me here today to speak about Bill C-52, the Fair Rail Freight Service Act.

I am joined by Annette Gibbons, director general, surface transportation policy, and Alain Langlois, senior legal counsel, modal transportation law, with Transport Canada.

Bill C-52 is a very important milestone for our rail industry. This legislation will help ensure that railways and shippers work together to accomplish a shared goal to improve rail freight service in Canada. It will help shippers expand their growth and their businesses, while ensuring that the railways can manage an efficient rail shipping network for everyone.

As this committee knows, rail shipping is extremely important to our country's economy. Some 70% of our surface freight moves by rail. A strong and effective railway-shipper relationship is essential, which is why our government committed to table this important legislation. It will support job creation, economic growth, and long-term prosperity in Canada.

[*Translation*]

I won't dwell too long on the road that led us to where we are today, but I think it's important nonetheless to touch on it briefly.

In 2008, our government created an independent committee to review the rail freight services in Canada. The committee carried out an in-depth study on rail freight transport. It concluded that there was an imbalanced relationship between the shippers and the railways, and that the situation needed to be rectified by leveraging the shippers' influence.

The committee recommended using service contracts as a commercial tool in order to provide a clear framework and a better predictability and reliability of freight services. In March 2011, our government accepted this commercial approach put forward by the committee. We also made a commitment to table Bill C-52 to ensure that Canada has the rail system that it needs to support a strong economy.

[*English*]

Most importantly, I'm confident this bill will pave the way for better commercial relationships between railways and shippers, which is ultimately the best outcome for everyone.

It is essential for the committee to understand why this legislation is necessary. We are not dealing with the normal free market. The reality is that many shippers have limited choices when it comes to shipping their products. It is therefore necessary to use the law to give shippers more leverage to negotiate service agreements with the railways.

The intent is to create the conditions that will allow for successful commercial negotiations that would normally be possible in a free market. Ideally the legislation will never have to be used.

Bill C-52 was developed in close consultation with both shippers and railways. We consulted widely and listened carefully to the input we received. Multiple sectors, including forestry, agriculture, mining, and energy, came forward to offer their views, as did the railways.

It was important to take the necessary time to carefully consider all of these complex issues and to develop intelligent and responsible legislation.

Most fundamentally, Bill C-52 creates a strong incentive for shippers and railways to negotiate service agreements commercially. It gives shippers the statutory right to a service agreement with the railways, and it will require a railway to make an offer to a shipper within 30 days of receiving a request for a service agreement.

● (1535)

[*Translation*]

Should contract negotiations fail, shippers could turn to the Canadian Transportation Agency to request that an arbitrator impose one. The agency is a regulatory body renowned for its expertise. The agency already manages several other arbitration and dispute resolution processes.

In order to access arbitration, the shipper needs to demonstrate that he or she made the necessary efforts to come to an agreement and that a notice was served to the railway company 15 days before the request for arbitration.

[*English*]

While this is a low threshold to trigger arbitration, it does require the parties to attempt to negotiate an agreement on their own before going to the agents. The shipper will be in the driver's seat. He gets to trigger arbitration, identify the type of service desired, and frame the issues to be addressed in front of the arbitrator. Both the shipper and the railway will then provide submissions to the arbitrator with their views on what the agreement should include.

Through an interest-based process, the arbitrator will have to consider the interests of both parties when establishing an agreement that is commercially fair and reasonable. The arbitrator will have to consider the shipper's transportation requirements as well as the railway's obligation to serve all shippers. The arbitrator will have the flexibility to determine what service elements are fair and reasonable in the particular circumstances of each case. There is no one-size-fits-all solution to these issues because every shipper is different.

It is essential that the arbitrator have enough flexibility to establish an agreement that makes sense for each unique situation. The arbitration process will benefit shippers because it will be fast, only 45 days, and the imposed contract will be binding and non-appealable.

[*Translation*]

To enforce these arbitrated service agreements, Bill C-52 sets out administrative monetary penalties. If the agency confirms that a railway company violated the arbitrated service agreement, it could fine the company a maximum of $100,000 per violation. This threshold is four times higher than the other existing penalties. The penalty would be applied to each violation. Therefore, if there are multiple violations of the arbitrated service agreement, the cumulative fine could reach hundreds of thousands of dollars.

This is a considerable monetary penalty for railway companies who do not respect their commitments. What I am proposing is different from the penalty system that the shippers put forward. They asked the government to give the arbitrator the power to establish a penalty system within the service agreement, therefore allowing them to be compensated later if the railway company didn't provide the services promised.

We studied this proposal very closely, but it entailed significant legal issues which made it inapplicable.

[*English*]

First, punitive penalties are not enforceable in commercial contracts. It would simply be unprecedented to have a regulatory agency impose pre-established penalties. Regulatory agencies address breaches of legislation after they take place, not before.

Second, such a penalty regime would disadvantage shippers by limiting their right to sue the railway in court for real damages after a service breach.

Finally, it would be an enormously complex and time-consuming task for an arbitrator to predetermine a penalty for every different kind of service failure before it happened.

For all these reasons, I'm proposing administrative monetary penalties because they will achieve the same outcome for shippers: a strong financial consequence to ensure railways are held accountable without creating unnecessary legal risk. The penalty regime will be fast, efficient, and inexpensive for shippers. I fully expect that the railways will want to avoid these penalties, so they will respect the imposed terms of service.

● (1540)

[*Translation*]

Now I would like to address certain points that were raised during the debate at second reading.

Some people fear that once this legislation is adopted, shippers who already have an agreement with a railway company will not be able to use arbitration before this contract is enforced.

Shippers and railway companies have entered into these agreements voluntarily, based on certain commercial expectations. Therefore it would be unfair to change the rules of the game for agreements that have already been signed. These agreements will eventually expire, and at that point, the shippers will be able to use arbitration if necessary, as laid out in Bill C-52.

Moreover, in regards to the transportation of goods to the U.S.A., Bill C-52 would cover the Canadian portion of shipments to the U. S.A. However, it would not seek to broaden the agency's jurisdiction in order to cover railway activities in the United States.

We have a different railway regulatory system than the United States. Expanding the scope of Canadian laws to include the United States would cause problems and compromise Canada-U.S. relations. Furthermore, American carriers operating in Canada would strongly oppose such an idea. Essentially, we must respect American jurisdiction just as the United States respects ours.

[*English*]

I've also heard concerns that there is no commercial dispute resolution mechanism established in Bill C-52.

By definition, you cannot use legislation to impose a commercial process. This bill outlines an arbitration process to resolve disputes once commercial options have failed. What the parties agree to do commercially is entirely up to them. Nothing in the bill prevents them from coming up with their own commercial dispute resolution process.

Shippers are also concerned that it may be too costly for them to use the arbitration process. This bill limits the costs that the government can control. The arbitration process has been limited to 45 days, in part to keep costs down. For the other costs, shippers may wish to enlist lawyers and experts to assist them in the arbitration process, but they control the use of such services.

It is also important to highlight that nothing in the bill diminishes the existing common carrier obligation that railways have had for over 100 years under section 113 of the act. The new arbitration process that will be established by Bill C-52 complements the existing provisions in the act.

[*Translation*]

In conclusion, when we made a commitment to table this bill, we clearly indicated that its emphasis would be on the service. The shippers supported this approach, and when it was being drafted, they did not ask for the rates to be included. The legislation lays out other measures that allow shippers to address rates and fees if the shippers believe that they are unfair.

Bill C-52 is complementary to other remedies. All of the measures in the bill will offer shippers the clarity, predictability and reliability that they need to succeed. That is what they have told us.

[*English*]

To quote the position of the Coalition of Rail Shippers, “Bill C-52 meets the fundamental requests of railway customers for commercial agreements.” Similarly, Pulse Canada, which represents pulse farmers, notes that the legislation will help them ensure that they are “seen in markets around the world to be reliable, consistent suppliers”.

We must act so that our rail freight system is well positioned to support economic growth, resource development, and our government's ambitious domestic and international trade agenda. We need Bill C-52 to ensure more predictable service to shippers, who help fuel our economy, farmers, who sell grain on the international markets, lumber mills, looking to expand sales overseas, and mineral producers, who ship products such as potash and coal.

Railways and shippers depend on each other to succeed. Since the rail freight service review has been launched, we have seen improvements in rail service in Canada. I commend the railways for working with shippers to negotiate for more service contracts. This bill is about solidifying and building upon those important gains.

Mr. Chair, for generations, agriculture and natural resources have created jobs and growth throughout Canada. To harness this potential and build for future growth, we need a strong rail freight system. I call all members of Parliament to support Bill C-52 without delay, so that these proposed measures will help achieve that goal.

I thank you and the committee for your time this afternoon.

● (1545)

[*Translation*]

Mr. Chair, thank you for your attention. My team and I will be pleased to answer any questions from the committee members.

Thank you very much, Mr. Chair.

[*English*]

The Chair: Thank you very much, Mr. Minister.

With no further ado, we'll turn it over to Ms. Chow, for seven minutes.

Ms. Olivia Chow (Trinity—Spadina, NDP): Thank you. I will share some time with my colleague later on.

Normally if a company breaks a contract, the penalty for this company would, if the customer is right, go to the customer. Then why is it, under this bill, the service penalties for non-compliance would be kept by the government and not the customer? Why would the customer complain if they can't get any financial compensation?

Second, why doesn't this bill cover existing service agreements? For the new agreement, why isn't there a template or a model agreement so that it's easier for customers to get started?

Finally, aside from service, the price that's being charged is also a huge concern for shippers across the country. Do you plan to do a full railway grain transportation costing review?

Hon. Denis Lebel: Mr. Chair, first of all to break a contract, we need one. That's what the bill wants to have for shippers. We want to give all shippers in Canada the opportunity to have a contract with railways that respects both parties. That's what we are doing now.

For years some shippers wanted to have a contract with railways, and they were not able to, but we have to thank and congratulate the railways. Since we have started this process, they have done a lot to have agreements with shippers. They already have done a lot. They have done that since we began this process. That's why we are very proud of what we are proposing here.

With this bill we want only one winner, the Canadian economy. We don't want to side with shippers or railways. We only want to give to the Canadian economy the tool it needs to have a better and bigger growth and to help both of them.

That's why in this process we have all tried to find a better solution for shippers and railways. That's why we have the template and all the rest. We want to have a balanced approach, and that's what we have done. Our department is already reviewing all the aspects for grain transportation, and we will come back later with the information about that.

Ms. Olivia Chow: Why then would the government keep the penalties? Normally if I have a problem with my service contractor, Rogers, and Rogers breaks the service agreement, if there is a financial penalty, I as the customer would keep the penalty. Why would the government keep the penalty money? This is not a cash cow. The money belongs to the shippers, because it's their grains that are not being delivered on time, or they received no notification of a change of service. Why would the government keep the penalties? I don't understand.

Hon. Denis Lebel: As I said in my speech, we have some legal challenges with that. We happen to have a lawyer with us who works for the department. I will ask Alain to give you more legal details about that.

Mr. Alain Langlois (Senior Legal Counsel, Team Leader Modal Transportation Law, Department of Transport): First of all, we have to establish the difference between a penalty and damages in the contractual world.

When you're looking at a punishment that you want to impose on somebody for failure to comply with an obligation that exists, that's what we call a penalty.

Money that is paid to one party as a result of another party's failure to comply with an obligation, which is aimed at compensating that party for the loss or the damage that party suffers, is damage.

What has been put in this legislation is the first thing, the penalty that is destined to punish the railway if they don't comply.

Throughout the consultation the government has had with the shippers, they have expressed strong concern that we as a government not affect their ability to sue for the actual damages resulting from a breach of obligations by the railway.

Normally in a commercial contract, the parties will agree on a predetermined amount of damages that may be payable by one to the other in the case of a breach. That is called a penalty clause in contract, but that's not what this bill does. This bill addresses the first point, which is the actual penalty.

I'll stop there.

● (1550)

The Chair: Mr. Aubin, you have about two minutes.

[*Translation*]

Mr. Robert Aubin (Trois-Rivières, NDP): Thank you.

I have two quick questions.

Approximately 80% of users were dissatisfied with the services. As a result, I imagine that a lot of $100,000 fines will end up in the government coffers. Will this money go directly into the consolidated revenue fund? Has anyone considered creating a fund dedicated to developing transportation in Canada?

Hon. Denis Lebel: You had two questions. You asked the first one but I am waiting for the second one. Would you like me to answer the first question? You won't have time to ask your second question, Mr. Aubin.

Mr. Robert Aubin: The second question is about the agreements. Unless I am mistaken, this same 80% of users cannot sign these new contracts before their existing contracts have expired. On average, how many years will it be before these contracts can be renegotiated?

Hon. Denis Lebel: These are private agreements between the shippers and the railways. We are introducing this legislation in order to encourage these agreements. Therefore we will respect contracts that have already been signed. Our objective is to promote commercial agreements between the shippers and the railways.

Earlier in my presentation, I said that we hope that this legislation would never have to be used. I also mentioned that, since this process started a few years ago, we must acknowledge that the railways have considerably improved their services. We hope that these new measures never have to be enforced.

The money will go into a specific fund. I might ask Annette Gibbons to provide you with further details.

Mr. Aubin, the government's objective is to provide shippers and railways with a commercial agreement. We definitely do not want this to be a means of generating income for the Canadian government. As Mr. Langlois was explaining earlier, our greatest challenge is the legal aspect.

Ms. Gibbons can now tell you about the fund.

Mrs. Annette Gibbons (Director General, Surface Transportation Policy, Department of Transport): The money will in fact go into the federal government's consolidated revenue fund. This is a feature of all administrative penalty systems, as stipulated by law. This system is no different. We want to encourage railway companies to respect these agreements. Arbitration will ensure this. In this context, the objective is to ensure that these agreements are respected, not to make money for the government. As I said earlier, one of the features of this system is that the money will go into the federal government coffers.

Mr. Robert Aubin: Thank you.

[*English*]

The Chair: Thank you very much.

We'll now move to Mr. Goodale for seven minutes.

Hon. Ralph Goodale (Wascana, Lib.): Thank you, Mr. Chairman.

Could I just pick up on that last point about the difference between the penalties that would go into the fund and the issue of damages for deficient performance by the railways? I take it Mr. Langlois is saying that the fact that a railway may have a penalty applied to it would not impair the shipper's ability to sue for damages if they thought there was a case to pursue, and the damages would go to the shipper if they were successful in the legal action.

Mr. Alain Langlois: That's right.

Hon. Ralph Goodale: I just wanted to confirm that point.

Minister, I—

Hon. Denis Lebel: This bill is to have an agreement between the shippers and the railways, and when the government signs, they have to respect it after that, and they can....

Hon. Ralph Goodale: Yes.

Minister, as I think you know, I've been anxious to see this legislation for quite some time, and obviously now that it's in committee I want to see it progress as quickly as possible through this part of the legislative process. But I'm also anxious to ensure that when we get to the point of hearing shippers as witnesses before the committee, they will have a full opportunity to explain, if they see any deficiencies in the legislation, where those deficiencies might be. Perhaps they will make recommendations for amendments, and I hope the government will be receptive to constructive ideas on where this legislation might be improved.

Could I ask you about the nature of the SLAs, the service level agreements? The shippers were quite clear, over a long period of time, that there were six things they wanted to see in those agreements, not to prescribe what the precise terms would be, but the subject heads would need to be in the agreements. One of those would be a description of the services and obligations. The second would be communications protocols to describe how the parties talk to each other. Third would be performance standards. Fourth would be performance metrics. Fifth would be consequences for non-performance, which is a part of the subject we were just discussing. Sixth would be a dispute resolution mechanism.

Can you confirm, Minister, with the possible exception of the last one, which you referred to in your opening remarks, that the other subject heads will be in the kinds of agreements that would be arbitrated by the CTA, with those subject heads covered?

● (1555)

Hon. Denis Lebel: Okay. I'm very happy to hear that you are very interested in this bill. I know that shippers have been waiting for this bill for years. I know that you were in government for 13 years before our arrival, and I'm very happy to hear that you're still very interested in this bill. We'll continue to work very hard on it.

But to let you know, we want to leave space in the agreements. If we are too tight.... We don't want one-size-fits-all for all the agreements. That way, the shipper will ask the railway what they want to have in their agreement, and if they have a deal, that will not go to the arbitrator. That's why we don't want to define exactly what will be in the deal, because we will let both parties decide what will be in the agreement. We will respect that and we'll continue to support that. If they don't have a deal, at that time the arbitrator will be there to be the referee. For that, we want to leave space for the arbitrator and not be too tight on things.

Hon. Ralph Goodale: I don't think the shippers, Minister, have ever said that the legislation or the regulations should prescribe all of the terms of the agreements, but they wanted the assurance that those agreements would at least cover off the areas that were important to a good commercial relationship.

You've mentioned that you have reservations about a dispute resolution mechanism. We can come back to argue that one another time, but what of the other subject areas would you have an objection to? Services and obligations, communications protocols, performance standards, performance metrics, and consequences for non-performance: why wouldn't those areas logically fit within the parameters of a service level agreement? Also, why would a railway object to such logical things being there?

Hon. Denis Lebel: The elements can be included in the arbitrator's decision and service, and framed broadly, to cover any rail service issue, including most all the items shippers ask for, except for penalties in the commercial dispute resolution process. They can be in.

Hon. Ralph Goodale: Well, I think we'll need to hear the shippers on whether that's an adequate framework. I'm glad that it's permissive in the sense that they can be in, but I think the shippers might want some assurance that those subject areas would be properly covered.

Mr. Chairman, I have one more point about the existing confidential contracts that some shippers may have already negotiated. Those contracts may or may not cover the kinds of things I've just described, and yet, if there is a confidential contract in place, whether or not it's a good one, an effective one, it was obviously negotiated without the benefit of this legislative framework. The particular shipper that has that kind of agreement with the railway would be barred from having access to the arbitration procedure until the existing contract expires.

I wonder if that's a way of rationing access to the CTA so that it's not overwhelmed by applications for arbitration. Or is there some other reason you wouldn't allow the shippers to migrate to a better arrangement, namely, an SLA, rather than remaining locked into an existing agreement that may be deficient? It's important, obviously, to get to the best possible result for everybody. I would think it might be wise to let them go to the CTA if the present contract proves to be insufficient.

● (1600)

Hon. Denis Lebel: For sure, as I have said, these contracts were signed in a good partnership by both parties at the time. But the information we have is that most of these contracts are for only one or two years, and most will end very soon, I think. At that time, it will be easier for them. But we're doing all that to have contracts. What doesn't respect the ones that are already signed?

The Chair: You're out of time, Mr. Goodale.

We now move to Mr. Poilievre for seven minutes.

Mr. Pierre Poilievre (Nepean—Carleton, CPC): Thank you.

On the question of the awards, this could go either to the minister or to the legal analysts. If the CTA were to predetermine a fine to be awarded to the shipper, what would that do to the shipper's subsequent right to seek damages in court?

Mr. Alain Langlois: Normally when you have such a clause in a contract, it's interpreted by a court as being a surrogate for the actual damages the court would normally allow to be paid if you were to go to court. It's normally viewed as an agreement to the party of the amount that will become payable if there's a breach. It's a contractual agreement. You don't go to court. You have an amount that's specified in a contract, and that's the amount that's payable, regardless of what are the actual damages suffered by the one party.

Mr. Pierre Poilievre: If, in a hypothetical case, the shipper had damages that were larger than the award previously assigned by the CTA, then they would not be able to pursue those additional damages in the court. It would actually fall behind as a result of a prescribed award.

Mr. Alain Langlois: That's correct. That's why it's difficult to envision that an arbitrator would actually impose these kinds of damages in the absence of an agreement between the parties. It almost has to be an agreement between the parties. It's an abdication of the party's right to go to court for actual damages. In order to have that consequence on a party, you want the party to agree, as opposed to having an arbitrator impose these types of amounts.

Mr. Pierre Poilievre: So under that hypothetical proposal, the arbitrator would be abdicating the shipper's right to go to court for damages in the event of some breach of contract.

Mr. Alain Langlois: That's correct.

One of the dangers, and one of the legal hurdles or problems, is that normally these types of damages are set at an amount that tries to replicate what the actual damages will be, but—

Mr. Pierre Poilievre: They don't know.

Mr. Alain Langlois: —the danger in having an amount that could be established at a very high level is that the penalty in a commercial contract is unenforceable. If the amount is too high, the courts will not enforce the amount because they will deem this amount a penalty. If the amount is too low, then it has the effect that you just described: it affects a shipper's ability to seek the actual damage amount.

Mr. Pierre Poilievre: So a proposal to provide shippers with awards from the proceeds of a fine could actually take away the legal rights of the shipper and/or shortchange that shipper of amounts that he or she might otherwise be entitled to in a breach of contract case.

Mr. Alain Langlois: Correct.

Mr. Pierre Poilievre: Okay. I presume it would be hurting the people we'd be trying to help.

Mr. Alan Langlois: Yes.

Mr. Pierre Poilievre: For clarity's sake, the administrative monetary penalty that this legislation envisions does not take away the shipper's ability to pursue damages for breach of contract in court.

● (1605)

Mr. Alain Langlois: Correct.

It's a government enforcement tool on an order that's been imposed, in this case, it's an SLA , that is above and beyond the right of a shipper to recover damage in court, if they want to do that.

Mr. Pierre Poilievre: So an administrative monetary penalty is punitive, but damages from a court are compensatory.

Mr. Alain Langlois: Right.

Mr. Pierre Poilievre: The two are not mutually exclusive.

Mr. Alain Langlois: Correct.

Mr. Pierre Poilievre: In other words, this bill adds a monetary penalty but does not take away the shipper's right to secure damages.

Mr. Alain Langlois: Correct.

Mr. Pierre Poilievre: Okay.

Shippers have indicated they want greater clarity and predictability on rail freight service.

Will service agreements help you achieve this outcome?

Hon. Denis Lebel: That's what they wanted. They will probably ask for some amendments—we will see—but they did agree with that. That gave them the predictability and the tools they need to have these agreements and to plan for the future.

To invest money in a country, you need to have some tools to show companies around the world that you can deliver what they are asking for, and that's what we are doing now.

Mr. Pierre Poilievre: Minister, shippers indicated throughout the process leading to the tabling of the bill that they wanted three fundamental elements in this bill: the right to a service level agreement; a process to get a service agreement, if one cannot be commercially negotiated; and financial consequences on the railways for non-performance.

Does this bill deliver one of these elements or all of them?

Hon. Denis Lebel: Yes. We'll fix all of that. The arbitration system will be short and not really expensive. A period of 45 days for some people can be long, but for us in the system that's not long. We think that will fix mostly everything that the shippers wanted.

Mr. Pierre Poilievre: Do you agree that commercial solutions are the best approach to resolve shipper-railway disputes?

Hon. Denis Lebel: It was former Minister of Transport Cannon who launched that. I'm actually the fourth Minister of Transport to work on it.

I'm very proud to arrive with this tool to support the Canadian economy, and I'm sure that's the right way to do it.

Mr. Pierre Poilievre: Many shippers say they do not have balanced commercial negotiations with railways.

Would this remedy of arbitration on service agreements help to give shippers the leverage they need?

Hon. Denis Lebel: Absolutely.

As we have said, many agreements have been signed in the last years. We think that is because we have started this process.

In the future we think there will be more and more agreements. We hope this bill will never be used, but we'll see. Railways are there. Shippers are there. Business is there. Companies want to make money, and shippers do too. That's why we think they will use this tool.

Mr. Pierre Poilievre: Some shippers believe the arbitration process will be too expensive, largely because of the cost of legal representation.

Isn't this up to the shipper to manage?

Hon. Denis Lebel: The cost will be split 50-50 between the shippers and the railways, and the arbitration will take 45 days. We think that's the right time and that's the best process to do it. There will be some cost, but that's the price to pay to have this kind of agreement. I hope it will not be used again.

The Chair: Thank you, Mr. Minister.

Mr. Poilievre, your time is up.

Mr. Toet, for seven minutes.

Mr. Lawrence Toet (Elmwood—Transcona, CPC): Thank you, Mr. Chair.

My understanding is that this bill is essentially a backstop. What we want to see, Mr. Minister, and maybe you can confirm this, is that commercial contracts are the desired methodology going forward. This is meant to be a backstop to bring that forward in a more expeditious fashion, for both sides of the equation.

Hon. Denis Lebel: Absolutely. That's the way we have managed this since the beginning of the process. When we set up the committee, we gave the mandate to a facilitator, Mr. Dinning. All the way through this process that was our goal, and now we think we have reached it.

Mr. Lawrence Toet: Thank you.

I want to talk a little bit also on the question of the confidential contracts that have been signed in good faith. As a businessman myself, I believe very much in the free enterprise system, our open market, in which we negotiate contracts. As a businessman, I'd be very upset no matter who the third party was who would step in and say that a contract I've signed, whichever side of the party I'm on, would be basically null and void and I'd have to start all over again because somebody has come in with a new process.

Would you agree that, again, it just comes back to the fact that for commercial contracts, being the desired methodology, we already have those in place? Why would we start to renew commercial contracts that we have today in order to facilitate somebody getting into an arbitration procedure? They've obviously negotiated a contract they were happy with at a point in time.

I would never sign a contract that I wasn't happy with. It might not be the contract I'd love to have, but it would be a contract I'm happy with and could live with, not a contract that necessarily ultimately meets all my goals. Any business negotiation is basically two parties going back and forth and coming to somewhat of a compromise at all points.

Would you agree that the free market approach we're bringing forward here is really in the best interests of Canadian business, both shippers and rail, and both are being brought into a position where they can use their strengths to the best of their ability to help drive economic growth in the country?

● (1610)

Hon. Denis Lebel: Absolutely. The goal we have with this bill is to have an agreement for both parties. Doing that and not respecting the agreements we have already signed is counterproductive for sure. These agreements will come to an end in one or two years, by the information we have, and at that time they will be able to sign another agreement. If they had one in the past, probably they will have another one. Fortunately, the free market is there, and, as I've said, we have only goal at the end. The Canadian economy will win, create more jobs, keep our kids and grandkids in our regions and have more jobs for them. That's why we think we have to respect the contracts that are already signed.

Mr. Lawrence Toet: Good. My kids and my, I hope, soon-to-be grandchildren would be happy to hear that.

I want to talk a little on the fine process. The $100,000 fine has been brought up a few times. There has been some indication from some of the other questions that this is seen more as a source of revenue for the government.

I would see it, and I wonder if you would agree or disagree, as really a desire to make sure that the railway is basically doubly motivated to make sure that they're meeting their obligations. They have one motivation. I think the commercial motivation is probably their number one motivation anyhow. Anybody who wants to run a business, I would assume, wants to run an appropriate business. They want to run a business that is well respected by all parties they deal with, and if you're going from that way of thinking, you also want to be well respected by your clients, or your shippers in this case.

Would you say this is basically meant more as a bit of doubling up of that motivation, not looking for a source of revenue? In fact, hopefully from the government's perspective, this is a fine we very rarely or never would collect.

Hon. Denis Lebel: Yes. We think with the bill we have now for railways, they will not want to pay this fine, and shippers, because the fine will go to the government, will not do things for nothing either. We're forcing an agreement. That's what they wanted. That's why we're working on that. I repeat, the Canadian economy will win in the end. That's what we want.

We want good agreements for both parties, and we think that the tolls we have now will be very helpful in that regard. That's what we think.

Mr. Lawrence Toet: I have one last item I want to touch on, the timeframe for the arbitration. I find it very interesting. To me, it is a very short timeframe of 30 days. When you've gone through the process.... It sounds to me like it's not a really onerous obligation on the part of the shipper to show they have done some really intense negotiation, that they have got into the process, and if they seem to be making no headway, then within 30 days they can go for arbitration, and then it's in 45 days that the arbitration is actually resolved by the arbitrator.

From your perspective and the dialogues you've had—and from what I understand there have been many dialogues with all parties and all stakeholders on this over the course of the years—would this short timeframe be something that should be very acceptable to all the parties?

Hon. Denis Lebel: Yes, from the information we have, for sure everybody wants to have a shorter one, but is that the right amount of time to give the arbitrator to do the job? The agreements must be arbitrated. The arbitrator will have to consider a lot of things and ensure those agreements are commercially fair and are reasonable for both shippers and railways. We think that 45 days is the right length of time to do that.

Mr. Lawrence Toet: How much time do I have left, Mr. Chair?

The Chair: You still have a little over a minute, Mr. Toet.

Mr. Lawrence Toet: I'm too efficient here, I guess.

The last thing I want to touch on I briefly touched on in my last question. I sense from reading some of the documentation that's gone on over the years, there's been a lot of consultation with all stakeholders going through this process and coming up with Bill C-52. Minister, could you touch on how much consultation was held and how deep that consultation has been? It might be interesting for the committee to hear that.

● (1615)

Hon. Denis Lebel: As I've said, I'm the fourth Minister of Transport to work on this bill. We've been working with stakeholders for years to build the best possible bill. The committee has done a very good job, composed a very good report. I don't know the numbers. Do you have the number?

Mrs. Annette Gibbons: There were 140 submissions to the rail freight service review panel.

Hon. Denis Lebel: That's a lot. The facilitator, Mr. Dinning, did another incredible job consulting most of the stakeholders involved in this process. Since we announced this bill, we have seen how these stakeholders reacted, and we're very proud of what we have now. I'm a former ball player, like many of you, and for sure we will not hit 4,000, but at least we have a very balanced approach. It will fix a lot of things in the Canadian economy.

Mr. Lawrence Toet: Thank you.

The Chair: I hear you were a very good ball player, Mr. Minister.

Hon. Denis Lebel: I don't know.

The Chair: We'll now turn it over to Ms. Morin. You have five minutes.

[*Translation*]

Ms. Isabelle Morin (Notre-Dame-de-Grâce—Lachine, NDP): Thank you.

Thank you for being with us, Minister.

I'm happy to note that you want the bill to be as good as it can be. At the same time, it appears to me that it does not allow the smallest businesses, such as family farm cooperatives, to access negotiations for service contracts with CN and CP. It seems to me that this is still reserved for large companies that can secure the best services.

I'm sure you will tell me that they can go to arbitration, but this costs money. It would be yet another expenditure for small businesses. How will this bill protect the smallest clients, family businesses?

I have another question. I was surprised earlier. My colleague asked you how long the contracts that have been signed would last and you said that they were private contracts. However, when my Liberal colleague asked you, you said these were one- to two-year contracts. I am a little bit confused. I would like to know whether these are private contracts or whether you have this information.

Hon. Denis Lebel: I did say that this was information I received. Your question is very relevant and I thank you for asking it. Ms. Gibbons, who is in contact with these people on a daily basis, will provide you with this information.

Ms. Isabelle Morin: That's fine.

Hon. Denis Lebel: Ms. Gibbons will not provide information on any particular contract, but she does have discussions with various partners who have signed contracts, and she was told that they were one- or two-year contracts. I personally have not seen any contracts.

Ms. Isabelle Morin: I understand.

Hon. Denis Lebel: I am not aware of any particular commercial agreement. The information is accurate, right, Ms. Gibbons?

Mrs. Annette Gibbons: Yes, that's right. Railway companies have told us that these agreements usually span one or two years.

Ms. Isabelle Morin: Thank you.

Hon. Denis Lebel: Every time an organization or business puts in a request, rail companies will have to work on a possible agreement. The bill does not mention the size of the business. It could be an agricultural cooperative in my region or in your region. It says that if a business wants to sign a commercial agreement with a rail company serving the region, whether that means shortlines or anything else that falls under federal jurisdiction, the rail companies have to respond to the business's request.

The way you asked the question is interesting. Commercial agreement requests from very small businesses may not be the same as those from a business that exports tonnes and tonnes of products outside Canada. That is why the bill does not impose a one-size-fits-all solution to commercial agreement requests. We are giving trade partners leeway to conclude agreements that meet their needs. We are also giving leeway for arbitration, even though we hope it will not be needed, so that everything can be analyzed based on criteria that will give businesses and rail companies the opportunity to come to an agreement.

[*English*]

The Chair: Mr. Sullivan.

Mr. Mike Sullivan (York South—Weston, NDP): I'm going to continue Madame Morin's time.

Mr. Minister, I have two questions.

Regarding small versus large, a small business will be less able to afford the costs of the arbitration process, which can be quite large. Each arbitrator in Ontario charges $4,000 to $5,000 per day for services. If you have a hearing that lasts even part of that 45 to 65 days, it can run up quite quickly into $100,000 or more, not counting the small business's own legal bills. A small business will have a much more difficult time going up against a multi-billion dollar corporation like CN and CP, and there is no assistance in this bill for those individuals.

I'm asking two things. Would you consider assistance, and perhaps you'd consider the use of the administrative monetary penalties as a kick-start to an arbitration regime, which would help small businesses? So if you have to collect, and perhaps there's a kick-start to start it, that money doesn't just go into general revenue; it actually helps with the process.

The other question, if I may, is whether or not your ministry is considering helping Canadian Pacific with its plans to build a tunnel across the Detroit River, between Detroit and Windsor. As you have helped with the bridge, will you be helping with the tunnel?

● (1620)

Hon. Denis Lebel: We think we have to let the private companies manage their own business. We'll follow what will happen with CP about that, but that's their business choice. We'll see what will happen with that.

For the size of companies, no companies want to start the process to have an agreement with a railway only for it to be finished by an arbitrator. For sure the small companies, small organizations, will express their needs, but at the beginning they will not want to go in front of an arbitrator and have to wait 45 days to have an agreement. We think these kinds of companies will have their requests, but they will know the capacity they have to manage this kind of agreement.

For sure when it is big companies, it will not be the same kind of discussion, but they will let free enterprise make their choice. That's free market. We know what I have said there. Sometimes some companies worry about the delivery of their service, sometimes it's only one. That's why we want to have an agreement. But at least we will let companies discuss together, organizations discuss together. We expect they will not have problems doing that. Then we can decide what will happen.

The Chair: Thank you.

We will now move to Mr. Holder for five minutes.

Mr. Ed Holder (London West, CPC): Thank you, Chair.

I would like to thank our guests for being here today.

Minister, it's a pleasure to have you here at committee. You indicated that as the fourth minister dealing with this issue, it's finally being dealt with, and I applaud you and your staff for moving it to this point.

I would imagine that the railways and shippers have known that this was coming to this point of fruition. I'd like to get a sense from you whether you have any feeling for what the current relationship is between the railways and shippers. Obviously this has happened historically because of what were perceived as significant problems, but I'd like to get a sense from you. Do you have a feel today, with this legislation pending, for what the current relationship is? In other words, are we getting better? Are they getting better in terms of their interactions with each other? Is there more frequency of offering service agreements? Do you have a feel for that at this stage?

Hon. Denis Lebel: Yes, for sure in the past we started this process because they were having problems. Since we started this process, as we said before, we know the railways have really improved their service and have agreements now with many companies.

Since we have announced this new bill, the reactions on both sides have been very good. We're very confident that it will be very helpful to have these agreements. We know sometimes there's a monopoly in certain parts of the country. It will really help to have this kind of agreement which the shippers have wanted for so many years.

Mr. Ed Holder: I'd like to ask a question but perhaps in a little bit of a different way. We've heard, through various questions asked of you, about the railways' obligations to the shippers, and I guess I'd like to ask it the other way. Does this confer any obligations on shippers to the railways? Is there something that shippers are being asked to do, notwithstanding historical challenges that have been there? I'd like to get a feel for that.

Perhaps you or your staff could help us with that.

Hon. Denis Lebel: As we know, when an agreement is signed, they have to respect what they have signed, but I will ask Annette to respond that.

Mrs. Annette Gibbons: The only obligations on the shipper will be operational matters. For example, for the railway to deliver cars to the shipper, the shipper has to be there and ready to load those cars. The shipper would need to have a crew there.

If the shipper is asking for certain service elements in a service agreement, the bill says that the arbitrator can look at whether there are operational requirements that the shipper has to follow, and put those in the agreement as well.

● (1625)

Mr. Ed Holder: Let me build on that.

If for any reason a shipper does not fulfill a requirement that is part of the service agreement, let's say—I'll speculate here—they take too long to load a car, or whatever it might be that delays a process, would that be deemed a punitive damage that would be potentially awarded by an arbitrator? How would that be perceived if the shipper were at fault?

I'm just trying to get a balanced sense of how this works.

Mrs. Annette Gibbons: The bill does not contemplate any particular consequences for the shipper in the arbitrated service agreement. If the railway is dissatisfied with the way the shipper is respecting the agreement, then that would be something the railway could address on its own. For example, if it were something very egregious, it could use the courts to sue the shipper.

Mr. Ed Holder: So it's much the same way outside of arbitration. If the shipper felt they had some claim, they would go outside of the arbitration arrangement. To be clear again, the arbitration amount is not a punitive issue, it's simply.... From the standpoint of damages, it's not a damages issue.

Mrs. Annette Gibbons: No, it's not damages.

Mr. Ed Holder: It's a compliance issue.

Mrs. Annette Gibbons: It's compliance.

Mr. Ed Holder: I have a curious question.

Minister, if I recall, you said that this would not apply, if I understand it, to American railways in Canada.

Could I ask a very terrible question? What would happen if one of these railways, CP, sold to the United States and then wanted to...? Let's hope that never happens, but let's just say it did. Would they all of a sudden be exempt from this legislation?

I'm not encouraging that, just for the record.

Mr. Alain Langlois: The proposed bill applies to every railway in Canada that is federal in nature. Whether the railway is American, whether the railway is Canadian, if it's a railway that operates in Canada under federal jurisdiction, it applies.

What the minister said was that the jurisdiction of the government or the agency or the arbitrator will not extend to the United States to impose obligation in the U.S.

Mr. Ed Holder: I've got it.

Mr. Alain Langlois: But it would apply to an American railway in Canada. At least then, they have an obligation in Canada.

Mr. Ed Holder: I appreciate that clarification.

I know my time is almost up.

We talk about the amount, up to $100,000, of fine in the event of non-compliance. Does the legislation respond to repeat problems? Let's say it was with the same shipper and the same railway. Would the $100,000 be the maximum, or is there any sense of changing that in the potential for repeat offence, knowing that your intention is to never have to utilize it?

Hon. Denis Lebel: Up to, but it would not be automatically $100,000. It can be more than.... It's per event. It can be $10,000 or $25,000, depending on what the arbitrator decides, but it's per event.

Mr. Ed Holder: Thank you very much.

Thank you, Mr. Chair.

The Chair: Mr. Minister, I know the time is very close to when you have to leave.

Ms. Chow, you have time for one question.

Ms. Olivia Chow: I'm not sure I heard an answer to the last question I asked.

There has been a lot of discussion about the need for a transportation costing review. This has been kicking around for quite a few years. During a stakeholder consultation, every group was talking about the pricing, the actual cost.

The question I had earlier was on whether you are planning to do a full railway grain transportation costing review.

A lot of the farmers are saying the cost is so high for them, and because it's a monopoly, CN and CP basically can charge them whatever. They say they have no choice. They can't just use trucks. It's costing them millions of dollars, partially because sometimes they don't arrive to the containers on time.

Are you planning a costing review?

Hon. Denis Lebel: For certain, we are focused on this bill for the moment. That's our main goal. We're focused on this.

These enterprises are doing business together. We have to respect the agreements they have signed. We will continue to encourage that this kind of agreement be signed.

In the future what we'll do.... I think we have started something on some reviews, but for the moment....

Do you have...?

Mrs. Annette Gibbons: No, there's just the final offer arbitration.

Hon. Denis Lebel: Yes, the final offer arbitration. We are focused on this bill for the moment, and that's the way we would prefer to leave that for the moment.

The Chair: You can ask a short follow-up to that.

Ms. Olivia Chow: Because there's a monopoly situation, you have one side that has all the power, when on the other side, the customers and the shippers really have none. This is why we have the bill in front of us anyway, just to make sure it's balanced and to make sure there's a level playing field.

We've heard, especially for small customers, that the legal fees might be too high, the year timeframe may be too high, and it could be a deterrent for small shippers.

What are you doing to protect them? They've been saying that they desperately need the government's assistance.

● (1630)

Hon. Denis Lebel: All of the stakeholders have been involved in this process for years. We saw the reaction of these stakeholders after we announced Bill C-52. We proposed the bill to let them have the space to have a commercial agreement. That's what they wanted. We will let them have these kinds of agreements. The arbitration will be there if they are unable to have it.

We're sure that's the right tool now to support the Canadian economy.

The Chair: With that, Mr. Minister, I know you have to leave.

We appreciate your taking time out of your busy schedule to be here.

Hon. Denis Lebel: Thank you.

The Chair: We'll suspend for a couple of minutes to allow the minister to leave. Then we'll have more questions for the department.

● (1630)

(Pause)

● (1630)

The Chair: Could I have the members back to the table, please.

Ms. Gibbons and Mr. Langlois, thank you for sticking around.

We'll go back to Ms. Chow, for five minutes.

● (1635)

Ms. Olivia Chow: A news release from your department on March 18, 2011, indicated that the government intended to take additional actions to improve the performance of the rail supply chain. At that time there was a commitment to establish a commodity supply chain table to deal with logistical concerns and develop a performance matrix to improve competitiveness, as well as to lead an in-depth analysis of the grain supply chain in collaboration with Agriculture and Agri-Food Canada.

I was beginning to lead into that question to the minister but I ran out of time. What is the status of these two initiatives? It's long past March 2011.

Mrs. Annette Gibbons: The commodity supply chain table is something that the department intends to get up and running this spring. We've been doing some work on preparing for that. The intention is to reach out to the stakeholders to actually form the group in the coming weeks.

On the supply chain study, the study is just about final. We'll be reviewing a draft of the final report, and expect to have it completed by the end of March.

Ms. Olivia Chow: The timeline for how you're planning to move ahead, the work plan, the report on the supply chain study once the minister has seen it, would you be able to table that at this committee so that we are able to connect it all and get the big picture? Would you be able to do that?

Mrs. Annette Gibbons: The intention is to make that report, the grain supply chain study, public.

Ms. Olivia Chow: Around when are you planning to do that?

Mrs. Annette Gibbons: I really can't give an exact date. I know that we expect to have a complete report around the end of the fiscal year, so around the end of March. If it will be, you know, final-final at that date, I don't know, but we do expect it to be pretty close to completion by then. It will be the government's decision on when exactly it's ready to release it.

Ms. Olivia Chow: Then the consultation and the discussion with the stakeholders, once that's been released, what plan would there be after the report's been finalized?

Mrs. Annette Gibbons: Certainly, we could expect that the commodity supply chain table would provide a forum if stakeholders would like to address issues that are raised in the grain supply chain table. It's certainly the intention that the commodity supply chain table would cover the grain sector, as well as several other commodities, so that would provide a venue for addressing some of the issues that we see in that study.

Ms. Olivia Chow: Is there a discussion of what you plan to do with the funds collected? Is there an estimation of how much it would be?

Mrs. Annette Gibbons: The monetary penalties?

Ms. Olivia Chow: I'm going back now to the arbitrated penalties that would be collected by the government. Do you have a ballpark figure per year of the amount as a result of these arbitrated contract awards?

Mrs. Annette Gibbons: We really don't have a sense of that. The government's expectation is that there will be an attempt to respect the agreements that are imposed by the arbitrator. The specific amounts, they go to the consolidated revenue fund. It's a feature of administrative monetary penalty regimes that this is where they go, and there's no specific attribution of them to any particular activity.

Ms. Olivia Chow: Would there be any legal impediments for those funds to be separated out of general revenue?

Mrs. Annette Gibbons: I really can't answer that. I'm not aware.... I simply know that those schemes do exist in other statutes. My understanding is they just go to the consolidated revenue fund. They're not dedicated to particular purposes.

● (1640)

Ms. Olivia Chow: I know the minister said that one size doesn't fit all, but it was very clear from the stakeholders' review that a template of some kind of guidelines would be in place so that the service contracts wouldn't be a complete blank slate to start. It would save a lot of time. It would save a lot of money. It would save a lot of unnecessary negotiation so there's at least some basic standard framework. Why isn't that part of this bill?

Mrs. Annette Gibbons: The way the bill is drafted is very much consistent with the other sections around rail service in the act. There isn't a really detailed description of what service is in practice. I would refer you to section 113, which is essentially the main provision that railways are obligated to provide service to shippers. It's not a very long section. It simply lays out that railways have to provide adequate and suitable conditions for receiving traffic, for moving traffic, for delivering traffic. We're essentially, in drafting the bill, referring back to section 113.

In terms of a specific template, in practice there is reference to more detailed elements of service in the report that Mr. Jim Dinning prepared as the facilitator on service agreements and commercial dispute resolution—

Ms. Olivia Chow: Is there a reason it can't be part of the bill?

Mrs. Annette Gibbons: The decision was to follow the same approach with the new provisions as exist with the existing provisions on service in the act, to keep the language at a fairly high level.

The Chair: Your time has expired, Ms. Chow.

Mr. Goodale, for seven minutes.

Hon. Ralph Goodale: Thank you very much, Mr. Chairman.

To pursue some of these issues a little more closely, I'll start with, again, the issue of the confidential contracts that may be in existence already, but of course by their very nature they're confidential, so no one knows for sure. If you were to look at proposed paragraph 169.31(3)(a), this is in the section that refers to those contracts and prohibits an application for arbitration while they're in existence.

I think it would be of some comfort to the committee if the department could consult a bit more extensively with both the railways and the shippers' coalition to give us a better feel for how many of these existing arrangements there are. Is it 8 or 10? Is it 200? How many are there? How many are beyond the timeframe that the minister referred to of just a year or two? Is there anyone out there who runs for 5 years, or for 10 years, for example? If the department had some statistics around that, I think it would give us more comfort as to how big a loophole that is in terms of access to arbitration. I wonder if the department could take a look at that.

Second, I'd be interested in your comments on the implications of this legislation for short-line rail operators. Is there anything in this bill that directly or indirectly has an impact for those typically farmer-owned or community-owned organizations that are running short-line rail systems, or are they completely exempt and unaffected by anything that is contained in Bill C-52?

Third, I wonder if you could give us a little help in understanding the new proposed subsection that appears on page 12 of the bill for section 177, which is the section that actually deals with the penalties. It talks in terms of “The Agency may, by regulation... designate” certain things as triggering penalties, and the penalties “shall not be more than $100,000”. I would like to know more about what actually triggers a penalty here and who decides.

If you have a commercial contract and one party is unhappy with the other side, typically they sue and present their case in court, but for these penalties, who will actually make the decision that a violation or, in the language of that section, a “contravention” has occurred? How does that contravention come to the attention of the decision-maker? Is it up to one side or the other to complain to the CTA, and then the CTA will decide whether or not there's been a contravention, and if so, what will be the level of penalty? Will it be not more than $100,000? I think we need a little more clarity around how those penalties work.

My fourth question, which I'll ask and then wait for answers to all of them, is that, since this is brand new legislation dealing with an area that has been a minefield of complaints for quite a few years, would it be a good idea to say that the department would, in two, three, or five years, review the practical impact of this legislation to identify whether or not the arbitration systems are working?

For example, is it just a backdrop and commercial arrangements are being worked out and nobody really has to have recourse to the legislation? Is it working out in the way that it was intended? Are shippers finding the arbitration process accessible if they need it, or are there financial or administrative barriers that are getting in the way? Would it be a good idea to have in the law a provision whereby the practical experience here gets reviewed a few years down the road to see if it's working out in the way the government intends?

● (1645)

Mrs. Annette Gibbons: I'll start with the last question, and raise a couple of points.

The agency will be reporting on the use of the provision, so certainly in its annual report it will be providing a sense of the number of arbitration cases it is seeing.

In terms of the use of arbitration agreements, certainly the department and the minister interact frequently with railways and shippers, and we get a good sense from them of changes that are happening out on the ground.

The final point I'd make on that is that there is a review of the Canada Transportation Act coming up in 2015. Certainly we would expect that stakeholders will discuss how they're finding this new provision on service agreements to be working in practice in the context of discussions in that review. That is a mandatory review.

In terms of the third question, on penalties, the agency's understanding is that they are intending to prepare regulations to implement the administrative monetary penalty regime for these arbitrated service agreements. In terms of what triggers a penalty and who decides, essentially the service agreements themselves will provide the framework for the specific penalties that may be applicable in each case.

Just to give you an example, if the service agreement has a performance standard in it that the railway is to provide service to the shipper on a certain day of the week and to provide a certain number of cars, that's what would determine, then, whether or not there's been a violation.

You asked who would determine it. It would be the shipper who would claim there has been a violation. The shipper would approach the agency. The agency would have the authority to conduct an investigation of the shipper's assessment of the situation. It would seek evidence as to whether or not there's been a breach. If it finds that there has, in fact, been a breach, then it would be in a position to impose an administrative monetary penalty. It would be brought to the attention of the agency by the shipper, and then the agency would do the assessment.

In terms of the second question on short lines, short lines are subject to the requirement to offer shippers a service agreement if they are federally regulated. I don't have the exact number, but we understand that there are between 20 and 25 short-line railways that are federally regulated. Those would be subject to the provision and required to offer service agreements to shippers who ask for one.

In terms of shippers, I think you may have been referring to producer-car loaders and whether or not they're eligible. They certainly are. A producer-car loader organization is a shipper, and can seek a service agreement, whether it's with a short line or with a class I railway.

On the question on statistics, on how many railways have confidential contracts greater than one or two years, we really don't have specific details on that because of the confidential nature of these contracts. What we do know from the railways, what they tell us is that the vast majority of the agreements, the contracts they sign with shippers, are for one- to two-year periods. We know there have been some agreements that are for longer periods, but we understand, again from the railways, that those are in the minority. They tend to be of more short duration.

● (1650)

The Chair: Thank you.

Mr. Poilievre, for seven minutes.

Mr. Pierre Poilievre: On the question of pricing, can you discuss the existing framework for the management of pricing disputes, particularly in agricultural commodities?

Mrs. Annette Gibbons: Rail rates are generally set by the railways. They are published in a tariff. At the same time, very often there are confidential contracts where a shipper and a railway will negotiate a rate that is different from the rate in the tariff.

In the grain sector—and this is the only sector where it applies—there is a revenue cap on the total revenues the railways can earn from the movement of grain in a calendar year. There's a formula under the act to determine that amount, and that of course varies. There are certain factors where it can change year over year related to the volume. There is an inflation factor that is considered. So there is a revenue cap for the grain sector.

In general terms, when shippers do not like the rate they are paying for rail service, they do have access to a final arbitration provision under the act, and that is different, and will remain different, from the new provision on service agreements.

Mr. Pierre Poilievre: None of this is removed by the bill before the House.

Mrs. Annette Gibbons: No.

The government was very clear in launching the consultations to draft the new provision that there would be no change to the existing provisions of the act.

Mr. Pierre Poilievre: Thank you.

I'd like to defer now to Mr. Daniel.

Mr. Joe Daniel (Don Valley East, CPC): Thank you to the witnesses.

I want to go back to the monetary penalty we talked about. Are there any guidelines on determining a confirmed breach? The implication of what we have here suggests you can have multiple breaches occurring in one agreement. Can you expand on that a bit?

Mrs. Annette Gibbons: You could have multiple breaches.

Again, it's the arbitrated service agreement, which will differ from shipper to shipper, that will lay out the framework for what service obligations the railway has to that shipper. There are details, such as that the service will be on a certain day, at a certain hour, and in there is how they will get along in the event the railway cannot provide service, if there's been an avalanche, or whatever. It will have the protocol for recovery of the service.

All of those things can be laid out in the service agreement. There will be parameters for determining whether the railway is respecting the agreement. For example, if you had a case where the service is supposed to be on a certain day and it's supposed to be a certain number of cars, then if both of those things did not happen, the agency would have the authority to determine whether that's one breach or two breaches.

That is within the purview of the agency to determine, based on what is in the specific agreement that a shipper is claiming has been breached. It does depend, case by case, but if there are multiple requirements, certainly the scope is there for the shipper to claim there have been multiple breaches and for the agency to apply multiple AMPs in a particular case.

● (1655)

Mr. Joe Daniel: For example, if they comply with all of that, yet 10% of the cars don't meet quality standards—the doors don't work; there are holes in it, what have you—can that be part of the breach? In other words, some of them are not usable. Is there any definition of that?

Mrs. Annette Gibbons: It's going back to what it says in the agreement and what the standards are with respect to car quality.

If that's addressed in the agreement and then not respected, whether or not there's been a breach is something the agency could assess.

Mr. Joe Daniel: Do you feel this will actually hold the railways accountable in terms of providing the right level of service?

Mrs. Annette Gibbons: The intention behind the administrative monetary regime was to provide a mechanism to provide accountability.

Mr. Joe Daniel: Changing the subject a little, the arbitrator will consider whether shippers have alternative or competitive means for transport. Those transport options may not need this recourse as much as someone with no options located in a remote area.

What are the concerns with having an arbitrator consider whether the shippers have options?

Mrs. Annette Gibbons: The particular factor, if you will, that the arbitrator will take into account is one of several factors intended to recognize the fact that shippers are different from one another, and that the circumstances and needs of shippers will differ depending on their unique situations.

The arbitration decision cannot be one size fits all. The presence of that particular factor in the bill reflects the fact that you can expect the situation of a shipper who has access to three railways in an urban area will be different in practice from the situation of a shipper who has only one railway and one transportation option because, say, trucking isn't viable in their remote area. Having that in there allows the arbitrator to consider those kinds of differences and to reflect that in the service agreement.

I would add that the provision, the access to the arbitration, is available to all shippers, whether they have competitive options or not. Any shipper can access the provision.

It means it's not a barrier to the remedy. The shipper can access the remedy. It's just something the arbitrator will consider.

The Chair: Your time is up. That was Mr. Poilievre's time, but I have you down for another seven minutes. I don't know whether you want to keep going or let someone else have a turn.

Okay, keep going, Mr. Daniel.

Mr. Joe Daniel: The way the bill is put forward, it almost seems to be favouring the shippers rather than trying to come up with an equitable solution. Given that a railway network business is a network business obligated to provide service to all shippers, why do shippers feel they should not be considered?

Mrs. Annette Gibbons: The list of factors that an arbitrator must consider captures the individual shipper's needs. It also captures the fact that the railway is obligated elsewhere in the Canada Transportation Act to provide service to all shippers. The goal there is to ensure that the arbitrator is really considering the individual shipper's requirements and also taking into account the fact that the railway has a broader obligation to provide service to all shippers. What that means in practice is making sure that it can operate an efficient network for everybody. Both of those factors are there to try to come up with a solution that allows the railway to operate the network and still provide individual shippers who have asked for an arbitration with the service they need.

● (1700)

Mr. Joe Daniel: Thank you. I'm going to pass it over to Lawrence.

The Chair: Mr. Toet.

Mr. Lawrence Toet: Thank you. I wanted to follow up along the same line.

When I look at this, the shippers do not have to make any commitments when they go forward to the arbitrator, but they may make commitments, which obviously would be part of the arbitrator's decision process going forward, as to which way to ultimately arbitrate on the service level agreement.

Is there any consideration for breaches that may be applied by the shipper that he has committed to as part of the arbitrator's process? Is there any consideration in that as far as applying any penalties at all, or can they make these commitments, then not stand up to them, and face no penalty whatsoever? Am I correct in that?

Mr. Alain Langlois: You're correct in that they're free to make a commitment. Nobody can force them. If they make a commitment in filing the application for arbitration, the act is very clear that they have to undertake to the railway that they will comply with the commitments they are making for the duration of the arbitrator's decision.

We're trying to get the parties to be bound by a commercial arrangement whereby a shipper commits to do this and an arbitrator, on the basis of the commitments, issues a decision that factors in these commitments, and post arbitrator's decision the relationship between the parties is set forth by the commitments and the arbitrator's decision. So if the shipper does not comply with a commitment and a railway feels harm in any shape or form, the railway can pursue whatever action it wants to pursue, in the same way that a shipper would have the same ability under contract.

Mrs. Annette Gibbons: What the arbitrator imposes will have the force of a contract, so the railway has the option to sue for breach of contract.

Mr. Lawrence Toet: Okay, but that's its only avenue, really, to sue for breach of contract. There is no ability, through this particular piece of legislation, to have any kind of imposition of penalties on the shipper. The shipper is basically free under this legislation on that.

If we talk about some of the aspects of the shippers' concerns on market aspects and things like that, is that part of the reason that's in there? Is it to kind of balance this off, saying that the railway has a big, strong arm and the shipper is the weakling in this arm-wrestle? Is this a balancing factor, and we're saying that they're not open to penalties automatically through this process? As a business guy, I could make some crazy commitments if I knew I didn't have to live up to them and there would really be nothing of consequence, because I'd be putting the onus on them to come after me and sue me in court, which would be an expensive proposition for both sides. You can say the railways have a lot of money, but they also don't want to go through unnecessary litigation.

Maybe you can clarify. Is that the whole rationale behind this? As Mr. Daniel has said, it could be looked at very quickly on the surface and appear a little bit stacked one way.

Mrs. Annette Gibbons: The provisions on rail service in the Canada Transportation Act are obligations on railways. They impose obligations on railways; they do not impose obligations on shippers. This bill reflects that same approach.

Mr. Lawrence Toet: I'd also like to have clarification on the overall approach for the arbitrator. From my understanding, the arbitrator is not just looking at a one-off contract, so to speak. That, obviously, is what is being dealt with at that particular moment in time, but the arbitrator is having to look at the overall network capability of whatever rail line the service level agreement is being made with. In other words, the arbitrator is not looking at this and saying, “Well, you have *x* number of cars, so you can definitely fulfill this contract”. The arbitrator is looking at where those cars have got to be throughout Canada, because we're spread over a wide, vast area. Is that part of the process?

● (1705)

Mrs. Annette Gibbons: The way the railways operate their networks, rail service operates very much like a bus route operates. So what you're looking at are the needs of everybody along the route and you're trying to come up with a schedule and an approach to serve everybody's needs in an efficient way. From that optic, the arbitrator, in receiving a demand from a shipper, will look at what the shipper needs, considering what the railway service is on that route for all of the shippers on the route.

It's a factor they take into account. If the shipper is saying, “I absolutely need more for my business”, and makes a case for that, then the arbitrator has the discretion to respond to that.

The Chair: Okay, the time has expired.

We now move to Mr. Sullivan, for five minutes.

Mr. Mike Sullivan: Thank you.

And thank you to both witnesses for being here.

I just want to clarify this for myself and for the record. The arbitration can't be about price, right?

Mrs. Annette Gibbons: That is right.

Mr. Mike Sullivan: Can the arbitration be about the cost to either shipper or carrier for failure? It says “operational term”.

Mrs. Annette Gibbons: Are you talking about penalties?

Mr. Mike Sullivan: Yes.

Mrs. Annette Gibbons: There are penalties. A penalty scheme, what the shipper—

Mr. Mike Sullivan: The arbitrator can't put a penalty scheme into a contract.

Mrs. Annette Gibbons: That's right.

Mr. Mike Sullivan: That's prohibited from part of this, so the only recourse for breach of contract is to go to court.

Mrs. Annette Gibbons: There is the option of going to court, but there is also the option of going to the agency to have it apply administrative monetary penalties.

Mr. Mike Sullivan: But that doesn't do anything for the shipper, because the penalty is just collected by the government. It's a tax on the railroads.

Mrs. Annette Gibbons: It doesn't go to the shipper, but it is a mechanism to provide for enforcement of the contract to make the railway accountable, to respect the contract.

Mr. Mike Sullivan: But if it's a $2-million breach, $100,000 is going to be no skin off my nose if I'm a railroad and you took me to court, right?

Mrs. Annette Gibbons: The administrative monetary penalty is intended to be a deterrent, or looked at another way, an incentive to comply with the contract.

Mr. Mike Sullivan: But the parties could, if they wanted to, ahead of arbitration, negotiate terms and conditions that would include price and would include monetary penalties for failures, on both sides.

Mrs. Annette Gibbons: Yes.

Mr. Mike Sullivan: But once they get to arbitration, it's really only the other portions of the contract that can be determined by a third party.

Mrs. Annette Gibbons: The shippers told us that they did not want price to be addressed in the arbitration; they did not want it to cover rates. They wanted it to focus on service.

Mr. Mike Sullivan: But it can't focus on failure for service either. It can't determine that failure to deliver or failure to arrive with the cars on time would result in a cost to the railroad.

Mrs. Annette Gibbons: It cannot provide for a penalty scheme, which was what the shippers were proposing. It can certainly include mechanisms to deal with failure, such as recovery mechanisms, for example. It can talk about operational activities that would happen in the event of a failure, how to get back on track.

Mr. Mike Sullivan: Normally, when you deal with arbitrated settlements in other situations, such as labour negotiations, etc., they become precedent setting. So one would think that over time, fewer and fewer of these arbitrations would be necessary because shippers and railroads would both know where these things tend to go and would work on getting there in the first place.

Except that here, they're confidential. Neither side will know about the precedents, and therefore each and every case.... Even if I had a contract last year with these guys, I'm going to have to go get them arbitrated again, or if I know that the farmer down the road has grain that is essentially the same schedule as mine, I have to go and get an arbitrated settlement because I can't use the precedent.

Mrs. Annette Gibbons: The shippers were very clear in the consultations we had that they wanted these arbitrated agreements to be confidential. The reason we understand that to be the case is they felt it would provide competitive information about their business that they didn't want in the public domain.

● (1710)

Mr. Mike Sullivan: In terms of the ability to use these things to set the tone, only the arbitrator and the railroad will know.

Mr. Alain Langlois: If you look at the way the confidential clause is drafted, there's a clear exception to the fact that the outcome is confidential. There's an exception that allows the agency.... First of all, any arbitrated decision has to be provided to the agency. The agency has the authority under the act, as an exception to confidentiality, to use the arbitrated decision for the purpose for fulfilling their mandate under the act.

One of the mandates under the act is to provide assistance to future arbitrators, so there is an ability for the agency to transfer knowledge going forward. Obviously, that transfer of knowledge from one to the other will have to somehow respect the rule of confidentiality.

You would assume that the agency in presumably helping another arbitrator will not disclose sensitive information, but the core nature of the dispute that was resolved could be transferred to a future arbitrator without disclosing sensitive information from the previous outcome. In doing so the arbitrator would obviously have to ensure that its own process complies with the rule of natural fairness.

There is a way to allow transfer of knowledge going forward from one arbitrator to the other.

Mr. Mike Sullivan: That's not in the act. That's just in the way the agency will behave.

Mr. Alain Langlois: It is pretty much spelled out in the act.

The Chair: You're out of time.

Mr. Holder, you get the last five minutes.

Mr. Ed Holder: Thank you, Chair. I'll share the last moments of my time with Mr. Daniel.

Thank you again, guests, for being here.

Minister Lebel indicated that the relationships between railways and shippers are better now, for any number of reasons, maybe the prospect of legislation coming forward, but that's good for business. It's obviously a positive.

Do you have any indication whether shippers, when requesting service agreements currently, are...whether there's more compliance in that regard? Do you have statistical information on that?

Mrs. Annette Gibbons: We don't have statistical information. When shippers speak to us about service, they speak very generally about the overall relationship. They say things are working much more smoothly now than they were in the past, that the communication is much better, that they have an open door with their service representative and they stay in close touch, that sort of thing. Those are the kinds of comments they make.

Shippers generally, in our conversations with them, are very wary of sharing any details on the negotiation of contracts. Again, it is an issue that they consider to be sensitive commercial information. You may hear the odd comment such as, “I have a confidential contract, and it was tough to get”, or it wasn't. Generally we don't have a whole lot of feedback on that.

Mr. Ed Holder: Just from a historical perspective, and again you would be enlightening me, why would railways not have given shippers service agreements when requested? What was the hesitation?

Mrs. Annette Gibbons: I think that would be an interesting question to put to the railways when they're here—

Mr. Ed Holder: I think we will.

Mrs. Annette Gibbons: —because it's difficult for us, not being in that day-to-day business.

At a very general level, I would say that our understanding of the way the railway business has traditionally worked is it's very much based on these publicly posted tariffs. That is the standard approach for determining the rate that shippers are going to pay and setting out some general service parameters. At one point the act was amended, I think back in the 1980s, to allow for confidential contracts to be signed. There was then a shift for certain parts of the business to move to cover the rate under a confidential contract, but still, we understand today that for some shippers, they just ship under the general posted tariffs. That's just the way the relationships evolved.

Mr. Ed Holder: I appreciate that.

In the legislation it reads that penalties would be up to $100,000. I'm trying to understand how egregious must non-compliance be to be a $10,000 penalty versus, say, $100,000. Has that been thought about, or is that going to be given totally to the arbitrator to determine?

● (1715)

Mrs. Annette Gibbons: It would be the agency, not the arbitrator, because this will be after the agreement is in place and there is actually a breach to assess. The agency will have the discretion to apply the right penalty for each case and to apply a penalty that they believe is commensurate with the breach. I won't speak, because that really is within the agency's purview to determine how they will administer the administrative monetary penalty scheme. As a general rule, we understand that these administrative monetary penalty schemes tend to be enforced in a way that there is a certain graduation. If there's a first offence, you may be at the lower end.

Mr. Ed Holder: I did try to ask that before. Do you think these administrative monetary penalties are sufficient to get the end that is being sought?

Mrs. Annette Gibbons: The $100,000 amount, when you're setting an amount for an administrative monetary penalty scheme, you really are starting from the context of the act that you're working from, and the current maximum amount for breaches of orders of the agency under the act is $25,000. Again, it's a relative issue to factor.

Mr. Ed Holder: I'm sure we'll pursue this more with the railways when we have a chance to talk to them.

Mr. Daniel, I know, has a question, please.

Mr. Joe Daniel: I just wanted to follow up on my colleague's questions about trying to give a balanced view of the act itself.

If a shipper requests way more than he actually needs, is there any recourse for the railways to come back and say, “Look. You have actually disrupted our business by overestimating that in your agreement”?

Mrs. Annette Gibbons: The railway will see what the shipper is asking for and have the opportunity to provide its own view of what service should be required, and then the arbitrator will make a decision.

There will also be in the process an opportunity for the two sides to question each other. The railway would be able in that kind of a situation to say, we've been serving you at this particular level for the last 10 years, and we don't understand you're now saying you need something different. It seems to work. That discussion could take place, and then the arbitrator would in the end, balancing everything, consider what makes sense.

Mr. Alain Langlois: One of the factors is the service that the shipper actually requires. That's meant to be objective. The arbitrator will look at what the shipper actually needs. It's not what they want; it's actually what they need. Then the arbitrator will do an assessment of what was proposed by both parties and make a decision.

The Chair: I made a mistake. I thought the bells for votes would start at 5:15; it's actually not until 5:30.

Ms. Morin, five minutes.

[*Translation*]

Ms. Isabelle Morin: Thank you. I will share my time with my colleague, Mr. Aubin.

I have two questions.

You said that you got 140 requests from stakeholders. I would like to know how many of them were from small family businesses.

Mrs. Annette Gibbons: That would be a question for the group that reviews requests. I cannot give you a very specific answer.

Ms. Isabelle Morin: Could you give me an approximate number?

Mrs. Annette Gibbons: I remember there were some.

Ms. Isabelle Morin: I would like to know how these stakeholders were heard. Arbitration costs a lot of money, and I am wondering how they were heard when they spoke about their concerns about that.

Mrs. Annette Gibbons: I believe there were a few, but most of the requests came from ports and shippers' associations. There were some large shippers and some medium-sized ones. I remember some —

Ms. Isabelle Morin: Thank you, I just wanted to know if there were any.

I have another question. To ensure transparency, who will actually be the impartial and non-political arbitrators?

Mrs. Annette Gibbons: The bill contains a clause on expertise and knowledge. It reads as follows: “Only persons who, in the Agency's opinion, have sufficient expertise to act as arbitrators are to be named in the list.”

Ms. Isabelle Morin: So we could have the same problem as with the port authority boards.

Mrs. Annette Gibbons: I don't quite understand.

Ms. Isabelle Morin: That means that we could have the same problem we see with port authority boards.

It's a very vague description.

● (1720)

Mrs. Annette Gibbons: The agency will have to consult with stakeholders to establish who will be on the list.

Ms. Isabelle Morin: Thank you.

I will give the floor to my colleague.

Mr. Robert Aubin: I would like to know more about the arbitration process. According to an answer you provided to one of my colleague's questions, stakeholders will not have access to arbitration decisions. I would like to share the minister's optimistic view and think that there will be no need for arbitration, but I do have some concerns. Railway companies, which will always be the respondents, will have access to all previous decisions, and arbitrators will have access to the information through the Canada Transportation Agency. In the end, the only ones to not have access to the files will be the applicants, who will also be responsible for the burden of proof.

Can they refuse an arbitrator? Will arbitrators be imposed by the department?

Mr. Alain Langlois: Under the act, the arbitrator is selected by the agency. The agency appoints the arbitrator.

Mr. Robert Aubin: So it will be imposed.

Mr. Alain Langlois: Arbitrators will be selected from a list drawn up by the agency. They are competent people who have the expertise required to review the files.

Regarding knowledge transfer, there are two railway companies. They will not be familiar with all the decisions.

Moreover, the legal world on the other side of the fence is not that large either. I know three private counsel who represent shippers across the country. There are not many of them either. The knowledge base from counsel to counsel will be concentrated in the same people. As I mentioned earlier, the agency can, by providing technical expertise to arbitrators, show them what a level of service is, for example.

Mr. Robert Aubin: Without naming any names, could you tell me whether the three counsel you mentioned represent large companies or small businesses? I am not sure that all small businesses would have the means to pay for the services offered by the lawyers you mentioned.

Mr. Alain Langlois: They represent whoever calls on them.

Mrs. Annette Gibbons: I simply want to add that the shippers told us they did not want the decisions to be made public because the information they contain is commercially sensitive. That was made very clear during the consultations.

Mr. Alain Langlois: I would like to try to answer your question about the burden of proof.

The burden of proof rests neither with the shipper nor with the railway company. We are talking here about arbitration and offers that are submitted at the same time. Each party must show that its offer is the best one, each party must present its case and hope that the arbitrator agrees with it. The arbitrator can also select to stay in the middle.

Mr. Robert Aubin: When we—

[*English*]

The Chair: Mr. Aubin, you're out of time.

I think Mr. Langlois has been pretty clear on that.

I understand there are no more questions on the government side.

On a point of order, Mr. Goodale?

Hon. Ralph Goodale: No, just a couple of quick questions since we have a little time left.

The Chair: No, you've had your round, Mr. Goodale.

The government doesn't have any. I'm not going to be presumptuous but I assume they're not going to give their time to somebody else. We're just a couple of minutes away from votes.

I'd like to thank Mr. Langlois and Ms. Gibbons for being here. Thanks very much for your straightforward answers.

Mrs. Annette Gibbons: Thank you.

The Chair: With that, the meeting is adjourned.