Canadian International Freight Forwarders Association

December 13, 2022.

Att. The Honourable François-Philippe Champagne,

Minister of Innovation, Science and Economic Development Canada

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Canadian International Freight Forwarders Association
Brief on Shipping Conference Exemption Act

Dear Minister,

Thank you for the opportunity to comment on the current and future Competition Act. The Canadian International Freight Forwarders Association is pleased to offer the following brief in response to the invitation to comment on Canada's competition policy and enabling legislation. We have also submitted to the Future of Competition Policy Page at your Ministry.

The particular competition issue which preoccupies CIFFA derives from Canada's competition policies and is a "companion" law: the Shipping Conference Exemption Act 1987.

Under this legislation a specific community of transportation service providers is exempt from the provisions of the Competition Act. "Conferences" in this instance are cartels of ocean shipping firms who are entitled to collaborate on pricing and scheduling without concern for Canadian competition legislation.

It is CIFFA's position that the rationale for this extraordinary measure has long been overtaken by economic realities and the benefits of vigorous competition have been denied to Canadian customers. In consideration of changes to Canada's competition regime, it's essential that this aberrant law be removed.

For decades Canadian law focused more obviously on defensive measures against practices inimical to consumers. The Combines Act was perhaps the primary legislative tool and it provided exemptions for a variety of cooperative activities among service and product providers such as agricultural cooperatives.

The arrival of the Competition Act of 1985 set forth a more specific vision of free competition as the norm, with more powerful investigative and enforcement provision and fewer, more explicit exemptions. One of these was the exemption for shipping conferences, which was enshrined in legislation of its own.

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The rationale for exempting shipper conferences was essentially the same as that used in any economic regulation: predicable rates provide certainty for suppliers and customers, while ensuring "excessive" competition does not destroy weaker suppliers. Around the world countries permitting cooperation among shipping conferences often did so as part of a protectionist approach to support their domestic maritime industries.

The introduction of the Canadian Shipping Conference Exemption Act did touch off an extensive Parliamentary debate which cited exactly these arguments. Tabled in the Senate first, the Act (S-6) was studied in committee with the input of many commercial organizations. According to the government of the day none of these intervenors registered strong opposition to the Bill. However the reasons for Canada's agreement to exempt ocean shipping from the law have clearly not proven correct and certainly do not provide the benefits the lawmakers imagined they would. Repeal of this law is long overdue.

Current realities destroy the rationales for exemption

The main argument in favour of permitting collusion among ocean shipping firms was the supposed benefit of "stable prices."

The Parliamentary Secretary to the Minister of Transport (Mr. Charles Lapointe) introduced the Bill to the House on March 8, 1979 with the statement: "The government has concluded that conferences continue to serve the public interest in providing stable services at reasonable cost…shipping conferences enable us precisely to avoid, both for the Canadian consumer and for the shipper who uses that system, unduly great fluctuations…"

Stability and predictability are common justifications for regulated markets. But conferences are not a regulated system, just an oligopolistic one. Customers do not have the advantage of reliable rates, although Parliamentarians speculated they would when the Exemption Act was passed.

Indeed, if there had been a regulated system through the crisis of Covid 19, Canadian customers would have avoided many billions of dollars in shipping fees. But instead CIFFA members saw container fees soar from a pre-covid fee average of about $3000 Shanghai/Vancouver to a high of $30,000 in a matter of months. In 2021 rates rose 121% over the previous year. Some members reported rates six times higher than they had paid in 2019.

These fee spikes were not imposed on customers because shipping costs had risen. They were imposed because the industry had the power.

During this time shipping firms recorded record-setting profits. The industry's 2021 profit was estimated at $150 billion, up from $25.4 billion in 2020, according to the Journal of Commerce. It is remarkable that the shipping companies' profits in a single year exceeded the profits recorded for the previous decade.

Far from providing stable rates, the industry's ability to cooperate on pricing allowed an unprecedented extraction from customers, exacerbating an economic crisis.

Demurrage and Detention Fees demonstrate oligopolistic abuse of customers

A particular issue vividly outlines how Canadians are *not* served by the absence of competition in ocean shipping. In normal times shipping firms levy penalties – called demurrage and detention fees.

A demurrage rate is a fee that is applied to containers if goods are not taken from the terminal or the port within the predetermined period of time. Terminals and ports are responsible for high amounts of cargo moving in and out daily. When goods are stagnant, they take up space and can slow operational capacity. Demurrage charges are a way to incentivize the shippers to avoid bringing goods to ports too early and getting them out of port as quickly as possible.

A detention fee is assessed on containers that are outside of ports and facilities. It is charged for the time freight leaves the terminal until it is returned empty. Detention fees apply when you do not return your container within the agreed upon time, as it delays the carrier from allowing another company to utilize it. Detention fees are applied to offset that loss and to discourage shippers from using storage containers for extended periods of time.

During the Covid-19 pandemic period, a change in consumer buying habits prompted importers to move more volumes into North America, and ports and terminals saw increased congestion and an influx of containers. Terminals were so full that customers could not return containers as the carriers stopped accepting them.. Though the ocean carriers did not immediately require the containers, they continue to invoice the Canadian importer fees which have totalled in the hundreds of millions of dollars.

In any competitive system such a scenario would never have played out. Competitive firms would have waived the penalties or customers would have refused payment for these unjustified fees. But the dominance of the carrier alliances is considerable; and as there are few dispute mechanisms, questioning practices can result in customers being blacklisted by the carrier (s)

Domestic Shipping did not flourish through the conference system

One explanation for Canada's willingness to exempt ocean shipping from the Competition Act was the supposed benefit the conferences would provide to Canada's domestic shipping industry. When they brought the Act to the House, Government ministers pointed out that "some Canadian companies" belonged to conferences, a status which supposedly would allow them to "integrate into the framework and allow them to do some international shipping." But this justification has plainly not worked. At present Canada has no ocean shipping firms registered as part of a conference.

Concentration is extreme in ocean shipping

When Parliamentarians debated the Act in 1979, they cited "about 50 conferences" serving Canada. Today, in reality, there are 3 "alliances" (the term under which the carriers now operate) which control in excess of 80% of global ocean movements:

- The 2M Alliance is Maersk and MSC. In 2015, they agreed to a ten-year vessel-sharing arrangement on Transpacific, Transatlantic, and Asia-Europe routes. 2M has a strategic

cooperation agreement with ZIM (and used to have one with HMM, but in 2019, HMM moved to THE Alliance.)

- The Ocean Alliance is COSCO, OOCL, Evergreen and CMA. COSCO acquired OOCL in 2018.

- THE Alliance is Hapag-Lloyd, ONE, HMM, and YML. All member East-West services are part of the alliance.

Conclusion

Across all the transportation sector, Canada has benefited from vigorous competition. The deregulation of rail, trucking and aviation drove prices down (sharply, compared to the regulated rates that existed under economic regulation.) A huge increase in service offerings added to the benefits realized by Canadian consumers. The lesson was clear; competitive markets are more responsive and cost efficient.

The exemption of ocean shipping from Canadian competition law has not resulted in benefits for consumers. It has not assured us of stable prices, or encouraged the development of domestic ocean shipping. The key government office responsible for assessing competition has called for its removal (please see Note 1 below)

As the government of Canada considers the future of the Competition Act, it's essential that this aberrant off-shoot be repealed.

Note 1 " **The *Shipping Conferences Exemption Act***

Shipping conferences are associations of shipping companies that adopt a number of common policies. Certain activities of shipping conferences are exempted from certain provisions of the *Competition Act*,

notably the use of common tariffs; the use of patronage contracts; establishing terms and conditions regarding service contracts; the allocation of ports; the regulation of times of sailing and service; pooling arrangements; and the regulation of conference memberships.

The rationale for shipping conferences laws is outdated. Tariffs resulting from market driven decisions lead to a more efficient allocation of resources than tariffs established on a common collaborative basis. The special privilege that international shipping is given does not apply to other sectors of the economy. For instance, collective rate making was abolished in 1987 in the railway sector. The increased trends toward globalization of trade reinforce the need to instill greater competitive forces into the shipping industry, including marine transportation. By way of comparison, in 2006, the European Union repealed its block exemption from European competition law for liner shipping conferences. The repeal ultimately went into effect in October 2008 after a two-year transition period."

Recommendation:

- *That the Government end the exemption to shipping conferences from competition law.*

- **Submission to the *Canada Transportation Act* Review Panel: Rail, air and marine transportation**
- **February 27, 2015**
- **By the Commissioner of Competition**

Sincerely,

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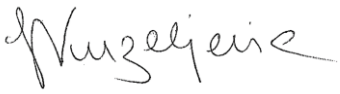

The Canadian International Freight Forwarders Association (CIFFA) represents some 300 regular member firms including freight forwarding, freight brokerage and drayage companies. CIFFA member companies employ tens of thousands of highly skilled international trade and transportation specialists. As a vital component of Canada's global supply chain, member firms of the Canadian International Freight Forwarders Association (CIFFA) facilitate the movement of goods around the world. We provide a vital link in Canada's global supply chains, enhancing export capabilities and assisting in the delivery of competitive solutions to Canada's importing and exporting communities.