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CANADIAN TRANSPORTATION POLICY, REGULATION, AND MAJOR PROBLEMS

BY GRANT H. NERBAS†

I. SCOPE OF ARTICLE

THE CANADIAN PARLIAMENT has recently enacted the National Transportation Act in order to define and implement a National Transportation Policy for Canada.¹ The act applies to air, rail, motor vehicle, water, and commodity pipeline transport under federal jurisdiction. In addition to major changes in railway regulation, it establishes a single Transportation Commission and provides the machinery for full examination of the relations between the different modes of transportation. Before examining the results of the new act, as passed by the current session of the Canadian Parliament,² it will be useful to comment on previous regulation and problems in Canadian transportation.

II. CONSTITUTIONAL POSITION

Under Canada's federal system of government, legislative jurisdiction is divided between the Canadian Parliament and the Provincial Legislatures. The division of legislative authority is enumerated, though not exhaustively, in Sections 91 and 92 of the British North America Act (B.N.A.),³ with the residue of authority resting with Parliament. Expressly stated to be beyond provincial authority (and therefore within exclusive federal authority) are lines of steam or other ships, railways, canals, telegraphs, other undertakings connecting a province with any other province or extending beyond the limits of the province, and works situated in a province but declared by Parliament to be for the general advantage of Canada.⁴ Local works not declared to be within federal jurisdiction, such as provincial highways, remain within the authority of the Legislatures. Because it was enacted in 1867, nowhere in the BNA Act is air navigation mentioned. However, the Canadian Parliament has exclusive legis-

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¹ The new act gives immediate effect to the policy statement contained in section 1 and leaves the main implementing parts to come into force on dates to be fixed by proclamation. Part V respecting Railways, Telegraphs and Telephones, including the new Railway Act provisions on abandonment of branch lines, was proclaimed by SOR/67-142 (effective 23 March 1967) and it is expected that the remaining parts will be proclaimed promptly except the provisions regarding extraprovincial motor vehicle transport which will likely await discussion with the provinces.

² The act was assented to on 9 February 1967 and is cited as The National Transportation Act, Stat. Can. c. 69 (1966-67).

³ 30 Vict. c. 3 (United Kingdom) (reproduced in 6 CAN. REV. STAT. 6187 (1952)).

⁴ *Id.* § 92(10).

lative authority over this mode of transport by virtue of its residuary powers to make laws for the peace, order, and good government of Canada.⁵

III. REGULATION AND MAJOR PROBLEMS BEFORE 1967

A. *Air Transport*

Because of the distances involved and its many inaccessible areas, Canada has always had an interest in aviation well beyond its population growth and other economic factors. Although the first manned flight by a Canadian was made in 1909, the next major development in Canada did not come until the first World War when numerous Canadians entered the British Flying Service and later the Royal Canadian Naval Air Service. After the war, the availability of surplus planes and trained pilots resulted in substantial aviation activity. In 1919 the first Air Board was appointed to regulate civil aeronautics and to license aircraft and personnel, operations in government services, and provide technical services. Many areas which were otherwise inaccessible were being reached by aircraft and transportation to and from these areas began to develop rapidly. In the meantime, since the numbers of aircraft in use for civil flying were not numerous, the Department of National Defense took over the administration of both military and civil air services in 1923, and the first Air Board was abolished.⁶

Notwithstanding the depression years, the carriage of cargo and passengers increased rapidly during the thirties. Cargo carried by aircraft increased from a little over two million pounds in 1931 to more than twenty-six million pounds in 1937, exclusive of traffic carried in international service.⁷ While Canada was probably the world leader in cargo carriage at this point due to the immense demand for such services, the United States and other countries had greatly advanced their interurban air services. The need to keep pace led Canada to the transfer of civil

⁵ *Johannesson v. West St. Paul R.M.*, [1951] 4 D.L.R. 609 (1951). Since the *Johannesson* case, there has been no question of the federal government's jurisdiction over aeronautics. Rail operations generally are beyond dispute as being either federal or provincial without any real difficulty in determining jurisdiction.

A telephone or telegraph company authorized by Parliament to carry on business in Canada or elsewhere is within exclusive federal jurisdiction and cannot be required by provincial legislation to obtain the consent of a municipality before exercising its powers to construct conduits and erect poles. *Toronto Corp. v. Bell Telephone*, [1905] A.C. 52 (P.C. 1905) (Can.).

The area of exclusive federal authority over water transport is very broad. In addition to the authority under section 92(10) of the B.N.A. Act, Parliament is given exclusive jurisdiction over navigation and shipping under section 91(10).

Motor vehicle transport, like aeronautics, is not mentioned in the B.N.A. Act and for many years it was thought that the provinces had substantial authority even over inter-provincial and international motor vehicle operations. However, in 1954 it was held by the Privy Council that the exclusive authority of Parliament over such undertakings could not be impaired by the provinces' general right of control over their own roads and that the provinces could not prohibit the inter-provincial bus operator from handling either inter- or intra-provincial traffic as part of its inter-connecting undertaking. *Attorney Gen. for Ontario v. Winner*, [1954] A.C. 541 (P.C. 1954) (Can.).

Pipelines connecting provinces or extending beyond a province are also under exclusive federal authority and a mechanic's lien filed against such a pipeline under provincial legislation is invalid. *Campbell v. Comstock*, [1954] 3 D.L.R. 481 (1954).

⁶ 1938 CAN. YB. 711-12.

⁷ *Id.* at 719.

air operations from the Defense Department to the new Department of Transport.⁸ Additional airport and navigation aids were being developed to furnish a trans-Canada airway. Meetings were held with the United Kingdom, Ireland, and the United States resulting in arrangements for a trans-Atlantic air service, the initial flying to be done by Imperial Airways and Pan-American.⁹ Canada was now ready for major developments in trans-Canada and international air services, and the real policy questions arose.

1. *Policy Problems*

On 4 March 1937, the Minister of Transport, the Hon. C. D. Howe, introduced a resolution proposing to incorporate Trans-Canada Air Lines, and on 22 March 1937, he explained government policy.¹⁰ After referring to the United Kingdom's financial participation in the development of air services through Imperial Airways and the United States' experience with mail subsidies and private ownership, the Minister remarked:

[I]t seems to me that this mode of arriving at the end desired could be bettered by a country like Canada, able to profit by the experience of others. . . . This company will fly only the main artery of traffic across the country, and such other arteries of traffic as are designated by the government as being of national importance.¹¹

Shortly thereafter the Minister reported that the company would operate a type of service new in Canada, an interurban service, and that Canada must start "where our competitors are today and must develop as rapidly as possible." Following discussion with United Kingdom and United States companies and having noted a United Kingdom report recommending that the cooperation of the railways should be sought he stated, "So it seemed to me from the start that in a properly organized trans-Canada system the railways should have a part."¹²

At this time it was obviously the wish of the Government and the Leader of the Opposition that the railways should take a major part in developing a proposed trans-Canada air service, but the plan did not materialize. At a later date the Minister summarized the problem which caused the impasse in 1937 as follows:

I approached the Canadian National Railways, the Canadian Pacific Railway Company, and Canadian Airways Ltd., the latter being by far the strongest of the air transport companies then operating. These companies were invited to provide the needed capital for, and assume the ownership of, the airline company, the government to assume responsibility for building adequate airports and the necessary communication system. Each of the three component companies was to share equally in the ownership of the air line, and each was to have two directors on the board of nine, the government to appoint three directors on account of its investment in airports and communications.

⁸ *Id.* at 712.

⁹ *Id.* at 715.

¹⁰ 11 H.C. DEB. 2041-44 (1937).

¹¹ *Id.* at 2042.

¹² *Id.* at 2216.

The financial provisions were the same as those finally adopted and now in force, which made the company a non-profit organization that was also protected against loss of its capital.

The Canadian Pacific Railway Company and Canadian Airways objected to having three government directors on the board, and at the last moment these two companies withdrew their support, with the result that the Trans-Canada Air Lines Act provided for full ownership of the enterprise by Canadian National Railways.¹³

2. *Trans-Canada Air Lines*

The Trans-Canada Air Lines Act¹⁴ created a corporation managed by a seven man Board of Directors, four being elected by the shareholders and three being appointed by the Governor-in-Council. Canadian National Railways (CNR) was authorized to subscribe for, hold, and dispose of shares provided that it should not sell or dispose of more than 24,900 of the 50,000 shares authorized without the approval of Parliament. The Governor-in-Council could require that the shares be transferred to the Minister. This newly-created corporation had broad powers to establish, operate, and maintain airlines both in and outside of Canada. The Government was authorized to contract with the corporation for the operation of designated lines.

As no shares were purchased by private interests, CNR was charged with the responsibility of developing Trans-Canada Air Lines (TCA), now called Air Canada. Gradually the airline took over more and more of the management functions so that today, while the current Board of nine members includes five elected by the shareholders— and therefore CNR, Air Canada makes its own report annually to Parliament and is free to develop a sound competitive position with the full cooperation of any railway officers involved.

3. *Regulation under the Board of Transport Commissioners*

Shortly after the incorporation of TCA Parliament enacted the Transport Act of 1938,¹⁵ establishing the Board of Transport Commissioners to replace the Board of Railway Commissioners and to regulate, in addition, the transport of goods or passengers by air or water. For the next six years this act applied to transport by air. Economic regulation was administered by the new Board but the safety of operation, including the licensing of pilots and the certification of aircraft, continued to be administered by the Air Services Branch of the Department of Transport.

With the outbreak of World War II, the expansion of air transport services in Canada was confined to war requirements with Canada concentrating on the development of the British Commonwealth Air Training Plan. Nevertheless, a substantial expansion in aviation took place, particularly in the training of air and ground personnel and in the construction of airports and navigation facilities. The manufacture of air-

¹³ II H.C. DEB. 1571-72 (1944). The two railway companies had an equal investment in Canadian Airways Limited.

¹⁴ CAN. REV. STAT. c. 268 (1952).

¹⁵ CAN. REV. STAT. c. 271 (1952).

craft was also undertaken, and it was planned that Canadian factories would furnish at least part of the postwar aviation equipment.

With the trans-Canada route the only major domestic route in Canada, the Government remained firmly of the opinion that it should be operated exclusively by TCA. An official air policy statement made by the Prime Minister, the Rt. Hon. W. L. McKenzie King on 2 April 1943, contained the following:

Trans-Canada Air Lines will continue to be the instrument of the Government in maintaining all trans-continental air transport services and in operating services across international boundary lines and outside Canada. . . . The development of supplementary routes will continue to be left to private enterprise, unless considerations of public interest indicate that certain of these routes should be designated by the Government as routes to be operated by T.C.A.¹⁶

On 6 June 1944, the Hon. C. D. Howe introduced a measure to establish an Air Transport Board to license and regulate commercial air services and to advise the Minister on matters connected therewith. During debates reference was made to a statement that no surface carrier in the United States was permitted to own, manage, or operate an air carrier. The Minister replied that the bill would provide that there should be no common ownership of surface carriers and air carriers. Later that same month he further stated:

[t]his bill . . . deals with a tendency . . . toward the concentration of air service wholly in the hands of Canada's two trans-continental railways. . . . The act of 1937 . . . specified that the ownership of Trans-Canada Air Lines would be in the hands of the Canadian National Railways. . . . That arrangement has had a tendency to encourage the other competing railroad to acquire all other services in Canada. That is a result which the government believes is not in the best interest of the development of air transport in Canada.¹⁷

However, the Aeronautics Act¹⁸ merely provided that no commercial air service owned, leased, controlled, or operated by a person engaged in transport of goods or passengers by means other than aircraft should be licensed unless the Governor-in-Council considered such licensing in the public interest. TCA and Canadian Pacific Airlines (CPA), a Canadian Pacific Railway subsidiary, were licensed without change in ownership. Railway ownership of airlines does not appear to have been questioned recently. The MacPherson Commission, when considering railway ownership of truck lines said, "[w]e see no reason to limit the entrance of railway companies into any other mode of transport."¹⁹

4. *Regulation under the Air Transport Board*

As created, the Air Transport Board consisted of three members.²⁰

¹⁶ 1943-44 CAN. YB. 573.

¹⁷ IV H.C. DEB. 3960-61 (1944).

¹⁸ CAN. REV. STAT. c. 2, § 15(2) (1952) (formerly § 12(2)).

¹⁹ 2 ROYAL COMMISSION, REPORT ON TRANSPORTATION 82 (1961) [hereinafter cited as the MacPherson Commission].

²⁰ The Air Transport Board was established by § 6 of Chap. 28, Stat. of Can., 1944-45, now, as amended, CAN. REV. STAT. c. 2, § 7 (1952).

Section 9 (now 11) provided that under the Minister's direction the Board would make investigations and surveys relating to commercial air services and such other matters in connection with civil aviation as the Minister might direct, and section 10 (now 12) provided for advice to the Minister. Section 11 (now 13) provided for the making of regulations, generally economic, and section 12 (now 15) provided for licensing by the Board. Refusal or restriction of a license or the cancellation of a license could be appealed from the Board to the Minister under this section. By these amendments, commercial air services ceased to come under the Transport Act and the Board of Transport Commissioners. Section 12(6) (now 15(7)) required the Board to grant TCA a license to operate a commercial air service in the performance of any agreement made between the Minister of Transport and TCA under the Trans-Canada Air Lines Act. Section 17 (now 18) provided that the powers conferred by this part on the Minister should be exercised subject to any international agreement or convention relating to civil aviation to which Canada is a party. Section 18 (now 19) provided for an appeal from the Air Transport Board to the Supreme Court of Canada on a question of jurisdiction or a question of law or both, upon leave of a judge of the Supreme Court. Under the new section 16 (now 17) the Governor-in-Council could authorize the Minister to grant financial or other assistance to an air carrier. This new Board was charged with the economic licensing and regulation of all commercial air services whether scheduled or non-scheduled. Safety regulation, including the licensing of pilots and the issuing of operating certificates, continued with the Air Services Branch of the Department of Transport.

As equipment became available following the war, scheduled and non-scheduled air services in and from Canada expanded rapidly. By 1958 TCA was operating routes of 31,544 miles on services in Canada and to the United States, the United Kingdom, France, Belgium, Germany, Switzerland, Bermuda, and the Caribbean Isles. Meanwhile, other domestic scheduled services had expanded, and with a change in government policy, CPA had been licensed for international flights serving Australia, New Zealand, Honolulu, Fiji, Japan, Hong Kong, Amsterdam, Portugal, and Spain—all from Vancouver. It also served South American points.²¹

5. Air Transport Board Report on Trans-continental Air Services

In 1957 CPA filed with the Air Board an application for authority to operate a scheduled trans-continental service in competition with TCA. On 10 February 1958, the Minister of Transport wrote a memorandum to the Board including a new statement of government policy and requesting that the Board should have a general hearing on the need for additional trans-continental air services rather than dealing only with specific applications. The statement of government policy included a

²¹ 1959 CAN. YB. 834.

statement favoring the introduction of some measure of competition into domestic scheduled services, provided the changes were made gradually and with caution. Competition which would result in a deterioration of services or an increase in rates was to be avoided. Following extensive hearings the Air Transport Board made its report.²² It concluded (within the policy statement) that additional trans-continental air services could not be introduced without major detrimental effect on existing operations and without economic hardship and possible deficits for scheduled airlines, including TCA and CPA. The Board adopted the statement of the government's expert that it is from an intensification of traffic density that future reductions in Canadian air transport costs will probably be achieved. It concluded that the level of TCA's operating costs, while important, could not be the sole factor in determining the desirability of trans-continental air competition. While CPA competition would not be justified on other grounds, it would be in the public interest to strengthen the position of CPA in its international operations by allowing it to operate a scheduled air service serving Vancouver, Winnipeg, Toronto, and Montreal. Under existing conditions the Board considered that a frequency of one return flight per day would be sufficient.²³

6. Regional Air Carriers

The 1958 hearings of the Air Board also considered the problems of regional air carriers. At that time there were five domestic air carriers licensed to operate scheduled air services in addition to TCA and CPA.²⁴ These regional carriers, with one exception, opposed the CPA application for a trans-continental route but wanted action to strengthen their own operations. The Board Report concluded that the regional air carriers should receive immediate consideration. It recommended that work being performed by the Royal Canadian Air Force and by other government agencies be diverted to commercial air carriers and that limited and controlled competition by the regional carriers with TCA should be permitted. The Board proposed to permit charter operations to be undertaken without its specific approval between points served by a scheduled carrier flying multi-engine aircraft with relatively high frequency. The Board rejected as impractical the recommendation of one expert that these charter carriers be permitted to supplement during peak periods the services provided by scheduled carriers.²⁵

On 20 October 1966, a Statement of Principles for Regional Air Carriers was tabled in Parliament by the Minister of Transport.²⁶ Such a policy

²² AIR TRANSPORT BOARD, REPORT TO THE MINISTER OF TRANSPORT ON TRANS-CONTINENTAL AIR SERVICES iv (summary) (1958).

²³ *Id.* at 12, 16. In 1966 Air Canada (formerly TCA) carried 5,293,561 revenue passengers 4,331,583,000 passenger miles and moved 99,998,000 ton miles of freight, express, and mail. 1966 AIR CANADA ANN. REP. 24.

Canadian Pacific Airlines figures available are for 1964. They show a new high of 541,014 passengers carried. Revenue passenger miles on international routes advanced to 983,066,481. 1966 CAN. Y.B. 811.

²⁴ 1959 CAN. Y.B. 835. These have been reduced to four.

²⁵ AIR TRANSP. BD. REP., *supra* note 22, at 19-21.

²⁶ Department of Transport, Press Release No. 95-66, 20 Oct. 1966.

statement has special significance in Canada because, as noted above, appeals on licensing applications go to the Minister. The statement was lengthy and specific. Regional air carriers would be supplementary to the East-West main-line operations of CPA and TCA's successor, Air Canada (AC), and would provide regular and scheduled service into the north but would not become directly competitive on any substantial scale with the two main-line carriers. Some routes might be transferred to them, but they would not be authorized to expand as potential trans-continental carriers. Where the regional pattern involved competition with a main-line carrier, competition could be authorized. Joint fares, cooperation, and an inter-line committee were promised, together with a limited policy of temporary subsidies for which specific requirements were set out. New types of services such as air bus service or specialized all-cargo service might be permitted on legs of main-line routes. Restrictions on domestic charter flying by regional carriers over main-line routes could be relaxed but not withdrawn entirely. The role of regional carriers in international charters might be expanded where possible without detriment to AC and CPA regular route operations. Carriers would be required to report plans for multi-engine aircraft acquisition and a firm position would be taken on the financial position of regional carriers in respect to licensing and subsidies. This policy statement was implemented by two Air Transport Board circulars containing its summary of the policy statement and its subsidy policy for regional air carriers.²⁷ Behind this policy statement and the Board circulars was a one hundred and twelve page report.²⁸ Hearings are now underway in which regional carriers are claiming access to or transfer of segments of the main-line routes and are seeking generally the implementation of the policy statement.

B. Railways, Telegraphs And Telephones

1. Railways

Canada's first railways served merely as land connections in an extensive river and canal transportation and defense system. By 1850 the rail portion of this system amounted to only sixty-six miles, while waterways in Central Canada continued to develop rapidly, particularly after the union of Upper and Lower Canada in 1841. The first major construction of railways took place in Central Canada with the completion in the 1850's of the Grand Trunk Railway (GTR).

At the time of confederation in 1867, Canada urgently needed development of a railway system from Central Canada eastward to the Maritimes and westward to the Pacific Coast. The eastern connection, which became known as the Intercolonial Railway, was provided for in Section 145 of the BNA Act of 1867 as one of the conditions under which the Maritime Provinces agreed to enter Confederation. Similarly, construction of a trans-continental railway was essential to hold and develop Western Can-

²⁷ Circular No. 62/66 (31 Oct. 1966) and Circular No. 61/66.

²⁸ SUDNICKI-GIZBERT, *THE REGIONAL AIR CARRIERS PROBLEM* (1966).

ada, including British Columbia. The Intercolonial Railway was government owned and operated while the trans-continental railway was constructed and operated by the privately owned Canadian Pacific Railway (CPR), assisted by government land grants, tax concessions, money subsidies, freedom in rate control, and a virtual monopoly of traffic. The line was open to the Pacific Coast in 1886.²⁹

Keen rivalry between the GTR and the new CPR existed in Central Canada. Agitation for an end to the CPR monopoly in Western Canada increased, causing the Government to authorize construction of a second trans-continental railway to be known as the Canadian Northern, completed in 1915.

A third trans-continental railway was undertaken in two segments. The eastern division known as the National Transcontinental Railway, with Moncton, New Brunswick, as the eastern terminal, was constructed to Winnipeg by the Canadian Government to be leased to the Grand Trunk Pacific Railway Company (GTP). The GTP was responsible for construction of the western division from Winnipeg to the northerly Pacific Coast port of Prince Rupert. On both segments of this third trans-continental system, construction costs far exceeded initial estimates. Upon completion of the National Transcontinental in 1915, the GTP was not prepared to complete the earlier lease agreement. Lack of available capital during the war years prevented both the Canadian Northern and the GTP from reaching the degree of development achieved by the CPR with the result that CPR was the only trans-continental railway in a sound enough position to survive the accelerated demands of 1914-1918.

The Duff Commission noted that the Drayton-Acworth Commission, reporting in 1917, found a condition of over-extension, unnecessary duplication, deficient equipment, and complete financial impotence in the case of both the Canadian Northern and the GTP.³⁰ By 1919, the Government was forced to take over the operations of all the major railroads except CPR. However, an act was passed that same year establishing the Canadian National Railway Company³¹ which by 1922 was operating, either on behalf of constituent companies or as manager of Canadian Government Railways, 22,000 miles of railway involving 139 companies.

In reviewing the decade between 1900 and 1910, which was the period of over-expansion of railway facilities in Canada, the Duff Commission found: "Thus there developed by the authority of parliament of Canada the tragedy of three transcontinental railways [providing with branches over 4,000 miles of unnecessary lines] when two were all the business of Canada required or could support."³² Thirty years later, the MacPherson Commission elaborated on these comments.

Notwithstanding the heavy burden of debt which was thereby placed

²⁹ ROYAL COMMISSION, REPORT ON RAILWAYS AND TRANSPORTATION IN CANADA 77-78 (1931-1932) [hereinafter cited as the Duff Commission].

³⁰ *Id.* at 82.

³¹ Stat. Can. c. 29 (1955).

³² Duff Commission, *supra* note 29, at 11.

upon the nation's economy, it is very doubtful if without the successful execution of the federal government's transportation policies relating to confederation a sufficiently firm foundation would have been established to permit the development of a viable Canadian union.³³

As for the two railway systems remaining after 1919, the Turgeon Commission of 1951 noted that the two transcontinental railway systems, one public and the other private, served as a balance on each other without destroying the private road, and it rejected the proposal for amalgamation under government ownership.³⁴ The MacPherson Commission commented further:

The over-building of railways during the period 1900 to 1914 resulted from a general mistaken judgment as to the pace at which the Canadian economy was growing and did not reflect a conflict between public and private interests which federal policy was unable to resolve.³⁵

2. Regulation

A major step in the regulation of railways was the establishment of the Board of Railway Commissioners³⁶ to take over the activities of the Railway Committee of the Canadian Privy Council. The Board's name was subsequently changed to the Board of Transport Commissioners for Canada.³⁷ The Board was purely regulatory and in no sense assumed management responsibilities of railways.

The MacPherson Commission, in reviewing the history of railway construction in Canada and the regulatory authority of the Board of Transport Commissioners, particularly with regard to rates, found that the problems confronting the railways were concentrated in four general areas:

(1) Restrictions, notably rate restrictions, originally imposed in a monopolistic environment were found to be overly restrictive in a competitive environment.

(2) Horizontal percentage rates increases were found to be self-defeating in combating erosion of traffic and an inequitable manner of passing on increases of labor and plant costs to shippers. In this regard, the MacPherson Commission recommended that rates should not increase to a point where a shipper is obliged to bear more than his fair share of increased railway costs.³⁸

(3) The use by the Government of railways as instruments of national policy in mitigating locational and resource disadvantages or in promoting the development of specific regions of the country.

(4) The unequal impact of competition in transportation across the nation and consequent freight rate inequities.³⁹

³³ 2 MacPherson Commission, *supra* note 19, at 185-86.

³⁴ ROYAL COMMISSION, REPORT ON TRANSPORTATION 276 (1951) [hereinafter cited as the Turgeon Commission].

³⁵ 2 MacPherson Commission, *supra* note 19, at 193n. 1.

³⁶ Statutes of Canada, 1903, c. 58, § 8.

³⁷ Statutes of Canada, 1938, c. 53, § 3.

³⁸ 1 MacPherson Commission, *supra* note 19, at 71.

³⁹ *Id.* at 17.

"Solutions," the Commission stated, "were to be found within a framework of public policy designed both to facilitate the spread of a fair and competitive transport market and to simulate competitive conditions in areas where competition has yet to take effect."⁴⁰ A major aim of the Commission was to help the railway find its proper role in the present competitive transportation environment.

As owners of track and equipment, railways were heavily committed to continuance of existing services. In comparison, highway carriers and, to a somewhat lesser extent, air carriers were users rather than owners of "rights of way" in that a highway carrier does not require a privately owned roadway and in Canada air terminal facilities are provided by the Government. "User" carriers have the advantage of greater flexibility in investment and operations and, incidentally, in the avoidance of certain property taxes. There was no recommendation of the Commission for the Government to redress this imbalance and absorb some of the railway's roadbed responsibility. In fact, the Commission found that "true economies rest on exploiting every advantage to its limits, and the incentive to that exploitation is the spur of competition. Public policy need only ensure that the advantages are real."⁴¹

The Commission, aware that highway transport had diverted inter-city traffic from the railroads to such an extent as to become the dominant mode for this type of short-haul transportation, endorsed the view that

The objectives of a National Transportation Policy can be partially achieved through the forces of competition. Where it does exist, it will tend to move prices towards conformity with costs of providing the service, and thereby lead to the optimum amount of resources of men and capital being devoted to each mode of transport.⁴²

Concerned not only about prices conforming to the cost of service but also with the railroads disadvantageous position as "owners" of a great deal of fixed assets, the Commission found nothing inconsistent in a policy whereby railways might diversify investment by purchasing and operating highway transport companies.⁴³ Previously, the Turgeon Commission had recommended as a possible solution to the increasing railway problem the establishment of uniform equalized class and commodity rates and uniform mileage scales throughout Canada as a means of curing the inequities of horizontal freight rate increases.⁴⁴ A 1951 amendment to Section 336 of the Railway Act was passed implementing the Commission's recommendation.⁴⁵

Subsequent events proved the ineffectiveness of equalization in a competitive environment.⁴⁶ By 1959, highway carriers share of inter-city traffic amounted to 318 million tons compared to 186 million moved by

⁴⁰ *Id.* at 73.

⁴¹ 2 MacPherson Commission, *supra* note 19, at 31n.1.

⁴² *Id.* at 43.

⁴³ *Id.* at 39.

⁴⁴ Turgeon Commission, *supra* note 34, at 126-27.

⁴⁵ CAN. REV. STAT. c. 234, § 336 (1952).

⁴⁶ 2 MacPherson Commission, *supra* note 19, at 54.

rail. The MacPherson Commission found that railways had lost their lead to motor transportation for inter-city freight, but had retained the large portion of long-haul, heavy loading freight.⁴⁷

Competition of this nature demanded a re-evaluation of policy and the Commission found:

Traditional measures to protect against "discrimination" in freight rates are in effect being set aside by competition. Preserving such measures on the statute books limits the power of railways properly to compete. In the real world of the market place, shippers make the best bargain they can make using one mode against the other and one firm against the other. . . . It is apparent to us that so long as one mode can freely quote rates at the instant of bargaining, the other is at a disadvantage not to be able to do so. Therefore, we recommend that rail rates shall be effective upon filing with the Board. . . . Under this philosophy of free competition the regulatory authority takes little initiative.⁴⁸

Minimum rate controls for railways were to be determined by the cost of service. Similar controls for highway carriers were not thought necessary on the assumption that economic reasons would limit highway companies to compensatory rates. If a highway carrier could haul at rates below the rail minimum, there should be no regulatory impediment from doing so, nor would enlightened railway management attempt it.⁴⁹ The MacPherson Commission also recommended that railways be subject to a maximum rate control to apply to non-competitive traffic.⁵⁰

One further disadvantage of an "owner" carrier such as the railway was the investment in excessive plant and the burden of uneconomic services. To relieve this situation, major proposals were made for rationalization of railway plant and services.⁵¹ These procedures were based on the assumption that statistics would be available to determine the cost of operation.

Persons using a service should pay the cost of that service but not more. If the Government, by employing the railway as an instrument of national policy, was the effective user of an "uneconomic" service, deficits incurred by the railway in the operation of this service should be paid by the public. Freight shippers should not be the ones to subsidize railway passenger service by means of excessive freight rates.

The MacPherson Commission viewed the function of Government in transportation as twofold—regulatory and promotional. However, regulatory boards or agencies should not attempt to fulfill the positive or promotional aspects of transportation policy. The Commission found that

[O]ver the past 30 years in Canada and in other countries, there have been many recommendations for the centralizing of regulation in transport. Insofar as the negative or strictly regulatory function is concerned, we are con-

⁴⁷ *Id.* at 57.

⁴⁸ *Id.* at 63-65.

⁴⁹ *Id.* at 70.

⁵⁰ *Id.* at 102. The rate suggested was the amount of the variable costs appropriate to the movement as defined by the Board of Transport Commissioners plus 150% of that variable cost.

⁵¹ *Id.* at 122-51.

vinced it would accomplish very little. Such a central authority would have to be so large that the division of labour necessary would follow the lines of agencies already in existence. In Canada, the division of constitutional responsibility for highway transport makes central regulation more complex.⁵²

The Commission recommended creation of a National Transportation Advisory Council to recommend broad policy to the Minister of Transport.

The conclusion reached was that transportation had to be treated in its entirety to enable the transportation system to fulfill national policy objectives and at the same time to develop along commercial and market oriented lines.⁵³

2. *Telegraphs and Telephones*

Federally constituted telegraph and telephone companies are subject to the jurisdiction of the Board of Transport Commissioners with respect to rates and practices under the provisions of the Railway Act.⁵⁴ Canada's long-distance microwave system, the longest single microwave route in the world, was constructed principally by the two major railways and operated as CN-CP Telecommunications. Canadian construction is continuing, particularly in the Northwest Territories and the Yukon.

C. Extra-provincial Motor Vehicle Transport

Highway carriers possess certain competitive advantages that have over the years gained for them a steadily increasing share of the transportation market. The view commonly held that any volume of traffic moved by highway today directly reduced the volume of traffic moved by rail yesterday is becoming less and less true, principally because the traffic itself has lost its identity as being either rail or highway traffic. Freight is no longer regarded as having been lost to another carrier but gained or won by the successful competitor. Generally, the successful competitor is one who provides the fastest and most efficient and reliable service at the lowest cost.

J. C. Lessard, Transportation Consultant and a former Deputy Minister of Transport, in a study⁵⁵ prepared for the Gordon Commission,⁵⁶ described the background of competition as follows:

The role which each type of carrier has played in the general transportation picture should be considered in the light of two factors—service and cost. Both stem directly from the technical and operating characteristics of each type of carrier. The remarkable growth of motor carriers and airlines is mainly due to three important characteristics—mobility, speed and the ability to penetrate into areas beyond the service limits of rail and water transport.⁵⁷

⁵² *Id.* at 161-62.

⁵³ *Id.* at 201.

⁵⁴ Railway Act of 1952, CAN. REV. STAT. c. 234, § 380 (1952).

⁵⁵ LESSARD, *TRANSPORTATION IN CANADA* (1956).

⁵⁶ ROYAL COMMISSION, *REPORT ON CANADA'S ECONOMIC PROSPECTS* (1957).

⁵⁷ LESSARD, *op. cit. supra* note 55, at 77.

1. *Growth of Short and Medium Haul Trucking—Intra-Provincial*

Advantages of for-hire highway carriers include speed and frequency of scheduled deliveries with reduced damage claims and packaging costs.⁵⁸ The initial areas penetrated in the mid-thirties were the short and medium hauls up to five hundred miles. Lack of adequate highways and equipment restricted growth to these areas under the control of the Provincial Highway Transport Boards. Operations were intra-provincial and not restricted initially by regulatory procedures. A more significant obstacle involved load factors which made railway costs lower than highway and created for highway carriers the task of convincing shippers that increased service was worthy of higher charges. That they succeeded is shown by one of the objectives of the MacPherson Commission which was to explain the apparent economic paradox that although rail transport costs were reported to be substantially below highway costs, the demand for highway freight services was growing at a much faster rate than rail freight services.⁵⁹

Highway carriers came into direct competition with railways for inter-city traffic, largely in the forties and fifties. During this period, the number of trucks registered increased five hundred percent while railway freight cars increased only seventeen percent.⁶⁰

2. *Growth of Long-Haul Trucking—Extra-Provincial*

By 1950, highway carriers had developed the technique of soliciting traffic selectively, concentrating efforts on high-revenue less-than-carload-lot (L.C.L.) and truck load traffic. Certain of the competitive disadvantages were disappearing with the construction of more miles of structurally sound highways and the continuing advancements in equipment, particularly the availability of diesel tractors and lengthened trailers.

Highway activities were extended to long-haul operations between Central and Western Canada, an area of overland transport where railways had been presumed to have their greatest competitive advantage.⁶¹ The effect of increased highway competition on railways was to reduce rail revenue resulting in an increase in rates. The method used was a horizontal freight rate increase which tended to drive an increasing volume of traffic to highway carriers and close the gap between rail and highway rates. Even prior to 1951, railways were faced with increased costs which they sought to transfer to shippers by means of horizontal rate increases between 1948 and 1950.⁶² From the railway's point of view, the increase in rates to meet falling revenues attributable to increased highway competition made a deteriorating situation worse.

⁵⁸ Private and contract carriers and farm truck operations are considered to be beyond the scope of this article.

⁵⁹ 3 Transportation Studies prepared for Royal Commission on Transportation 3 (1962) [hereinafter cited as Transportation Studies].

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 11. As routes lengthened, highway conditions, equipment limitations, and mounting provincial and state vehicle license fees created concern. United States Highway No. 2 afforded a paved route through northern border states. The Trans-Canada Highway was under construction but was not completed and opened until September 1962.

⁶² Turgeon Commission, *supra* note 34, at 298.

A fortuitous advantage to highway carriers came when the 1950 Canadian National-Canadian Pacific Railway strike suspended rail operations for nine days. Highway service, resorted to in order to fill the gap, was limited only by the available supply of equipment. The strike opened the door for an expansion of long-haul trucking that otherwise would probably have taken years to accomplish. It provided an opportunity to haul a wide range of traffic and to discover that trucking could compete at railway rates on much of it.⁶³

Following the 1950 rail strike, many shippers continued to use highway carriers, either exclusively or along with railways. Rapid growth of Canadian light industries, many operating under conditions of close inventory control, contributed to the growth of highway carriers.⁶⁴ The tempo of business in the fifties and sixties did not always permit the time required for deliveries to be made from railway sheds or team tracks and not all shippers or consignees were located on industrial trackage.

The railways' reaction to growing competition took a different direction in 1955 when restrictions on mixing L.C.L. traffic to Western Canada were removed along with the equalization of freight rates. Previously, the mixing rule (designed to permit L.C.L. shipments to be mixed in one car to obtain the lower carlot rate) as applied to shipments between Western and Eastern Canada was restricted to shipments going to persons in the same line of trade.⁶⁵ Railways intensified their efforts by offering lower L.C.L. rates, agreed charges, and competitive commodity rates. Similar reductions in highway rates followed. Efficient highway operations became essential if highway carriers were to survive.⁶⁶

Rapid growth of long-haul trucking to 1960 was largely due to the ability of operators to keep costs low through the use of efficient equipment, screening of drivers, leasing of equipment, minimizing terminal investments, careful storage, maximum payloads, and minimum empty returns. Installation of teletype and telex services improved the control of traffic and the dependability of long-haul service.⁶⁷

3. Regulation and Problems

The Duff Commission (1931-1932) concluded that only through voluntary coordination of services could the entire transport industry prosper.

Any restrictive regulations imposed on the road vehicle will not determine the division of the functions as between roads and railways except to a relatively limited extent. In our view, this division of function will not be best obtained through the arbitrary action of governments, but rather through the efforts of those engaged in the transport industry. By concentrating less on mutual competition and by turning their energies to the co-

⁶³ Trucking firms reported that revenues of \$2,000 per truckload from Western to Central Canada were regularly obtained, giving a good margin of profit in spite of relatively high costs. Such West to East traffic in 1960 was normally yielding only about \$500 to \$800 a load. *Transportation Studies* 13n. 4.

⁶⁴ LESSARD, *op. cit. supra* note 55, at 78.

⁶⁵ *Transportation Studies* 14-15.

⁶⁶ *Id.* at 15.

⁶⁷ *Id.* at 19.

ordination of the services they provide, a properly co-ordinated system of transport will be evolved. In our view the true function of road transport, in such a co-ordinated system, as auxiliary and complementary to the steam railways, would appear.⁶⁸

The Commission also thought that if railways were regulated, highway carriers should also be regulated in the interest of fair competition, and that the former should be empowered to provide and operate road vehicle services subject to whatever restrictions are imposed upon other road transport operators.⁶⁹

In 1937-1938 federal regulation of extra-provincial highway carriers was considered but dropped because of strenuous opposition from the provinces and an erroneous view on the extent of federal jurisdiction.⁷⁰

The Turgeon Commission in 1951 was the next investigatory body to recommend a coordinated system of regulation. "The several means of transportation—railways, waterways, airways, [highways], and now pipe lines—are distinct agencies that are inseparably inter-related. They should be so regulated as to serve not only individually but collectively in meeting the country's needs."⁷¹ The bracketing of "highways" resulted from the view that provincial cooperation was needed and from doubts that it would be obtained. Attempts to have provincial jurisdiction transferred to Parliament produced negative results. "This attitude of the Provinces give no ground for the hope that central, uniform control and regulation of all transportation, including provincial transportation, is realizable in the near future."⁷²

Provincial Boards attempted to control and license such extra-provincial highway carriers on the ground that while within a province, picking up and unloading freight and in effect carrying on the work of an intra-provincial operator, these carriers were subject to the same control as purely intra-provincial carriers.

However, in 1954, *Ontario v. Winner*⁷³ decided that Parliament had broad powers over extra-provincial motor vehicle transport and laid the basis for the establishment of a federal central authority. But the federal government chose to vest federal authority in the Provincial Carrier Boards by enacting the Motor Vehicle Transport Act of 1954.⁷⁴ Provincial Boards thereafter granted two types of operating certificates—intra- and extra-provincial certificates, often arising out of a single public hearing. Although the question is sometimes raised whether this act validly establishes the Provincial Boards as federal agencies, it has not yet received judicial attention.

The decision of the Manitoba Court of Appeal in *Kleysen's Cartage*

⁶⁸ Duff Commission, *supra* note 29, at 56.

⁶⁹ *Id.* at 55-56. At that time, railway transportation was considered essential to the economic welfare of the country and should be protected from unfair competition.

⁷⁰ 1 H.C. DEB. 911 (1938).

⁷¹ Turgeon Commission, *supra* note 34, at 279.

⁷² *Id.* at 278.

⁷³ Attorney Gen. for Ontario v. Winner, [1954] A.C. 541 (P.C. 1954) (Can.).

⁷⁴ Stat. Can. c. 59 (1953-54).

Co. v. Manitoba Motor Carrier Bd.,⁷⁵ interpreting section 3 of the 1954 act, described an area of "no regulation" for highway carriers operating outbound. Section 3 provides that the Provincial Transport Board may issue a license for an extra-provincial undertaking into or through the province on like terms and conditions with local undertakings. The court found that the absence in section 3 of the words "out of" the province exempted an outbound carrier from regulation under either the federal or provincial statutes and left regulation of these outbound operations to neighboring provinces. The trend since *Kleysen* has been for Provincial Transport Boards to close ranks and in a practical way fill any gaps in section 3 of the act.

Editorial comment in 1954 on the Motor Vehicle Transport Act was not kind. Confusion or worse was predicted. Actually, there has been little controversy and even less litigation arising out of the act. The Provincial Transport Boards have made the system work although the system remains a group of Provincial Boards.

D. Water Transport

Water transport made possible the exploration and settlement of Canada's interior and has continued to be a major factor, particularly in the movement of heavy bulk goods. Parliament's principal concern in shipping over the years has been the cost of maintaining adequate Canadian shipbuilding and merchant shipping.

1. Shipbuilding

The Spence Commission noted that whereas in the nineteenth century the eastern provinces supplied most of the vessels for the Canadian Merchant Marine, with the advent of steam-powered ships of iron and steel the Canadian shipbuilding industry declined sharply.⁷⁶ Faced with the problem of maintaining adequate minimum shipbuilding facilities, the Canadian Maritime Commission was led to conclude after World War II that it would be advisable for security reasons to maintain a nucleus capable of rapid expansion. It felt that the average monthly employment in the industry should not fall below seven thousand men, approximately half in ship construction and half in repairs and conversion.⁷⁷ However, in 1957, the Spence Commission concluded that, so long as the shipbuilding cost differential between Canadian and United Kingdom shipyards continued to be in the order of fifty percent, the prospects for construction of new merchant vessels in Canada in competition with the United Kingdom were poor. It noted that ship repairing and a variety of engineering work have in peace time been more important than the construction of ships, and it felt that this work in eastern waters and the Great Lakes might increase with the volume of traffic on the Seaway.⁷⁸

⁷⁵ [1965] 48 D.L.R.2d 716 (Man. Ct. App. 1965).

⁷⁶ ROYAL COMMISSION, REPORT ON COASTING TRADE 141 (1957) [hereinafter cited as Spence Commission].

⁷⁷ *Id.* at 148.

⁷⁸ *Id.* at 155.

Accordingly, the Commission recommended rejection of a proposal to restrict the coasting trade to vessels built and registered in Canada.⁷⁹

2. *The Ocean-Going Fleet*

Since 1880 Canada's ocean-going fleet declined rapidly due to competition from steel steamers until by 1914 there were few Canadian registered ships in overseas trade.⁸⁰ World War II ended with the Government owning two hundred and fifty-eight dry cargo vessels and twenty tankers, many of these on loan or charter to the United Kingdom. The Government sold most of the war-built vessels to private operators but required that the vessels be operated on Canadian registry.⁸¹

Some owners of former Canadian Government ships were later permitted to transfer to United Kingdom registry, Canada reserving the right to have them transferred back to Canadian registry. Based on this theory the recommendation of the Canadian Maritime Commission that the Canadian ocean-going fleet should not be less than 750,000 deadweight tons was met by including ninety ships transferred to United Kingdom registry but subject to retransfer.⁸²

As in the case of shipbuilding, ocean-going operations on Canadian registry have found competition difficult, particularly with the United Kingdom.

3. *The Coasting Fleet*

In contrast with the ocean-going fleet, the Canadian coasting fleet has been more closely related to the growth of the country and far exceeds the ocean-going fleet in importance.⁸³ The Spence Commission concluded that restriction of the coasting trade to vessels registered in Canada would be detrimental to the public interest, whether the restriction applied uniformly or only to a particular part of Canada.⁸⁴ However, Canadian legislation is to the contrary. Section 671 of the Canada Shipping Act⁸⁵ provided generally that only Commonwealth-registered ships could engage in the coasting trade. This section was amended⁸⁶ to provide that only Canadian ships may engage in the coasting trade on the Great Lakes and St. Lawrence River.

a. *The St. Lawrence Seaway*—Including the lower St. Lawrence River, the Seaway furnishes a water route of some 2,200 miles into the middle of North America. Although the Seaway is of vast importance to Canada and the United States, it opened the way for greater competition.

b. *The Canadian Maritime Commission*—The Canadian Maritime Commission Act⁸⁷ established an agency to coordinate the administration of

⁷⁹ *Id.* at 178.

⁸⁰ *Id.* at 51.

⁸¹ *Id.* at 54-55.

⁸² *Id.* at 57, 59-60.

⁸³ *Id.* at 60.

⁸⁴ *Id.* at 139.

⁸⁵ CAN. REV. STAT. c. 29 (1952).

⁸⁶ Stat. Can. c. 39, § 38 (1964-65), adding subsection 2(a) to § 671.

⁸⁷ CAN. REV. STAT. c. 38 (1952).

shipping matters and recommend to the Government policies for preserving the shipping and shipbuilding industries. Various devices were adopted in order to achieve these aims,⁸⁸ but the economics of the problem prevented any substantial success.

In 1951 the Turgeon Commission said that the role of the water carrier in the entire Canadian transportation system should be more definitely determined to enable it to take its proper place. Therefore, it recommended centralization of control in place of the Board of Transport Commissioners, the Air Transport Board, and the Canadian Maritime Commission.⁸⁹ Six years later the Spence Commission noted the Turgeon Commission recommendation but did not feel called upon to express an opinion on whether one regulating body would serve the public interest. It observed that no problem placed before it required the attention of a central authority.⁹⁰

E. Pipelines

Canada now has a network of oil and gas pipelines, running chiefly East-West, making the oil and gas fields of Alberta and Saskatchewan available to other areas as far east as Quebec. The National Energy Board Act⁹¹ created the National Energy Board to regulate inter-provincial and international oil and gas pipelines, having taken over regulation from the former Pipelines Act and the Board of Transport Commissioners.

IV. THE NATIONAL TRANSPORTATION ACT

A. Policy, Commission, And General Provisions

The National Transportation Act⁹² does not codify provisions respecting transportation but amends various acts to give effect to the purposes of the new act. It is entitled "an act to define and implement a national transportation policy for Canada"

The policy declaration⁹³ must be read in conjunction with the provisions

⁸⁸ Spence Commission, *supra* note 76, at 55-59.

⁸⁹ Turgeon Commission, *supra* note 34, at 280.

⁹⁰ Spence Commission, *supra* note 76, at 182-83.

⁹¹ Stat. Can. c. 46 (1959).

⁹² *Supra* note 2.

⁹³ National Transportation Act § 1:

1. It is hereby declared that an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests of the users of transportation and to maintain the economic well-being and growth of Canada, and that these objectives are most likely to be achieved when all modes of transport are able to compete under conditions ensuring that having due regard to national policy and to legal and constitutional requirements

(a) regulation of all modes of transport will not be of such a nature as to restrict the ability of any mode of transport to compete freely with any other modes of transport;

(b) each mode of transport, so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided that mode of transport at public expense;

(c) each mode of transport, so far as practicable, receives compensation for the resources, facilities and services that it is required to provide as an imposed public duty; and

which implement it. The declaration theme, like that of the MacPherson Commission, is competition. Later references to particular provisions will show that generally regulation gives way to competition. The government's intention was so stated by the Minister of Transport.⁹⁴

Section 4 makes the new act apply in general to air, rail, and water transport; commodity pipelines under federal jurisdiction; and to similar motor vehicle undertakings if and when other provisions of the act are made effective.

1. *The Canadian Transport Commission*

Section 6 establishes the Canadian Transport Commission of not more than seventeen members and makes it, like the former Board, a court of record. Under section 5, the provisions of the Railway Act, which formerly applied to the Board of Transport Commissioners, will apply to the new Commission in regard to sittings, practice and procedure, orders and decisions, and appeals, irrespective of whether the proceeding is under the new act, the Aeronautics Act, the Transport Act, or any other legislation imposing functions on the Commission. Sections 7 and 17, together with related sections, transfer to the new Commission the members of the Board of Transport Commissioners, Air Transport Board, and Canadian Maritime Commission, and establish committees to deal with the various modes of transportation. Each committee presumably will be staffed initially by persons already engaged in the regulation of that mode of transport. Section 17 requires the Commission to establish individual committees for air, rail, water, motor vehicle, and commodity pipeline transport, and such other committees as the Commission deems expedient. Under section 7, the Commission will have a president and two vice-presidents, and each committee will have a chairman. Under section 7(4), one of the vice-presidents is to be charged with supervising the study and research necessary to achieve the objectives of the national transportation policy. The legally qualified vice-president will have general supervision over the work of the committees. Section 14 requires the

(d) each mode of transport, so far as practicable, carries traffic to or from any point in Canada under tolls and conditions that do not constitute

(i) an unfair disadvantage in respect of any such traffic beyond that disadvantage inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or

(ii) an undue obstacle to the interchange of commodities between points in Canada or unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports;

and this Act is enacted in accordance with and for the attainment of so much of these objectives as fall within the purview of subject matters under the jurisdiction of Parliament relating to transportation.

⁹⁴ III H.C. DEB. 12020 (1967):

I hope I will not be considered to be reflecting in any way upon the expertise of those two expert witnesses [called to testify before the standing committee] when I say they were fundamentally opposed to the whole principle of the bill. They both indicated very clearly they did not believe in competition, but rather in the United States system of regulation and setting of rates by regulatory bodies. Since they entirely rejected the very concept of the bill it is perhaps not very surprising that they found fault with individual features of it.

Commission to perform the functions vested in it with the object of coordinating and harmonizing the operations of all carriers. However, in view of the policy declaration, section 14 cannot be read as intending coordination to restrict competition between modes of transport. Section 15 prescribes new powers, duties, and functions in respect to sound economic development of all modes of transport. The Commission is required to inquire into and report to the Minister on (1) the relationship between the various modes of transport, (2) the measures that should be adopted to achieve coordination in development, regulation, and control of the various modes of transport, and (3) to advise on matters of financial assistance and federal investment in facilities.

2. *Committees of the Commission*

As mentioned, section 17 provides that the Commission shall establish committees consisting of not less than three commissioners, exclusive of the president, who shall be *ex officio* a member of every such committee. It would be a reasonable assumption that the Air Transport Committee will consist initially of the three members of the Air Transport Board. The chairman of each committee is its chief executive officer, who will preside in the absence of the president and the legal vice-president of the Commission. A committee may, in accordance with the rules of the Commission, exercise all the powers and duties of the Commission and its Orders, Rules, or Directions have effect, subject to review, as if made by the Commission itself. A Committee Order, Rule, or Direction relating to a particular mode of transport, exclusive of matters concerning a specific rate, license, or certificate, may be objected to by the operator of another mode of transport as discriminatory or unfair and the Commission must, otherwise than by that committee of the Commission, review the matter. Appearances by interested governments and shippers' representatives will be permitted.

Under section 18, a final decision of the Commission with respect to an application for a license to operate a commercial air service, motor vehicle undertaking, water transport, or a certificate for a commodity pipeline may be appealed to the Minister of Transport and the Minister's opinion as certified to the Commission must be complied with. Similarly, a suspension, cancellation, or amendment of a license to operate a transportation service or of a certificate of public convenience and necessity may be appealed to the Minister by the carrier and the Minister's opinion as certified to the Commission governs.

Under section 19, the Commission may make rules and regulations to attain the objects of the act, including procedural rules, and such regulations will supersede any conflicting regulations issued pursuant to other legislation. Section 20 requires notice to the Commission by the carriers of their intention to acquire an interest in the business or undertaking of any person whose principal business is transportation. Upon receipt of such notice, the Commission may investigate and disallow any such acquisition

which will in its opinion be unduly restrictive or prejudicial to the public interest.

In addition to these provisions establishing the new Commission and its jurisdiction, Part I contains general provisions affecting all carriers brought under the act. Excluding rail carriers, section 15(6) provides for the apportionment of a toll expressed as a single sum for carriage partly by one mode of transport and partly by another. Section 16 requires the Commission to investigate an objection that an act or omission or a rate prejudicially affects the public interest regarding tolls for or conditions of carriage of traffic. For this purpose "public interest" includes the public interest as described by the national policy statement in section 1 and the specific matters to be considered under section 16 include whether the control or interest of a carrier in another form of transportation may be involved. Section 16(4) provides that the Commission may issue an order requiring the carrier to remove the prejudicial feature in the toll or conditions of carriage, but the Commission is to have regard to Section 334 of the Railway Act, which deals with the filing of competitive tariffs.

B. Provisions Affecting Air Transport

While the National Transportation Act does not by itself appear to make major changes in the regulation of air transport or in government policy with respect to it, the act does contain machinery which could ultimately effect changes. If, as has been suggested, the members of the Air Transport Board form the three-member committee of the Commission exercising the Commission's jurisdiction with respect to air transport, the transition will be accomplished by sections 82 and 83 which provide for the transfer of the members, officers, and employees of the Air Transport Board to the Commission. The Air Board Chairman will become Chairman of the Air Transport Committee if he does not become president or vice-president of the Commission. Under section 90, all regulations, rules, orders, and directions made by the Air Board continue in force until changed by the Commission.

The Air Board has not adopted any comprehensive set of rules whereas the Board of Transport Commissioners has a comprehensive General Order No. M-2 which may well become the basis for uniform procedures in committees exercising the jurisdiction of the new Commission. The practice of the Exchequer Court is made applicable in any case not expressly provided for by the rules or by statute. If the new Commission follows the practices of the former Board of Transport Commissioners the procedure will continue to be informal. Therefore, it would seem likely that there will be no material change awaiting air carriers who have been before the Air Transport Board.

The general provisions of Part I affecting all carriers may have less significance in respect to air carriers whose traffic is not easily tied in with movements by rail or motor carriers. The specific duty of the Commission to perform its functions with the object of coordinating and harmonizing

the operations of all carriers is more readily applicable to transport by railways, water, and motor vehicles. The policy statement in section 1 shows that any mode of transport is to be permitted to compete freely with other modes. In the end changes will, as before, follow traffic and public demands, and competition with other modes of transport will not be a major factor. Any pressures for increased competition between air carriers could probably be the subject of research under section 15.

C. Provisions Affecting Railways, Telegraphs And Telephones

1. Railways

The National Transportation Act will have an immediate effect on railways, principally in the relaxation of regulation of freight and express rates, discontinuance of passenger services, branch line abandonments, and reduction or elimination of current government payments. The act makes detailed provision with respect to the manner in which railway costs are to be computed. Major changes will result from the following:

a. *Rates*—Old sections 317 and 319(3) of the Railway Act, which provided shipper protection against rate discrimination or undue preference, were repealed. The effect is that now a railway is free to publish whatever rate it chooses with competition between carriers being relied on to keep the rates at a reasonable level. This right, however, is subject to three important safeguards. First, under section 16(2) provision is made for complaint by any person to the Commission that a rate "may prejudicially affect the public interest," and the Commission may require the carrier "to remove the prejudicial feature." Second, new Section 334 of the Railway Act requires that all freight rates be compensatory; *i.e.*, in excess of the variable costs of the movement of the traffic concerned. Third, in cases where a shipper of goods has no alternative competitive service by common carrier other than a rail carrier, the Commission may fix a maximum rate for carload and less-than-carload shipments.

b. *Discontinuance of passenger service*—New Section 314I and J of the Railway Act regulates discontinuance of these services. The Commission, after finding that a service operates at a loss, is free to order its discontinuance or retention. If the former, a discontinuance date will be assigned not later than one year from the date of the order. If it is to be retained for reasons of public interest, then its status will be reviewed at five year intervals during which time eighty percent of the loss will be reimbursed to the railway.⁹⁵

c. *Abandonment of uneconomic branch lines*—Procedures are extensively changed by the new provisions of the Railway Act. Railway Act, Section 168, provides for abandonment of any line upon approval by the Board of Transport Commissioners. The test applied by the former Board in handling abandonment applications was whether the loss and inconven-

⁹⁵ This arrangement does not include commuter operations but there is provision for certification of losses on commuter operations and reporting them to the Governor-in-Council for assistance.

ience to the public upon abandonment outweighed the burden that continued operations imposed on the railway.⁹⁶ New Section 314B of the Railway Act provides for applications to abandon branch lines. The Commission will ascertain the actual loss of the lines and give public notice of its principal conclusions in the area affected. It may hold hearings concerning areas rather than individual lines and must consider all matters it thinks relevant to the public interest including rail losses, alternative transportation facilities, facilities dependent on the line, the effect on other lines or carriers, the effect on areas served, and possible line or operating changes. At the conclusion of its examination, the Commission will decide if lines should be abandoned immediately or retained subject to review at intervals not greater than five years, in which case the railway is entitled to reimbursement for its ascertained loss on all uneconomic branch lines. There is no limit on the time lines may be retained under such a subsidy.

New section 314G provides for designation of branch lines that shall not be abandoned and areas within which branch lines should not be abandoned within prescribed periods of time. On 12 September 1966, the Government, after consultation with grain elevator groups, railways, and provincial authorities, produced a plan of prairie railroads whose existence it intended to guarantee until 1975. Lines not included in the guaranteed network could become subjects of abandonment applications by railways.

d. *Computing Costs*—New Section 387A of the Railway Act provides that in computing railway cost in service discontinuances, line abandonments, and under the rate provisions, reasonable allowances shall be made for depreciation and for the cost of money.⁹⁷ The act also requires the Commission to prescribe by regulation the items and factors including depreciation and the cost of capital relevant to determining costs, having regard to the costing principles adopted by the MacPherson Commission and to later costing methods and conditions.⁹⁸

e. *Statutory rates and payments*—With the exception of statutory rates for export grain and flour, a two year freeze on non-competitive carload rates in the Maritime Provinces, and payments to railways under the Maritime Freight Rates Act,⁹⁹ all other payments are to be cancelled immediately or in stages. Payments to railways to offset operating costs through undeveloped areas of northwestern Ontario, presently amounting to about seven million dollars annually, are to be cancelled over a period of three years during which railways will be allowed to increase their rates as the payments decrease. Railways will be paid their losses for any uneconomic branch lines continued and for any uneconomic passenger services continued. Furthermore, railways will be reimbursed for losses on eastern port export grain and flour carried at eastern rates. The railway is also to be

⁹⁶ CPR KASLO—Sandin Branch Line Application 1957, 47 BTC (Board of Transport Commissioners) 39, 74 Can. Ry. Cas. 339 (1957).

⁹⁷ National Transportation Act § 387A.

⁹⁸ National Transportation Act § 387B.

⁹⁹ CAN. REV. STAT. c. 174 (1952).

paid compensatory rates for transporting mail, service personnel, and their effects.

The overall effect of the National Transportation Act is to give railways freedom of action similar to that exercised by independent commercial enterprises, including freedom to quote rates immediately and to compete on a more equal footing with other modes of transport. In addition, where a rail carrier is used to further national policy, the railway will be compensated for its services.

Section 469 added to the Railway Act provides for phasing out payments which have been made for maintenance of rates during the sixties. In the interim the Commission will calculate the normal payment that would have been made to the railways by reference to amounts decreasing from \$110,000,000 for 1967 to \$12,000,000 for 1974, with payment to railways being made only for the portions of such amounts to which they would be entitled and which are not covered by railway branch line abandonment or discontinuance of passenger service provisions or payments respecting maintenance of rates to eastern ports.

2. *Telegraphs and Telephones*

New section 381 retains for telegraph and telephone companies, including railway company operations in this field, the just and reasonable and non-discrimination rules respecting tolls as determined and applied by the Commission. The Commission has the power to disallow or order substitution of offending tariffs along with its general power to make orders respecting traffic, tolls, and tariffs.

D. Provisions Affecting Extra-Provincial Motor Vehicle Transport

Part III, sections 29 to 35 of the new act, relates to extra-provincial motor vehicle transport, but only insofar as a motor vehicle undertaking or such part thereof has been exempted from the provisions of the Motor Vehicle Transport Act.¹⁰⁰ Section 5 of the last-mentioned act permits the exemption of any person, the whole or any part of an extra-provincial undertaking, or any extra-provincial transport from all or any of the provisions of the act. The new act contemplates that such exemptions will take place and that regulation of extra-provincial motor vehicle transport will thereby come under the Canadian Transport Commission. In the meantime, Provincial Motor Transport Boards will continue regulation under the federal act. If and when regulation of extra-provincial operation comes under the new Commission, there will be central control over operating certificates and fees; but vehicle and driver licenses, as distinguished from franchise licenses, will continue to be issued by provincial authorities. Section 35 authorizes the Commission to make regulations respecting filing tariffs, minimum compensatory tariff requirements similar to railways, uniform accounts and terms and conditions of carriage, uniform bills of lading, safe operation, and other necessary matters.

¹⁰⁰ Stat. Can. c. 59 (1953-54).

Under a central authority, the often onerous task of applying first to the Board in the carrier's home province and subsequently to Boards in each of the provinces in which operations are to extend for complementary authorities would be avoided. The risk of obtaining conflicting decisions from different Boards on similar applications would also disappear.

E. Provisions Affecting Water Transport

While the Spence Commission saw no need of a central authority regarding the problems of Canadian shipping and shipbuilding,¹⁰¹ water transport is brought under the new Commission. The new act, as noted above, transfers the members and employees of the Canadian Maritime Commission to the Canadian Transport Commission, the Chairman becoming Chairman of the Water Transport Committee unless he is appointed the president or a vice-president of the Commission.

In addition to the general powers of the new Commission, there are specific powers and duties aimed at the financial difficulties of Canadian shipping and shipbuilding. Section 15(1)(f) requires the Commission to recommend to the Minister such economic policies and measures as it considers necessary and desirable in the operation of the Canadian Merchant Marine. The act further empowers the Commission to ascertain and report to the Minister on the shipping services required for the domestic and external trade of Canada, the costs of operation on Canadian registry in comparison with operation on other registries, and on the water transportation industry and services directly related thereto.

The new act, accordingly, does not purport to remedy the recurring problems but rather provides the machinery for continuing study and for recommendations for action.

F. Provisions Affecting Commodity Pipelines

As already noted, oil and gas pipelines connecting provinces or extending beyond a province are regulated under the National Energy Board Act. The new act, however, is made applicable to "commodity pipelines." Under section 3(b), "commodity pipeline" does not include a pipeline for the transmission solely of oil and gas or either. The jurisdiction respecting commodity pipelines is determined by applying the provisions of the National Energy Board Act. Authority over a pipeline through which oil and gas can also be moved is shared between the Energy Board and the new Commission, but the Governor-in-Council may transfer such a combined pipeline to the sole jurisdiction of the National Energy Board. The Commission, with the approval of the Governor-in-Council, may exempt a commodity pipeline from any provisions of the act. The new Commission may, under section 15(5), delegate to any other federal authority its duties and powers in respect to commodity pipeline safety. This could mean delegation to the Energy Board.

¹⁰¹ *Supra* note 90.

G. *Coordination Or Competition*

As noted, the new act contains some provisions indicating coordination through regulation. Section 14 is to the same effect as section 3(2) of the Transport Act of 1938¹⁰² except that the object of "co-ordinating and harmonizing the operations of all carriers" is extended to include extra-provincial motor vehicle transport and commodity pipelines along with transport by aircraft, railways, and water. The national policy declaration in section 1 does not use the word coordination. Subject to reservations, it declares that the national objectives are most likely to be achieved when all modes of transport are able to compete under conditions ensuring that regulation will not restrict the ability of any mode of transport to compete freely with any other. The Canadian National-Canadian Pacific Act,¹⁰³ which required the two railways to cooperate for the purpose of effecting economies,¹⁰⁴ is repealed by section 76 of the new act. The most significant area for coordination will be between railway and motor transport. Moreover, section 39 fills a gap by widening the Railway Act¹⁰⁵ to authorize railways to interchange traffic and to divide and apportion tolls with any other common carrier. Substantial coordination by voluntary action has developed in the use of railway long-haul economies; *e.g.*, highway trailers and containers on rails. Competition rather than coordination or regulation is the theme of the MacPherson Commission and the National Transportation Act.

¹⁰² Statutes of Canada, 1938, c. 53, now, as amended, CAN. REV. STAT. c. 271 (1952).

¹⁰³ CAN. REV. STAT. c. 234, § 156(1) (1952).

¹⁰⁴ CAN. REV. STAT. c. 39, § 17 (1952).

¹⁰⁵ CAN. REV. STAT. c. 234 (1952).