Canadian Transport Liberalization: Planes, Trains, Trucks & Buses Rolling Across the Great White North*

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> To this American visitor, Canada has always been a very attractive place, with an appeal that goes far beyond its trains. Geologically, the world's second largest country has been graced with an incredible diversity of compelling scenery, from the 40-foot tides of the Bay of Fundy to the endless pines of western Ontario, from the yellow flatness of Saskatchewan to misty rain forests of coastal British Columbia. Culturally, Canada's mix of French and English heritage provides an agreeable touch of Europe close to home. And socially, Montreal, Toronto and Vancouver are forceful reminders that big cities need be neither ugly nor dangerous unless people let them get that way.
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> — Tom Nelligan, "VIA Rail Canada: The First Five Years," 2 (1982).

I. INTRODUCTION

As a huge and disparate country, Canada has been dependent on good transportation lines to keep its people together and to safeguard its sovereignty. Railroad construction was mentioned in the British North America Act and was on the minds of the Fathers of Confederation. The

construction of the Canadian Pacific Railway kept the Canadian west from falling into the hands of James J. Hill and his Great Northern Railway. Rail service developed the ports of Vancouver, Prince Rupert, Thunder Bay and Churchill, thus giving export potential to the farmers of the Prairie Provinces. The Riel Rebellion, the last serious threat to Canadian sovereignty in the West, was crushed with the aid of the Canadian Pacific, which ferried crack troops from Montreal to Regina to put an end to the revolt.

Motor carriers of passengers and property made possible the development of communities not served by good rail service. Buses still serve Canadian communities and regions with no alternative service, as well as competing with trains and even planes in the urban corridors of Ontario and Quebec. Trucking companies, based on both sides of the Canadian-U.S. border, are able to use Canada's excellent highway system to bring deliveries to small and medium-size cities and towns through the Dominion. Only a few reaches of the far north are not served by all-weather highways and even there, intermodal service allows trucks and trailers to be piggybacked to these remote communities by rail.

More than any other factor it has been the development of air service which has made Canada accessible to the whole world and has brought the most remote portions of the country into the Canadian community. There are no roads north of Thompson, Manitoba; there are no rails north of Churchill. But the arctic and subarctic regions are now linked with Toronto, Winnipeg, Montreal and Vancouver by daily air service, and the planes are relied upon for day-to-day transportation as well as the necessities of life. Canada's two principal airlines, Air Canada and Canadian Airlines International, link the frozen tundra with the urban fringe along the U.S. border where 90% of the country's population lives. Canadian airlines also show the Maple Leaf in every continent of the world through the international air routes of the two principal carriers. As a major airfaring nation, Canada has a tremendous stake in the future of international aviation. The headquarters of both the International Air Transport Association and the International Civil Aviation Organization (the U.N.'s specialized agency for air transportation) are located within a few blocks of each other within the city of Montreal.

II. Deregulation of the Airline Industry in the United States and Canada

A. Introduction

The mid-1970s was a turning point for the civil aviation industry in both Canada and the United States. The policy that emerged emphasized more reliance on competitive market forces and less governmental con-

trol of what was once a highly regulated industry. Both Canada and the United States began a process of "*de facto* deregulation" of their respective domestic airline industries which was subsequently codified by statute. Deregulation of the aviation industry had two dimensions. First, deregulation represented a new substantive policy of competition for domestic aviation. Second, deregulation was also the process of the regulatory changes and elimination of governmental controls.[1]

In October, 1988 the United States marked the tenth anniversary of the promulgation of the Airline Deregulation Act of 1978.[2] The Act's purpose was to encourage, develop and attain an air transportation system which relied on market forces to determine the quality, variety and price of air service.[3] Canada began reform of its economic regulatory framework in 1984, culminating the passage of the new National Transportation Act,[4] effective January 1, 1988.[5] Canadian deregulation, usually referred to by Canadians as "economic regulatory reform", is still unfolding. The reform is intended to ensure the existence of economic and efficient carriers and at the same time provide reasonable fares and adequate service to Canadians.[6]

During the past decade, the United States witnessed a number of significant developments within its aviation industry. There have been three distinct phases of deregulation:[7]

1) Expansion in the number of carriers in 1978, followed by a marked reduction of carriers in 1985;
2) Consolidation of carriers through mergers. Buyouts of smaller regional carriers;
3) Concentration among large carriers.

The U.S. deregulation experience has become a model for Canada and the rest of the free world.[8] The model is not without flaws, including increased concentration and market power among major carriers, anticompetitive practices, bankruptcies, mergers, a gradual rise in airfares,

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1. A. Phillips, Airline Deregulation: Its Process, Effects and Implications for Canadian Competition Law (January, 1988) (unpublished manuscript) (available at the Transport Institute, University of Manitoba, Winnipeg, Canada) at 4 [hereinafter Phillips].

2. Airline Deregulation Act, 49 U.S.C. app. §§ 1301-1552 (1982).

3. *See generally*, 49 U.S.C. app. § 1302 (1982). Section 1302 of the ADA states that the Board in performing its functions shall consider the public interest. *Id.* Competition to the extent necessary to assure sound development of the airlines along with fostering of economic conditions is in the public interest. *Id.*

4. National Transportation Act, 1987, Chapter 28 (3rd Supp.) [hereinafter NTA, 1987].

5. FOURTEENTH ANNUAL FAA AVIATION FORECAST CONFERENCE PROCEEDINGS, March 3, 1989, U.S. Department of Transportation, FAA-APO 89-2 at 108 [hereinafter 14th ANNUAL CONFERENCE].

6. NTA, 1987, *supra* note 4 at art. 3(1).

7. 14TH ANNUAL FAA CONFERENCE, *supra* note 5 at 20.

8. *Id.* at 21.

minimal labor protection and serious safety concerns.[9]

In this section we will examine the airline industry, its deregulation and post-deregulation effects in both the United States and Canada. Deregulation in the United States and Canada is similar, and yet unique. In order to achieve adequate and efficient air transportation, both countries have relied on: 1) the abolition of independent regulatory tribunal discretion in licensing and fare regulation, thereby opening the industry up to free market competition; and, 2) the suitability and effectiveness of competition laws to ensure fair market competition.[10]

B. UNITED STATES

1. DEREGULATION

Prior to 1978, the United States airline industry was accustomed to extensive government regulation and intervention. The regulatory agency known as the Civil Aeronautics Board[11] (CAB) promoted both the safety and economic aspects of civil aviation. The Federal Aviation Agency (FAA) assumed the control over the safety aspects of the U.S. airline industry in 1958. The CAB continued to exercise economic control over routes, fares, labor, mergers and acquisitions.

The CAB began the process of regulatory reform in 1977.[12] Alfred Kahn was appointed chairman of the CAB by U.S. President Jimmy Carter. Kahn was a proponent of free market competition for the aviation industry and an advocate of deregulation.[13] Prior to any legislative reform, Kahn embarked on a program of "*de facto* deregulation" within the framework of the existing regulations.[14] Some examples of Kahn's *de facto* deregulation were as follows:

1) Low fares became a factor in carrier selection for service routes;
2) New route authority was granted to multiple carriers thereby allowing market forces to determine which carrier would most effectively service the route;
3) Carriers were given some pricing freedom.[15]

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9. *See generally*, P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION (1989).

10. Phillips, *supra* note 1 at 2.

11. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938) (codified as amended at 49 U.S.C. app. § 1321(a) (1982). In 1938, Congress passed the Civil Aeronautics Act which created a five-member independent regulatory agency known as the Civil Aeronautics Board (CAB). The CAB's purpose was to promote and regulate the safety and economic aspects of civil aviation. *Id.*

12. E. BAILEY, D. GRAHAM & D. KAPLAN, DEREGULATING THE AIRLINES 12 (1985) [hereinafter E. BAILEY].

13. Phillips, *supra* note 1 at 5-6.

14. *Id.*

15. *Id.* at 6. Dempsey, *The Rise and Fall of the Civil Aeronautics Board: Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 9 (1979).

The Airline Deregulation Act[16] (ADA) was signed into law on October 28, 1978. The ADA proposed a gradual relaxation of the CAB's regulatory powers with a four year phase out over controls of rates and routes.[17]

By January 1, 1982, the CAB's domestic route and licensing authority based upon "public convenience and necessity" expired and any existing carrier was allowed to enter any domestic route of its choice,[18] so long as it could demonstrate that it was "fit, willing and able" to operate.[19] Consistent with freedom of entry was freedom of exit from unprofitable markets.[20] No application or agency approval was necessary for the abandonment of a route; only notice provisions were required. A provision for essential air service to small communities was included in the legislation.[21]

The ADA sought to encourage competition in the domestic aviation industry by coupling greater pricing freedom for carriers with greater protection against anti-competitive pricing practices.[22] With respect to fares, Section 102(3) of the ADA called for "the availability of adequate, economic, efficient and low price fares without unjust discrimination, undo preference or advantageous or unfair deceptive practices."[23]

The CAB controlled rates until January, 1983. During the interim, between 1978 and 1983, carriers were given greater pricing freedom. The CAB was required to accept as "just and reasonable" any fare that represented an increase of up to 5% above the standard industry fare level (SIFL) or as much as 50% decrease below the SIFL.[24] When the CAB's fair regulation function ceased entirely, it was the intent of Section 102(3) of the ADA to permit carrier pricing freedom so as to allow fares to stabilize at levels that would attract passengers as well as earn a profit for the airlines.

Section 102(7) of the ADA called for "the prevention of unfair, deceptive, predatory or anti-competitive practices in air transportation and the avoidance of:

a) unreasonable industry concentration, excessive market domination and monopoly power and
b) other conditions that would tend to allow one or more air carriers unrea-

16. Airline Deregulation Act, 49 U.S.C. §§ 1301-1552 (1982).
17. E. BAILEY, *supra* note 12 at 34. The CAB's authority over routes ended on December 31, 1981 and its authority over fares ended on January 1, 1983. *Id.*
18. Phillips, *supra* note 1 at 9.
19. *Id.*
20. *Id.*
21. *Id.*
22. *See* Airline Deregulation Act, 49 U.S.C. app. §§ 1301-1552 (1982).
23. *Id.*
24. Phillips, *supra* note 1 at 10.

sonably to increase prices, reduce services or exclude competition in air transportation.[25]

More than a decade later, the empirical results are not significantly different from those predicted by deregulation's opponents. In fact, the air transportation system in the United States today appears to be antithetical to the above described purposes of the ADA.

2. Effect of Deregulation on the Domestic Aviation Industry in the United States

The manner in which U.S. commercial carriers conduct their business, as well as the domestic aviation structure as a whole, has been affected by deregulation.[26] Deregulation has impacted service, airfares, airline financial performance, safety and labor protections.

Between 1938 and 1978 the CAB had adopted a protectionist attitude toward existing carriers.[27] The CAB maintained the status quo by restricting both the entry of new carriers into existing routes and fare reductions to attract new passengers. Thus, carriers were protected from financial ruin resulting from destructive competition.[28] Deregulation gave American carriers unlimited freedom of choice in route network planning decisions.[29] The only existing barrier was raising enough capital to enter the market. Prior to deregulation there were approximately 36 interstate carriers. This number grew to 229 in early 1984, 22 of which were brand new carriers.[30]

The United States is now experiencing excessive concentration among its major carriers and anti-competitive practices in the airline industry. "After a dozen years of warfare in the open skies above the United States and a wave of mergers, the domestic airlines have been consolidated into an industry of megacarriers."[31] Approximately 214 airlines have disappeared or merged into hardier carriers.[32] Established carriers such as National, Western, Pacific Southwest, Frontier, Ozark and Republic have ceased to exist.[33] Vanished is the fleet of early deregulation upstarts such as People Express, Muse Air, Air Florida, Pride Air, Jet America and Empire.

Prior to deregulation the five largest U.S. carriers controlled 63% of

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25. *Id.* at 9-10.
26. *Id.* at 13.
27. *Id.*
28. E. Bailey, *supra* note 12 at 95-96.
29. Phillips, *supra* note 1 at 13.
30. *Id.* at 14.
31. N.Y. Times Magazine, April 2, 1989, (Magazine), at 69, col. 1. *See* Dempsey, *Antitrust Law & Policy in Transportation: Monopoly I$ The Name of the Game*, 21 Ga. L. Rev. 505 (1987).
32. Time, May 15, 1989 at 52, col. 1.
33. *Id.* at 52, col. 1-2.

the passenger business. Supporters of the deregulation hoped to reduce the concentration of the market share among the top carriers.[34] The results have been to the contrary. Today, American Airlines is the largest carrier of domestic traffic, and operates 119 weekly flights to 13 European cities. Ranked by size, American is followed by United, Delta, Northwest and Continental. Together these five airlines control 70% of the industry's U.S. traffic.[35]

Further diminishing the ranks of the U.S. carriers are bankruptcies and take-over bids. Among the more notable bankruptcies are Braniff (1982 and 1989), Continental (1983), Frontier (1986), and Eastern (1989). Pan Am is also on the verge of being swallowed up and or dismantled after losing $151 million during the first quarter of 1989 and a $73 million annual loss for 1988.[36] Four airlines today have a negative net worth — Eastern, Continental, TWA and Pan Am.[37]

Eastern entered Chapter 11 bankruptcy in March of 1989 after a strike by its machinists virtually shut it down. In April, 1989, former commissioner of major league baseball and financier Peter Ueberroth, bid $464 million to purchase the bankrupt Eastern.[38] In May, 1989, wheeler-dealer Donald Trump's agreement to buy Eastern's shuttle operations for $365 million was briefly jeopardized by a higher bid from Phoenix-based America West Airlines.[39] At the same time, Northwest was fighting a take-over by Denver oilman Marvin Davis, who bid $2.6 billion for the airline.[40] In 1989 the Department of Transportation approved a $3.65 billion leveraged buyout of Northwest by a group of investors led by Alfred Checchi.

The possible takeover of Northwest[41] prompted a bill in the 1989 Minnesota legislative session that would have extended the protections of Minnesota's anti-takeover law to Northwest Airlines. Part of the bill dealing with worker and consumer protections in the event of a takeover made it to the senate floor. Ultimately the bill failed to pass.[42]

The development of the hub and spoke route system is a major change in commercial aviation and is today one of the major factors con-

34. *Id.* at 52, col. 2.

35. *Id.*

36. *Id.* at 54, col. 2.

37. Dempsey, *Corporate Pirates Assault the Heavens: Leveraged Buy-Outs and the Airline Industry*, 2 DE PAUL BUS. L.J. 59 (1989).

38. TIME, April 17, 1989 at 44-46.

39. TIME, May 15, 1989 at 54, col. 2.

40. *Id.*

41. U.S. NEWS & WORLD REPORT, September 11, 1989 at 54, col. 1. The Department of Transportation (DOT) approved the sale of Northwest Airlines on Sept. 29, 1989 after forcing the new owners led by Alfred Checchi to re-structure the buyout to prevent a Dutch airline (KLM) from controlling the carrier. Grand Forks Herald, Sept. 30, 1989, Part C, at 1. col. 5.

42. Grand Forks Herald, May 23, 1989, Part A, at 6, col. 2. Telephone interview with Charles Wikelius, Deputy Attorney General of the State of Minnesota (Dec. 5, 1989).

tributing to the anti-competitive practices in the U.S. airline industry. The hub and spoke system is a method of feeding travelers from small cities into a central hub where they can catch connections on the same airline to other points.[43]

The CAB had favored a nonstop linear route system. Carriers had to provide this type of service to avoid losing their route authority in favor of other carriers.[44] Many city-pair markets could not profitably support direct nonstop service. Therefore, the airlines often added routes which connected into the nonstop city-pair markets to add sufficient traffic flow. Both the nonstop and backup routes remained fairly stable under the authority of the CAB.[45]

Deregulation changed this essentially linear traffic pattern into a hub and spoke system because of the increased competition in the backup markets. Local carriers which had previously funneled their passengers to major carriers were now extending their routes to keep passengers until their final destination.[46] During the early years of deregulation, major U.S. carriers endured their worst losses in history due to the onslaught of head-to-head competition until fortress hubs could be created. American and United suffered fewer losses because their east-west routes continued to attract business travelers who tended to pay full rates.[47]

Delta and Piedmont pioneered the hub and spoke system in the South. Major airlines began creating their own hub airports thereby saving on maintenance costs, baggage handling and other ground services.[48] The major airlines also began merging with feeder airlines from the backup markets as well as with carriers from other regions. For example, Northwest bought Republic thereby gaining dominance in Minneapolis and Detroit; it also has hubs in Memphis and Milwaukee. Atlanta-based Delta bought Western taking over its hub in Salt Lake City. TWA purchased Ozark resulting in a domination of St. Louis.[49]

The airlines have benefited from the hub and spoke system in several ways. By linking flights at hubs and tightly coordinating arrivals and departures, airlines are able to offer more frequent service and carry more passengers to a wider variety of destinations than by flying linear route patterns.[50] The hub and spoke system also allows the airline to carry

43. TIME, May 15, 1989, at 52. col. 2. *See also*, 14th ANNUAL FAA CONFERENCE, *supra* note 5 at 20.

44. Phillips, *supra* note 1 at 18.

45. *Id.*

46. *Id.*

47. TIME, May 15, 1989, at 53, col. 2.

48. *Id.* at 53, col. 3.

49. *See generally*, TIME, May 15, 1989, at 52-54.

50. Phillips, *supra* note 1 at 19.

more passengers from the point of origin to the final destination without having to turn them over to a competitor.

But for the airline passenger, hub and spoking has meant less nonstop service, more frequent changing of planes, use of smaller planes on connecting routes, more delays at hubs and higher airfares.[51] With the concentration of between one and two carriers at each hub, there is less competition. There appears to be a direct relationship between the number of competitors and average fare levels.[52] Since January, 1989, ticket prices have risen approximately 15%.[53]

The hub and spoke system has also had a pronounced affect on traffic patterns in individual markets in the United States. There has been a general increase in weekly departures and boardings at large and medium hubs. Smaller hubs have had less of an increase, while non-hubs have had decreases. Many small communities have lost air service completely.[54]

Airline travel in the United States has doubled from 240 million trips in 1977 to 447 million trips in 1987. But during this period, no major airports have opened. The focus of competition has now shifted from cut-rate fares to control of airport departure gates and takeoff and landing slots at the hubs.[55] Many hubs are filled to capacity and there is little turnover in gates which hinders new applicants who wish to use the airport controlled by a major carrier. Many airlines that were unable to secure gates and takeoff and landing slots were forced out of business.[56] As the public's demand for increased travel grows, the megacarriers controlling the hubs are easily able to add flights to meet this demand. New carriers are virtually barred from entering the market. Investors are reluctant to enter the airline business except as buyers of existing carriers and their gates and landing and takeoff slots.[57]

U.S. Transportation Secretary Samuel Skinner has expressed concern about the concentration of mega airlines and their control of the

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51. *Id.*

52. *See generally*, Phillips *supra* note 1 at 22. Goetz & Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air*, 54 J. AIR L. & COM. 927 (1989).

53. TIME, May 15, 1989, at 52. If the passenger lives in a place at which his airport is dominated by one airline such as in Charlotte, Detroit or Minneapolis-St. Paul, he may be paying 27% more than passengers in competitive cities such as Los Angeles, Miami or Philadelphia. Grand Forks Herald, June 7, 1989, Part B at 5, col. 3. *Accord*, 14th ANNUAL FAA CONFERENCE, *supra* note 5 at 83.

54. Phillips, *supra* note 1 at 17. Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445 (1987).

55. TIME, May 15, 1989, at 53, col. 3. *Accord*, 14th ANNUAL FAA CONFERENCE, *supra* note 5 at 84.

56. TIME, May 15, 1989, at 53, col. 3.

57. *Id.* at 53-54.

hubs.[58] Skinner believes that building new airports may be one solution. Building new airports and expanding existing ones would add more gates and hence more competition for existing carriers. The Dallas-Fort Worth airport, completed in 1974, was the last new airport built in the United States. In May of 1989 Denver voters approved the construction of a new huge airport, estimated to cost $2.3 billion.[59] Serious congestion is expected at the nation's approximately 58 airports by the year 2001.[60] Seven major airports (Chicago, Detroit, Los Angeles, New York, Phoenix, St. Louis, and San Francisco) need to be replaced. New airports require massive sums of money and approximately 10 years to complete. Other than Denver, only Austin has proposed a new airport, slated for 1995.[61]

Along with the concerns regarding concentration of mega carriers and their control of airport hubs is the competition in computer reservation systems (CRS). CRS is vital to an airline's ability to compete and survive. The automated reservation systems are vast computer networks that major carriers use to disperse up-to-date flight information to travel agents.[62] Travel agents linked to the system can check schedules, compare fares, book tickets and reserve hotel rooms and rental cars.[63] The CRS network is vital to the airlines not only to fill its seats, but to fill seats in a profitable way. Travel agents depend heavily upon the CRS network to book passengers often at the expense of carriers without computers.[64] American Airlines SABRE system (Semi-Automated Business Research Environment) is dominant and used by about 14,000 agencies to keep up with the 45 million fares of 281 airlines.[65]

James Oberstar, U.S. House of Representatives (D-Minn.) stated that to sustain the energy of deregulation, there must be a market place in which there is not only competition, but also the underpinnings for competition.[66] The CRS network is an economic underpinning that must be open to competition. The four top U.S. carriers control approximately 66% of the CRS market and nearly 87% of all flights are booked through carriers with CRS.[67]

The major changes in U.S. commercial aviation during the past decade have threatened the economic underpinnings of deregulation as ex-

58. *Id.* at 54, col. 2.
59. *Id.*
60. U.S. NEWS & WORLD REPORT, May 29, 1989, at 10, col. 1. *See generally*, 14th ANNUAL FAA CONFERENCE, *supra* note 5, at 84.
61. U.S. NEWS & WORLD REPORT, May 29, 1989, at 10, col. 1.
62. TIME, May 15, 1989, at 54, col. 1.
63. *Id.*
64. *Id.*
65. *Id.* The second largest CRS network, United's Apollo, is used by 10,000 agencies.
66. 14th ANNUAL FAA CONFERENCE, *supra* note 5 at 83.
67. *Id. See also*, TIME, May 15, 1989, at 54, col. 1.

pressed by the ADA.[68] The competition needed to sustain the lower fares of deregulation is shrinking. Since 90% of all Canadians live within 150 miles of the United States border and avail themselves of many U.S. flights, Canadian airline consumers are also directly affected by the deregulation of the U.S. aviation industry. For the airline passenger, deregulation brought a brief period of low airfares and many new carriers serving the routes. The tourist-oriented traveler has probably received a major benefit through discount tickets with certain restrictions. Some airline passengers in high density markets and on long haul routes also reaped the benefit of discounts. The average business traveler in the United States has had the least benefit of deregulation and pays more for his airfare in real terms. With the advent of the hub and spoke route system and the bankruptcy and takeover of many new competitors, the average consumer now experiences more crowded planes, flight delays and rising airfares. Those passengers living in smaller cities or remote areas have limited and more expensive or no air service at all.[69] Concerns have been expressed that market domination by a small group of megacarriers could result in a highly uncompetitive airline industry. Instead of regulation resting with the government, competition will be thwarted by the power wielded by the megacarriers which control the scarce amount of space available at major airports, the computer reservations systems, the frequent flyer programs, and enjoy the scale economies of hub and spoke operations.

C. CANADA

The year 1984 marked the beginning of Canada's reform of its economic regulatory framework (i.e., deregulation) over airlines. Having embarked upon deregulation in a different manner and somewhat later, Canada has been able to observe some of the negative effects in the United States. Canadian airline deregulation has been unique in several ways. First, the United States has a specific policy for its aviation industry. Canada has a broad transportation policy which includes airlines, railways and motor carriers.[70] Canada's flight patterns are principally transcontinental, from east to west, due to Canada's geography and population. Unlike the United States, Canada embarked upon deregulation with a mixture of private and government owned airlines. Finally, the Canadian government has not completely deregulated its airline industry.

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68. *See supra*, note 24 and accompanying text.

69. Phillips, *supra* note 1 at 17. *Accord*, Grand Forks Herald, June 7, 1989, Part B, at 5, col. 3.

70. FREEDOM TO MOVE IN CANADA'S A NEW TRANSPORTATION ENVIRONMENT, Minister of Supply and Services Canada 1988, Cat. No. T22-74/1988 E, 2-3, [hereinafter FREEDOM TO MOVE].

Canada's two major transcontinental carriers are Air Canada and Canadian Airlines International. Until 1989, Air Canada was a Crown Corporation wholly owned by the Canadian government; the Minister of Transportation acted as a trustee and shareholder for the Federal Government. In August of 1988, the Canadian government announced its intention to sell 45% of Air Canada to the public.[71] A 100% sell-off was completed by the Fall of 1989.

Canada's second major carrier has always been privately owned. The Canadian Pacific Railway operated this, the second largest airline in Canada, formally known as Canadian Pacific Airlines, or more popularly as CP Air. In 1986, CP Air was purchased by Pacific Western Airlines (PWA), a former regional carrier, thus forming Canadian Airlines International.[72]

In addition to the two transcontinental carriers, Canada's federal policy prior to 1984 also provided for four major regional carriers which supplemented the main line operations of the nationals. Each carrier was restricted to a section of Canada: 1) Pacific Western Airlines served western Canada and the Northwest Territories; 2) Transair Limited served the Prairie Provinces of Manitoba and Saskatchewan, the Northwest Territories and Ontario; 3) Quebecair served Quebec and Labrador; and, 4) Eastern Provincial Airways served the Maritime Provinces (New Brunswick, Nova Scotia, Prince Edward Island, NewFoundland), and Quebec.[73] A third level consisted of smaller local carriers. Regulation of the transportation industry in Canada served to prevent the two transcontinental carriers from competing with the regionals.[74]

1. *Regulatory Structure Prior to Deregulation*

Canada implemented deregulation on January 1, 1988.[75] Prior to deregulation, transportation, including aviation, was governed by the policy guidelines of the National Transportation Act, 1967.[76] The National Transportation Act created the Canadian Transport Commission (CTC) which functioned as an independent regulatory body for all modes of transportation including air, rail and motor carriers.[77] The Aeronautics

71. MACLEAN'S, November 14, 1988, at 32, col. 1.

72. Phillips, *supra* note 1 at 65.

73. 14th ANNUAL FAA CONFERENCE, *supra* note 5 at 109. Phillips, *supra* note 1 at 49.

74. Phillips, *supra* note 1 at 49.

75. 14th ANNUAL FAA CONFERENCE, *supra* note 5 at 108.

76. Can. Rev. Stat. ch. N-17 (1970).

77. Phillips, *supra* note 1 at 44. Until deregulation was implemented in Canada effective January 1, 1988 the economic regulation of Canada was governed by the policy guidelines outlined in the National Transportation Act, 1966-67, c. 69 and the licensing and fare control functions of the Air Transport Committee as enumerated in the Aeronautics Act R.S.C. c. 2. *Id.*

Act[78] granted the CTC's Air Transport Committee (ATC) licensing and fare control in aviation using the familiar "public convenience and necessity" criteria.[79] Despite the appearance of continued regulation by the above-named government bodies, the 1967 National Transportation Act marked the government's first move away from direct economic regulation and toward competition in the market place.[80]

Section 3G of the 1967 National Transportation Act outlined the basic policy for all modes of transportation as an ". . . economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost."[81] The Act, however, contained a limiting phrase, ". . . having due regard to national policy and to legal and constitutional requirements."[82] "Due regard to national policy" referred to policy as outlined by the Minister of Transport. This limiting phrase prevented the move to complete regulation by market forces.

In 1969, the Minister of Transport announced a new policy clearly specifying the boundaries in which the regional carriers could operate.[83] The regional carriers were "preferred vehicles" whose roles were to operate local and regional routes that supplemented the two major transcontinental carriers (i.e., Air Canada and the then CP Air).[84] Thus, the regional carriers were placed in a protected and noncompetitive role.

One of the transcontinental carriers, Air Canada (A Crown Corporation), was created by the 1937 Trans-Canada Airlines Act.[85] The 1937 Act reflected the Canadian government's desire to contribute to the economic and political integration of the country and to thwart the entry of American-owned carriers. Trans-Canada Airlines (known as Air Canada since 1964) was established to supply services no existing carrier was then providing.[86] The Air Canada Act of 1977 revoked the Air Canada contract, thereby subjecting Air Canada's license applications to the discretion of the ATC. Prior to 1977, Air Canada was free from regulatory control by the ATC except in the matter of tariffs.[87] Despite the revocation of Air Canada's contract, Air Canada remained the dominant carrier and

78. Aeronautics Act, Can. Rev. Stat. ch. A-3 (1970).

79. Thoms, *Canadian Air Deregulation*, 15 TRANSP L.J. 137, 139, (1986) [hereinafter, Thoms]. *See also*, Aeronautics Act, Can. Rev. Stat. §§ 14 (1) (a) (b), 16 (1)(3), (1970), *supra* note 78.

80. Ellison, *The Rise and Decline of Protective Economic Airline Deregulation in Canada*. 15 TRANSP. L.J. 105, 110 (1986) [hereinafter Ellison].

81. *Id.*

82. *Id.* at 110-11.

83. *Id.* at 111.

84. *Id.* at 111-12.

85. Can. Stat. ch. 43 1937.

86. Ellison, *supra* note 80 at 107.

87. *Id.* at 110, 113.

price leader in domestic as well as international markets.[88]

Canada's domestic airline market was also affected by the international airline market. Beginning in the 1960's and continuing in the 1970's, there was a spectacular growth of international air charters (a large portion of that market being the tourist trade) with points of travel often originating in Canada to destinations in both the U.S. and Europe.[89] Canada's regional carriers entered into low fare competition on these long-haul international routes competing with charters such as Wardair (Canada's largest international charter carrier during the mid 1970's) and the American carriers.[90] Thus, the regionals began to access markets beyond their normal boundaries, and the carefully drawn regional carrier boundaries had eroded substantially by 1978.

One of the regional carriers, Pacific Western Airlines acquired another regional, Transair Limited. Subsequent policy decisions by the Minister of Transport and the ATC allowing several regional carriers access to Toronto further altered the regional air carrier policy.[91] By 1981, all regional carriers served Toronto, that city being the major stopping point in the basically East/West trunk lines. The regionals began to fly east-west instead of their former predominantly north-south routes, thereby competing with the nationals.[92]

The federal government's process of reevaluating the domestic aviation competition policy was prompted as Canada observed more and more Canadian passengers crossing the border to the United States to fly on the cheaper airlines such as People Express. Canada was also responding to the U.S. deregulation style prices.[93] This reevaluation process involved numerous governmental departments and agencies. Two noteworthy recommendations came from the House of Commons Standing Committee on Transport and the ATC of the Canadian Transport Commission which conducted cross-country hearings on the issue of aviation

88. *Id.* at 114. Although Air Canada's license applications were subject, as were all other domestic carriers to the discretion of the ATC, Air Canada still retained a favorable market position because its debt was backed by the Federal Government. *Id.*

89. *Id.* at 114-15.

90. *Id.* at 115. *See also*, MACLEAN'S, January 30, 1989 at 35, col. 1.

91. Phillips, *supra* note 1, at 50.

92. Ellison, *supra* note 80, at 119.

93. *Id.* at 114. It became cheaper for Canadian airline passengers to travel across North America to Canadian destinations than it was to travel across Canada to those same destinations. *Id.* International flights involving both Canadian airlines and foreign airlines are governed by bilateral agreements signed by the Canadian government and the government of the destination county. Cabotage restrictions mean that local traffic within Canada cannot be handled by foreign airlines. Thoms, *supra* note 79, at 138. The U.S. has successfully attracted passengers in Canada. Agreements allowing the U.S. to maintain customs and immigration agents at Canadian airports assist American carriers in attracting or retaining "through passengers" who connect to other planes of the same carrier at the U.S. hub airports. *Id.* at 139.

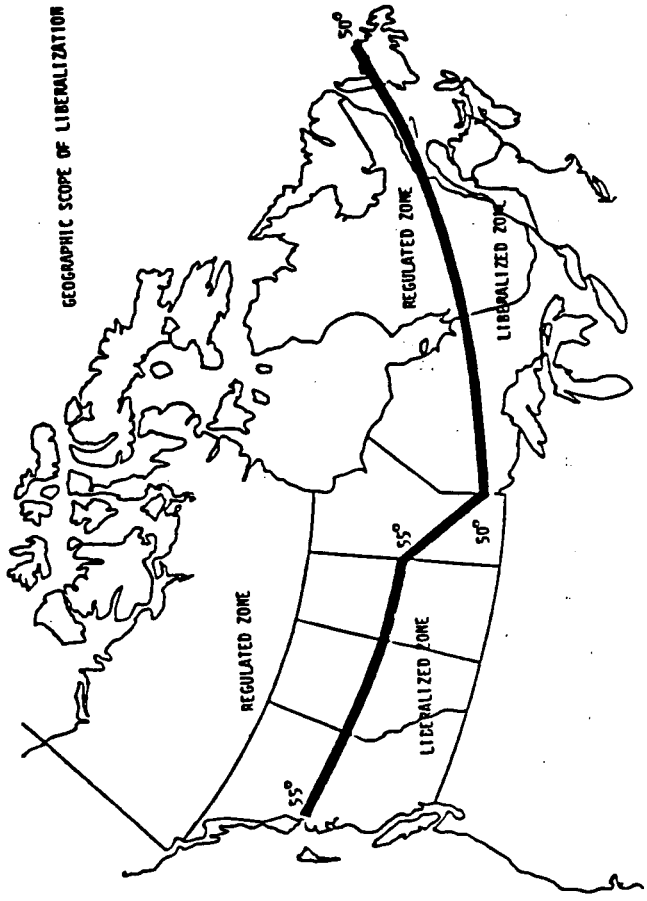
competition.[94] The Standing Committee recommended reliance on competition to be a principal means of promoting efficient, convenient, adequate and stable air service. The ATC viewed competition as just another factor of "public convenience and necessity" to be emphasized in the mature southern Canadian markets.[95] With these recommendations in mind, the then Minister of Transport, the Honorable Lloyd Axworthy, announced his "New Canadian Air Policy" in May of 1984 as a culmination of the work of the various committees.[96] The essence of Axworthy's policy was less regulation and more competition.[97] Full deregulation was not implemented, rather a policy of "liberalization" of the existing regulatory framework and its licensing and fare control functions was added.[98] The CTC was still in place, but it was directed to use discretion in interpreting the "public convenience and necessity" to favor competition in the skies.[99] A "use it or lost it" approach was adopted for carrier service on routes. Financially fit charter airlines were freed altogether from meeting entry requirements.[100] Pricing controls were to be totally eliminated; fares were to be lowered within two years, although the maximum price controls would still remain in force.[101]

The "New Canadian Air Policy" had two major limitations. First, the Minister of Transport could exert pressure on the CTC to exercise discretion within the limits of national policy by virtue of his power to vary or rescind anything done by the CTC.[102] Second, the new air policy did not apply to all of Canada. A demarcation line of 50 degrees north in the East and 55 degrees north in the West, Winnipeg being the middle, was drawn. (See Table 1.) The new liberalized policy would apply to the traffic south of that line in which over 90% of the Canadian people live.[103] The North would continue to be regulated since its population is smaller and therefore unable to withstand the deleterious effects of excessive competition. In some remote areas, air service is the only mode of transportation.

The "New Canadian Air Policy" eliminated the historic division between the "big two" (Air Canada and Canadian Airlines International for-

94. Phillips, *supra* note 1 at 50-51.
95. *Id.* at 54.
96. *Id.* at 50.
97. Thoms, *supra* note 79, at 140.
98. Phillips, *supra* 1 at 50.
99. Thoms, *supra* note 79, at 140.
100. *Id.* at 140-141.
101. *Id.* at 141.
102. Phillips, *supra* note 1, at 56.
103. Thoms, *supra* note 79, at 141. The North comprises about 5 percent of Canada's air carrier activity. 14th ANNUAL FAA CONFERENCE, *supra* note 5 at 110.

Table 1



Source: A. Phillips, Airline Deregulation: Its Process, Effects and Implications for Canadian Competition Law (January, 1988) (unpublished manuscript) (available at the Transport Institute, University of Manitoba, Winnipeg, Canada) at Appendix C.

merly known as CP Air) and the regional and charter carriers.[104] The Minister stated that any new or existing carrier may henceforth be considered, upon application to the CTC, for any type of domestic service, thus making the concept of regional carriers obsolete, as any airline could now apply to serve any region in Canada.[105]

Restrictions that prohibited or limited the frequency of nonstop and turnaround services, and the types and sizes of aircraft or routes were eliminated from existing certificates. The new policy called for greater freedom of entry into routes. The CTC was asked to give greater weight to the benefits of increased competition as a factor of "public convenience and necessity." In line with freer entry, carriers were also given freedom to exit routes subject to certain notice requirements.[106]

The "New Canadian Air Policy" can be compared to the regulatory reform implemented by Alfred Kahn when he was appointed chairman of the CAB in the United States in 1977. In licensing, both national policies required the respective regulatory agencies (CAB and CTC) to rely on market competition as a prime factor in determining "public convenience and necessity." Kahn proposed "zones of reasonableness" to achieve pricing freedom. Axworthy accepted "zones of flexibility" wherein the ATC would determine whether fares were just and reasonable. Unlike the United States Airline Deregulation Act which abolished the CAB, the ATC continued to function and exercise its discretion. Axworthy had to continue to work within the existing regulatory system.[107] The Canadian system gave much broader discretion to the ATC by not legislating specific policy objectives and factors to be used by the ATC in exercising its discretion. Thus, Axworthy ran into difficulty when he was faced with implementing his policy in a manner acceptable to the public but which was ultimately unacceptable to the ATC's view of proper exercise of discretion.[108] Four months later in September 1984, the Liberal government was defeated by the Conservatives under the leadership of Brian Mulroney.

2. *Deregulation of the Canadian Airline Industry*

With this background in mind, we turn to Canada's deregulation under the control of the Conservative government. The Honorable John C. Crosbie, Minister of Transport until 1989, stated that the transportation costs in Canada were higher than they need be. The new system, according to Crosbie, would make Canadian transportation more efficient,

104. Thoms, *supra* note 79, at 141.
105. *See generally*, Phillips, *supra* note 1, at 57.
106. Phillips, *supra* note 1, at 58.
107. *Id.* at 59.
108. *Id.* at 59-60.

cost-effective and competitive.[109] Less regulation would result in greater choices and competitive airfares. Canadians would be offered more flights at more convenient times and with a variety of fares. There would be provisions for air service to northern and remote communities. "The result is a made-in-Canada transportation policy that reflects this country's unique transportation requirements," said Crosbie.[110] Although it is the second largest country in the world, Canada has a small population. Its transportation system ties the vast nation together.

In July, 1985, the government issued a discussion paper entitled "Freedom to Move."[111] The proposals in this document evolved into the new National Transportation Act as set out in Bill C-18 of the National Transportation Act, 1987, which became effective January 1, 1988.[112]

The National Transportation Act, 1987, abolished the Canadian Transport Commission (CTC) and replaced it with the National Transportation Agency (NTA).[113] The powers of the NTA are to be tailored to the new regulatory "Freedom to Move" approach.[114] The NTA is to respond to public interest, industry needs and policy direction from the government. The legislation calls for the establishment of regional NTA offices in western Canada and the Atlantic provinces.[115]

The NTA has the authority to grant transportation licenses, review public complaints, and help resolve disputes between shippers and transportation firms. One of the NTA's most important functions involves resolving disputes, both public and private, affecting transportation. Dispute resolution can be accomplished through voluntary mediation or arbitration.[116] In keeping with the emphasis on minimal regulation, the Agency can in most instances take action only upon request.[117] Since the Minister of Transport is accountable to Parliament for both the national transportation policy and the Agency's actions, the Minister may issue binding directions upon the Agency.[118]

The NTA is also required to consider the new national transportation

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109. FREEDOM TO MOVE, *supra* note 70, at i, Foreword.

110. *Id.*

111. Hon D. Mazankowski, Minister of Transport, *Freedom to Move: A Framework for Transportation Reform*, Ottowa, July 15, 1985.

112. Bill C-18, The National Transportation Act, 1987.

113. National Transportation Act, 1987, *supra* note 4, at Part I, § 6. *See also*, Phillips, *supra* note 1, at 60.

114. *Id.*

115. *Id.*

116. *Id. But see*, National Transportation Act, 1987, *supra* note 4 at § 35 (1)(2)(3) (The Agency may inquire into complaints, licensing matters and safety matters).

117. National Transportation Act, 1987, *supra* note 4 at Part I, § 46-57.

118. FREEDOM TO MOVE, *supra* note 70 at 11, col. 2. The government may issue general policy or other binding directions to the Agency. The government may also alter any decision, order or regulation made by the Agency. *Id. See also*, NTA, 1987, *supra* note 4 at Part I, § 23.

policy in all its decision making. The policy's principles and objectives are: 1) a safe transportation system; 2) a transportation system to serve the needs of shippers and travelers; 3) competition in market forces as the prime means for providing Canadians with efficient transportation at the lowest possible cost; 4) regulations to be kept simple and at a minimum to encourage competition within the transportation industry; 5) transportation as the key to regional economic development; 6) carriers being required to bear a fair and reasonable share of the cost of facilities provided at public expense and to be compensated for publicly imposed duties; and 7) access to transportation as a basic necessity for Canadians, including disabled travelers.[119]

The new policy is already apparent in air transportation. The licensing and control of entry into and exit from the industry has abolished the "public convenience and necessity" test. Any carrier may enter a domestic route if it meets the "fit, willing and able" test which focuses on the safety of the carrier and adequate liability insurance.[120] The firm must also be 75% Canadian-owned or controlled.[121] (The United States has similar statutory restriction over foreign ownership of its flag carriers.) Service, route or equipment restrictions are abolished. The result is carriers which have added new routes to their services, introduced more efficient aircraft in certain markets and offered innovative pricing arrangements. (See Tables 2 & 3.) It should be noted that carriers with only a generic domestic license for southern routes are permitted to fly in or out of the North, but may not fly the northern routes.[122] Carriers wishing to discontinue or reduce service on unprofitable routes need only give 120 days advance notice of their intention to stop or reduce air service. Shorter notices may also be approved by the NTA.[123]

Competitive passenger fares and cargo rates are encouraged by permitting carriers to establish rates and charges without regulatory approval and by allowing carriers to negotiate confidential contracts with their customers.[124] However, the Act requires that carriers have domestic tariffs (i.e., fares, rates, charges) available for inspection by any interested person.[125] Increases in fares on so-called "monopoly" air routes

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Questions of law or jurisdiction may be appealed to Federal Court. FREEDOM TO MOVE, *supra* note 68 at 11, col. 2.

119. FREEDOM TO MOVE, *supra* note 70, at 4, col 1. *See also*, National Transportation Act, 1987, *supra* note 4 at Part I, § 3.

120. National Transportation Act, 1987, *supra* note 4 at Part II, §§ 71, 72.

121. *Id.* at Part II, §§ 67, 72.

122. *Id.*

123. *Id.* at Part II, § 76.

124. FREEDOM TO MOVE, *supra* note 70, at 6, col. 2. *See also*, National Transportation Act, 1987, *supra* note 4, at Part II, § 79 (1).

125. National Transportation Act, 1987, *supra* note 4, at Part II, § 83(1)(2)(3).

TABLE 2
SOUTHERN TRANSCONTINENTAL

CITY PAIR	1983 FLIGHTS	1988 FLIGHTS
Toronto To:		
Vancouver	8	21
Calgary	10	16
Halifax	8	14
Edmonton	7	10
Winnipeg	10	15

REGIONAL ROUTES

	1983		1988	
CITY PAIR	FLIGHTS	CARRIERS	FLIGHTS	CARRIERS
Vancouver-Victoria	24	4	86	6
Halifax-Moncton	2	1	10	2
London-Toronto	8	1	21	2
St. John's-Halifax	7	2	15	4
Quebec-Montreal	11	2	29	4
Toronto-Montreal	30	4	50	5

Source: FOURTEENTH ANNUAL AVIATION FORECAST PROCEEDINGS. March 3, 1989, U.S. Department of Transportation, FAA-APO 89-2 at 115.

TABLE 3
THE NORTH

CITY PAIR	FLIGHTS	CARRIERS	FLIGHTS	CARRIERS
Whitehorse-Vancouver	1	1	3	2
Yellowknife-Edmonton	2	1	6	2
Resolute Bay-Yellowknife	2/WK	1	8/WK	3

Source: FOURTEENTH ANNUAL AVIATION FORECAST PROCEEDINGS. March 3, 1989, U.S. Department of Transportation, FAA-APO 89-2 at 116.

can be appealed to the NTA, and if unreasonable, can be disallowed or reduced.[126] Carriers in the North may be subject to review of both basic fare levels and increases, but only upon complaint.[127] In sum, fair increases in the southern market will not be subject to review.

The Northern and remote Canadian communities have specialized transportation needs. Transportation is their lifeline and many communities depend upon the service of a relatively few transportation providers.[128] In certain remote areas, air transportation is the only mode of travel. The Transportation Act, 1987 recognized these needs and made

126. *Id.* at Part II § 80(1).
127. *Id.* at Part II § 80(2).
128. FREEDOM TO MOVE, *supra* note 70, at 9, col. 1.

special provisions for northern air transportation.[129] Although the removal of the restrictive economic controls is intended to increase domestic competition, the North will continue to be regulated. Carriers wanting to provide new air service in the North must meet the "fit, willing and able" test. However, this test is accompanied by a "reverse onus test" in which the burden is on the interested community or party to voice its concern and show it would significantly decrease the existing level of service or jeopardize the continuation of essential air service by the granting of a new license.[130] The NTA will also continue to impose license conditions with respect to the type of service offered, the routes and destinations served, the size of the aircraft and exit from northern routes.[131]

Mergers or acquisitions of any Canadian federally regulated mode of transport (e.g. airline) which has assets or annual income of $10 million or greater are subject to review by the Agency.[132] However, the proposed acquisition must represent 10% or more of the issued and outstanding voting shares of the airline or mode of transportation.[133] Notice of such a merger or acquisition must be given to the Agency, but review will only be granted upon objection to the proposed merger or acquisition.[134] The Agency must then examine whether the proposed merger or acquisition would be adverse to the public interest as defined by the NTA.[135]

Finally, the NTA provides for financial assistance to those domestic services designated by the Minister of Transport to be essential as of January 1, 1988.[136] The legislation is unclear as to who determines which level of service is essential. The term essential air service is not defined in the legislation, nor are the terms and conditions of assistance.[137]

3. *Impact of Economic Regulatory Reform on the Canadian Airline Industry.*

Unlike the United States experience with deregulation, there have been virtually no new entrants into the Canadian carrier market. However, two mergers and acquisitions have occurred in Canada. Prior to deregulation in Canada, the two transcontinental carriers, Air Canada and the then-CP Air, the four major regional carriers and Wardair (which was a

129. National Transportation Act, 1987, *supra* note 4 at Part II, § 67. The north is referred to as a "designated area" (See Table 4).
130. *Id.* at Part II, § 72(2).
131. FREEDOM TO MOVE, *supra* note 70, at 9, col. 2.
132. National Transportation Act, 1987, *supra* note 4 at Part VII, §§ 251(1), 253(1)(2).
133. *Id.* at Part VII, § 253(3).
134. *Id.* at Part VII, §§ 252(1)(2), 255, 256.
135. *Id.* at Part VII, § 257, Part I, § 4.
136. *Id.* at Part I, § 85.
137. Phillips, *supra* note 1 at 63.

charter airline) were the main providers of air transport. Competition between the carrier levels was minimal. Since deregulation, the Canadian air transport industry has seen the rise of two large carrier families (Air Canada and Canadian Airlines International) operating fully competitive coast-to-coast networks[138] (See Table 4 & 5). This duopoly of carriers came about as the regionals merged with or were acquired by these two large carriers. One of the regionals, Pacific Western Airlines (PWA) increased its share of the market by acquiring smaller regional carriers, third level carriers, and by signing cooperative marketing agreements to offer coordinated feed services and schedules. CP Air acquired several regional carriers and a commuter airline and was renamed Canadian Pacific Airlines, Ltd. (CPAL). PWA acquired 100% of CPAL for $300 million and renamed the carrier Canadian Airlines International.[139] Canadian Airlines International also established a new regional airline providing fleet services to southern Ontario, particularly Toronto. Canadian Airlines International affiliates include TimeAir, CalmAir, AirAtlantic, Inter-Canadian and Ontario Express.[140] Air Canada's affiliates include AirOntario, AirToronto, AirNova, AirAlliance, NWTAir and AirBC.[141] The alliance with turbo prop carriers by both Canadian Airlines International and Air Canada provides local commuters with access to the major carriers and routes as well as joint fares.[142] Thus in Canada, carriers have increased their market shares through mergers and acquisitions, rather than through the deep discount fares experienced by U.S. carriers at the onset of deregulation.[143]

Canadian deregulation was intended to subject Canadian carriers to greater competition and market forces. Paradoxically the result of deregulation is less competition. By 1988, Air Canada and Canadian Airlines International plus Wardair handled about 95% of scheduled passengers and earned 97% of the operating revenues[144] (See Table 6). In January of 1989, Canadian Airlines bought out the last competitor to the Big Two, Wardair, a charter carrier which had acquired some commuter and international routes. Wardair did not emerge as a serious competitor until 1986 when it launched its regularly scheduled domestic service. Wardair initiated dramatic fare wars, however, the Big Two were determined to undercut Wardair. The intense competition, continued operating losses,

138. NATIONAL TRANSPORT AGENCY CANADA, ANNUAL REVIEW 38 (1988), at 51 [hereinafter 1988 ANNUAL REVIEW].

139. *See generally*, Phillips, *supra* note 1 at 64-65. PWA acquired 100% of CPAL in 1986. *Id.* at 65.

140. 1988 ANNUAL REVIEW, *supra* note 138 at 53.

141. *Id.* at 52.

142. Phillips, *supra* note 1 at 66.

143. *Id.*

144. 1988 ANNUAL REVIEW, *supra* note 138 at 55.

TABLE 4

THE AIR CANADA FAMILY

CARRIER	NETWORK	FLEET
Air Canada	points in all 10 provinces; the U.S., the Caribbean, Europe and Southeast Asia.	108 jets
Air Nova (49% owned)	points in Newfoundland, Nova Scotia Prince Edward Island and New Brunswick; Montreal, Quebec City. Ottawa and Boston.	3 jets 7 non-jets
Air Alliance (75% owned)	points in Quebec; Ottawa and Boston.	3 non-jets
Air Toronto 75% owned	points in Ontario; Winnipeg, Montreal, Hartford, Minneapolis, Cleveland and Detroit.	1 jet 42 non-jets
Air Toronto (commercial agreement)	service between Toronto and 7 northeast U.S. cities	7 non-jets
AirBC (85% owned)	points in B.C. and Alberta; Whitehorse and Seattle.	3 jets 19 non-jets
NWT Air (90% owned)	points in the Northwest Territories; Edmonton and Winnipeg.	1 jet 7 non-jets

Source: NATIONAL TRANSPORT AGENCY CANADA, ANNUAL REVIEW 38 (1988) at 52.

TABLE 5

THE CANADIAN AIRLINES INTERNATIONAL FAMILY

CARRIER	NETWORK	FLEET
Canadian Airlines International (PWA Corp.)	points in all 10 provinces and both territories; the U.S., Europe, Central and South America, the South Pacific and Asia.	84 jets 3 non-jets
Air Atlantic (45% owned)	points in Newfoundland, Nova Scotia, New Brunswick and Prince Edward Island; Montreal, Ottawa and Boston.	7 non-jets
Inter-Canadian (35% owned)	points in Quebec and New Brunswick; Charlottetown, Ottawa and Toronto.	5 jets 11 non-jets
Ontario Express (49% owned)	points in Ontario; Brandon, Winnipeg and Pittsburgh.	14 non-jets
Calm Air (45% owned)	points in Manitoba and the Northwest Territories.	15 non-jets
Time Air (46% owned)	points in B.C., Alberta and Saskatchewan; Winnipeg and Minneapolis.	3 jets 29 non-jets

Source: NATIONAL TRANSPORT AGENCY CANADA, ANNUAL REVIEW 38 (1988) at 52.

TABLE 6

Carrier	Domestic South		Domestic North		Transborder		International		Total	
	1988	% Change	1988	% Change	1988	% Change	1988	% Change	1988	% Change
Air Canada	290,993	2.8	1,000	0.0	36,591	5.0	13,993	2.6	342,577	3.0
Affiliates	104,985	53.7	22,603	72.8	6,796	85.6	0	NA	134,384	58.0
Total	395,978	12.7	23,603	67.6	43,387	12.7	13,993	2.6	476,961	14.2
Canadian	279,088	(7.8)	33,160	(17.8)	6,569	(33.2)	9,156	17.7	327,973	(9.0)
Affiliates	120,546	110.5	30,820	94.8	3,365	181.6	176	0.0	154,907	108.1
Total	399,634	11.1	63,980	14.0	9,934	(9.9)	9,332	17.3	482,880	11.0
Wardiar	53,445	189.4	0	NA	471	(5.8)	7,258	152.7	61,174	180.1
Independents	43,919	(38.8)	31,093	2.5	2,475	(48.8)	1,570	96.5	79,057	(26.6)
Total	892,976	11.4	118,676	18.0	56,267	2.5	32,153	27.2	1,100,072	12.0

Note: ( ) indicates negative figures
Source: NATIONAL TRANSPORT AGENCY CANADA, ANNUAL REVIEW 38 (1988) at 55.

and ongoing equipment costs prompted Maxwell Ward, chairman of Wardair, to sell out.[145]

PROVINCE	ABANDON	RETAIN (miles)	TOTAL
British Columbia	27	100	127
Alberta	15	0	15
Saskatchewan	48	0	48
Manitoba	71	0	71
Ontario	267	0	267
Quebec	38	69	107
New Brunswick	10	0	10
Prince Edward Island	0	0	0
Nova Scotia	0	0	0
Newfoundland	0	0	0
Total Miles	476	169	645
(%)	(73.8%)	(26.2%)	(100.0%)

The ranks of independent carriers grew in 1988. Aside from Wardair, the largest are City Express and First Air.[146] In the international charter markets, the established carriers (Nationair, Worldways, Air Transit and First Air) were joined by the new carriers[147] of Vacationair, Odyssey International, Air 2000, Ports of Call, Minerve Canada and Holidair.[148] Also, the shift to hub-and-spoke route systems opened up opportunities for smaller commuter airlines to serve as feeder airlines for the megacarriers.[149]

With respect to air fares, the major Canadian airlines apparently have learned from observing their U.S. counterparts. Aside from the fare wars with Wardair, the major Canadian carriers did not have to offer the deep discount fares to increase their market share.[150] Over all, discount fares in Canada are limited. Although there has been an increase in the number of passengers traveling on discount tickets, seating capacity is limited and various travel restrictions apply. The average level of fares has not declined, although the variety of fares has increased. The Na-

145. MACLEAN'S, January 30, 1989 at 34-36. On March 23, 1989, the Agency approved the proposed acquisition of Wardair by PWA Corporation (owner of Canadian Airlines International). 1988 ANNUAL REVIEW, *supra* note 138, at 54.

146. 1988 ANNUAL REVIEW, *supra* note 138, at 54. First Air upgraded its service to northern Canada during 1988 and continued to service Mirabel and Boston out of Ottawa. First Air also operated flights (passengers and cargo) to Florida, the Caribbean, Mexico and the Arctic. *Id.* City Express expanded its Toronto-Ottawa-Montreal route network in 1988. It also added a second U.S. destination. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Phillips, *supra* note 1 at 99.

tional Transport Agency's 1988 annual review indicated that business and economy fares increased on most domestic routes. More and deeper discounts were available, however, on the highly competitive long-haul transcontinental routes such as Toronto-Vancouver, Calgary-Toronto, Edmonton-Toronto, Montreal-Vancouver and Ottawa-Vancouver.[151]

Deregulation has also brought about changes in the Canadian route structure system. Since Canadian Airlines International and Air Canada have entered into alliances and joint feed and scheduling agreements with many of the regional and local commuters, carrier route patterns have evolved into the hub-and-spoke systems. The traveling passenger is offered more destinations, ticket and baggage integration, and access to frequent flyer programs. The carriers benefit by being able to keep the passenger on line until final destination,[152] however, there are disadvantages to the passenger. Fewer nonstop long-distance flights mean more connections, higher load factors and more delays. Jet service to low-traffic-density communities has been replaced by turboprop carriers which share the major carriers designator code.[153]

As have their American counterparts, Canadian airlines have cut their labor costs in order to compete more effectively in the deregulated market. All carriers have relatively stable overhead costs such as fuel, interest and liability insurance thus, labor costs become the target for cutbacks through layoffs, paycuts, greater use of part-time employees, more flexible work rules and profit sharing plans.[154]

The newly deregulated Canadian airline industry theoretically relies on competition and market forces to achieve an economic, efficient and adequate air transport system in Canada.[155] In the U.S., eight megacarriers have emerged, controlling 94% of the passenger business, with one or two major carriers dominating gate and landing and takeoff slots at each of the major hub and spokes. Canada's two large carrier families dominate about 97% of its market. It is now important for Canada to address the emerging forms of anticompetitive conduct. Anticompetitive conduct results from mergers which limit competition, create opportunities for conspiracies of price-fixing and market sharing, predatory pricing or scheduling and manipulating the costs of competitors. Potential agreements by major carriers such as Air Canada and Canadian Airlines International regarding airfares, markets to be served and schedules, inhibit local carriers from entering the larger markets and preclude potential new

151. 1988 ANNUAL REVIEW, *supra* note 138 at 60-61.

152. Phillips, *supra* note 1 at 99.

153. *Id.*

154. *Id.* at 100.

155. *Id.*

entrants.[156] Hub domination by major carriers also affects competitive access to gates and landing and takeoff slots. Finally, anticompetitive practices potentially surface through travel agents and computerized reservation systems which generally favor the larger and established carriers.

The NTA, 1987, frowns upon anticompetitive conduct in its declaration of policy by stating that ". . . competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services. . . ."[157] The agency has the power to make administrative decisions and order compliance with the Act, however, the sanctions for noncompliance are vague.[158]

The *New Competition-Act*[159] in Canada, although not formulated specifically for the Canadian airline industry, penalizes criminal conduct such as price fixing and market sharing conspiracies. Whether the *Competition Act* provides adequate protection against anticompetitive conduct by air carriers is yet to be determined. The *Competition Act* may be difficult to enforce with respect to the Canadian Airline Industry due to the vagueness of the statutory criteria involving the standards of proof and available defenses. The determination of anticompetitive conduct most likely will be left to the discretion of the courts and the Competition Tribunal (the governing body established by the Competition Act) on a case-by-case basis.[160]

The question arises as to whether the domination of the market by the two major carriers, Air Canada and Canadian Airlines International, is anticompetitive or in Canada's best interest. Maxwell Ward regretted having his airline (Wardair) swallowed up by Canadian Airlines International. However, Ward maintained that the Canadian airline industry must develop huge airlines that are large enough to compete with major international carriers including American Airlines (the largest U.S. carrier) and

156. *Id.*

157. National Transportation Act, 1987, *supra* note 4 at Part I § 3(1)(b).

158. *See generally*, Part I §§ 34-45. "Any decision or order of the Agency may be made on order of the Federal Court or any superior court and is enforceable in the same manner as an order thereof" *Id.* at § 42. *But CF*, Part II, of the Act dealing specifically with air transportation does provide punishment for willful contravention of licensing procedures. Punishment ranges from fines not exceeding $5,000 or imprisonment for a term not exceeding one year or both for individuals; corporations may be liable for fines of up to $25,000. *Id.* at 103, 104, 105.

159. *Competition Act*, [am. 1968, c. 26] [hereinafter *Competition Act*].

160. Phillips, *supra* note 1 at 88. The *Competition Act* provides for the establishment of a Competition Tribunal. This body will hear applications and issue orders with respect to Part VII of the NTA, 1987, dealing with acquisitions of Canadian transportation undertakings (i.e., any business engaged in transportation under the legislative authority of Parliament). *Id.* at 88. *See also*, NTA, 1987, *supra* note 4 at Part VII § 251(1). Reviewable matters will include refusal to deal, exclusive dealing, market restriction, tied selling, abuse of dominant position, delivered pricing, specifications agreements and merger. Phillips, *supra* note 1 at 88.

British Airways, even if this means the smaller airlines will not be able to survive.[161] Ward is of the opinion that domination of the Canadian market by the Big Two is positive for the industry. Canada has a problem sustaining smaller airlines. With a new 747 jumbo jet costing $125 million, ". . . there is only room for the largest."[162]

Maxwell Ward's opinion is shared by others in the industry. August E. Pokotylo, Director General, Air Policy and Programs, Transport Canada, maintains that the restructuring of Canada's airline industry is emerging with positive signs.[163] Despite increased concentration, there is more competition on a route-to-route basis between existing airlines. In sum, Pokotylo views airline management as innovative in offering discounted yet quality service to Canadians.[164] Furthermore, as one member of Transport Canada expressed, Canada's airline industry does not function in a vacuum and must still compete on an international level.[165]

Added to the list of potential anticompetitive practices is the phenomenon of "globalization." This term refers to mergers and agreements between foreign carriers.[166] Globalization may have begun in December of 1987 when United Airlines announced a marketing agreement with British Airways.[167] Scandinavian Airline System (SAS) has a 10% stake in Continental.[168] Swissair and Singapore Airlines each own 5% of Delta. More recently the Netherland's KLM contributed $400 million to Alfred Checchi's buyout of NWA.[169] With the advent of the European Economic Community in 1992, the arena of possible merger between foreign carriers widens.[170]

If the skies should belong only to the megacarriers, what will protect the passengers and the shippers from potential anticompetitive effects of deregulation? Not all would agree with Maxwell Ward that domination of the Canadian market by the Big Two is desirable.[171] While it may be more feasible for Canada to support only a duopoly, this system, without any type of regulation, invites potential abuse. Under deregulation, competitive market forces were predicted to effectively discipline the airline

161. MACLEAN'S, January 30, 1989 at 35, col. 2.
162. *Id.*
163. 14TH ANNUAL FAA CONFERENCE, *supra* note 5, at 113.
164. *Id.* at 113-14.
165. Interview with Vale'rie Dufour, Director, Domestic Air Policy, Transport Canada, in Ottawa, Canada (Sept. 15, 1989) [hereinafter Interview].
166. 14TH ANNUAL FAA CONFERENCE, *supra* note 5, at 21.
167. *Id.*
168. U.S. NEWS & WORLD REPORT, Sept. 11, 1989, at 54, col. 1.
169. *Id.* at 55, col. 1.
170. Dempsey, *Aerial Dogfights over Europe: The Liberalization of EEC Air Transport*, 53 J. AIR L. & COM. 615 (1988); P. DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION (1987).
171. *See generally*, Phillips, *supra* note 1, at 101-02.

industry. Without effective competition, market forces cannot operate as intended by the proponents of deregulation.

The Canadian Federal Government implemented economic regulatory reform of its airline industry closely following the model set by the United States. However, Canada still retains the National Transportation Agency to provide *minimal* regulation. It has been suggested that the Federal Government could have maintained the liberalization policy and still retained independent regulatory discretion. Like the CAB, the CTC, rather than being abolished, could have used its expertise to combat the potential anticompetitive practices using the existing regulatory framework.[172]

It is feared that the general market competition laws are not suitable to an essential infrastructure industry which is excessively concentrated.[173] A highly concentrated airline industry may create uneconomic, inefficient, anti-competitive, expensive and inadequate transportation for Canadians.

One effective way of dealing with the anti-competitive effects of airline deregulation may be through the Competition Tribunal. This tribunal was established by the *New Competition Act* as a governing body authorized to hear applications and issue orders with respect to anti-competitive conduct such as market restrictions, abuse of dominant positions, exclusive dealing, and special agreements on mergers.[174] The Tribunal's approach is civil rather than one based upon criminal law standards. If assisted by lay experts knowledgeable in the area of effective but fair competition, the Tribunal may be an appropriate mechanism to deal with the anti-competitive effects of airline deregulation. The Tribunal was recently called upon to determine whether the Gemini Merger, Canada's largest computer reservation system (CRS), was anticompetitive. (Air Canada and Canadian Airlines International merged their travel agency reservation systems under the Gemini Group Distributed Information Systems, Inc.). The Gemini Merger was approved. However, Transport Canada has been instructed to develop a code of conduct.[175] Finally, if the courts are called upon to determine anti-competitive conduct by carriers, it is hoped that clearer, consistent guidelines will be developed to interpret these statutory tests as outlined in the *Competition Act*.

172. Phillips, *supra* note 1, at 101.
173. *Id.*
174. *Id.* at 88.
175. Interview, *supra* note 165.

III. THE NEW RAIL REGIME IN CANADA

A. DEREGULATION COMES TO CANADIAN RAILWAYS

Railroads in Canada have operated on a different basis from those south of the 49th parallel. The United States still has no true transcontinental railway (Robert R. Young used to argue that a hog could cross Chicago without changing trains — but *you* can't), while Canada has two — the Canadian National [CN] and the Canadian Pacific [CP].

Moreover, these two railroads are essentially the only important railways in Canada.[176] Canadian National Railways is a Crown Corporation — owned by the government, as was Air Canada and as is the Canadian Broadcasting Corporation. CN & CP at one time also competed in hotels, telecommunication and air carriers services.

Thus, deregulation would seem to have less appeal in a country where the market is already dominated by a duopoly. Nonetheless, the same National Transportation Act that brought deregulation to the skies and highways applies to Canada's two transcontinentals and a few provincial railways as well.[177]

Both Canada and the United States developed their framework of railroads under regulation by their Federal governments. The Constitution Act of 1867 gave the Federal parliament the right to legislate for a "work for the general good of Canada,"[178] and development of the railroads has taken place under Federal regulation. The intent of regulation was to promote competition between the privately-owned CP and the publicly-owned CN.

The railway system in Canada operates in eight of the ten provinces, having just exited the island provinces of Prince Edward Island and Newfoundland in 1988-89. Canada is also one of the few countries in the world still adding to its railway network, building extensions to serve economic activity in the hinterland.[179]

Both the United States and Canada have maintained continent-wide railroad systems with an extensive private component. In the United States, private ownership is the rule, while in Canada the privately owned Canadian Pacific is one of the largest railroads in the world.[180] Both U.S.

176. Ellison, *The Formation and Dissolution of the Canadian Rail Cartel*, 15 TRANSP. L.J. 175, 176 (1987).

177. National Transportation Act of 1987, 35-36 ELIZ. II, ch. 34 (1987).

178. British North America Act of 1867, retitled Constitution Act of 1867, *by* the Canada Act of 1982.

179. C. PHILLIPS, RAILWAYS IN CANADA, Transport Canada Surface Administration, Railway and Grain Transportation Report at 2 (March 1986). The report mentions that B.C. Rail has just completed the first modern electrified line in Canada, the 69 mile Tumbler Ridge branch, and that CP is engaged in a $600 million project for tunnelling and line relocation in the Rockies.

180. *Id. See also* Ellison, *supra* note 176.

and Canadian railroads face competition from motor carriers, although long-distance trucking is less significant to Canada than to the United States. Both country's railroads have lost the bulk of their passenger business to airways and, to a lesser extent, to buses.[181] Both nations find that their rail systems are overbuilt for today's traffic needs.

Between 1976 and 1980 the United States substantially demolished the statutory system of economic regulation of trucking, buses, airlines and railroads.[182] Within the United States, rail passenger service was spun off to Amtrak in 1971;[183] commuter rail service was turned over to the states a decade later.[184] Unprofitable Eastern railways were lumped in together and turned over to Conrail in 1976, a federal entity. Conrail was later returned to the private sector.

The key point of rail deregulation in the United States was the Staggers Rail Act of 1980.[185] The Staggers Act was based upon a finding by Congress that modernization of regulation was essential,[186] and an intention to rely upon competition to the greatest extent possible.[187]

Under Staggers, entry to the rail industry was relaxed, which facilitated the start-up of short line railroads.[188] Similarly, abandonment of rail lines was accelerated, and made much easier for railroads to accomplish.[189] The Staggers Act provided for less supervision of ratemaking, with no maximum rates unless the carrier has market dominance, and a great deal of ratemaking freedom.[190] Rates themselves may be virtually irrelevant, as the Staggers Act also allowed railroads and large shippers to contract for the shipment of goods without any recourse to regulatory approval.[191]

Reliance on competition in the United States meant turning to intermodal competition, as few new railroads were coming onto the scene. In fact, railroads have now become even more of an oligopoly under de-

181. RAIL PASSENGER SERVICES IN CANADA. A FRAMEWORK FOR THE FUTURE, at 1, Transport Canada, Report of Transport Minister Mazankowski (1985).

182. *See generally*, P. DEMPSEY & W. THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION 3-34 (1985).

183. Amtrak began operation of America's intercity passenger trains, with some exceptions, on May 1, 1971. *See generally* W. THOMS, REPRIEVE FOR THE IRON HORSE 55-61 (1973).

184. The Northeast Rail Services Act provided for state operation of commuter services formerly operated by Conrail. Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 643 (1981) (codified as amended at 45 U.S.C. §§ 1101-1116 (1982).

185. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

186. *See* Thoms, *Clear Track for Deregulation* 12 TRANSP. L.J. 183 (1982).

187. *Id.*

188. The public convenience and necessity need only permit (not require) construction or acquisition and operation of a rail line. 49 U.S.C. § 10901 (d),(e) (1980).

189. Abandonment is now limited to a 330-day process. 49 U.S.C. § 10904 (1980).

190. Staggers Rail Act, Pub. L. No. 96-448, § 207, 94 Stat. 1895, 1907 (1980).

191. Staggers Rail Act, Pub. L. No. 96-448, § 208, 94 Stat. 1895, 1908 (1980).

regulation with seven major railroad systems dominating the U.S. industry ten years after the passage of Staggers, four west of the Mississippi, and three east.[192] Canada, with two major railroad systems, nevertheless saw the need to meet the competition of the Yankee railroads, which were competing for coast-to-coast traffic with the CN and the CP. As with airlines, the Canadian government chose to follow the U.S. example and substantially deregulate the rails.

Passenger service had already been spun off from CN and CP by the establishment of VIA Rail Canada, Inc., a Crown Corporation, to take over intercity passenger service in a similar fashion to the establishment of Amtrak in the United States.[193] Commuter service in the Toronto and Montreal areas had been lifted from the railways and placed under the operating authorities of Ontario and Quebec, respectively.[194] The repeal of the Crow's Nest Pass rates, which mandated uneconomic rates for movement of western grain, brought on a more realistic rate base for agricultural products and ended a cross-subsidization of freight traffic.[195] Now it was Parliament's turn to examine the regulation of the freight railroad industry in Canada.

B. The National Transportation Act

The National Transportation Act, of 1987 contains the most far-reaching changes in the regulation of railways since Confederation. Its aim is to strengthen the railway system by allowing it to better compete with other modes, and to allow the railways to modernize, even though such modernization might deprive many communities and shippers of freight service. In many ways, the partial deregulation experience in the U.S. by the Staggers Act is replicated north of the border.

Many of the Canadian deregulation features found in the National Transportation Act were found originally in the Staggers Rail Act in the U.S. For example, it is now easier for Canadian and U.S. Railroads to enter and leave markets. True, few new railroads are being built either in the U.S. or Canada, but the new law makes it easier for a Canadian short line to obtain Letters Patent to take over and operate an existing line that a major railroad no longer wants. (The Staggers Act makes this process easier for U.S. railroads.) With abandonments, the burden of proof has been shifted to shippers and passengers to prove that the line is still re-

192. The seven are: Santa Fe, Southern Pacific, Union Pacific, Conrail, Norfolk Southern, CSX and Burlington Northern.

193. *See* Thoms, *VIA Rail: A Canadian Amtrak*? 55 N.D.L. REV. 61 (1979).

194. *See* Thoms, *Commuting in the Great White North*, TRAINS, Dec. 1986, p. 18.

195. Ellison, *The Formation and Dissolution of the Canadian Rail Cartel*, 15 TRANSP. L.J. 175, 197-201 (1986).

quired for the needs of the public.[196]

The agency which has replaced the Canadian Transport Commission, the new NTA, is directed by the statute that states traditional regulation of railroads is to be used as a last resort.[197] Such time-honored practices as collective ratemaking are no longer allowed, and railroads are allowed to enter into contracts with their shippers. Currently in the United States most freight moves by contract rather than tariff rates, and a shift to "confidential contracts" (as they are called in Canada) is occurring in Canada as well.[198]

The philosophy of the National Transportation Act is found in the government's White Paper, "Freedom to Move." Following a study by the Canadian Transport Commission on railway problems, it endorsed the need for Canadian shippers to have confidential contracts, but moved away from the then-current policy of allowing the two railroads to exchange information on costs and to file joint and common rates.[199] In an informative article published in the *Transportation Law Journal*, Canadian economist Anthony P. Ellison writes:

> By removing the exchange of cost information and the setting of common rates, the . . .National Transportation Act withdraws the legislative protection afforded the fifty year old rail cartel. The (National Transportation) Agency, with its proposed direction over running rights, joint-track usage and joint rates, empowered to facilitate rather than limit intramodal competition.[200]

The Act's Section 3 clarifies Canada's National Transportation Policy, which includes safety as a key objective, but then relies upon competition and market forces as the prime agents in providing a transportation system. Competition is regarded as desirable both between modes and within each mode. Carriers are to set rates which do not discourage movement of commodities nor the development of primary and secondary industry or export trade.[201]

The Act creates a National Transportation Agency, of not more than nine permanent members plus up to six temporary members, appointed by the Prime Minister and the Cabinet. The Governor in Council may revise or annul decisions of the Agency. The NTA requires a complaint or an application to trigger its jurisdiction except for matters relating to safety

196. National Transportation Act, 49 U.S.C. §§ 157-177 (1987).

197. National Transportation Act, 49 U.S.C. § 3 (1987).

198. Confidential contracts are allowed by Section 120 of the NTA. The parties may agree to a contract concerning rates, level of services, equipment and other conditions. Neither party may apply for final offer arbitration nor public interest appeal of that contract unless the other party concurs.

199. *Freedom to Move*, Transport Canada White Paper, Cat. 722-69/1985# (July 1985).

200. Ellison, *supra* note 195, at 216.

201. National Transportation Act, 49 U.S.C. § 3 (1987).

or licensing.[202] In its independence from Cabinet, the NTA has some features of the Interstate Commerce Commission in the United States.

C. *Branchline Abandonments*

Abandonment proceedings have been streamlined: if a railroad applies to abandon a branchline and nobody objects, the railway is automatically permitted to close the line. If a party protests the application, then the NTA must determine if the line is profitable or has some prospect of becoming so. The NTA also has power to establish short lines or to subsidize operations over the branch for years. There is a cap on abandonments, as no railroad may abandon more than 4% of its system during each of the first five years of the Act. This 4% limit was at first objected to by the railways, but proposals for abandonment have in no instance come close to 4% of the total of either of the two transcontinental systems, nor of the smaller railways.[203]

The rail abandonment process before the NTA works like this:

- A railway company must give the National Transportation Agency (the Agency) and the public in areas served by the rail line a Notice of Intent to apply for abandonment.
- Ninety days after the Notice of Intent the railway may apply to the Agency for abandonment authority.
- Within sixty days of the application, any party may oppose abandonment in writing to the Agency.
- If the application is not opposed within the sixty days, the Agency *must* order abandonment.
- If the application is opposed, the Agency investigates the present and future economics (costs and revenues) of the line.
- The Agency must decide *within six months* of the application whether or not to allow abandonment of the line, according to the following provisions in the National Transportation Act:
  (a) if the line is deemed to be uneconomic, with no reasonable probability of becoming economic, the Agency *must* order abandonment;
  (b) if the line is deemed to be economic (now or in the future), *but* is not required in the public interest, the Agency *must* order abandonment;
  (c) if the line is found to be uneconomic, but is deemed to have a reasonable probability of becoming economic *and* is required in the public interest, the Agency *must* order the line retained and reconsider the application within three years;
  (d) if the line is found to be economic (now and in the future) *and* required in the public interest, the Agency *must dismiss* the application for abandonment.

202. National Transportation Act, 49 U.S.C. § 44 (1987).

203. Interview with rail planners Peter Hoisak and Ralph Jones, Ministry of Transport, Ottawa, September 15, 1989. The 4% limit is found in National Transportation Act, 49 U.S.C. §§ 157-160 (1987).

- Public interest considerations are examined only if the line will be or has a reasonable probability of becoming economic in the future.
- The Agency may hold public hearings if there is opposition to the application and it considers hearings necessary.
- There is not opportunity for Ministerial intervention in the abandonment process once an application has been received.[204]

There are several limitations to the rail abandonment process:

- A railway company cannot abandon more than 4% of its total route mileage in any of the five years including 1992.
- The existence of passenger service on a line does not prevent the line from being ordered abandoned (for freight traffic).
- The effective date of an abandonment order would be set so that VIA Rail would have six months to decide if it wants the rail line for its passenger services and another six months to negotiate the terms of the line's transfer.
- VIA Rail may abandon the rail line if subsequently it is no longer needed for passenger rail service.
- The Agency can order a line retained for as long a period of time as a province, municipality, or other interested person pays the actual losses of the line.[205]
- Once the agency has announced its decision, there are three mechanisms for appeal including rehearing by the Agency, appeal to the Federal Court of Canada, or appeal to the Governor in Council for a delay of up to five years if there are inadequate alternate facilities in the area.[206]

The largest abandonment of 1988 was concluded outside of the NTA's abandonment processes. The narrow-gauge Newfoundland Railway had been transferred to the central government of Canada when that province entered Confederation in 1949. Under a deal worked out in June 1988 between the Newfoundland and federal governments, the Canadian National (the line's operator) was allowed to abandon the entire railway. Included in the agreement was over $800 million in federal funding to improve highway and other transport facilities in the province (plus labor protection provisions for displaced railway employees, who will not be required to leave Newfoundland to obtain railway work elsewhere. Most are now engaged in the demolition of the railway).[207] Under new legislation, once a railroad line is abandoned, disposition or reinstatement becomes a provincial responsibility. As the wreckers were tearing up the 42-inch gauge track, the province stepped in to save a few segments for tourist and historical purposes. Because an isolated railway is now a pro-

204. This outline is adapted from "Railway Branch Lines", a memorandum Transport Canada, Surface Administration, Railway & Grain Transportation of 1989. The pertinent parts of the statute can be found in National Transportation Act 1989, §§ 157-177.

205. *Id.* at p. 2.

206. *Id.* The relevant sections are National Transportation Act 1987, § 41, § 45, and § 165(2).

207. Crawford, *Newfoundland Railway Farewell*, TRAINS, Jan. 1989, at 26.

vincial, and not a federal responsibility, Newfoundland is now in the railroad business, and is responsible for the upkeep of the remaining lines.

During 1989, the Canadian National also abandoned what little trackage remained on Prince Edward Island under the provisions of the National Transportation Act. The same year, Canadian Pacific reorganized its entire system in the Maritimes (which also passes through the State of Maine) as the Canadian Atlantic Railway. Some observers suggested that such a move was made to isolate the costs involved in operating in the Atlantic provinces as a separate profit centre, which could be abandoned if losses prove to be too onerous. This is apparently why Canadian National had set up its Newfoundland operations as Terra Transport in the years preceeding abandonment.[208]

D. Competitive Access

Most substantive changes under the Transportation Act of 1987 parallel the changes in the Staggers Act for U.S. railroads. The uniquely Canadian difference is competitive access for captive shippers. We have seen that in most cases there are only two Canadian railroads and not much opportunity for intramodal competition. To remedy this defect the new law establishes an "interswitching limit" of 30 kilometers. That means that if a factory is located on a CN siding and there is an interchange with the CP some 25 kilometers away, the shipper can choose CP service; the CN must then allow the CP switcher to use its tracks and haul the car away.[209]

A shipper which is served by only one railway at either origin or destination may request that railway to establish a competitive line rate to or from the nearest interchange with a competing railroad. The shipper may designate the route for the competitive line rate (for example, a Manitoba shipper might request a rate to Emerson from the CN and via the Soo Line or Burlington Northern beyond). If a cost-effective continuous route from origin to destination is available entirely in Canada, the shipper is precluded from selecting a route involving a U.S. carrier. If a carrier fails to establish a competitive line rate upon request, then the National Transportation Agency will do so. Competitive line rates are not available for containers or trailers on flat cars, unless the intermodal shipment is export or import traffic moving to or from a port. The percentage of the distance to or from the interchange point cannot be more than 50% of the total rail mileage or 750 miles, whichever is greater. Unless agreed upon otherwise between the carrier or shipper, a competitive line rate will remain in

208. Nett, Canadian Pacific's Main Line, *Railfan & Railroad*, July 1989, at 34-39; National Transportation Act 1987 § 152.

209. National Transportation Act 1987 §§ 134-142.

force for one year.[210]

One interesting feature of this competitive access provision is that it is not limited to CN, CP or the local Canadian railways (British Columbia, Algoma Central, Ontario Northland, Quebec North Shore & Labrador). Five U.S. railroads (Burlington Northern, Norfolk Southern, CSX, Conrail and Delaware & Hudson) also operate into Canada. If they come within the interswitching limit, Canadian shippers can take advantage of U.S. competitors as well. It is also easier for U.S. railroads to obtain trackage rights over Canadian lines, and possibly abandon their own Canadian track.[211] CN and CP are both vulnerable to competition by Burlington Northern, Conrail and other northern U.S. lines.

E. Prospects for Rail Freight Deregulation

Both national railways have made it clear that they would like to slim down their systems (in Saskatchewan in May 1988, CN and CP exchanged trackage rights so that each could serve certain points near their systems and abandon redundant lines). The 4% cap will limit the size and scope of the abandonments. But a quick look at the rail map of Canada will show a pre-auto-age map crisscrossing the country without the consolidations and rationalization of lines that characterizes American railways.

In 1988, the National Transportation Agency issued 20 decisions relating to the abandonment of 645 rail lines, with the following results:

Province	Abandon	Retain (miles)	Total
British Columbia	27	100	127
Alberta	15	0	15
Saskatchewan	48	0	48
Manitoba	71	0	71
Ontario	267	0	267
Quebec	38	69	107
New Brunswick	10	0	10
Prince Edward Island	0	0	0
Nova Scotia	0	0	0
Newfoundland	0	0	0
Total Miles	476	169	645
(%)	(73.8%)	(26.2%)	(100.0%)

In 1989, the railways submitted 65 applications for abandonment of

210. National Transportation Act 1987 §§ 148-149. In addition to the freight railroads, Amtrak has running rights over CN and CP into Montreal, and operates joint services with VIA Rail into Toronto.

211. Data from Rail Planner Hoisak, Transport Canada, and included in Transport Canada report "Railroad Branch Lines". Surface Administration, Railway and Grain Transportation, August 17, 1989, p. 5.

1,306 miles. As a result, all lines on Prince Edward Island were abandoned. In addition, the Agency has twenty-three applications for 1,008 miles carried over from 1988, including reconsideration of previous decisions on lines that were ordered retained and were due for review in 1989. Short of amending the National Transportation Act, there is no mechanism for the Minister or Governor in Council to override the abandonment process currently set out in the NTA.[212]

During the last decade, large U.S. railroads have been turning over tremendous segments of routes to short lines or regional railroads. Locally operated with lower labor costs, and a friendly connection to the parent railroad, they are providing service to communities that might otherwise be bypassed. But such an easy turnover has not been possible in Canada. The Canada Labor Code provides that a successor employer inherits not only the same union, but the same collective bargaining agreement as it predecessor. This means that the same work-rules that hampered economical operation of the major railroad will still prevail. It may also mean that there might be no takers for these castoff lines.[213]

One important role for the NTA is the mediation of disputes between a shipper and a carrier or between two railways. A dispute may be referred to the NTA for mediation, which must be completed within thirty days. The mediation process is nonbinding and confidential, unless the parties agree to disclosure, and is available for all traffic except for grain movements and rail-water intermodal traffic.[214]

A shipper may apply to the Agency for final offer arbitration when dissatisfied with a railroad rate. Unlike traditional arbitration, the NTA is obliged merely to select from the final offer of the shipper and the final offer of the railroad. The Agency may pick the arbitrator if the parties cannot select one, and both parties share in the cost of arbitration, which must be completed with 90 days.[215]

Not only shippers, but the public in general may request the NTA to investigate any rate, act or omission of a carrier believed to be prejudicial to the public interest. The proceedings are informal, with no requirement for the appellant to prove a prima facie case, but in any case they must be completed within 120 days.[216] In all matters affecting rail transportation,

212. *See* Thoms, *How Long is the Short Line?*, TRAINS, October 1986, p. 37; Thoms, *Dereg Comes to Canada*, TRAINS, Dec. 1988, p. 26. Presently there is only one spinoff short line in Canada, Alberta's Central Western Railway. The CWR claims, as an intraprovincial railway, the federal government cannot legislate for it. Most observers believe that legislation is necessary to allow local contract negotiation and settlement for shortline railroads.

213. National Transportation Act 1987 § 46.

214. National Transportation Act 1987 §§ 47-57.

215. National Transportation Act 1987 §§ 58-63.

216. National Transportation Act 1987 §§ 110-119.

these procedural provisions may be suspended by the NTA if they have an unfavorable impact on the viability of Canadian railways.

Liberalization of railway regulation has not meant an end to rate regulation. The statute still requires that rates be compensatory (cover the variable cost of the particular movement of traffic).[217] A noncompensatory rate must be disallowed unless it is proved by the carrier that the rate was not designed to be anti-competitive and does not, in fact, lessen competition.[218] But a railroad need only publish tariffs on a request of a shipper.[219] There are four types of rates allowed: agreed charges, published tariffs, confidential contracts and statutory rates.[220] Published tariffs must not contain secret rebates, discounts or allowances. Even though confidential contracts are expected to move most bulk traffic in Canada by the end of the century, even these may be appealable if they are not compensatory.[221]

The common carrier obligations traditional in Canada have been reiterated by the National Transportation Act: a railway must provide cars, deliver traffic offered to it and maintain facilities for receiving rates. It must interchange with connecting railroads and handle their cars. The NTA will police violation of common carrier obligations, but shippers and railways may agree to modify these obligations.[222]

The NTA also may approve running rights and joint track usage, and determine whether railroads should build connections between the two of them. The Agency can also order one railroad to operate over the tracks of another. The aim of these new powers is to produce a more streamlined and efficient railway system for Canada.[223]

F. Rail Passenger Service

Until recently, Canada relied upon passenger trains connecting its large cities with virtually every hamlet of the Dominion. For the last dozen years, Canada has followed a regime similar to that of the United States: long-haul passenger service was made a responsibility on the central government (Amtrak in the U.S.; VIA Rail in Canada), while commuter service is the responsibility of state or provincial governments. (In Canada, extensive commuter operations in both Montreal and Toronto are supported by the Quebec and Ontario governments.) There is also a

217. *Id.*
218. *Id.*
219. National Transportation Act 1987 §§ 129-133.
220. National Transportation Act 1987 § 120.
221. National Transportation Act 1987 §§ 144-147.
222. National Transportation Act 1987 §§ 148-152.
223. Section 52d of Appropriations Act No. 1, 1977, Can. Stat. 1976-77, Ch. 7. *See* Thoms, *VIA Rail: A Canadian Amtrak?*, 55 N.D. L. Rev. 61 (1979).

modicum of passenger service by the provincially-owned railways (British Columbia and Ontario Northland) and some privately-owned trains hang on so long as the Algoma Central and Quebec North Shore & Labrador keep going.

VIA Rail is a relatively new Canadian institution, limited to providing intercity rail service. In the mid-1970's, the Canadian rail transport system was an anomaly. Other nations had converted their rail networks to public ownership. The United States Congress had passed the Rail Passenger Service Act of 1970, which had established the National Railroad Passenger Corporation - Amtrak. Amtrak is not a public entity, but a private corporation owned by four participating railroads - but it has continued to exist by virtue of Congressional funding and government support. In contrast to this, Canada persisted in its competition between the public and private sector. The privately-owned Canadian Pacific was decidedly unhappy about continuing to foot the passenger burden, and was taking steps to reduce its passenger deficit by replacing conventional trains with rail diesel cars, and discontinuing secondary and branchline runs, as well as some intercity service. Even the publicly-owned Canadian National was chafing under its mandate to provide essential passenger services. Its experiments with innovative fare pricing policies had not stemmed the rising tide of red ink, and by 1975 the CN was in the process of studying the best way to use its passenger fleet effectively.

In October, 1976, the first joint timetable was issued by Canadian National and Canadian Pacific. The latter railroad also announced it was adopting the VIA logo for its equipment, with an eye to coordinating service, a necessary first step before a government-sponsored revitalization of that service could occur. Via Rail Canada, Inc., was incorporated in January, 1977, under the Business Corporation Act, and approved by the Parliament of Canada in March of that year.[224] Originally, VIA was a subsidiary of the Canadian National and was charged only with the planning and marketing of services. Equipment, stations and employees would continue to be provided by CN and CP. VIA was to collect all the revenues and would pay the carriers 100% of the costs incurred in providing the service, as opposed to 80% under the 1967 National Transportation Act.

VIA found it difficult, however, to conduct negotiations with a railroad of which it was a subsidiary. In order to maximize the efficiency of VIA and make it more even-handed in its dealings with both the CN and CP, it was made a Crown Corporation on April 1, 1978.[225] It operates basically

224. *Id.* A Crown corporation is established for some public or quasi-public purpose. VIA Rail's sole responsibility is the carriage of intercity passengers. *See* T. NELLIGAN, VIA RAIL CANADA: THE FIRST FIVE YEARS (1982).

225. P. DAWES AND E. JOHNSON, A STUDY OF AMTRAK'S EFFECTIVENESS 168-169 (1974).

as a private corporation, but is subsidized by the Federal government and must submit an annual report and request for funding to the Canadian government. The new corporation now has the powers of a railway company and is regulated by the CTC. The company was not to be responsible for any rail service until the CTC completed its rationalization process for that particular service. Then, the government would enter into a contract with VIA for that particular route. VIA would contract with CN or CP to provide locomotives and crews. VIA acquired CN and CP intercity equipment, after selecting the best of the aged fleet for its purposes. It has since ordered rail equipment of its own.

Like Amtrak, VIA is set up as an independent, ostensibly "for-profit" corporation dedicated to providing improved intercity passenger service by rail. Neither country is yet ready to declare outright nationalization of their railroads, or even of their passenger function. However, VIA is owned, as is Canadian National, by the Crown, whereas Amtrak was legally the property of four cooperating railroads. Also similar to Amtrak's legislation is the limiting of VIA's service to intercity passenger trains. VIA does not run commuter or urban transfer routes.

The main thrust of VIA was to reduce the deficit of rail passenger operations in Canada. While VIA is labeled a "for-profit" corporation, it was never expected to be a money-making venture. It has, however, slowed down the increase in losses.

The rationalization and emergence of VIA was the end product of a CTC study on the implications of Amtrak for Canada. One of the implications was that by 1978, the U.S. would have a better rail passenger system than that of Canada.

> Furthermore, if Amtrak's estimate of its FY1978 deficit is at all accurate and, if Canada's passenger train subsidies continue to increase at about the same rate as they have in the past, it is likely that Canada will pay more for its 80% subsidy program than the United States will be paying for Amtrak.
>
> Another implication has to do with the roadbed problem. Are passenger and freight systems just as incompatible in Canada as they apparently are in the United States? Not enough is known to provide a definitive answer to the questions. A great deal of additional research needs to be done to reveal the system-wide effects of "efficient" 250 car freight trains.
>
> Finally, the findings and conclusions of this study do not seem to indicate that Amtrak, in its present form, is an appropriate model for Canada. Amtrak was, and is, a pragmatic compromise developed within the larger United States context of bankrupt railroads owned by successful holding companies. Canada, with a program of 80% subsidy and a Crown Corporation in railroading, has an institutional context quite different from the United States — and perhaps even more complex. Certainly, further study of institutional arrangements for providing future rail passenger service in Canada is

required.[226]

All Fool's Day, 1978, brought VIA into the rail business directly. Up until that date, the corporation had been proceeding on a step-by-step, route-by-route basis. But observers felt that basis was too complicated and inefficient. Thus, April 1, 1978, was set for VIA's takeover of every CN or CP train not rationalized out of existence by that time.[227]

VIA is organized into four regions: Atlantic, Quebec, Ontario and West. At its genesis, it acquired at its start approximately 2,800 unionized employees and 500 non-scheduled management and professional employees. Approximately 2,300 additional employees were later transferred from CN and another 500 from CP.

Labor negotiations between the parties were governed from the outset by Federal government legislation enacted in October 1977. The parties were unable to agree, and a special mediator was called in to help the parties reach a settlement, with one issue - separation from service - submitted to binding arbitration. As a result, the unionized employees did not come under the VIA plan until July of 1978.

Since April 1, 1978, CN and CP have sent the bills for their passenger service to VIA — 100% of the avoidable costs. Ministry of Transport officials were expected to keep a close check on the fledgling carrier's finances since the Ministry is VIA's banker. The relationship of the Ministry to its creature, VIA, is very much like that between the government and Air Canada, until 1989 a Crown corporation. The government does not run the corporation; it arranged that the corporation is well run. A Ministry spokesman described the role of the government as giving the general direction, providing management and verifying that management is working in the direction outlined. The corporation should handle the specifics. The first combined tariff was filed for VIA trains, effective June 15, 1978.[228] (Unlike Amtrak, the corporation must have regulatory approval of rates and fares.)

From the start, VIA Rail's costs relative to the size of the population to be served proved to be a problem. David P. Morgan, the respected rail journalist and editor of *Trains*, wrote in 1978:

> Those inexorable economics show no respect for national boundaries. Or to quote Canadian National President Robert A. Bandeen, "Passenger services cannot be provided on a profit-making basis under North American conditions." To which, we think, VIA's (Garth) Campbell would add, any passenger service: rail, road, or air. The trains' losses are visible, he argues, while the deficits of the competition are hidden in publicly provided airways and roadways.

226. PASSENGER TRAIN JOURNAL, Oct. 1977, p. 28.
227. PASSENGER TRAIN JOURNAL, June 1978, p. 35.
228. Morgan, *On the Verge of Via*, TRAINS, August 1978, pp. 28-29. Allen, *Derailing VIA. Id.*

> Be that as it may, the VIA system is going to cost 23 million Canadians more than the Amtrak network costs 216 million Americans:
>
> | | VIA | ATK |
> |---|---|---|
> | Route-Miles | 14,000 | 26,000 |
> | Passengers (millions) | 7 | 19.2 |
> | Revenues (millions) | $120 | $311.2 |
> | Loss (millions) | $300 | $536.6 |
>
> The assumption is that parliament will be more benign about these statistics than is Congress. However, thinly populated, Canada's land mass is larger than that of the U.S., thus eight times as many passenger route-miles per capita may be justified. Item: There's no U.S. equivalent for CN's line up to Hudson Bay, with a terminus at Longitude 94 and Latitude 59 (on a parallel with Juneau, Alas.), and in consequence no Amtrak counterpart for the triweekly passenger train that goes there.[229]

There are many similarities between Amtrak and VIA which show a basic affinity in the statutory schemes. Both are independent corporations with government guidance. Both are nationwide in scope and intend to effect savings by combining formerly separate systems. Both involve marketing schemes to increase patronage and reduce deficits, and both replace railroad-operated passenger services which the railroads involved wanted to dump. Both are concerned only with intercity, long-distance passenger services. VIA and Amtrak do not operate commuter trains, which are a local responsibility.

In the last decade, VIA Rail has compiled a worse track record than Amtrak. It was too late in refurbishing its equipment as a tenant of the railroads, and has had trouble keeping a handle on costs or scheduling reliability. Part of the problem is that the VIA rail system, almost the length of Amtrak's with a similar deficit ($600 million a year) is being supported by one-tenth the population. Whereas Amtrak's deficits cost every American $3, the equivalent deficit costs each Canadian $30 to support VIA. It is like trying to run the Trans-Siberian Railway with the population of New York State.

VIA was left out of much of the planning that resulted in the Transportation Act. Furthermore, the government planned a VIA Rail Act to complement the other transport legislation, but none was forthcoming. The Mulroney government viewed rail passenger and freight services as discrete problems.

In contrast to the plans for other Canadian transport modes, VIA is deregulated but publicly owned. The main issue concerning VIA is cost limitations and government subsidies.

In April 1989, a trial balloon was leaked from the Mulroney government, suggesting the end of the line for VIA. The budget for Fiscal Year

229. MACLEAN'S, August 21, 1989, pp. 20-23.

1990 calls for just enough to keep VIA's major services running, and after that it is anyone's guess.

As of this writing, changes have been proposed affecting the future of VIA Rail without any legislation being enacted in Parliament. The entire effort to cut back on VIA subsidies has been run by the Cabinet through ministerial order; the point man for the campaign in 1989 was the Conservative Minister of Transport, Benoit Bouchard. Ronald Lawless, already chief executive officer of Canadian National, was appointed president of VIA as well in the Spring of 1989, and apparently will preside over the shrinkage of the system.[230]

Government funding of VIA operations will be reduced as follows:

1989-90: $541 million
1990-91: $435 million
1991-92: $394 million
1992-93: $275 million
1993-94: $250 million

VIA is instructed to submit a new business plan to the government for the years 1990-94, which would include prospective operations of passenger service throughout that date. Another expenditure will be lifetime job protection for VIA employees with more than four years' seniority; under that dispensation, it might be cheaper in the short run to operate VIA than to shut it down, as is the case with Amtrak.

In Canada, passenger trains often serve isolated communities with neither airports nor highways. Because of this phenomenon, the transport minister declared that services are to be protected on the following remote routes:

Edmonton, Alberta - Prince Rupert, British Columbia
The Pas, Manitoba - Churchill, Manitoba
Winnipeg, Manitoba - Capreol, Ontario
Montreal, Quebec - Senneterre, Quebec
Montreal, Quebec - Jonquiere, Quebec
Senneterre, Quebec - Cochrane, Ontario

Provision of these remote services would leave scant funding for the rest of the system. It appears that the reduction in VIA subsidies was decided not on the basis of transportation criteria, but in response to the Mulroney government's need to cut its horrendous fiscal deficits. VIA Rail was a service that the government decided Canada could do without.[231]

The cuts in VIA service were announced on October 5, 1989, with the Transport Minister stating that Canada could no longer afford the level of service provided by VIA Rail. As part of a diminished budget strategy for VIA, the cuts may not be the last word; but under Canada's parliamentary

230. Taylor, *There is No Other Access*, MACLEAN'S, August 21, 1989, p. 25.
231. Bergman, *Cutting Back VIA*, MACLEAN'S, Oct. 16, 1989, pp. 18-19.

system where the government gets its way until there is a vote of no confidence, few expect the discontinued trains to make a comeback.

The effect of the cuts is effectively to take the Canadian Pacific out of the passenger business (except for a triweekly Sudbury-White River RDC, the *Atlantic* across Maine and a Calgary-Vancouver weekly stub). Transcontinental service will now be an all-CN routing.

Canadian National's route was favored because it incorporates some "remote services" stipulated in the earlier (May 3) report which stated that the government "ensures that rail passenger service will be maintained to remote localities which have no other year-round means of transportation." One of these routes is Winnipeg-Capreol, which now will be included in a triweekly *Super Continental* route. In addition, Edmonton-Prince Rupert (route of the *Skeena*) is a remote service deserving of protection, which can connect with the Super Con at Jasper.

Other services to be protected as to "truly isolated communities" include the Winnipeg-Churchill Hudson Bay, that Wabowden-Churchill mixed and the mixed train serving The Pas and Lynn Lake, Manitoba. Service out of Montreal to Senneterre and Jonquiere, Quebec, and between Senneterre and Cochrane, Ontario, is to be preserved as well. Finally, the *Canadian* may be gone, but the "remote services" provision will ensure that the RDCs operating between Sudbury and White River, Ont. along the CP will be saved as well.[232] Still other features of the trimmed rail service include the following:

—Daily service in Canada is restricted to the provinces of Ontario and Quebec. Everything outside the Quebec-Windsor corridor is now triweekly.

—The Maritime is the area most hard-hit by the Bouchard axe. It is also the most vocal; an earlier plan to restrict service to a triweekly *Ocean* was replaced by the current scheme of service six days per week, thrice weekly on each route (CN and CP).

—Joint services with Amtrak are unaffected. Joint trains will still run out of Toronto to New York and Chicago. New York-Montreal service via the *Adirondack* and the newly-reinstituted *Montrealer* are totally Amtrak concerns and thus unaffected.

—The "Canadian Rockies by Daylight" service has been renamed the "Rocky Mountaineer" and remains in the timetable. The train will leave Vancouver each Sunday and proceed to Kamloops, where passengers will stay overnight and reboard the train the next day, divided into Jasper and Calgary sections. The daylight train will return to Kamloops on Thursday and Vancouver on Friday.

—Hudson Bay service remains unaffected, even to the mixed train

232. Gormick, *VIA: A Canadian Sunset*, PASSENGER TRAIN JOURNAL, Nov. 1989, p. 7.

between Wabowden and Churchill. Minister Bouchard has said, however, that such protected remote services will be reexamined after a year, in a continuing search for transport alternatives.[233]

—With everything west of Windsor on a triweekly basis, Amtrak's *Empire Builder* (with connecting buses) is now[234] the only daily service to Winnipeg and Vancouver.

—VIA made no attempt to cushion the blows with alternative services. However, Canada's intercity bus companies have stepped up plans to offer increased service on January 8, one week before VIA's cuts take effect. Bus fares are also expected to rise with the withdrawal of subsidized rail competitors.

Not only trains will disappear, 2,761 of VIA's 7,300 employees are scheduled to be furloughed on January 15. Although VIA's contract contains generous labor-protective provisions (lifetime guarantees after four years with the corporation), VIA spokesmen insist that such benefits are only due those who exhaust all railroad and non-railroad opportunities to mitigate their losses first.[235]

The new VIA system of 191 weekly trains will require $350 million (Canadian) in annual subsidies, compared with the $641 million (roughly equivalent to Amtrak's annual subsidy) presently needed to keep the 405 VIA trains in operation.

The selection of CN routes throughout may have been based on other than transportation criteria. Several influential Tory parliamentarians live on the retained routes. (When the Liberals were in power, it was the CP, not the CN, that was retained for transcontinental services.) CN routes are further north with fewer transportation alternatives. Although a smaller population base may threaten revenues, the trains perform a greater social need in the northland. Finally, VIA operates over the CN with its own crews and own labor agreement. Its CP trains operate with CP engine and train crews, and a more expensive labor package.

Gone from the timetable for good are the following routes:

Halifax-Yarmouth
Halifax-Sydney
Moncton-Edmundston
Montréal-Québec (via CP and Trois-Rivières)

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233. Amtrak's *Empire Builder* serves Grand Forks, N.D. and Everett, Washington. Amtrak has made arrangements with connecting bus lines to bring passengers to Winnipeg and Vancouver. In November there was a brief flurry of excitement in Manitoba, as local politicians accused Amtrak of a power grab to lure passengers south of the border. (The *Empire Builder* operates on a daily basis, while VIA will only run thrice weekly on the transcontinental route.) *See* Huck, *Sabotaging VIA Rail*, Winnipeg Free Press, Nov. 28, 1989.

234. Interview with Jane Dick, Public Affairs Representative, VIA-WEST, Winnipeg, October 18, 1989. *See* Bergman, *supra* note 231.

235. Gormick, *supra* note 232. *See also* TRAINS, Dec. 1989, p. 5.

Toronto-Havelock
Toronto-North Bay
Cochrane-Kapuskasing
White River-Winnipeg
Winnipeg-Calgary
Victoria-Courtenay

(See Table 7)

All non-corridor service operates thrice weekly, except the weekly *Rocky Mountaineer* and the once-a-week Wabowden-Churchill mixed train. With the demise of the overnight Montreal-Toronto *Cavalier*, sleeping cars will now only operate on the transcontinental and Maritime trains, as well as on the *Hudson Bay* to Churchill.

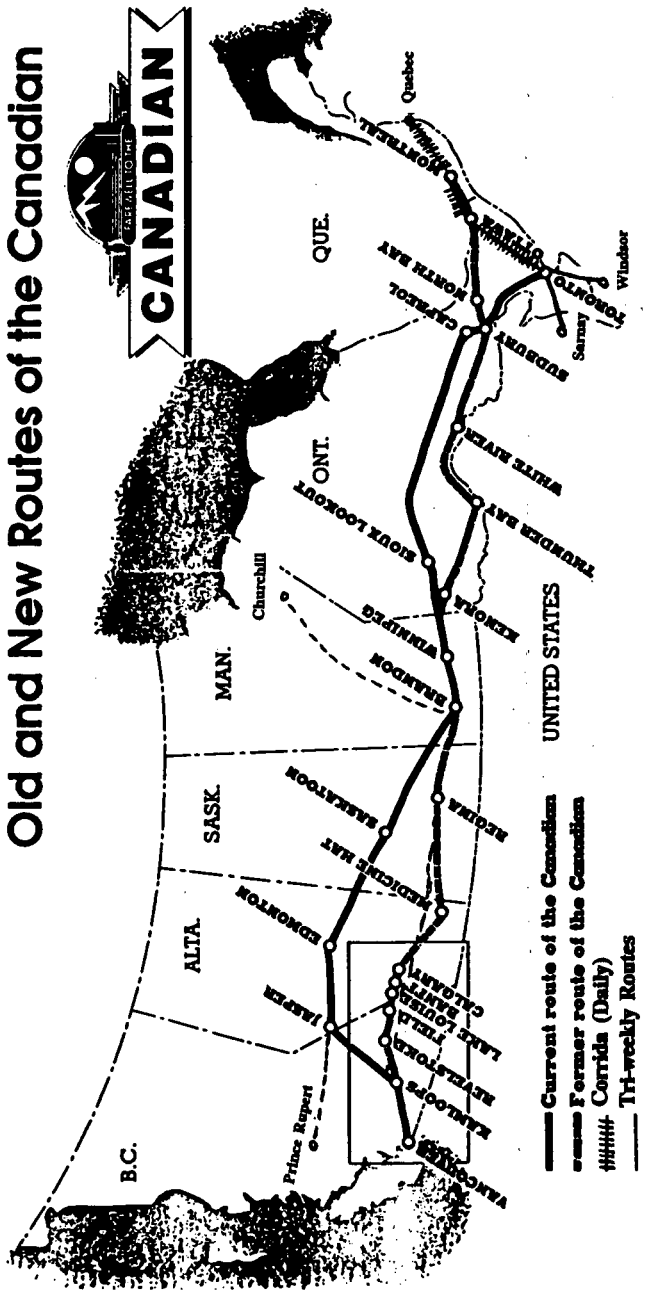
Within the Corridor, frequencies will be reduced as well. Montreal-Quebec (now limited to the CN route, plus the *Ocean*, which stops at Levis across the river) is down to three trains a day. Toronto-Sarnia is cut from four times a day to twice daily (including the International), and there are reductions to Niagara Falls and London as well.[236]

As for the future, the Tory motto is still "use it or lose it." Meanwhile, Prime Minister Mulroney has promised a Royal Commission to investigate the future of Canadian surface transportation for the 1990s and develop legislative policy. Royal Commissions in the past have been graveyards for political concepts, but this time the Government states that it will be bringing out a VIA Rail Act in the Spring of 1990. Currently, there is no Canadian legislation comparable to the Rail Passenger Service Act of 1970, which governs Amtrak. The lack of a statutory basis is one of the handicaps VIA has had to face in this troubled decade.

The vagaries of VIA are similar to the continuing melodrama of Amtrak appropriations during the 1980s. Amtrak has both expanded and contracted along with the political winds, but its system remains more or less intact and service is gradually improving. During the Reagan administration, successive Republican secretaries of transportation proposed budgets with zero funding for the passenger rail corporation. However, in the United States, unlike Canada, the head of government does not control the budget's fate in Congress. For eight years, a Democratic house and a Senate which changed from Republican to Democratic leadership successfully rebuffed the Reaganite efforts to eliminate the intercity passenger train from the United States. An uneasy truce prevails during the Bush administration, and Amtrak has been able to trim its own costs by operating new equipment and establishing new labor contracts with its operating unions. Also, Amtrak has its own enabling legislation (the Rail

236. Jenish, *One Alternative: Buy the Train*, MACLEAN'S, Aug. 21, 1989, p. 22. For an interview of the VIA cuts, *see* Thoms, *VIA Gets the Axe*, TRAINS, Jan. 1990, p. 22.

Table 7
VIA Network -- 1990
Old and New Routes of the Canadian



Passenger Service Act of 1970), while VIA has been around for a dozen years without any organic act of Parliament establishing its functions.

Neither VIA nor Amtrak are technically part of the deregulation story. But the corollary of allowing freight railroads to compete effectively with truckers for the shipper's dollar has been relieving them of public service burdens by setting up entities to operate both commuter and intercity passenger service.

Deregulation in Canada goes hand in hand with talk of privatization — of VIA Rail, of the Canadian National Railways, and even of Air Canada. Whether or not privatization is a way to phase out the Crown Corporations, or merely a smokescreen for abandonment of services remains to be seen.

With regard to privatization of passenger railroads, there is one prospective buyer at this writing. Sam Blyth, president of the Toronto-based travel agency Blyth & Co., is negotiating a $10 million bid to buy the *Canadian* linking Montreal and Vancouver. Blyth intends to convert the train into a luxury cruise train, similar to the Orient-Express operation in Europe. The price of a first-class one-way ticket between East and West would be $2,500 — five times the current price. If the deal is consummated, Blyth would operate twice weekly during the summer, and in the winter, merely operate Toronto-Montreal and Calgary-Vancouver luxury service. In response to charges of elitism, Blyth said his luxury express would stop at the smaller cities currently served along the CP route, and have a few coach seats for one-way fares as low at $230.[237]

In addition, on November 30, 1989, VIA advertised nationally throughout Canada that it was initiating discussions with parties who have expressed an interest in private operation of the seasonal "Rocky Mountaineer," complete with a fax number for interested parties to state their qualifications. The Mulroney government is at least giving lip service to privatization. In addition, Ontario's GO Transit commuter agency has taken over VIA's Toronto-Peterborough route.[238]

Railroad deregulation began in the system of competing private rail-

237. VIA advertisement appeared in Winnipeg Free Press, Nov. 30, 1989. It states that "Others with an interest are invited to make this interest known, in writing or by Fax, no later than 12 noon, December 15, 1989." Sources at the Free Press stated that Amtrak may be one of the interested parties in this tourist operation. As far as GO Transit, *see* PASSENGER TRAINS JOURNAL, Nov. 1989, p. 37.

238. *De facto* deregulation of the motor carrier industry began with the liberalized approach of the Interstate Commerce Commission in 1977 and 1978, when the ICC began issuing operating authority more broadly defined, from a commodity and territorial perspective, than ever before. The nation's economic recession did not begin until 1979, yet every leading economic indicator shows that the industry has progressively suffered virtually every year since 1977. P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 40 (1989) [hereinafter P. DEMPSEY].

roads in the United States. To see if deregulation is exportable, the next market test seems to be our closest neighbor, which has relied on duopoly — the Crown corporation to keep the private sector honest; the private company to keep the Crown efficient. In embracing deregulation, Canada is taking as historic a step in changing policy as it has in free trade. Both are leaps of faith. Let us hope Canada can profit from our mistakes.

IV. CANADIAN MOTOR CARRIER DEREGULATION

A. *MOTOR VEHICLE TRANSPORT ACT, 1987*

This section assesses the legal, social, and economic dimensions of motor carrier deregulation in Canada. In some respects it may be too early to draw definitive conclusions about transport liberalization in Canada, because Canada has only recently passed federal legislation liberalizing interprovincial traffic. However, one can, by looking at the decade of experience under motor carrier deregulation south of the border, make some projections as to how deregulation will manifest itself in Canada, for the United States effectively deregulated its motor carrier industry a decade before.

In the United States, Congress deregulated motor carriers with the promulgation of the Motor Carrier Act of 1980. It provided for rate flexibility, and on entry, shifted the burden of proving that granting an application for operating authority would be inconsistent with the "public convenience and necessity" to protestants, while applicants continued to bear the legal obligation of proving that they were "fit, willing and able" to perform the proposed operations. But *de facto* deregulation preceded *de jure* deregulation in the United States by about two years, tracing its origins to decisions of the U.S. Interstate Commerce Commission in 1977 and 1978.[239]

Canada promulgated the Canadian Motor Vehicle Transport Act, 1987 [MVTA][240] about a decade after the United States launched its experiment in deregulation. Many Canadian Provinces, too, launched their experiment in *de facto* liberalization in the early 1980s, following the American lead; the new federal legislation is designed to provide uniformity for the acquisition of intra-provincial authority in all provinces.

The 1987 legislation replaced the Motor Vehicle Transport Act of 1954, under which provincial transport boards defined criteria for extra-provincial authority. Under the 1954 legislation, each province was free to define its own criteria for motor carrier entry across its borders. Pursuant thereto, there was a wide spectrum of approaches to regulation, some

239. Motor Vehicle Transport Act, 1987, Ch. 35 Eliz. 2, [hereinafter MVTA].

240. NATIONAL TRANSPORT AGENCY CANADA, ANNUAL REVIEW 38 (1988) [hereinafter 1988 ANNUAL REVIEW].

provinces adopting virtually *de facto* deregulation while others remaining rather tightly regulated. The 1987 legislation was designed to eliminate those discrepancies between provinces, and to provide uniformity among the provinces in terms of the acquisition of extra-provincial operating authority.

The new legislation is the product of a 1985 Memorandum of Understanding between the federal and provincial governments.[241] The 1987 legislation calls for a five-year, phase-in period of deregulation. As of January 1, 1988, the acquisition of operating authority is a three-step process. In the first, an applicant's fitness is determined, no longer by the provincial motor carrier boards, but now by an independent functionary.[242] Second, once notice is published, if no objection has been filed, the application is automatically granted to those carriers deemed fit in stage one. If an objection is filed, the provincial motor carrier board determines whether a hearing shall be set.[243] Third, the board determines whether issuance of the requested authority is likely to be "detrimental to the public interest."[244] Here, the burden of proof has been shifted to protestants. This places a reverse onus upon interveners. If the protestants establish a *prima facie* case, the applicant may submit rebuttal evidence. In deciding whether new entry will be allowed, the Board must give "primary emphasis to the interests of users of transportation services."[245]

The MVTA eliminates interprovincial rate regulation as of January 1, 1988, although rates have never been as strictly regulated in Canada as they once were in the United States.[246] It also creates a mechanism for establishing more stringent safety regulation of motor carriers, that is being implemented in phases.[247]

As of January 1, 1993, the MVTA provides for elimination of the "public interest" test; hence, "fitness" will become the sole criterion for extra-provincial entry. Moreover, commodity and route limitations will then be eliminated. However, the "reverse onus" procedure will be reviewed by the Minister of Transport to determine whether an extension of the transition period will be desirable.[248]

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241. MVTA, *supra* note 239, Part II, art. 8(2).

242. MVTA, *supra* note 239, Part II, art. 8(3).

243. *Id.*

244. MVTA, *supra* note 239, Part II, art. 8(5)(a).

245. Extra-provincial rates in Canada were only nominally regulated prior to 1985 when rate regulation was limited to a filing requirement in certain provinces. 1988 ANNUAL REVIEW, *supra* note 240, at 45.

246. MVTA, *supra* note 239, art. 3(1).

247. 1988 ANNUAL REVIEW, *supra* note 240, at 38.

248. Smith, *The Motor Vehicle Transport Act, 1987 and Ontario*, 56 TRANSP. PRAC. J. 352 (1989) [hereinafter Smith]. MVTA, *supra* note 239, Part I, art. 4-6.

The MTVA left interprovincial bus transport much as it found it. Entry in the bus industry will continue to be governed by the "public convenience and necessity," and the Provinces may regulate bus tariffs and tolls.[249] It also leaves intraprovincial discretion on motor carrier regulation to the Provinces, much as the U.S. Motor Carrier Act left intrastate regulation unmolested.[250]

B. Provincial Implementation of the MVTA

The new federal legislation appears to have opened wide the floodgates on entry in motor carriage. Tremendous interest has been generated on behalf of motor carriers in seeking new operating authority. For example, in 1988, there were more than one thousand applications pending in Ontario alone.

On the whole, the approach of the provincial licensing boards appears to be extremely liberal. At this writing, Quebec and Alberta appear to be the most liberal, while Manitoba and New Brunswick appear to be the most conservative.[251]

Moving from west to east across Canada, in one case, the British Columbia motor carrier provincial board denied operating authority to a new applicant, concluding that the hauling of automobiles from docks to interior points was a natural monopoly. In a more recent decision in British Columbia, and one which has received considerable attention, it granted extra-provincial operating authority to United Parcel Service. In Alberta, applications appear to be generally unopposed. Being unopposed, of course, requires that the applications be granted under the new legislation. The Saskatchewan Board has required certificates of support for new applications. Manitoba appears to have adopted a "go-slow" approach to new entry, preferring to use the transition period as a true transition, as the federal legislation suggests. More about Manitoba's independent approach below. For some time, Ontario appeared to be paralyzed because of a jurisdictional dispute between two regulatory bodies, the Provincial Transportation Ministry and the Ontario Highway Transport Board. In Quebec, the motor carrier board appears to be granting all applications. In Nova Scotia, transport authorities apparently are taking a conservative approach to less-than-truckload (LTL) entry.[252] In New Brunswick, a number of cases have been set for hearing. In Newfound-

249. MVTA, *supra* note 239, Part III, art. 11-15.

250. 1988 Annual Review, *supra* note 240, at 38.

251. Smith, *supra* note 248.

252. D. Norquay, The Motor Vehicle Transport Act, 1987: What Happens When an Irresistible Force Meets an Immovable Object 5 (address before the 56th Annual Convention of the Manitoba Trucking Ass'n, Apr. 22, 1988).

land, the motor carrier board has made it clear that the intervenor would have to meet a very heavy burden in order to prevail.

In most Provinces, it appears that existing incumbents are finding that opposing motor carrier applications for extra-provincial authority is wasteful of time and resources. The futility of opposition is causing more and more applications to go unopposed, leading to a flood of new entry. Although the federal legislation called for a five-year transitional period toward deregulation in 1992, in most provinces the period has been collapsed to one or two years. The net effect is that *de facto* deregulation of extra-provincial operating authority is pretty much here today. That, in itself, creates a number of concerns for the economic well-being of the industry and its stability to adhere to the highest level of safety, in light of the fact that the national safety code in Canada is only gradually being implemented.

C. MANITOBA'S INDEPENDENT COURSE

The Manitoba Motor Transport Board has taken an independent approach to implementing the MVTA, one which insists on not capitulating immediately to deregulation as have virtually all the other Provinces, and which intends to utilize the statute's full five-year transition as a legitimate transition period. Early in the process, Mr. Donald S. Norquay, Chairman of the Manitoba board, recognized that the "reverse onus" of the federal legislation would be an impossible burden for intervenors to sustain, and that unless a more conservative approach to licensing were taken, the floodgates to entry would be opened creating much unnecessary turmoil in the industry. The "reverse onus" started was proposed by the Council of Ministers on May 31, 1984. Mr. Norquay immediately had reservations about the viability of such a standard. In the 1985 proposal he prepared for the Manitoba Transport Minister, he perceptively observed:

> After a very short period, it is probable respondents will find they are losing all their cases because they cannot prove, beyond speculation, any detriment [to the public], and will give up on filing oppositions. As a result, the system will be effectively deregulated in an insidious manner, without adequate preparation for the consequences of doing so.[253]

Indeed, what Mr. Norquay accurately predicted would happen has happened in virtually all the Provinces. As in the United States, Canadian protestants eventually give up protesting applications they cannot defeat. Mr. Norquay expanded his thoughts in a speech delivered before implementation of the MVTA:

> [R]eform economic regulation is a *slippery slope.* When entry is eased, beyond some point entry control will be effectively eliminated for all practical

253. D. Norquay, The Regulatory Scene in Manitoba — Facing Reality 3 (address before the 55th Annual Convention of the Manitoba Trucking Ass'n, Apr. 24, 1987).

> purposes. Cognizant of this, the Board has been cautious in its reform. Rather than a full "reverse onus," which is feared may be tantamount to complete deregulation, the Board has adopted a "shared onus" entry standard. . . [N]ext January 1st, the Board will be *compelled* by *federal* law to implement a full "reverse onus" entry standard, despite our concern that such a standard has the potential to cause the system to quickly slide down the slippery slope of regulatory reform to the bottom of the valley of deregulation; and at the risk of carrying the metaphor too far, with this occurring *before we have a national safety code in place* that valley could literally be akin to the valley of the shadow of death. In this context, I pledge to you that the Board will do everything within its legal power to ensure the continuance of a meaningful entry standard for extra-provincial trucking, after January 1st, 1988.[254]

Unfortunately, Mr. Norquay had the Curse of Cassandra: the ability to predict the future coupled with the inability to have anyone believe him. Here is the fundamental difficulty posed by the MVTA's imposition of a "reverse onus" upon intervenors, again, as described by the eloquent Mr. Norquay, after implementation of the federal legislation:

> Quite frankly, in my heart I still believe that you either regulate entry or you do not. In principle, there can be no "easing" of entry control through reversing the burden of proof without assuming entry control should be virtually eliminated. . .
>
> The essential reason for this is that by shifting the burden of proof to respondents, Parliament is saying to the respondents in each and every case, it is up to you the carriers, to provide a theoretical and empirical basis to support a system of economic regulation. You must prove the negative that unfettered competition will not best serve the public interest. And of course, if any carrier could do this, then we should not be deregulating at all. . . .
>
> A system that assumes competition is best, but gives respondents a chance to prove otherwise, makes no sense: if a respondent can do this, then the basic assumption of the system is wrong. It is entirely unreasonable to expect respondents to prove the theories of destructive competition, network economics, economies of scale and scope, oligopoly pricing, price and service discrimination, cross-subsidization and so on. Economists have spent decades studying these issues without definitive answers.[255]

The Manitoba Motor Transport Board responded to the dilemma posed by the MVTA by finding that a significant influx of new entrants would increase the likelihood that "a significant component of the existing Manitoba trucking industry will not survive the transition to deregulation."[256] It believed that "there is a significant risk of a substantial adverse effect on the economic development of the Province which could be

254. D. Norquay, *supra* note 252, at 4, 6-8.

255. Decision of the Manitoba Motor Transport Board in Application of Robert Lindsay, at 3 (Dec. 14, 1988).

256. *Id.*

avoided if deregulation is appropriately phased-in."[257] In order to avoid these potential adverse effects, the Manitoba Board adopted a "cumulative effects" test — applicants would effectively bear the burden of proving that the public interest would not be adversely affected if all other pending applications are granted as well. Said the Board:

> Although there may be no demonstrable detriment to the public interest from the granting of a single application, where there is no evidence to distinguish the applicants' operations from one another, the Board must, in order to properly assess whether detriment to the public interest is likely, assume in each application the granting of all others pending, and assess the cumulative effect on the public interest of doing so.[258]

The number of applications for extra-Provincial applications pending before the Manitoba Board was vast:

EXTRA-PROVINCIAL APPLICATIONS FILED WITH THE MANITOBA MOTOR TRANSPORT BOARD

	1988	1989 (to Sept. 30)
Applications filed	393	291
Pending	214	188
Granted in full	218	173
Granted in part	218	43
Denied	1	2

Source: MANITOBA MOTOR TRANSPORT BOARD

Obviously, the granting of each of the hundreds of applications filed would flood the market with capacity and destabilize the trucking industry, potentially causing the bankruptcy even of efficient and well-managed carriers. The Manitoba Board was convinced that a more conservative approach to gradual entry would cause less economic turmoil and fewer safety problems, and was therefore determined to use the five-year transition period contemplated under the MVTA to avoid deleterious consequences.

But the Manitoba Court of Appeals struck down the Motor Transport Board's application of the cumulative effects test on grounds that in denying operating authority to new applications, the Board had not considered the evidence in the other pending applications proceeding upon which it relied to deny operating authority.[259] The solution of this problem is, of course, to consolidate a large number of pending applications, and consider the evidence as to the cumulative effects of

257. *Id.* at 5.

258. Robert Lindsay v. Motor Transport Board of Manitoba, Manitoba Court of Appeal, slip. op. (Sept. 8, 1989).

259. Dempsey, *Congressional Intent and Agency Discretion — Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 CHI.-KENT. L. REV. 1, 14-21 (1981).

granting them all. This indeed, appears to be the direction in which the Manitoba Board is heading.

D. The Impact of Unconstrained Entry

In its economic impact study, the Canadian federal government predicted that the new legislation would create a large number of entrants and a large number of motor carrier failures. That indeed, was the experience in the United States when it opened the floodgates of entry and deregulated rates.[260] The empirical evidence of motor carrier deregulation in the United States reveals that a large number of new carriers entered the industry during the initial years of deregulation.[261] Excessive capacity caused the proportion of empty trailers and the number of empty miles to increase and load factors to suffer.[262] The immediate response to declining rates was one of great public applause. This appeared to be a development of great benefit for consumers.[263] However, the United States experience reveals that in the longer run, there are some distressing trends. Among them is some measure of declining productivity,[264] because more entry creates more capacity without stimulating additional freight, and that simply leaves trucks emptier over more miles. In the

260. Between 1980 and 1983, 49,726 new certificates for motor carrier operating authority had been granted by the ICC; this included certification of 13,806 new carriers. Rosenak, address before the Motor Carrier Lawyers Ass'n., (Washington, D.C., Jan. 8, 1983); *ICC Chairman Tells Senate Panel He Favors Early Sunset of Agency*, TRAFFIC WORLD (Dec. 20, 1982), at 27, 64. The ICC has also largely expanded the ability of private carriers to engage in common carriage. *See e.g.*, Leasing Rules Modifications, 132 M.C.C. 927 (1982); Lease of Equipment and Drivers to Private Carriers, 132 M.C.C. 956 (1982). *See* Faris & Southern, *Federal Regulatory Policy Affecting Private Carrier Trucking*, 49 ICC PRAC. J. 503 (1982); Borghesani, *Motor Carrier Regulatory Reform and Its Impact on Private Carriers*, 10 TRANSP. L.J. 398, (1978). As of June 1, 1983, the ICC had certificated 25,342 carriers. This represents a 43% increase in the number of carriers holding operating authority since promulgation of the Motor Carrier Act of 1980. The Commission gave some 870 carriers nationwide authority, effectively deregulating them from an entry standpoint until the end of time. *See* Statement of George Ziglich before the U.S. Senate Surface Transportation Subcommittee of the Committee on Commerce, Science and Transportation (Sept. 21, 1983).

261. P. DEMPSEY, *supra* note 238, at 79.

262. *Id.* at 100.

263. Productivity for general freight carriers grew by an average of 0.29% annually after 1969, it has declined by 0.21% per year since 1978. In contrast, productivity levels of all manufacturers have increased an average of 2.4% per year since 1975. *Panelists Deplore Truck Regulation; Rate Discrimination at NARUC Confab*, TRUCK WORLD, Dec. 1, 1986, at 68-69.

264. Professor Grant Davis has observed that the nation's largest shippers exert monopsony of the economic leverage they wield by conferring or withholding their vast volumes of freight. The Fortune 500 can unilaterally dictate rates at (and for cash-starved carriers, below) the marginal costs of trucking companies. *Oversight of the Motor Carrier Act of 1980: Hearings before the Subcommittee of Surface Transportation of the Senate Committee on Commerce, Science and Transportation* 99th Cong., 1st Sess., 234 (statement of Prof. Grant M. Davis).

short run, wealth is transferred first from investors, and then from labor, to shippers, particularly large shippers.

E. PRICING

Under deregulation, the United States experienced a phenomenon that was largely unanticipated, that of a monopsony power creating highly discriminatory pricing.[265] Very large shippers enjoy monopsony power because of their enormous volumes of freight, which enables them unilaterally to dictate rates. To give an example, in the United States, upwards of 50% in general revenue price increases have been authorized by the U.S. Interstate Commerce Commission since 1983.[266] Discounts off the published rates are running up to 75%, but the steep discounts are enjoyed exclusively by large-volume shippers. Smaller shippers either pay the full rate or enjoy rather more modest discounts of, say, 5-15%.[267] While all shippers perceive that they are getting a bargain, in fact, smaller shippers are paying more for transportation today than they did prior to deregulation.[268] Moreover, this distortion in transport pricing distorts the broader market for the sale of commodities.[269] If a large shipper can get his goods to market at a lower price than a smaller shipper, then the large shipper will, by definition, have a significant advantage and access to the market for the sale of his commodities, one which might enable him to dominate that market. The U.S. Supreme Court in *Munn v. Illinois* recognized that transportation firms are the gatekeepers of the larger market for the sale of commodities; therefore their price and service offerings must be nondiscriminatory.[270] If the market for transportation services is dis-

265. Dolan, *Benefits of Economic Regulation,* 7 TRANSP. L.J. 235, 255 (1989).

266. P. DEMPSEY, *supra* note 238, at 100.

267. A small shipper recently summarized the impact of transportation deregulation upon smaller enterprises in testimony before the U.S. House of Representatives: "the benefits promised by the Motor Carrier Act of 1980 have not reached the medium and small shipper. Small shippers are receiving discounts substantially below what the large shippers enjoy. Our markets are shrinking." COALITION FOR SECOND GENERAL FREIGHT TRUCKING, THE RATIONALE FOR TRUCKING REGULATION: EXPOSING THE MYTHS OF DEREGULATION (1986).

268. Pricing discrimination may cause serious injury to those enterprises or geographic regions disfavored by the pricing scheme. The U.S. Supreme Court has observed that "discriminatory rates . . . may affect the prosperity and welfare of a State. . . . They may stifle, impede, or cripple old industries and prevent the establishment of new ones." Georgia v. Pennsylvania R.R., 324 U.S. 439, 450 (1945).

269. 94 U.S. 113 (1876).

270. P. DEMPSEY, *supra* note 238.

torted, the market for the sale of commodities will be distorted as well.[271] A significant advantage that Fortune 500 companies enjoy under deregulation *vis a vis* their smaller rivals is of particular concern,[272] unless one concludes that domination by huge corporations is not an undesirable phenomenon.

Two other products of the monopsony power of large shippers have manifested themselves in the United States. One is the ability of large shippers with market power unilaterally to dictate excessively low rates, insufficient to allow trucking companies to cover their full costs of operation. This has a fatal economic impact on unsophisticated carriers with inadequate understanding of costs and without the ability to counterbalance the monopsony power of large shippers which unilaterally dictate noncompensatory rates.[273] This causes carriers to underprice their services, which gives them insufficient resources to maintain safe operations. By underpricing their services, they also drag down efficient firms with them into the Darwinian abyss of bankruptcy.

A second phenomenon which appears to be growing more widespread is the practice by large shippers of sending commodities "freight collect," whereby the consignee pays the full, published rate for transportation. The large shipper then forces the carrier to rebate to the consignor the difference between the full, published rate and significant discount of up to 75% off the published rate.[274] Thus fraud is being practiced on unwary consignees.

If Canada has the same experience, it will see an immediate fall in transport prices in the short run, followed by a longer-term increase in discrimination between large *vis a vis* shippers, in which larger corporations enjoy a significant advantage over their smaller competitors. This will distort the broader market for the sale of commodities, giving larger firms a decided advantage, and cause many motor carrier failures. With the consummation of the Canadian-United States Free Trade Agreement (FTA) in 1988, opening the border between the United States and Canada for the sale of commodities, that broader market could come to be dominated by larger corporations headquartered south of our common border.

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271. — The ten most profitable carriers in 1984 accounted for over 80% of all general freight carriers profits.

— Between 1979 and 1983 the 75 largest general freight carriers increased their share of Class I less-than-truckload revenues from 79.2% to 88.2%.

— During this same period, the four largest carriers increased their market share from 26.4% to 30.6%, with the largest carrier increasing its share from 9.1% to 10.1%.

D. SWEENEY, C. MCCARTHY, S. KALISH & J. CUTLER, JR., TRANSPORTATION DEREGULATION: WHAT'S REGULATED AND WHAT ISN'T 172 (1986).

272. Dempsey, *Punishing Smallness*, Cleveland Plain Dealer, Dec. 12, 1987, at 15A.

273. Dolan, *Benefits of Economics Regulation*, 17 TRANSP. L.J. 235, 255 (1989).

274. *See* Murray, *Turmoil in Trucking*, DUN'S BUS. REV. (May 1982).

F. Industry Economic Anemia: Failures, Mergers and Concentration

In addition to the discriminatory pricing that has occurred in the longer term under deregulation, declining productivity engendered by excessive capacity appears also to have caused destructive and predatory competition between the motor carriers themselves.[275] It must be remembered that transportation firms sell what is, in essence, an instantly perishable commodity. Once the truck leaves its terminal, any unused space is lost forever. It cannot be warehoused and sold another day as could, say canned beans. It is as if a grocer were selling commodities which had the propensities of open jars of unrefrigerated mayonnaise. He would be forced to have a "fire sale" every afternoon in order to rid himself of unsold inventory, for it could not be warehoused and sold another day. So it is with transportation capacity. Unlimited entry creates excessive capacity which, in turn, creates destructive competition and economic anemia.

In the United States, the profitability of the motor carrier industry has been inadequate. Motor carrier profit margins have fallen significantly under deregulation.[276] The U.S. trucking industry has suffered the worst economic losses and the highest failure rate since the Great Depression. In the United States, more than one thousand trucking companies have gone bankrupt each and every year since 1983.[277] In the less-than-truckload (LTL) section of the United States industry, more than 50% of the firms which existed before deregulation have failed.[278] There is also evidence that larger firms have engaged in predatory behavior in order to drive their smaller motor carrier rivals out of the market. Often we see the phenomenon of pricing at or below short-term marginal costs. In part, this is inspired by the instantly perishable nature of the service being sold and the monopsony power of large shippers, and in other instances, it appears to be inspired by the desire of large trucking companies to domi-

275. Although productivity for general freight carriers grew by an average of 0.29% annually after 1969, it has declined by 0.21% per year since 1978. In contrast, productivity levels for all manufacturers have increased an average of 2.4% per year since 1975. *Panelists Deplore Truck Deregulation, Rate Discrimination at NAURUC Confab*, TRAFFIC WORLD Dec. 1, 1986, at 68-69. Michael Evans found that productivity in the motor carrier industry fell from an average annual 1.5% increase between 1969-1980 to 0.7% between 1980-1985. M. EVANS, THE ECONOMIC EFFECT OF TRUCKING REGULATION 3 (1987).

276. P. DEMPSEY, *supra* note 238, at 80.

277. Between 1978 (the year that de facto deregulation of interstate trucking began) and 1986, more that 54% of the LTL trucking companies went out of business, costing 120,000 employees their jobs. *California DUC En Banc Hearing on Regulation of the State's For-Hire Trucking Industry*, at 34 (Feb. 12, 1988) (Comments of Martin E. Foley).

278. P. DEMPSEY, *supra* note 238, at 84-85.

nate the market by engaging in predatory behavior.[279]

As a direct consequence of the ruthlessly competitive environment unleashed by deregulation, the transportation industry in the United States is more highly concentrated than it has ever been.[280] This high level of concentration has manifested itself not only in the motor carrier industry, but also in airlines, in railroads, and in the bus industry.[281] The eight largest U.S. airlines accounted for 81% in 1987; the eight largest motor carriers accounts for 20% of industry revenue in 1978, and 37% in 1987; and the bus duopoly of Greyhound and Trailways which preceded deregulation became a monopoly with their merger after deregulation.[282] Because of the scale and network economies existing in these industries, the long-term trend of deregulation appears to be oligopoly of megacarriers. As noted above, while the less-than-truckload sector of the motor carrier industry has experienced a shakeout of more than half of the firms which previously existed, there have been no new, major entrants into that section of the industry since deregulation began.[283]

The immediate results of Canadian liberalization appear to parallel those of the United States. Canada has already experienced significant new entry into the truckload arena, although entry into LTL trucking has not been significant.[284] Such entry appears to have created significant overcapacity in trucking.[285] This squeezed the profit margins of many firms, sharply increasing industry operating ratios to 0.98 in 1988 from 0.96 in 1987.[286] Mergers and acquisitions intensified in 1987 and 1988.[287] What is even more significant is that bankruptcies of Canadian motor carriers rose sharply to 394 in 1988, a year in which the Real Gross Domestic Product increased by 4.5%, a higher rate than anticipated.[288] This parallels the U.S. experience, in which bankruptcies continued at a robust rate even after the recession abated and fuel prices fell.

Unlimited entry and rate deregulation in the United States have, as noted above, created excessive capacity, declining productivity, and

279. U.S. GEN. ACCT. OFF., TRUCKING REGULATION 11, 14 (1987).

280. P. DEMPSEY, *supra* note 238, at 91-92.

281. P. DEMPSEY, *supra* note 238, at 83-93, 129-93.

282. N. GLASKOWSKY, EFFECTS OF DEREGULATION ON MOTOR CARRIERS 25 (1986); U.S. GEN. ACCT. OFF., TRUCKING REGULATION 11, 14 (1987).

283. 1988 ANNUAL REVIEW, *supra* note 240, at 39.

284. *See Id.* at 42.

285. *Id.* at 47-48.

286. *Id.* at 38. The most prominent acquisition was of CF Kingsway of Toronto be Federal Industries of Winnipeg, a company which already controlled Motorways Inc. *Id.* at 38.

287. *Id.* at 17, 40-41. The largest Canadian bankruptcy in 1988 was that of Transport Route Canada. *Id.* at 37. Although the number of bankruptcies for 1988 is lower than that experienced in 1982-1984, North America was then reeling from the impact of the deepest recession since the Great Depression.

288. P. DEMPSEY, *supra* note 238, at 120-125.

therefore destructive competition which, in turn, has created economic anemia and inadequate returns on investment. This economic anemia has had other adverse consequences in addition to the high failure rate among trucking firms. It has caused a significant deterioration in safety and had an adverse impact on labor-management relations and wages.

G. SAFETY

Under deregulation, motor carriage in the United States is an anemic industry with a high turnover rate among firms running aging and poorly maintained equipment and employing overworked and underpaid drivers.[289] A recent study by the U.S. Office of Technology Assessment reveals that heavy-truck accidents have increased significantly under deregulation, and at a rate higher than the increased in truck miles travelled.[290] Professor Nicholas Glaskowsky points out that deregulation has produced aging equipment, deferred maintenance, and an increasing accident rate. The American Insurance Association performed a study in which it found that the accident rate per million miles has increased under deregulation.[291] The American Automobile Association concluded that, under deregulation, motor carriers in the United States run older equipment, pay less in wages, work drivers longer, and skip on maintenance.[292]

Under the severe rate competition engendered by excessive capacity, carriers cut costs wherever they can.[293] The alternative, as noted above, is bankruptcy. For that reason, they have reduced wages for drivers and mechanics.[294] Between 1979 and 1985, trucking wages fell 30% in California. At the same time, factory wages increased more than 15%. By reducing pay, the job becomes less attractive, causing the industry to hire unskilled and untrained drivers.

The industry also appears to be deferring new vehicle purchases.[295]

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289. OFFICE OF TECHNOLOGY ASSESSMENT, GEARING UP FOR SAFETY; MOTOR CARRIER SAFETY IN A COMPETITIVE ENVIRONMENT (1988) [hereinafter OFFICE OF TECHNOLOGY ASSESSMENT].

290. N. GLASKOWSKY, EFFECTS OF DEREGULATION ON MOTOR CARRIERS 32 (1986).

291. F. BAKER, SAFETY IMPLICATIONS OF STRUCTURAL CHANGES OCCURRING IN THE MOTOR CARRIER INDUSTRY 15 (1985) [hereinafter cites as AAA SAFETY STUDY].

292. Chow, *Deregulation, Financial Condition and Safety in the General Freight Trucking Industry*. 1987 N.W. U. CONF. PROC., TRANSP. DEREGULATION AND SAFETY 629 [hereinafter CONF. PROC.].

293. AAA Safety Study concludes that because there are few other areas in which to cut costs, motor carriers whose profit margins are squeezed have less alternative but to "run older equipment, pay less in wages, work drivers longer, and/or skip on maintenance." AAA SAFETY STUDY, *supra* note 291, at 15.

294. AAA SAFETY STUDY, *supra* note 291, at 17. N. GLASKOWSKY, *supra* note 282, at 32.

295. Corsi & Fanara, Jr., *Effects of New Entrants on Motor Carrier Safety*, CONF. PROC., *supra* note 292, at 561.

Carriers also have cut maintenance expenditures up to 3.6% annually. This means that carriers are not buying spare parts when they need them and they are not taking vehicles off the highway when they ought to be. Carriers have also cut training and forced drivers to work longer hours. Corsi and Fanara found that the new entrants had an accident rate up to 27% higher than that of existing motor carriers.[296] The Motor Carrier Act of 1980 exacerbated this problem by increasing the number of new entrants. Daust and Cobb found that fatigue and unqualified drivers were responsible for a disproportionate number of trucking accidents.[297] The American Automobile Association study found that driver fatigue was responsible for 41% of motor carrier accidents on the highway.[298] Under the National Accident Sampling System, the three largest causes of accidents were (1) speeding, (2) the level of training, and (3) the age of the vehicle. All of these factors seem to have worsened under deregulation. Professor Garland Chow found that the carrier which eventually goes bankrupt spends less on maintenance and new equipment; he runs older equipment and uses more owner-operators.[299] Professor Corsi found a correlation between owner-operator use and a higher accident rate.[300]

The average age of trucks on the highway has risen significantly under deregulation from 6.9 years in 1978 to 8 years in 1987.[301] According to Professor Evans, the number of trucks twelve years or older on the highway have more than doubled under deregulation.[302] In 1985, checks of vehicles on the highway under the Federal Motor Carrier Safety Assistance program revealed that 29% of large trucks were insufficiently safe to be on the highway. In some states, the figures have been even higher.[303] In 1986, studies in New York and Connecticut revealed that 60% of trucks were insufficiently safe to be on the highway.[304] The U.S. Office of Technology Assistance reveals that the number of accidents between 1981 and 1989 increased 15%, more than the increase in truck-miles

296. Daust & Cobb, *The Relationship between Economic Deregulation of the Motor Carrier Industry and Its Effects On Safety*, CONF. PROC., *supra* note 292, at 785.

297. AAA FOUNDATION FOR TRAFFIC SAFETY, A REPORT ON THE DETERMINATION AND EVALUATION OF THE ROLE OF FATIGUE IN HEAVY TRUCK ACCIDENTS (1985). For purposes of this study, fatigue was defined as more than 15 consecutive hours of on-duty or defined activity time. *Id.* at 2.

298. Chow, *Deregulation, Financial Condition and Safety in the General Freight Trucking Industry*, CONF. PROC., *supra* note 292, at 629.

299. Corsi & Fanara, Jr., *Effects of New Entrants on Motor Carrier Safety*, CONF. PROC., *supra* note 292, at 561. *See also* Labich, *The Scandal of Killer Trucks*, FORTUNE, Mar. 30, 1987, at 85.

300. Dolan, *supra* note 273, at 274.

301. *Id.* at 273-274.

302. P. DEMPSEY, *supra* note 238, at 122.

303. Hanley, *60% of Trucks Fail New York Area Inspections*, N.Y. Times, Oct. 8, 1986, at B1.

304. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 289. *See also*, N. GLASKOWSKY, EFFECTS OF DEREGULATION ON MOTOR CARRIERS 33 (1986).

traveled during that period.[305]

The Canadian MVTA implicitly admits that deregulation will likely have a deleterious effect on safety. First, it includes specific recommendations that the Minister of Transport create a safety program.[306] Second, the Minister must report to the Canadian Parliament statistical information regarding highway accidents.[307] Hopefully, the results will not be as bleak as those experienced south of our common border.

H. SMALL COMMUNITIES

Another adverse effect of deregulation is its impact upon small community service and pricing.[308] Approximately 90% of all Canadians live within one hundred miles of the United States border. If small community service should deteriorate or grow more expensive, the vast northern reaches of the continent will be adversely affected. In motor carriage, we have not yet seen the full impact of deregulation, because there has been no federal preemption in the United States of intrastate trucking. Therefore, the deleterious consequences have been somewhat blunted. The overwhelming majority of states in the United States continue to regulate motor carrier entry and pricing.[309]

However, in those transport sectors where the federal government has preempted the states, the adverse impact upon small community service has been quite profound.[310] For example, four years after promulgation of the Bus Regulatory Reform Act of 1982, more than 4,500 communities have lost service, while fewer than 900 had gained it.[311] Since enactment of the Staggers Rail Act of 1980, more than 1,200 small communities have lost all of their rail service.[312] And, since promulgation of the Airline Deregulation Act of 1978, more than 100 communities have lost all air service.[313] More than 150 now receive air service under Section 419 of the Federal Aviation Act, which provides essential air services to eligible points.[314] Should the federal subsidies for such service dry up,

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305. MVTA, *supra* note 239, art. 3.

306. MVTA, *supra* note 239, art. 35.

307. P. DEMPSEY, *supra* note 238, 195-216.

308. Since the Motor Carrier Act of 1980, only six states have deregulated their motor carrier industries. P. DEMPSEY, *supra* note 238, at 217.

309. Under the provisions of the Airline Deregulation Act, state jurisdiction over intrastate air service is totally preempted. And the Bus Regulatory Reform Act of 1982 gave the ICC jurisdiction to reverse PUC denials at bus discontinuances and rate increases. P. DEMPSEY, *supra* note 238, at 199.

310. Letter from ICC Chairman Heather Gradison to Senator Larry Pressler (Sept. 8, 1986).

311. P. DEMPSEY, *supra* note 238, at 210.

312. Havens & Hemsfeld, *Small Community Air Service Under the Airline Deregulation Act of 1978*, 46 J. AIR L. & COM. 641, 673 (1981).

313. GEN. ACCT. OFFICE, DEREGULATION 31-32 (1988).

314. *The Economic Impact of Federal Airline Transportation Policies on East Tennessee:*

a significant number of them — perhaps most — would lose all air transport service. That is of significant concern when one realized that 80% of the Fortune 500 executive officers revealed that they would not locate a facility in a community which did not have reasonable adequate air service.[315]

The loss of transport services creates an outmigration of investment, jobs and population to crowded urban areas, a social consequence which may not be desirable. As noted above, in the United States, we have not witnessed severe disruptions of motor carrier service to small communities under deregulation; however, pricing appears to have increased significantly.[316] Many communities are only served by United Parcel Service (UPS), which sets a price somewhat lower than the United Postal Service for small parcels, but which enjoys profit margins well above those of other industries, suggesting a pricing structure reflecting their monopoly position in the market. Since deregulation, many trucking companies have exited rural markets, leaving the void to be filled by UPS. This means that small communities are paying monopoly prices for transport services.

Moreover, many large carriers are refusing to provide discounts on interline movements.[317] Hence, the local regional carriers are unable to provide the small communities they serve with the discounts enjoyed in the national pricing structure elsewhere. This means that pricing to and from small communities is higher, on average, than competitive rates in larger markets.

Oddly, while Canadian airline deregulation retains regulatory control and subsidies over entry in the northern tier of Canada so as to protect aviation access to small communities, Canadian motor carrier deregulation has no similar provision to protect rural areas.

I. TRANSBORDER TRUCKING

In the early 1980s, the United States government became concerned about the potential advantages Canadian trucking firms enjoyed because of the deregulation of interstate trucking. Canadian-based firms could apply to the ICC for U.S. operating authority and receive rather liberal and

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Hearings before the Senate Committee on the Budget, 99th Cong., 1st Sess. 12-13 (1985) (testimony of Eugene Joyce).

315. Thomas Gale Moore, a nationally recognized proponent of deregulation, admits that 40% of small communities have suffered a loss of air service since deregulation began, while ticket prices have increased disproportionately for them. Moore, *U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor*, 24 J.L. & ECON., 1, 15, 18, 28 (1986).

316. *See supra* text accompanying notes 265-74.

317. G. BLANCHARD & L. CLAVEL, TRANSBORDER TRUCKING BETWEEN CANADA AND THE UNITED STATES 11 (1988) [hereinafter G. BLANCHARD & L. CLAVEL].

expeditious application approval. In contrast, U.S.-based firms would apply to the Canadian provincial motor carrier commissions for authority; while some were as liberal as the ICC several were not. This created an appearance of discriminatory treatment.

In 1982, the ICC began an investigation of the question, freezing 340 pending applications filed by Canadian carriers for U.S. operating authority.[318] The ICC found that Canadian motor carrier regulation was applied to both the U.S. and Canadian carriers in an even handed and nondiscriminatory fashion, although Canadian restrictions were tighter than those in the United States. In September of that year, Congress passed the Bus Regulatory Reform Act of 1982, Article 6 of which authorized a two year moratorium on the issuance of operating authority to carriers domiciled, owned or controlled in Canada or Mexico. Under the legislation, the President could lift the moratorium if he deemed it in the national interest to do so. In November 1982, letters of understanding were signed between the Canadian ambassador to the United States and the U.S. Trade Representative which established economic and administrative guidelines for jointly resolving problems which have or will arise in transborder trucking. On November 12, 1982, President Reagan lifted the moratorium on Canadian entry in the U.S., and the ICC began processing some 400 pending applications.[319] A bilateral consultative mechanism was established which has met annually since, alternatively in Ottawa and Washington, D.C.

In the wake of this confrontation, and taking a philosophical lead from their neighbors to the south, many of the Provinces began to liberalize entry in the early 1980s. A number of U.S. carriers seized this opportunity to expand operations in Canada, both by filing applications with the Provincial boards for new operating authority, and by purchasing Canadian truck lines. Since 1980, almost 3,000 motor carrier operating permits have been issued to U.S. carriers.[320] By the time the MVTA has been promulgated in 1987, a number of large U.S. motor carriers were already established in Canada.

By 1988, two thirds of Canadian carriers operating across the common border reported that they faced more competition by U.S. carriers in this market.[321] Domestically, one in five Canadian carriers had experienced more competition from U.S. carriers, particularly in Ontario, Quebec and Manitoba.[322] In its 1988 report, Transport Canada noted:

> Canadian carriers are concerned about sustained price competition from

318. *Id.* at 13.
319. *Id.* at 27.
320. 1988 ANNUAL REVIEW, *supra* note 240, at 42.
321. *Id.*
322. *Id.* at 43.

> large scale U.S. carriers (especially in respect to volume discounts). . . [B]ecause U.S. carriers do not have to penetrate deeply into Canada to access the major markets, they can draw on domestic U.S. traffic to balance headhaul/backhaul loads. In reaction, a number of Canadian firms have made greater use of U.S. based operations and have set up operations in the United States to serve the transborder market.[323]

With 90% of Canadians living within 100 miles of the United States, LTL terminals in the U.S. can easily expand to serve Canadian points.

Tariff and investment barriers for most economic sectors were eliminated by the Canada-United States Free Trade Agreement, signed on August 1, 1988.[324] Transport services were omitted from the FTA because of the concern of the U.S. maritime industry with Jones Act protections afforded labor. But with promulgation of the U.S. Motor Carrier Act of 1980 and the Canadian MVTA in 1987, the net effect is deregulation on both sides of the common border — relatively open entry by Canadian firms into U.S. markets, and by U.S. firms into Canadian markets (although immigration laws restrict labor somewhat).

With the conclusion of the new Canadian-United States Free Trade Agreement, traffic patterns which have traditionally been east-to-west and west-to-east will shift and be dominated in the long run by traffic patterns which are north-to-south and south-to-north. In 1989, the two nations exchanged $180 billion in goods.[325] We are each others largest trading partners. Trade with Canada accounted for 22% of the United States' exports and 19% of its imports.[326] In contrast, trade with the United States accounted for 72% of Canada's exports and 66% of its imports.[327] For Canada, with one-tenth the population of the United States, the FTA will have a more profound impact. It is anticipated that the FTA will increase U.S. GNP by one-half a percentage point and create 750,000 jobs, while it will increase Canadian GNP by 2.5% and add 250,000 jobs.[328]

If the largest firms are ultimately to dominate North American transport on both sides of our common border — and they likely will — one must fear that Canadian transportation in the motor carrier sector, now dominated by Federal Industries Transport Group, CP Trucks Group and TNT Canada,[329] may ultimately come to be dominated by firms headquar-

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323. G. BLANCHARD & L. CLAVEL, *supra* note 317, at 100.

324. Feder, *Unfinished Business with Canada*, N.Y. Times, Oct. 8, 1989, at 4F.

325. *Id.*

326. *Id.*

327. *Id.*

328. Lockwood & Howarth, *The Top 100*, TODAY'S TRUCKING, Sept. 1989, at 19, 20.

329. EXTERNAL AFFAIRS CANADA, CANADA-USA THE RELATIONSHIP (1989). Although the U.S. is the single most important destination for Canadian foreign investment, Canada is the fourth largest investor in the United States.

tered in the United States — United Parcel Service, Yellow, Consolidated Freightways and Roadway. Canada is the nation which accounts for the single most significant target of U.S. investment abroad, or one-fifth of all U.S. foreign direct investment.[330] While the FTA does not liberalize free trade in transportation, the net effect of deregulation in the United States in the 1977-80 period, and in Canada under the 1987 federal legislation, is the same.

An interesting dimension of this problem involves national security. If one looks at the major infrastructure industries, one sees a long history in more nations, including the United States, of prohibiting foreign ownership. This is true in communications and energy; cabotage legislation has also prohibited dominant foreign ownership in the major transportation industries of airlines and ocean shipping. Imagine what problems might have existed in 1938 if Lufthansa and Japan Airlines had been the dominant air carriers in the United States. The United States has never promulgated cabotage legislation in the surface transport modes, presumably because foreign ownership has never been a significant potential problem. However, one wonders whether the United States would tolerate foreign ownership of its domestic transport industry. That is a question that Canada must now confront. And it will undoubtedly be a difficult one between friends as strong as these.

J. Summary and Conclusions

In the United States, unlimited entry and rate deregulation has created excessive capacity, declining productivity, destructive competition, discriminatory pricing, predatory behavior, inadequate returns on investment, a deterioration in safety, a decline in wages, a deterioration in labor-management relations, an enhanced number of bankruptcies, mergers, and acquisitions, and, in the long term, unprecedented concentration. The motor carrier industry in the United States is becoming dominated by a very small number of extremely large firms.[331] Today, much of North America is dominated by its four largest trucking companies — United Parcel Service, Yellow, Consolidated Freightways, and Roadway. In the long-term, deregulation appears to have created an oligopoly of megacarriers providing highly discriminatory pricing, as smaller firms fall into the social Darwinist abyss of bankruptcy. In the interim, the smaller firms endanger the safety of those with whom they share the highways.

Why has deregulation failed to achieve much of what it has promised? Deregulation's proponents assured us that, if we were to free the transport market of the dead hand of regulation and replace it by Adam

330. P. DEMPSEY, *supra* note 238, at 129-69.

331. *Truckers in Trouble*, INSIGHT, Nov. 3, 1986.

Smith's invisible hand, we would enjoy marginal cost pricing and near-perfect competition in a healthy, competitive environment.

Deregulation failed because it was a theory based on false assumptions. In theory, regulation distorted efficiency. The transportation industry was thought to be naturally competitive. It was thought to have no economies of scale or scope of consequence. It was believed that there were no economic barriers to entry of significance except by regulatory authorities. It was thought that, if incumbent firms enjoyed market power and raised prices to supra-competitive levels, new entrants would be attracted to these markets like sharks to the smell of blood. This was, in essence, the theory of contestable markets which was premised on the notion that the presence or threat of new entry would restore the competitive equilibrium. It was also predicted that destructive competition would not occur. But what we have seen under deregulation is unprecedented losses, a high number of bankruptcies, a shakeout of many small producers, an industry which is highly concentrated, and one in which there has not been significant new entry.

The theory of contestable markets has not been sustained by the empirical evidence. Leaseway was the only major carrier to enter the less-than-truckload sector of the industry in the United States, and it exited after several years of significant losses.[332] There appeared to be significant economies of scale, scope, and density in the trucking industry. The LTL section requires a significant multi-million-dollar investment in a network of terminals, a large number of employees, and skilled management.[333] Therefore, barriers to entry in the less-than-truckload sector are very high. Economies of scale exist in terms of the terminal networks which are required by these very large firms.

Deregulation's proponents also did not foresee the monopsony power of large shippers and the high level of discrimination it creates. This overwhelming strength of large carriers and large shippers had distorted the market for the sale of transportation services in a way which is antithetical to notions of achieving allocative efficiency.

Only prudently administered economic regulation can accomplish both economic and social goals deemed to be in the highest public interest. Among the economic goals are the prevention of the distortions created by imperfect competition. Regulation can avoid the regressive wealth transfers created by market power, including large shipper's monopsony power to unilaterally dictate rates which are noncompensatory. Additionally, regulation can ameliorate the market power of large carriers, preventing them from charging excessively high rates to small shippers

332. *Is Deregulation Working?*, BUS. WK., Dec. 22, 1986, at 53.

333. MVTA, *supra* note 240, Part V, art. 35.

and engaging in predatory practices against competing carriers. Regulation can also avoid the problem of externalities, which manifests itself in transportation by the impact of inadequate profits upon highway safety, and the discriminatory pricing and service provided to small communities.

In addition, regulation can accomplish a number of important social goals. It can engender a regime of cross-subsidization providing for equality of access to all shippers and to all communities, large and small. Regulation can create a geographic distribution of opportunity for economic growth spread over a larger and more diverse group of participants, thereby enhancing pluralism. It can ensure that small and remote users enjoy the same access to the broader market for the sale of goods as do large firms, thereby enhancing competition in that broader market for the sale of goods.

Transportation is part of the broader infrastructure which is the foundation for economic growth. In most nations, that infrastructure (communications, energy, and transportation) is owned, subsidized, or regulated by government. Only in North America have we entered the Brave New World of deregulation and the highly imperfect economic environment that it creates. Most nations view the infrastructure as an essential foundation for economic growth, and therefore, distortions in it cannot be tolerated. It is for that reason that these industries are treated differently from other sectors of the economy. There is also a strong public interest in motor carriage because these firms are users of a public resource — highways — which are shared by nearly all citizens. If carriers are to use this scarce public resource, they have traditionally been required to do so in a way that achieves broader social goals.

The net impact of deregulation is that the social objectives for which regulation has traditionally been a catalyst have been abandoned. We have left the industry and the public it serves to a highly imperfect market which has created gross distortions between large and small firms. The result is that the larger users of the system (the large shippers) in the short run, and the larger providers of the service (the large carriers) in the longer run, are its principal beneficiaries. Small shippers, small communities, and small transportation firms are clearly disadvantaged in an unregulated environment.

The same problems which exist today in a deregulated trucking environment are those which existed in the 1930s prior to regulation and differ only in magnitude. In the 1930s, the world was ravaged by the worst economic depression of this century; during the early 1980s, the economy was struggling. After the recession, the economy has much improved. Yet, the same parallels exist between destructive competition in the 1930s preceding regulation and the destructive competition in the 1980s following deregulation. A nation that does not learn from its history

is doomed to repeat it. The United States has an extremely short memory, and is prone to reliving its past. Canada can learn from the mistakes we make south of our common border, if only it will see them.

The MVTA calls for the Minister of Transport to undertake a comprehensive review of the impact of the reverse-onus entry test in 1991.[334] Transport Canada has already begun to prepare the data necessary to sustain the success of the government's policy. Officials in Transport Canada were quite candid in interviews with the authors, foreseeing major Canadian motor carrier bankruptcies and searching for rationales (such as "bad management") to blunt criticism that deregulation was to blame. They were envious of the ability of the U.S. Department of Transportation (DOT) to lay the blame of widespread U.S. motor carrier bankruptcies on the recession of the early 1980s. One fears that Transport Canada will prepare the same kind of whitewash reports and studies of Canadian deregulation that the DOT prepared of the impacts of U.S. deregulation during the last decade. Political ideology too often prevails over truth.

Although the five-year transition period contemplated by the MVTA has been collapsed into one, the impact of Canadian deregulation is not likely to be felt sharply in the next year or two, for many Provinces began to liberalize entry early in the 1980s, and rates in Canada have never been as tightly regulated as in the United States. Thus, the impact of deregulation in Canada must be viewed as a phenomenon which in some Provinces is well advanced, with lots of entry, acquisitions and mergers already having occurred. Some U.S. carriers have been present and growing in Canada for years.

Of course, if U.S. carriers should come to dominate Canadian trucking, Canada could always shut the door, for transportation was intentionally excluded from the Canada-United States Free Trade Agreement. In the last analysis, that is Canada's trump card should this grand experiment in free market ideology turn out not to be as lovely as that depicted in economics textbooks.

V. Deregulation and the Bus Industry

In the United States, the rate wars, bankruptcies, a deteriorating margin of safety, and consumer exploitation coalesced in the mid-1930s to prompt federal regulation of the bus industry. In promulgating the Motor Carrier Act of 1935, Congress added trucking and bus companies to the jurisdiction of the Interstate Commerce Commission (ICC).[335] Destructive

334. Pub. L. No. 74-255, 49 Stat. 543 (1935). *See Hearings on S. 1629, S. 1632 and S. 1635 Before the Sen. Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 78 (1935).

335. 49 U.S.C. § 10922 et seq.

competition abated, and for the half century which followed, bus service was ubiquitously available throughout the nation at a price which was "just and reasonable." Service was safe and dependable to large and small communities throughout the nation.

As in telephone regulation, there was some measure of "cross subsidization" performed under the regulatory umbrella of the U.S. Interstate Commerce Commission (in interstate transport) and the State Public Utility Commissions (PUCs) (in intrastate transport), with more lucrative, denser traffic lanes paying a premium above marginal costs to subsidize rural and small community service. With the disintegration of the passenger railroad system, buses became the only public means of transport to or from tens of thousands of communities across the nation.

With the laissez faire crusade sweeping railroads (with promulgation of the 4-R Act of 1976 and the Staggers Rail Act of 1980), airlines (with the enactment of the Air Cargo Deregulation Act of 1977 and the Airline Deregulation Act of 1978), and trucking (following a biased construction of the Motor Carrier Act of 1980), the buses became the latest casualty of free market theory.

The Bus Regulatory Reform Act of 1982 (BRRA) significantly liberalized entry, exit and pricing of the U.S. bus industry, and largely preempted the states.[336] Paradoxically, while the BRRA was premised on the notion that deregulation would enhance competition, the result has been a higher level of concentration than has ever existed in the industry, poorer returns than have ever been realized, and a large and growing number of small community abandonments.

The BRRA liberalized entry by removing the requirement that applicants prove "public convenience and necessity," leaving them with the obligation to establish only that they are "fit, willing and able" to provide the proposed operations. A protester must then prove that issuance of the authority sought will not be in the public interest.[337] Abandonments became easier too. Moreover, industry proposed intrastate abandonments and price increases denied by the State Public Utility Commissions could now be appealed to the Interstate Commerce Commission, where they were almost always reversed.

In the first year under the BRRA, the bus industry announced termination or reductions of service at 2,154 communities.[338] The ICC estimated that 1,045 communities that lost service in the first year of deregulation had no alternative intercity transportation.[339] By late 1986, 4,514 com-

336. *H.R. Rep.* No. 97-334, 97th Cong., 1st Sess. 29 (1981).

337. U.S. DEPT. OF AGRICULTURE, RECONNECTING RURAL AMERICA 20 (1989) [hereinafter RECONNECTING RURAL AMERICA].

338. *Id.*

339. Letter from ICC Chairman Heather Gradison to Senator Larry Pressler (Sept. 8, 1986).

munities had lost bus service, while only 896 had gained it. The big losers were small communities — 3,432 of the small towns which lost service had a population of 10,000 or less.[340] This loss of service falls particularly hard on nonmetropolitan and rural populations, which have a higher percentage of children and elderly who need access to public intercity transport, than do urban areas.[341]

Who suffers when bus service deteriorates or becomes more expensive? Individuals in the lowest income groups, people living in rural areas, and the young and elderly rely disproportionately upon buses than any other mode of transportation.

During 1977, the last year the U.S. Department of Commerce performed a travel survey, 30% of all intercity bus passenger miles were traveled by individuals living in rural areas, compared to trains (20%) and airlines (15%); families earning less than $10,000 a year accounted for 45% of intercity bus passenger miles, compared to trains (25%), automobiles (18%), and airlines (15%);[342] people under the age of 18 or over the age of 64 accounted for half of intercity bus passengers, compared to automobiles (33%), railroads (25%), and airlines (17%).[343]

The isolation of rural America has had a pernicious social and economic impact.[344] The U.S. Department of Agriculture recently summarized the impact of deregulation upon small towns and rural communities:

> Many rural residents no longer have intercity public transportation available to them. It is no longer possible "to get from here to there." The combined effect of rail, air, and bus deregulation has simply removed many rural areas from the intercity transportation network. In those small communities where some form of intercity transportation is still available, the cost of travel has risen, sometimes dramatically. . . .
>
> The net result for many rural residents is increased isolation from society at large, as linking with other communities becomes more and more difficult. An alternative for some elderly people is to move away from their homes in rural areas to an urban area—where they no longer have the support of their local community network and where they may require the support of human services agencies to remain independent. . . .
>
> [T]here may be an incremental addition to a larger trend toward increased isolation and rising costs for rural communities. As costs rise, businesses close, thereby reducing the number of services available locally.

340. *See* RECONNECTING RURAL AMERICA, *supra* note 337, at 8.

341. The trend continues. A 1988 survey by Greyhound Lines, Inc. revealed that 44.8% of its passengers were from families which earned less than $15,000 a year. R. NATHAN, FEDERAL SUBSIDIES FOR PASSENGER TRANSPORTATION, 1960-1988: WINNERS, LOSERS, AND IMPLICATIONS FOR THE FUTURE 17 (1989) [hereinafter R. NATHAN].

342. *Id.* at 17-20.

343. *See* Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of This Endangered Species*, 32 AM. U.L. REV. 335, 343-44 (1983).

344. RECONNECTING RURAL AMERICA, *supra* note 337, at 26-27.

> And as the number of services decline, residents are forced to travel farther to access medical care, shopping, employment opportunities, and social and recreational outlets. As people travel to meet basic needs, the cycle of decline is reinforced as individuals combine their trips to the larger community to include the doctor, the shopping center, and the theater—and bypass the local business as an additional, unnecessary stop. Eventually, population declines as access to basic services becomes too difficult or too costly for rural residents to sustain.[345]

The U.S. intercity bus network is shrinking under deregulation. Peaking at 27.7 billion intercity passenger miles traveled in 1979, it has fallen steadily each year since to 23 billion passenger miles in 1987.[346]

Prior to its deregulation, industry officials predicted that deregulation would result in drastic service reductions to small communities. Harry Lesko, President of Greyhound of Arizona, said that "Eighty-nine percent of our routes are subsidized by the bread-and-butter primary routes. . . [I]f we are to keep our lines running and the scheduled miles operating on the primary routes to satisfy the high-density population factors, the rural areas are going to have to suffer because they're straining the main line system."[347] Similarly Charles Webb, President of the National Association of Motor Bus Owners, insisted that "[t]he one conclusive argument against removal of controls on entry by motor carriers of passengers stems from their obligation to provide service to thousands of small cities and towns and to vast rural areas without profit or at a loss, and from the fact that it would be unconscionable either to permit new entrants to skim the cream of traffic or to authorize existing carriers to discontinue bus service to thousands of communities having no other form of public transportation."[348]

Moreover, the loss of bus service means the loss of the most fuel efficient and least pollutive mode of transport.[349] In 1985, the various modes consumed the following amounts of fuel per passenger mile:

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345. R. NATHAN, *supra* note 341, at Appendix B, Table B-1.

346. SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, 95th Cong., 2d Sess., INTERCITY BUS SERVICE IN SMALL COMMUNITIES 17 (1978).

347. Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 105 (1976). *See* P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 205 (1989).

348. R. NATHAN, *supra* note 341, at 20-24.

349. *Id.* at 20.

FUEL CONSUMPTION BY MODE

Mode	Btus per passenger mile
Buses	1,323
Trains	2,800
Automobiles	4,040
Commercial Aviation	4,376
General Aviation	11,339

Despite the freedom to raise prices and leave unprofitable markets created by deregulation, the bus industry suffered unprecedented losses under deregulation. Industry operating ratios exceeded 96.9 every year between 1982 and 1986.[350] Part of this was due to "cream skinning" by new entrants which focused their operations on the denser, higher revenue traffic lanes. Excessive capacity in dense markets deprived carriers of the revenue needed to cross-subsidize weaker markets. Another part still was prompted by the impact of the airline rate wars of the early 1980s, created by the destructive competition unleashed by the Airline Deregulation Act of 1978. Supersaver air fares were luring passengers away from the bus stations and into airports.[351] Even charter and tour deregulation had a deleterious effect upon carrier profitability. Jeremy Kahn painted the following portrait of the empirical results of deregulation:

> [W]ith the exception of a handful of intercity carriers engaged in regular route transportation (be it true intercity transportation or even long distance commuter service within major metropolitan areas), charter and tour revenues provide a significant—if not the most significant—proportion of most carrier's revenues. Deregulation of charter and tour operations on the federal level (and, generally on the state level to varying degrees) has resulted in overcapacity, leading to severe price competition, resulting in a diminution of overall carrier profits. This, coupled with ever increasing costs of operation, including the staggering cost of the newest intercity motorcoaches, increased cost of labor, including benefits, and other operating costs, including taxes, has resulted in mere economic survival being a major issue for many smaller charter and tour carriers within the industry.
>
> Regardless of the number of efficient management programs which are instituted, regardless of the modernization of maintenance facilities and customer service facilities, and regardless of computerization of record keeping and billing, many carriers are faced with a close-to-being unbearable squeeze on their profits. . . .
>
> Many carriers are today operating aging fleets of equipment, with models costing the then significant amount of $155,000 now replaceable only with comparable models which cost twice as much.
>
> In many instances, only new entrants, highly leveraged, and barely able to make lease payments on these expensive coaches, enter the charter market and provide fierce price competition, anxious only in the short run to

350. R. NATHAN, *supra* note 341, at Appendix C, Table C.

351. RECONNECTING RURAL AMERICA, *supra* note 337, at 21.

meet their leasing obligations, thereby further exasperating this problem.[352]

Between 1981 and 1986, Greyhound in the United States experienced severe losses;[353] because of its anemic performance and labor difficulties, it was placed on Standard & Poor's "watch list" in 1983.[354] In 1986, Greyhound of Arizona sold its domestic operations to an investment group led by Fred Curry, a former officer, for $350 million.[355] The following year, Greyhound acquired its rival Trailways, for $80 million, and the U.S. bus duopoly became a monopoly.[356] Recognizing that Trailways was on its death bed, the U.S. Department of Justice acquiesced and withheld antitrust opposition under the "failing company" doctrine.[357] That single firm today accounts for more than 85% of the operating revenues of the ten largest carriers.[358]

While deregulation initially increased price competition by flooding the market with excess capacity, it caused the industry's profit margin to plummet, a large number of carriers to fail, or merge, thereby creating unprecedented levels of concentration. During that time, small and rural communities lost bus service or faced extreme price discrimination.[359]

Thus, deregulation of the U.S. intercity bus industry has created an anemic monopoly providing poorer service than before deregulation. Even Alfred Kahn, the guru of deregulation, has acknowledged that bus deregulation was a threat to small communities, whose lifeline is the intercity operator. Therefore, had he been at the helm of government, he probably would not have deregulated the bus industry.[360]

The public has suffered unduly in the United States as free market economists played havoc with national transportation policy. Laissez faire has made impossible the achievement of the broader social and equity objectives of ubiquitous intercity passenger transportation linking all to the infrastructure, even those living in remote communities, for it has

352. J. Kahn, The U.S. Bus Industry Seven Years After Deregulation 16-17 (address before the Canadian Transport Lawyers Ass'n, Nov. 18, 1989) [hereinafter J. Kahn].

353. GREYHOUND CORP., ANNUAL REPORT 2 (1982); GREYHOUND CORP., ANNUAL REPORT 1 (1986).

354. *Greyhound Put on S&P's Watch List*, Wall St. J., Jan. 24, 1983, at 32.

355. *Greyhound to Sell U.S. Bus Operations for $350 Million to Group of Investors*, Wall St. J., Dec. 24, 1986, at 3.

356. *Greyhound Gets Clearance to Run Trailways for Now*, Wall St. J., July 3, 1987, at 3; *Greyhound Lines to Take Control of Trailways Assets*, Wall St. J., July 14, 1987, at 16.

357. *See* Dempsey, *Antitrust Law and Policy in Transportation: Monopoly I$ the Name of the Game*, 21 GA. L. REV. 505 (1987).

358. J. Kahn, *supra* note 352, at 14.

359. Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 13 TRANSP. L. INST. 121, 172-75 (1981).

360. Testimony of Alfred Kahn Before the California Public Utilities Commission on Cross Examination by Paul Stephen Dempsey 6247-48 (Jan. 31, 1989).

obliterated the delicate balance of cross-subsidies which only responsibly administered economic regulation can provide.

In Canada, the Motor Vehicle Transport Act of 1954 essentially granted the provincial highway transport boards the authority to regulate extra-provincial bus transport in accordance with provincial laws and regulations. Although the Motor Vehicle Transport Act, 1987, significantly liberalizes extra-provincial and international trucking regulation, it leaves companion bus regulation as it was under the 1954 Act, with one addition: the Governor in Council may, upon the recommendation of the Federal Minister of Transport after consultation with the provincial governments, promulgate safety regulations.[361] Thus inter-provincial and extra-provincial regulation remains under the jurisdiction of the Provincial motor carrier transport boards, and most continue to require that new applicants demonstrate that new operations would be consistent with the "public convenience and necessity."

Canada thus can avoid the serious problems of deregulation caused by unlimited entry. Its provinces can take a more moderate, balanced approach, one which recognizes that the U.S. experiment with transport deregulation has created significant problems antithetical to the public interest.

VI. CONCLUSIONS

> "Trans-Canada Air Lines was established to carry the mail . . . there were still plenty of people around in 1937 who would no more have set foot on an aeroplane than they would willingly have stepped into a bear trap. And there were those on both sides of the Atlantic who felt that no matter how intrepid the potential airline passenger might be, he had no place aboard a machine designed to speed the mail. 'Mails may be lost but never be delayed. . . and passengers may be delayed but must never be lost.' "
>
> — C. G. Grey, quoted in Smith "*It Seems Like Only Yesterday*", 11 (1986).

> "By the time we're ready to celebrate the bicentennial of passenger rail in 2036, much will have changed in our world. The steel wheel on the steel rail may well be a thing of the past. But the pioneering vision that built our first railways against incredible odds will service well in the 21st century and beyond."
>
> —VIA Rail Canada, *Rails Across Canada*, 127 (1986).

Transportation systems in Canada grew under conditions of benevolent protection and sponsorship by a development-minded government in Ottawa. While the United States opted for private operation of its railroads, airlines and motor carriers, most other nations opted for nationali-

361. F. Lemieux, Federal Regulation of the Canadian Bus Industry 5-13 (address before the Canadian Transport Lawyers Ass'n, Nov. 18, 1989).

zation of these modes. Canada has relied for most of the twentieth century on competition between a major Crown and a large-scale private carrier. Canada was content to let this duopoly serve most of its transportation needs, and extend this competition to hotels and telegraph services.

The 1970s brought about a greater coordination of Canadian transport facilities. It also began the unloading of social services from the carriers upon the government. VIA Rail was implemented to take the passenger burden away from Canadian National and Canadian Pacific. Canadian National, in turn, was restructured to operate more like a conventional railroad, while local commuter services were turned over to the provinces. Air Canada was relieved of many obligations to serve northern communities, and Canadian Pacific Airlines was permitted more competitive service on the transcontinental run. Regional airlines emerged to handle local traffic, connecting with Air Canada and CP Air at major hubs. Bus service took the form of Greyhound of Canada as the principal east-west carrier, with other regional carriers operating in the various provinces. (Buses are the one form of transport whose regulatory regime has not been changed.)

The 1980s was the decade wherein the United States attempted a massive experiment in deregulation of transportation as well as other regulated industries. Later, two administrations in Canada decided that the deregulation route was the way for Canada to go as well. Deregulation in the United States was intended to bring more competition, but in many cases it ended in oligopoly. Much of the same process occurred in Canada, particularly in aviation. The principal Canadian private airlines were all merged into Canadian Airlines International. Air Canada has now been privatized. VIA Rail has been downsized, and the government is looking for private buyers to take over the pieces as an alternative to abandonment. The two major freight railroads are now being rationalized. Canadian Pacific has taken its trackage in the Maritimes and placed it with a subsidiary; Canadian National has abandoned its trackage in Prince Edward Island and Newfoundland. Motor carriers are facing increased competition from large U.S. carriers and oligopolistic trends are being seen in the Canadian trucking industry. After a five-year shakeout period, provincial control of extraprovincial trucking will be a nullity. With the implementation of the Canada-U.S. Free Trade Agreement, traffic patterns will increasingly shift from east-west to north-south. Ultimately, that may lead to growth of a handful of dominant North American motor megacarriers.

The twin themes of deregulation and privatization have changed the face of Canadian transport and its regulatory and statutory controls. Enactment of the Transportation Act, 1987 was the culmination of the drive

to replace the Canadian regulated duopoly with a freewheeling system modeled after that south of the 49th parallel. It represents a faith that a system which developed in a far more densely populated nation will suffice for a Canada of vast expanses and few alternative transportation facilities. The long history of multimodal transportation systems owned by the railways represents a different face of transportation development in Canada; presumable that history is set aside in hope that new carriers will come to take their place. Cross-subsidization, a necessity for developing transport facilities in the remote portions of the country, is now a thing of the past.[362] As in the United States, concern with government inefficiency may also have been a motivating factor, and certainly was a factor in the radical restructuring of VIA Rail.[363]

The 1990s will be a period wherein a largely deregulated Canadian transportation system faces a similarly deregulated system in the United States. During this decade, the Free Trade Agreement between the two countries will be phased in, gradually eliminating all tariffs, easing non-tariff trade barriers and encouraging the integrations of markets on the North American continent. At the same time, both Canadian and American rail, air and truck regulations have been greatly eased. Is the next logical step the blending of the two nation's transport networks with complete continental deregulation?

As it happens, transportation services are not included in the Free Trade Agreement. Pressured in part by U.S. maritime interests and border state congressmen, Canada agreed in 1987 to drop the transportation annex proposed to be appended to the Fair Trade Agreement. American sailors feared repeal of the Jones Act, which limited coastwide trade to U.S. bottoms, and American airlines, reeling from deregulation, feared the easing of cabotage restrictions. Under pressure from his negotiators, Prime Minister Mulroney agreed to drop transportation from the free trade legislation, and the Canadian Parliament complied.[364]

But mutual deregulation has brought many of the economic effects of

362. For an overview of transport deregulation in Canada as it unfolded, see Heaver, *Railway Ownership of Motor Carriers in Canada*, 52 TRANSP. PRAC. J. 478 (1985); O'Brien, *Deregulation or Regulatory Reform?*, 54 TRANSP. PRAC. J. 15 (1988); Saul, *The National Transportation Act* (1987), 56 TRANSP. PRAC. J. 261 (1989); Dresner, *The Canada-US Air Transport Bilateral*, 56 TRANSP. PRAC. J. 393 (1989).

363. *See* Gormick, *VIA's Cuts Stun Canada*, RAILWAY AGE, Nov. 1989, at p. 46. (The author points out that for roughly the same subsidy, Amtrak operates twice as many trains and carries three times VIA's ridership of 6.8 million passengers. Amtrak has re-equipped its system, while VIA has only purchased some LRC trains for corridor service and 59 new locomotives, the latter in the last three years. Furthermore, VIA is top-heavy, with one manager for every 3.5 employees.)

364. Solomon, *Canada Seen Anxious To Re-Insert Transportation Annex in Trade Pact*, TRAFFIC WORLD, November 6, 1989, at 32.

free trade to Canada's transportation community anyway. U.S. carriers now have a better chance at operating within Canadian provinces. Since some states (New York, Michigan and Ohio, for example) still have strict standards about entry into intrastate trucking, Canadian members of Parliament are now wondering if the U.S. got the better of the deal, and are openly campaigning for an annex to the Free Trade Agreement which would give them transportation access to the greater U.S. market.

Perhaps, a limited amount of cabotage in aviation would give competition to what appears now to be an airborne oligopoly. Currently, there are routes in Canada which are served by only Air Canada or Canadian Airlines. Much of the upper Great Plains is only served by Northwest Airlines. (Aspen Airways, operating as United Express under a special bilateral arrangement between the Canadian and U.S. governments, cancelled its service between Denver, Grand Forks and Winnipeg in December 1989. Northwest is now the only carrier offering transborder service out of Winnipeg). Such a move, even one which merely allowed a carrier to fill in empty seats on the other side of the border, would be a positive move toward bringing competition to the skies — the stated purpose of deregulation. The last decade of the twentieth century will bring either a sober second look at what transport deregulation has wrought, or the liberalization of Canadian transport to participate in a continent-wide common market with U.S. carriers.[365]

365. The authors would particularly like to thank the Government of Canada, the Department of External Affairs, for an Institutional Research Grant which enabled them to travel to Canada to cover late-breaking legislative and regulatory developments in the preparation of this article.