

TRANSPORT REGULATION IN CANADA

IVAN R. FELTHAM

Introduction

Transport regulation encompasses safety, labour relations, working conditions, protection of the environment, and the attainment of other social and economic policy objectives. This paper focuses on regulation designed to implement the national transportation policy, which may be described for convenience of reference as "economic regulation", to distinguish it from other subjects of regulation. In focusing on economic regulation, one should not overlook the fact that other aspects of regulation have economic significance, but that is not the primary purpose of such regulation. Their primary purpose is to achieve certain minimum standards and they are usually directed specifically at the objectives being sought. The achievement of those objectives through the regulation can be measured and predicted with some degree of certainty. In the case of economic regulation, however, the relation between the techniques of economic regulation and the overall goal of providing an efficient and adequate transportation service is complex and unclear. It is the purpose of this paper to examine some of the problems in this connection.

The objective of the national transportation policy is the provision of (at least) adequate transportation to serve the broader national policies of industrial development and alleviation of economic disparities among the regions of the country. This involves investment in the facilities of transportation such as roads, ports and harbours, airports and navigation aids. It also involves provision by government, either directly or by subsidy, of necessary services that private enterprise will not provide based on an expectation of profit.

The government's duty to ensure an adequate transportation service to meet national and regional needs may be described as the promotional function. Compared with other aspects of the regulatory system, this is the broader and more basic element of total transportation policy. Within this framework, economic regulation, as we usually understand that term, is designed to constrain free business decision-making to avoid destructive competition, exploitation of monopolistic power and cutting corners with regard to service and safety.

The National Transportation Act¹ sets out the following goals for the

Vice-President and General Counsel, Canadian General Electric Company Limited; formerly Professor and Director, Business Law Program, Osgoode Hall Law School of York University, Toronto.

1. Revised Statutes of Canada 1970, c. N-17, as amended.

national transportation system. The system should be economic, efficient and adequate and achieve the best use of all modes at the lowest total cost in the interests of users and the economic well-being of Canada.² The statute states also that competition is the technique chosen generally to achieve those goals and that they are most likely to be achieved when the modes are free to compete, when they bear the real cost of public facilities and services provided to them, when they receive fair compensation for public duties imposed on them and when rates are fixed so as to avoid discrimination among users and to offer no undue obstacles to trade in Canada and externally. The techniques are to be employed with due regard to national policy and to legal and constitutional requirements.

The Act imposes upon the Canadian Transport Commission the duty to perform its functions "with the object of coordinating and harmonizing the operations of all carriers engaged in transport by railways, water, aircraft, extra-provincial motor vehicle transport and commodity pipelines. . . ."³ The powers and duties of the Commission more specifically enumerated in the National Transportation Act and in the other statutes which it administers, particularly the Railway Act,⁴ the Aeronautics Act⁵ and the Transport Act,⁶ are to be carried out within these broadly defined principles. Indeed, the policy is so broadly defined that one might reasonably conclude that it offers very little, if any, guidance in the application of the more specific rules and powers assigned to the regulators. The specific powers, to the extent that they are clear and unambiguous, must be complied with. Indeed, they are the very definition of the general principles.

One might reasonably assume from the grand declaration of policy that the specific regulations for the several modes would exhibit a uniform pattern. However, one is led quickly to question whether there is indeed any national transportation policy as one notes the differences among the modes and their governing statutes in the regulation of rates and entry to, and abandonment of, particular transportation services. These are developed in some detail in this paper. The essential point to be made at this stage is that there is no apparent plan to accomplish the goals of Sections 3 and 21 of the National Transportation Act. It is questionable, therefore, whether the agency upon which is imposed the responsibility for implementing the policy has been given adequate authority to do so.

An active agency could strive toward a comprehensive policy by formu-

2. *Ibid.*, s. 3.

3. *Ibid.*, s. 21.

4. R.S.C. 1970, c. R-2, as amended.

5. R.S.C. 1970, c. A-3.

6. R.S.C. 1970, c. T-14.

lating recommendations for new policy and law⁷ and by developing principles for uniform application subject only to the inflexible constraints of the statutory framework⁹ This has undoubtedly happened to some extent, but it is not apparent from a review of the published work of the Canadian Transportation Commission—the regulatory decisions and the annual reports. We now have five annual reports of the Canadian Transport Commission. They have shown some expansion but they are still slim pickings for anyone wishing to gain from them help in evaluating the operation of the regulatory system.

Two different approaches may be taken to a discussion of the system of regulation. One approach would review the transportation system with a view to identifying major problems, then determine what policies might best achieve a solution to those problems and evaluate the regulatory system and its operation against those policies. The other approach would consider the system of regulation as it presently exists and attempt to evaluate its efficacy in the light of facts relating to the operation of the system and the problems inherent in the system. The danger with the former approach is that it might not adequately take account of the experience reflected in the system as it presently exists. The danger with the alternative approach is that it has a tendency to limit one's perspective and, particularly in the Canadian context, to embroil the reviewer in past experience, thus distorting what could otherwise be a contemporary and future-oriented review. I propose in this paper to look at the system as it exists and attempt to evaluate its efficacy having due regard to stated and implicit economic and social policy.

This paper generally attempts to relate specific rules to general policy, and to evaluate the processes by which policies are translated into action and applied to particular cases and problems. From this evaluation will arise questions and criticisms of the fundamental policy itself. A policy that does not work is not satisfactory, that is, a policy has to be evaluated in the light of the details of its application. A general statement of policy by itself does not suffice because all such general statements assume some effect or effects. On close examination of the results of the application of the policy, the assumptions on which the policy rests may be shown to be not well founded.

This paper is not intended to be a comprehensive analysis of economic regulation of transportation in Canada. It is a selective analysis of certain problems which reflect my assessment of priorities and the legal content of the problems.

7. See Section 22 of the National Transportation Act.

Regulation of carriers or traffic

Transportation is not an end in itself. It is a service; it serves the purposes of moving goods and people from point to point. For this discussion, let us concentrate on the movement of goods. Goods are available in certain places and are needed in others. It is the movement of goods which is the basic economic phenomenon. The means of movement are secondary. If we follow this line of reasoning, we might conclude that economic regulation should concentrate on the movement of goods. In context, that would mean that price, service and conditions of carriage would be subject to uniform regulation for any movement. Such a system should tend to minimize the cost of regulation and insure that similar movements are subject to similar regulations in terms of cost and competitive effects.

The National Transportation Act and the related statutes regulate carriers. Only within that framework does the regulation bear on the movement of goods and people. As matters now stand, movements of goods are not subject to a uniform regulatory system. They are handled by some carriers and other providers of transportation service who are subject to one regulatory regime and by some who are subject to another as far as the essentials of price, service and conditions of carriage are concerned. The regulatory regime which applies to any movement of goods may be an accident of how a particular firm is organized. A multi-faceted undertaking may be wholly subject to federal regulation; another inter-provincial carrier may use local cartage services, or interline with intra-provincial carriers subject only to provincial regulation. There are several aspects of the mix. One is the constitutional division of authority between the Parliament of Canada and the provinces, another is the "natural" division of authority and responsibility between those supervising the broader system and those supervising local services. No system will be simple or perfect because of the complexity of our geographical and political organization. A third aspect is the separate modal regulation even within federal jurisdiction. This aspect is amenable to greater coordination and uniformity.

Some aspects of transportation (for example, conditions of carriage) would appear to me to be more conveniently regulated if the focus were on the movement of goods. Every movement would be subject to a uniform set of conditions. Other aspects of regulation, perhaps entry of new highway carriers in any particular transportation market, may be more conveniently regulated as now where the focus is on the carrier rather than the cargo. In this case, the emphasis is on the provision of service in a geographical area; with regard to conditions of carriage, the empha-

sis is on the contractual relations between the shipper and the carrier without regard to the question of competition in the transportation market although the existence of competition may well have an effect on the conditions of carriage the carrier attempts to impose on the shipper.

The subject of regulation, that is, whether the focus is on the movement of goods or on the operation of providers of transportation services, has a large constitutional aspect. But, in addition to that, it still remains a fundamental consideration and should be reviewed, as far as possible, apart from the constitutional division of power in Canada. On such review, it might appear that some aspects of regulation are appropriate for uniform national regulation and also that the constitutional power exists or a system can be agreed upon between the provinces and the federal authorities, and other subjects of regulation might be dealt with differently to reflect the different needs to which they relate.

Uniformity and coordination of regulation among the modes.

A fundamental question that arises from a review of the Canadian statutory package is, to what extent should the several modes be subject to a set of uniform principles? As noted before, the specific statutory directives to the Transport Commission are not at all uniform, although all modes and the distinctive services provided by those modes are part of a single system with a single goal, namely, the provision of economic, efficient and adequate transportation service in Canada. Of course, some service capabilities are peculiar to particular modes. One does not conceive of moving Kootenay coal to Roberts Bank by aircraft nor is the bus likely to be regarded as an alternative mode for air passenger service for business travellers from Toronto to Vancouver. But, the bus is clearly competitive for some users of passenger service even over very long distances and many commodities which only a few years ago were not moved by air except in the extreme circumstances where no alternative modes were available (as in the far north) may now move by air because of the peculiar advantage of speed. Fresh fruits and vegetables are perhaps a good illustration of this potential. It is, I suggest, consistent to continue to think of bulk movements by rail and water as special problems at the same time as we consider the integrated use of the rail bed and water facilities for other aspects of freight and passenger service. I believe we are compelled to establish a perspective which is comprehensive of all aspects of the transport system, rather than focusing first on the special conditions and the peculiar problems of each mode and, from that starting point, moving toward a more comprehensive view. Each approach or perspective may achieve the same results, but I believe the broader ap-

proach is more likely to assist us in a contemporary and forward-looking review. Certainly, we would appear to know better what we are doing if we were to develop a comprehensive transportation code within which special rules could be framed as required rather than persisting with the scissors-and-paste job which characterizes our present statutory package.

The structure of government—the role of an “independent tribunal”

Parliament habitually delegates to the executive arm of government substantial powers to make laws (usually referred to as regulations) within the framework of a statutory mandate. Such regulation-making authority is never delegated to the courts (except perhaps with regard to some procedural matters). The “independent tribunals” within the structure are in many respects more closely akin to the executive branch than to the judicial, although they are often referred to and thought of as quasi-judicial tribunals. The governing statutes often delegate to such tribunals the power to make regulations as well as the authority and responsibility for determining issues in a quasi-judicial fashion. The Canadian Transport Commission is one of the tribunals to which such power and responsibility is assigned. The subject of separation of powers is, of course, a complex field by itself. The reason for referring to it in this context is to ask the question whether the utilization of a quasi-judicial or independent tribunal for the range of authority and responsibility assigned to the Transport Commission is the most effective and satisfactory method of implementing a dynamic transport policy.

It is often stated that there should be a clear-cut distinction between judicial and executive or administrative functions. The difference between the two is sometimes described as a narrow line.⁸ This is a fallacy. There is in fact no line at all. Most functions within the sphere of economic regulation are a mix of judicial and executive functions. Nor is it demonstrated that the mix of functions is bad. Those who conclude otherwise with regard to the operation of independent boards base their view on assumptions about the difference between administrative and adjudicative functions which are not borne out by experience. The fact that some boards may have performed inadequately, or less well than hoped or expected, is not proof that boards staffed by more imaginative, skilled people would not have performed better. Having due regard to the practicalities of staffing all responsible positions, we must distinguish those problems from others inherent in the structure itself.⁹

8. See, for example, A.W. Currie at p. 399 of his *Canadian Transportation Economics*, Toronto, U. of T. Press, 1967.

9. Similar discussions now rage about the Competitive Practices Tribunal proposed in

Examination of the role of the Canadian Transport Commission involves a double-barrelled question: how much independence does the statutory structure contemplate? And, to what extent if any does and should the Cabinet or the Minister of Transport direct policy? The statutes (Aeronautics Act, National Transportation Act, Railway Act and Transport Act) assign responsibilities and powers to the Commission. These include not only the power of decision in individual cases, but also a relatively broad power to make regulations. But, every decision of the Commission, whether on an individual case or on a general regulation, is subject to review by the Cabinet which may act either on complaint or of its own motion.¹⁰ In effect, the Cabinet is given the statutory authority to reach out and substitute its own view for any action of the C.T.C. That the Cabinet has exercised this power sparingly still leaves the obvious question as to the extent to which the Transport Commission and its predecessors felt obliged to be responsive to declared government policy. Further, an appeal may be taken to the Minister of Transport in certain cases involving a decision of the Commission in connection with an individual license.¹¹

These provisions for appeal and review by the Minister and/or the Cabinet undoubtedly reflect the basic conviction that the development of national transport policy, both in general terms and in particular cases, is a matter of the highest importance and should not be totally delegated by the government. This being the case, is it desirable to preserve the impression of independence? Would it be preferable to recognize the Commission for what the statute makes it, namely a branch of the executive arm, albeit one with important and far-reaching responsibilities? In practice, the Commission appears to operate independently with regard to a wide range of its work (as in the railway passenger service decisions), yet express itself to be very concerned to implement stated government policy rather than develop its own opinion, as one might expect having regard to the statutory duty of the Commission, with regard to regional air services.¹²

Another model for decision-making is to give a tribunal independence subject only to judicial review to contain the decisions of the tribunal within its proper sphere of discretion. Such a tribunal might be more

the Competition Act. If the Government were to make a suitable declaration of intention with regard to the types of people to be sought for that tribunal and the level of remuneration to be established, a good deal of the criticism would likely abate. Compare the procedure for Cabinet review of foreign takeovers (Foreign Investment Review Act).

10. N.T.A., s. 64 (1).

11. *Ibid.*, s. 25.

12. See the Nordair and Transair decisions, March 9, 1970, decision serial no. 2954, and February 24, 1969, decision no. 2689.

inclined to strike out on its own and to formulate long-run policies. Issues before such an independent tribunal might be the subject of representation by both federal and provincial governments. The tribunal would be the arbiter among opposing views. But, is such independence desirable for the wide range of responsibilities of the C.T.C.? Is it practicable or desirable to divide the functions relating to transport between adjudicative and administrative? The model of the regular courts is not instructive. It has long been recognized that one of their greatest limitations is their inability to innovate with regard to matters of general public policy, and the field of economic regulation is perhaps the leading illustration of this.

A distinctly different approach would be to eliminate the appearance of a division of function and to integrate the function of economic regulation directly into the ministry structure. One might ask whether the present division of function is not based on outmoded notions and fears of political buccaneering. What greater chance of impropriety, or what greater chance of not reaching the "right decision", is there under the present structure which requires the C.T.C. to rule on rail abandonment, or air service rationalization, than would be the case if the decisions were made by the same people working directly within the Ministry of Transport? What purpose does the "independent" tribunal play in these matters? Is the present structure just as effective as any other?

An anomaly in the Canadian structure is that while the Ministry of Transport has broad responsibility for planning and developing an adequate transportation system, a number of the direct-promotion functions of the system are assigned to the Canadian Transport Commission, for example, the determination of abandonment of passenger rail services and railway branch lines. The C.T.C., on finding actual loss, has the power to order continuance of the service or permit abandonment. Upon ordering continuance of the service, the operator becomes entitled to a subsidy—100% in the case of branch lines and 80% of the loss in the case of rail passenger service (except commuter service). Yet the Ministry has the fundamental responsibility for the provision of basic facilities—ports and harbours, airports, etc. How does the provision of a railway branch line to serve the communities thought to need that service differ from the provision of an airport or seaport to serve other communities? There seems no logical distinction.

One can conceive of the role of the Transport Commission as being that of orchestration and administration of competition (including potential competition). This assumes that there is a desire on the part of private entrepreneurs to offer additional service, that there is competition and that it is necessary to regulate competitive practices and entry into the

several transportation markets. Provision for the supervision of all non-competitive service, including the basic decision as to whether to provide a subsidy, might be the responsibility of the Ministry. An operation conducted by a private operator, but on subsidy, would be treated the same as other private operations. But, is the distinction viable for the peculiar mix of public and private enterprise in the Canadian transportation system?

Another question with regard to the governing structure is whether an adequate establishment has been provided for the C.T.C. to do the job assigned to it. This again is a large and complex topic, but one is left wondering whether scarce resources are not being dissipated over too many different branches of the federal government's structure relating to transportation. For example, it is not obvious to the outsider what the relative roles of the Transportation Development Agency and the Research Branch of the Canadian Transport Commission are to be. One notes that the National Transportation Act assigns extensive research responsibility to the C.T.C. To what extent has this been superseded by the Ministry reorganization?

Problems of the Canadian Constitution—division of legislative power—cooperative federalism

This is one of the fundamental problems in the development of a rational regulatory structure. As noted before, some of the problems are inherent in the geographical dispersion of Canadian cities and centres of economic activity which need to be joined by the transportation system. There are inherently local-interest matters and inherently national questions. There is also the over-riding consideration of the division of authority between Ottawa and the provinces.

In strictly legal terms, the constitution gives to the federal Parliament adequate scope to regulate the national transportation system including highway carriers.¹³ The jurisdiction to regulate highway carriers has, however, never been assumed and regulation by provincial transportation boards continues under the authority delegated to them by the Motor Vehicle Transport Act of 1954.¹⁴ Notwithstanding the constitutional division of authority, there is substantial provincial interest in air, rail and water service and considerable expressed reluctance to give up control of truck and bus service. To what extent and how should this interest and

13. See McNairn, "Transportation, Communications and the Constitution; The Scope of Federal Jurisdiction", 47 Canadian Bar Review 355 (1969), and McNairn, "Aeronautics and the Constitution", 49 Canadian Bar Review 411 (1971).

14. R.S.C. 1970, c. M-14.

concomitant responsibility be reflected in the regulatory system?

The problem of the division of authority requires a bold imaginative approach. It is not peculiar to the transport field, nor is it more acute in that field than it is in others. In all fields of economic regulation, the same problem is inherent—how to integrate provincial and regional interests into an overall national policy. In functional terms, the question is often seen as one of provincial participation in the decision-making process. The problem is alive in connection with broadcasting, particularly community television and cable services, regulation of securities issues and securities dealers, and probably will become a more active issue in connection with energy, foreign investment and competition policy. Indeed, the problem is inherent in the development of basic economic policy. An illustration of current importance is the insistence by the Government of Ontario that there should be established some joint economic machinery to develop and coordinate policy.

The provinces have a special interest in transport regulation which is not satisfied by the present structure. On the one hand, they have exclusive yet uncoordinated control of for-hire motor carriers. On the other hand, they have virtually no control of the rail, air or water service. The British Columbia Railway and the Ontario Northland Railway are notable exceptions. If federal jurisdiction over trucking were asserted, the greater portion of inter-city trucking would fall under federal control.¹⁵ Although the validity of the proposition that the provinces are better able to regulate this service than a board appointed by the federal government is questionable, there is no doubt that the provinces (at least some of them) want a substantial role in the regulatory structure and, in my view, this should be accomplished by some form of cooperative federalism, but subject to the paramount control of federal law, and to the overriding authority of review by the federal cabinet if that type of review power is to be retained. Provincial interest in regional development within a province could be adequately satisfied by the provinces' power to attract carriers by subsidies where appropriate, and even to provide the carrier service. Illustrations exist today to demonstrate the viability or the desirability of such provincial activities. Over a period of a relatively few years, the road networks have been considerably improved and expanded. The British Columbia Railway has been substantially expanded to comple-

15. An Ontario study estimates 75% to 90% of the larger commercial carriers in Ontario, accounting for 95% of the for-hire traffic revenue in the province, although 75% of the tonnage accounting for the 95% figure moves wholly in Ontario. "An Appraisal of the Potential Impact to Ontario from the Implementation of Part III of the National Transportation Act", prepared by The M.W. Menzies Group Limited for the Department of Transportation and Communications, February, 1972, pp. iii, VII-14.

ment the rail and road service in the province. The Ontario Northland Railway is maintained to provide a service in north-central Ontario.

Probably the best compromise to satisfy all governmental interests is some sort of joint-board arrangement under which some members of the board, nominated by the respective province or region and other members would deal regularly with problems in all parts of the country. The value of provincial nominees would be that their work would be heavily concentrated on questions pertaining to their own region while other members of the board would be involved in questions from several parts of the country and would therefore be more inclined to take a broader national view. The provincial nominees might also have responsibility for administration of the regional offices of the board.

The effectiveness of a cooperative board is related closely to the question of its independence. If the members of the tribunal are not independent of the governments, whether federal or provincial, there is serious risk that the work of a joint board would be a constant cause of friction and might be stymied by continuing differences in the instructions and policies of the respective governments to which the members were responsible. One solution would be to make a tribunal independent of both levels of government, subject only to the statutory framework of its authority and to judicial review with regard to the extent of its jurisdiction. Such a tribunal would have wide power to regulate the transport system. The question would still remain, of course, as to what is the appropriate scope of work for such a regulatory tribunal. Is it merely to be confined to orchestrating and administering competition or is it to extend to the broader questions of guaranteeing essential service as in the case of railway branch lines and railway passenger service?

A number of different arrangements for cooperation between federal and provincial governments might be considered. For systematic coverage of transportation services, some arrangements might involve some delegation of federal jurisdiction to provincially appointed boards (as under the Motor Vehicle Transport Act) and some delegation of provincial jurisdiction to federally appointed boards.¹⁶ A possible difficulty with an agreed arrangement between Ottawa and the provinces is that any person adversely affected by a decision under such a system would be free to attack the constitutional validity of the regulation or the decision. It is not clear that legislation could be framed sufficiently precisely to achieve a functional division of responsibility between provincial and federal agencies which does not follow the constitutional division of

16. The recent decision of the Supreme Court of Canada in the *Coughlin* case confirmed the validity of relatively straight-forward delegation (in that case, the arrangement under the Motor Vehicle Transport Act to assign federal jurisdiction to provincial transport boards). *Coughlin v. Ontario Highway Transport Board et al.* 68 D.L.R. (2d) 384 (1968).

power. In other words, there may be a point at which cross-delegation to boards either by the provinces or under federal law might be defective. In the field of transportation, having regard to the basis for federal regulation, the risk is minimal and should not, in my view, deter attempts at a cooperative arrangement. If such cooperative arrangements were attempted for foreign-ownership policies, energy and natural resources, broadcasting, securities regulation or other aspects of economic regulation, the problem might be more acute.

An attempt to extend federal jurisdiction to the operations of forwarders and brokers might well involve the necessity of relying on the trade and commerce power rather than the works and undertakings power of Section 92 (10) of the British North America Act. The courts have generally given wide scope to federal jurisdiction under the latter power.¹⁷ There has been some indication recently of a judicial willingness to reconsider the extent of the trade and commerce power.¹⁸ It is likely that there will be further development of the jurisprudence relating to the trade and commerce power as the federal government proceeds with its new competition policy and the policy respecting foreign ownership is developed.¹⁹

Regulation and adequate service—curtailment and abandonment of service

The central question under this heading is, what is the relation between economic regulation and maintenance of an adequate transportation system? The subject matter involves different considerations from those dealt with in the next section of this paper, namely, the regulation of

17. See, for example, *Regina v. Ontario Labour Relations Board*—the Northern Electric case, [1970] O.R. 654.

18. See the judgment of Gibson, J. in *Northern and Central Gas Corporation Limited et al v. National Energy Board and Trans-Canada Pipe Lines Limited*, [1971] F.C. 149 (Federal Court of Canada, Trial Division, June 11, 1971), and the decision of the Supreme Court of Canada in the Manitoba egg marketing case: *A.G. for Manitoba v. Manitoba Egg and Poultry Association et al* 19 D.L.R. (3d) 169 (1971).

19. The relevant recommendation of the Special Joint Committee of the Senate and House of Commons is notable but unhelpful ("The Constitution of Canada", Report of the Special Joint Committee of the Senate and House of Commons, 1972, pp. 84-85). The Committee recommends (*Ibid.*) that "Parliament should have adequate power to control the instrumentalities of trade and commerce". The Committee's discussion of the scope of the concept of trade and commerce is far from clear, but the Committee appears to lean in favour of federal regulation of the inter-provincial and inter-national movement of goods and of the system that performs that movement. At the same time, the Committee recognizes the importance of provincial control over intra-provincial trade and commerce. The fact that transportation undertakings typically serve both intra-provincial and extra-provincial trade and commerce is not considered. The problem remains—how to accommodate federal and provincial interests in the regulatory structure. This problem is not materially assisted by the recommendations and discussion of the Special Joint Committee.

competition, which I have referred to earlier as the orchestration and administration of competition. The latter presupposes the desire on the part of private entrepreneurs to offer transportation services and the essential questions are, to what extent should entry into markets be limited and competition among transport operators in a market controlled to prevent what would otherwise be adverse effects of unrestrained freedom of business decision-making? With regard to the maintenance of an adequate system, the central questions relate to the provision of basic facilities by government, either directly or by contract, and restraint on private entrepreneurs or managers from deciding to reduce or eliminate a service which is not returning a profit satisfactory to the operator. The decision on the part of the subsidizers to maintain, for example, a rail service when it would not otherwise be competitive with road service, the latter not receiving a subsidy, represents a public policy decision regarding the maintenance of competitive service but does not involve regulation of competition in the sense in which it would apply if both rail and road service were profitable and the operators were free to indulge in price and other types of competition. The relation between the two chapters of discussion is complex, particularly in respect of the obligation which might be imposed upon the operator of a profitable business to continue unprofitable services or marginal services as a *quid pro quo* for the right to engage in the profitable business. Recognizing the inter-relation of all aspects of transport regulation, one can make a substantial distinction between the focus on maintenance of an adequate system and the focus on regulation of competition.

The legal questions related to abandonment of service include the following: (1) definition of actual loss, including analysis of the costing order as it applies to railway branch line and railway passenger services, and (2) comparison of the considerations to be applied with regard to the various modes to determine whether abandonment of a line or a service should be permitted or denied.²⁰ The Railway Act²¹ directs the Commission to determine, with regard to branch lines, the public interest and stipulated eight considerations to be reviewed in that connection, namely: "(a) the actual losses that are incurred in the operation of the branch line; (b) the alternative transportation facilities available or likely to be available to the area served by the branch line; (c) the period of time reasonably required for the purpose of adjusting any facilities, wholly or in part dependent on the services provided in the branch line, with the least disruption to the economy of the area served by the line; (d) the probable effect on other lines or other carriers of the abandonment of the operation

20. The costing order will be discussed *infra* in connection with rate competition.

21. Section 254(3).

of the branch line or the abandonment of the operation of any segments of the branch line at different dates; (e) the economic effects of the abandonment of the operation of the branch line on the communities and areas served by the branch line; (f) the feasibility of maintaining the branch line or any segment thereof as an operating line by changes in the method of operation or by interconnection with other lines of the company; (g) the feasibility of maintaining the branch line or any segment thereof as an operating line either jointly with or as part of the system of another railway company by the sale or lease of the line or segments thereof to another railway company or by the exchange of operating or running rights between companies or otherwise, including, where necessary, the construction of connecting lines with the lines of other companies; and (h) the existing or potential resources of the area served by the branch line, seasonal restrictions on other forms of transportation therein and the probable future transportation needs of the area." With regard to the abandonment of passenger service, the Railway Act²² directs the Commission to determine the public interest but lists only four matters to be particularly reviewed, namely: "(a) the actual losses that are incurred in the operation of the passenger-train service; (b) the alternative transportation services, including any highway or highway system serving the principal points served by the passenger-train service, that are available or are likely to be available in the area served by the service; (c) the probable effect on other passenger-train service or other passenger carriers of the discontinuance of the service, or of parts thereof; and (d) the probable future passenger transportation needs of the area served by the service." The specified items are not exhaustive and there is probably therefore little significance in the catalogues except so far as they relate to the special features of branch line and passenger service operations. No criteria are stipulated with regard to the curtailment or abandonment of freight service. The power of specific regulation of railway service would presumably apply.

The Aeronautics Act does not contain any specific provision regarding abandonment of service. Control is exercised by requiring all carriers to obtain approval of their service plans, and by the requirement of the Air Carrier Regulations that no service be suspended or abandoned without approval of the Air Transport Committee.²³ Nor is there anything in the Transport Act dealing with the abandonment of regulated water service. It is directed to the regulation of service which an operator wishes to offer, not specifically to the maintenance of an adequate transportation system.

22. Section 260 (6).

23. Air Carrier Regulations, SOR/72-145, May 5, 1972, s. 7 (6).

With regard to highway carriage, the public Commercial Vehicles Act of Ontario,²⁴ for example, contains no provision regarding the abandonment of service, nor is there provision for regulations in that respect. However, the Ontario Highway Transport Board may review a licence and failure to maintain adequate service would be a ground for cancellation or suspension. There is apparently nothing to prevent an operation from going out of the transportation business altogether. The statutory and regulatory provisions regarding busses are parallel.²⁵ This reflects the practical consideration that a bankrupt cannot be forced to continue and an unwilling operator is not desirable. The laws of other provinces exhibit a variety of provisions. The uniform regulations proposed by the Federal Provincial Advisory Council on Motor Carrier Regulation²⁶ would require a carrier to have approval of abandonment or substantial curtailment of service. No criteria for determination of the issue are prescribed.

Another question which should be noted is whether total abandonment of service should be treated according to the same principles as curtailment of either freight or passenger service. The latter might be thought of as more a matter of convenience, while the former may be a matter of "life or death" to a community or a business. Considering the availability of alternative modes of transport, and the critical factor of transportation costs (not only price but also quality and frequency of service) to a business, it seems to me that the pertinent principles are largely of general application. Again, one should note that the basic concern is to maintain an adequate transportation system and "adequate" must surely bear some relation to the importance of the service to the user.

Regulation and competition

It will be noted that the maintenance of an adequate transportation system, discussed in the last section of this paper, is fundamental goal of the system. Competition, by contrast, is seen as the most effective instrument by which an economic and efficient system can be achieved. It is expected that it will also contribute to the maintenance of an adequate system at the lowest total cost and consistent with general public policy.

A basic consideration is the relation between the general competition policy as reflected in the proposed Competition Act²⁷ (or in the existing Combines and Investigation Act²⁸) and control of competition in the

24. R.S.O. 1970, c. 375.

25. Public Vehicles Act, R.S.O. 1970, c. 392

26. Draft uniform regulations were distributed to carriers and others for comment during December 1971.

27. Bill C-256, June 29, 1971.

28. R.S.C. 1970, c. C-23.

“regulated industries”. Regulation and free competition may be seen as partners. What one partner is doing, the other need not be doing. Is it useful to consider whether “free competition” or “regulation” should be regarded as fundamental?²⁹ One view is that the general competition policy should be regarded as the more fundamental building block in our free enterprise society. Direct regulation of the kind applicable to the transportation industry should be imposed only where the general policy of free competition cannot be relied upon to produce the desired results. In fact, a substantial part of our industrial activity is subject to direct economic regulation. Moreover, it can be argued with some persuasiveness that regulated monopolies or cartels may be just as efficient as firms operating under free competition. The general statement of transportation policy³⁰ opts for free competition as the fundamental principle—but the specific provisions of the several statutes are not consistent.

Concentration

It is said that too much concentration is likely to result in monopolistic prices and profits and arbitrary decisions regarding service. Is this a valid assumption if rates and service are regulated? In many markets, transportation services are not monopolized and competition is at least potential in all markets unless prevented by control on entry into the market. Before considering the application of competition policy with respect to concentration, one should attempt to establish a picture of the transportation industry in Canada with regard to its propensity for concentration and the anti-competitive effects which may be inherent in any such trend. At the one extreme, one may conclude that the industry is already so highly concentrated that it exhibits monopolistic tendencies; at the other extreme, one may conclude that there is plenty of real competition and no serious immediate danger of too much concentration. This analysis may be broken down and applied differently to the different modes. At the same time, we should consider present or potential inter-modal competition and present and potential competition by “private” trucks. An important element in the concentration of transportation services may be the activities of brokers and forwarders. Conglomerate mergers may require special attention. All of the foregoing may involve different conclusions for different transportation markets.

29. It is interesting to note in this connection the recent proposal of the Director of the Antitrust Division of the U.S. Department of Justice to replace much of the direct regulation now exercised by the Interstate Commerce Commission by application of the general antitrust laws.

30. National Transportation Act, s. 3

The National Transportation Act requires a transportation company subject to the legislative jurisdiction of the Parliament of Canada to notify the Canadian Transport Commission if it "proposes to acquire, directly or indirectly, an interest by purchase, lease, merger, consolidation or otherwise, in the business or undertaking of any other person whose principal business is transportation, whether or not such business or undertaking is subject to the jurisdiction of Parliament".³¹ The Commission is required to give or cause to be given such public or other notice of any proposed acquisition as appears to be reasonable in the circumstances, including notice to the Director of Investigation and Research under the Combines Investigation Act.³² If any person affected by a proposed acquisition or any association or other body representing carriers or transportation undertakings affected by such acquisition object to such acquisition on the grounds that "it will unduly restrict competition or otherwise be prejudicial to the public interest",³³ the Commission is required to make an investigation and it may disallow any such acquisition if in its opinion "such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest".³⁴ The disallowance power can operate only if the acquirer is within federal jurisdiction. It cannot be used directly to prevent acquisitions by trucking companies operating only intra-provincially, nor does it apply to Canadian or foreign acquirers who are not in the transportation business. Moreover, it does not appear to cover a holding company that is not itself directly in the transportation business.

It will be noted that the Commission may act under section 27 only if objection to the acquisition is made by certain specified persons or associations. It may not act itself in the absence of such objection; nor does inaction by the Commission or its failure to disallow an acquisition when objection has been received amount to approval of the acquisition. The National Transportation Act does in section 23 give to the Commission wide power to investigate acts of carriers which it thinks may prejudicially affect the public interest, but the purpose of the section seems to be confined to rate-making activity. Further, the specific mention of acquisitions in section 27 might be taken to exclude that subject matter from the operation of section 23.

Whatever the constitutional or other justification for the limited scope of section 27, the fact of the limitation has to be noted in assessing the effectiveness of the Commission's review power under that section. The

31. National Transportation Act, s. 27 (1)

32. *Ibid.*, s. 27 (2)

33. *Ibid.*, s. 27 (3)

34. *Ibid.*, s. 27 (4)

limited scope of section 27 is important because the result of the limitation is to bring under review by the Canadian Transport Commission only acquisitions by the named companies and not others. Therefore, a proposed acquisition by a company not now in the transportation business is clearly not covered, nor is it clear that the section covers acquisitions by a holding company, least of all a conglomerate.

The provisions of the National Transportation Act do not specifically derogate from the general effect of the Combines Investigation Act and the duties of the Director of Investigation and Research under that Act. Whether or not objection is received to a proposed acquisition of which notice is given under section 27, it appears that the Director of Investigation and Research is free to consider the acquisition as he would any other acquisition. Indeed, it is his duty to do so. The only objection the Commission may consider is that the proposed acquisition "will unduly restrict competition or otherwise be prejudicial to the public interest". Although the Commission is not required to disallow such acquisition even if in its opinion such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest, it is likely that a decision by the Commission not to disallow an acquisition will in most cases be in accord with the view of the Director of Investigation and Research. However, this may well not be the case where the transportation company is part of a conglomerate merger likely to be restrictive of competition in other aspects of its business.

Regulation of acquired companies.

One of the criteria normally applied to determine whether the public convenience and necessity indicates the desirability of granting operating authority is the fitness of the applicant to operate the undertaking. This may involve equipment, financial stability, and moral character. Another reason for concern by the regulator about the transfer of an operating authority lies in his general concern about the quality of the industry as it may be affected by reduction in competitive strength and tendencies toward monopolization. The regulator may therefore have a two-fold concern in any transfer or merger of an undertaking, of the corporate structure within which, in effect, is synonymous with the undertaking. Without the licence there can be no undertaking insofar as the licensed operation is concerned. The regulator may be concerned about any change in the management or control of an undertaking or operation. Any such change may in effect be a transfer of the licence from one person or group of persons to another. At the time of transfer, or in

anticipation of it, the regulator may wish to exercise control either by prohibiting the transfer or by subjecting the transfer to certain conditions. Control may also be exercised from time to time by review of licences.

A licence is issued in the name of a person and it is therefore relatively easy to control any change in the name of the person to whom the licence is granted. However, the control or management of the licence may also change in fact where the licensee delegates the operation to some other person to be operated in the licensee's name, or where the control and management of the licensee, being a corporation, is changed by sale or other transfer of the shares in the corporation. The corporate vehicle is an immensely flexible instrument of business organization and the types of changes of control, direct and indirect, which may result from manipulation of the corporate vehicle are complex. This is so even in the case of corporations or groups of corporations held by a relatively small number of people, with no shares traded publicly, and is even more so in the case of corporations with publicly traded shares.

The Aeronautics Act provides that the Commission may make regulations "prohibiting the change of control, transfer, consolidation, merger or lease of commercial air services except subject to such conditions as may by such regulations be prescribed".³⁵ The Air Carrier Regulations³⁶ adopt the provisions of Section 27 of the National Transportation Act for all proposed changes of control, consolidations, mergers, leases or transfers of commercial air services. In effect, the "conditions" prescribed by the regulations are that the C.T.C. not disallow the transfer. Thus the power to prohibit, transfer, etc., "except subject to such conditions. . ." is boot-strapped by the regulation into a general power to prohibit transfer.

An alternative interpretation of the regulation-making power is that it is not intended to give the C.T.C. general power to prohibit transfers, but only to attach to transfers such conditions as may be deemed desirable to protect the public interest or to ensure that the public convenience and necessity will continue to be served after the transfer. However, it does not appear to me to be sensible to talk about the conditions which may be imposed unless one also talks about the possibility of prohibiting the transfer outright. There is, of course, theoretically a difference between outright prohibition and a prohibition subject to conditions, but if the types of conditions are not limited in any way, I doubt if it makes any practical sense unless the notion of imposing conditions is carried to its logical extent of also permitting complete prohibition. This is the interpretation reflected in the Air Carrier Regulations and their predecessor,

35. Section 14 (1) (1)

36. SOR/72-145, s. 19, 20.

the Commercial Air Services Regulations,³⁷ which, as far as I am informed, have not been challenged on this point.

The power to regulate the transfer of control of motor carriers is conferred upon the provincial regulatory agencies by some of the provincial statutes. For example, the Ontario Public Commercial Vehicles Act prohibits the transfer of an operating licence without approval³⁸ and

The Board may in its discretion require the directors of a corporation that is the holder of an operating licence to present to the Board for approval any issue or transfer of shares of its capital stock, and, where, in the opinion of the Board, a substantial interest is issued or transferred, such issue or transfer shall be deemed to constitute a transfer of all operating licences held by such corporation, and the corporation shall forthwith pay the fees prescribed by the regulations for the transfer of operating licences.³⁹

It will be noted that the section does not require notification of the Board of a proposed transfer. Although the section is far from clear, it appears to give the Board power to disapprove any transfer of shares. Where the Board considers that a substantial interest is being transferred, fees applicable to the transfer of operating licences are payable. Looking at the section as a whole, one might infer that it was intended primarily to give the Board power to disallow only transfers of a substantial interest⁴⁰ which would be tantamount to the transfer of an operating licence. In any event, it is not broad enough to cover holding companies, nor does it deal with publicly traded shares.⁴¹ Data are not readily available (if at all) on which to base a systematic analysis of the practice of the Ontario Highway Transport Board with regard to acquisition of motor carriers within its jurisdiction.

Entry control

The national transportation policy apparently envisages a single transportation system. Provision of an adequate and efficient transportation system at the least total cost is the goal. One might reasonably assume

37. SOR/65-1440, as amended.

38. Revised Statutes of Ontario, 1970, c. 375, s. 5(6) and 11

39. *Ibid.*, s. 6

40. There is no guidance to the Board in the state or regulations as to what constitutes a "substantial interest."

41. See Sommerville, "Dialogue: On Growth", Truck Transportation, Mil-Mac Publications, Toronto, July, 1969, pp. 15 and 23.

that to the extent that the several modes compete, or are potential competitors, the criteria upon which to decide whether new service should be permitted should be uniform. Water, truck and rail service may be competitive over a wide range of service. The rail system is in place and generally offers freight service to as many points as the companies would wish to serve under present circumstances. The range of water service is, of course, limited. Truck service, by contrast, might be the subject of expansion by new entrants to the field in practically every area served by rail and by the Great Lakes-St. Lawrence water service.⁴²

Entry control assumes that someone wants to offer the service, that is, that there is either actual or potential competition. As noted before, the following questions are related, namely, abandonment or substantial curtailment of service and the grant of operating authority conditional upon offering service for which authority is not sought. Entry control by itself is a narrow concept. It is only a fraction of the total picture which includes providing service where it is needed, although no-one wants to offer it because there is no profit expectation. Abandonment is also a narrow concept because it pre-supposes that service is being offered which the operator seeks to abandon.

There are two basic questions: (1) why entry control? and (2) if entry control, on what criteria? Why entry control is essentially an economic question. The traditional justification is perhaps too well-known to bear repeating. The questioning of entry control is equally well-known. In the United States, the 1971 legislative proposals of the Department of Transportation have increased the tempo and temperature of debate with regard to trucking.⁴³ If regulation can not be justified, we should not keep it. But, we do not know what would happen if it were eliminated.⁴⁴ How does one balance the expected gain from deregulation against the risk of disruption of the system? With regard to trucking, one possibility is to try deregulation on a gradual basis. Some transportation markets surely do not need the protection of entry control. There is a sufficient number of firms willing and able to provide the service. How can we evaluate the argument that firms now providing that service need the protection of regulation to support their less profitable service elsewhere? Even if the proposition is accurate, is it desirable to perpetuate that cross-subsidization?

A new approach might short-circuit the regulation/deregulation arguments. For this purpose we must re-examine our fundamental concerns.

42. I am focusing on the areas where competition is possible, or practicable; there are some areas served only by air, rail or water, as the case may be.

43. Transportation Regulatory Modernization Act of 1971 (H.R. 11826 and S.2842) cf. The Surface Transportation Act of 1971 (the joint industry proposal) (S. 2362).

44. The English, Australian and Alberta experiences may indicate that entry control could be relaxed or eliminated without causing serious problems.

They are as follows:

1. Adequate service for transportation of goods and people, that is, a high quality, efficient service to facilitate efficient, competitive commerce.
2. The minimum infrastructure necessary to facilitate such high quality service.
3. Minimization of the adverse effects on space, congestion, air and noise.

A basic purpose of regulation should be directed to maximize utilization of facilities and minimize adverse effects. This may lead us to control the capacity offered by highway trucking services, (for-hire and private), the goal being the fewest trucks consistent with high quality service and not as at present a few for-hire operators free to operate as many trucks as they wish and no limit on private operators. We should discourage all inefficient use of the infrastructure and "private" trucks should pay identical user charges to those charged for-hire trucks. If we are going to continue regulation of entry, let us have a system geared to the fundamental issues, not a half-baked mix of differential user charges and non-specific controls that grew haphazardly over the years.

One of the major problems in our society is the cost of roads and related facilities, the cost of congestion on those roads and the pollution of air and the high noise level. This surely leads to the conclusion that the basic need is to limit capacity to the amount reasonably necessary to carry traffic efficiently. It is argued that for-hire trucking is preferable to private trucking because for-hire trucking generally has a much higher load factor. If this is so, for-hire trucking probably represents a more efficient use of the investment in road and related facilities.

Entry control is variously based on "public convenience and necessity" and "public interest". The criteria for the establishment of "public convenience and necessity" or "public interest" are nowhere definitively established. Nor has the accumulated experience of regulatory agencies resulted in the articulation of a well-defined body of principle. Included among the problems are the differences, if any, between public convenience and necessity and public interest. In any case, the question is, what onus is to be placed on the applicant to establish the basis for a ruling favourable to him? Does he have to show that existing service is inadequate? Is an opportunity to be afforded to the presently licensed carriers to add service to meet the needs sought to be satisfied by the applicant? Will a new licence be granted only when existing operators are unwilling or apparently unable to provide the service demanded by shippers or

passengers? In practical terms, the pressure for new entrants comes in the realm of air services and trucking.⁴⁵

It is notable, too, that some applications to the C.T.C. illustrate a major interface between federal and provincial policy makers. Perhaps a leading illustration of this is the Air Ontario application which was rejected.⁴⁶ The proposed operation was supported by the Ontario government. The Ontario government also supported the Ontario World air application for a charter service, which was also denied.⁴⁷ The denial of the application by Burlington Northern to interchange traffic with Kootenay and Elk may also represent a similar interface in substance, although, the case itself was decided on a technicality and the decision of the C.T.C. has been overruled by the Supreme Court on the crucial point of law.⁴⁸

Another special aspect of entry control and the regulation of competition involves the operations of brokers and forwarders. There is, first of all, in Canada a fundamental question about constitutional jurisdiction to regulate such operations. The issue raises squarely the question of the extent of federal jurisdiction under the trade-and-commerce power. By only a stretch of the imagination can the transportation-works-and-undertakings provision⁴⁹ be used to support federal jurisdiction over brokers and forwarders who are not themselves providing the means of transportation except by contract with independent carriers. As matters now stand, they do, however, provide competitive service through a combination of local cartage with rail piggy-back. The underlying mode of transportation is subject to regulation, but the relations between the broker-forwarders and their shipper-customers are not directly regulated as are the relations between carriers and their customers. The field is a mix of considerations involving local cartage, inter-city trucking and other transportation services which needs to be harmonized with other aspects of regulation of the transportation system. The promotion of an economic and efficient system requires that every aspect of it be subject to uniform treatment so far as uniformity is relevant to the basic consid-

45. There have been some recent applications for water service on the Mackenzie River system. Statutory criteria for entry control are to be found in the Railway Act (as amended by R.S.C. 1970, 1st supp., c. 10, sections 11 and 11.1), the National Transportation Act, Part II, re commodity pipelines (s. 32) and the Transport Act (s. 5). Some provincial motor carrier statutes, for example, British Columbia, indicate the criteria to be considered. Others do not (for example, Ontario and Quebec). Nor are criteria indicated in Part III of the National Transportation Act regarding Motor carriers and in the Aeronautics Act.

46. Air Transport Committee, May 12, 1972, Decision no. 3360.

47. Air Transport Committee, August 26, 1971, Decision No. 3234.

48. Judgment of May 1, 1972.

49. British North America Act, s. 92 (10).

eration. Ontario requires freight forwarders to obtain a licence under the Public Commercial Vehicle Act but principles of economic regulation do not appear to be applied in the granting of the licences. Presumably the licensing power can be used to maintain the quality of service provided by the forwarders.

Rate Regulation

Rate regulation involves at least two aspects, namely, prevention of "unfair" or uneconomic competition and the prevention of monopolistic exploitation by rate agreements or exploitation of the captive shipper situation. The rate agreement question involves the operations of the tariff bureaus and of the Canadian Freight Association as well as the practice of the Air Transport Committee in establishing uniform rates. The problem of costing permeates the field as well as having application with regard to determining levels of subsidization where subsidies are related to a calculation of "actual loss". Whatever controls may be established by the laws specifically relating to transportation, agreements among two or more carriers and discriminatory trade practices have their counterpart controls in the Combines Investigation Act and in the proposed Competition Act. The question of the relation between the Combines Investigation Act and the existing rate-making practices is not clear; nor has the relation between the proposed Competition Act and the direct regulation of the transportation system been finally established.

The national transportation policy appears to favour intermodal competition and this presumably is designed to reflect the inherent advantage of each mode. For the purpose of accurate comparison, it is obviously necessary that any minimum standards for rates be calculated on uniform principles. If cost is to be the desideratum for the price of any service, the principles of costing should be uniform as far as that is possible. The following catalogue of the inconsistencies of the statutory framework is subject to the observation that the accumulated experience in regulating rates in Canada may render more precise and uniform definition unnecessary. Perhaps the people who are doing the job do not require, and would not be assisted by, additional statutory direction.

The Aeronautics Act merely provides in general terms that the Commission may make regulations "respecting traffic, tolls and tariffs and providing for (i) the disallowance or suspension of any tariff or toll by the Commission, (ii) the substitution of a tariff or toll satisfactory to the Commission, or (iii) the prescription by the Commission of other tariffs or tolls in lieu of the tariffs or tolls so disallowed".⁵⁰ Within this framework, the Air Carrier Regulations provide that carriers shall establish

50. Section 14 (1) (m).

just and reasonable tolls and that the Commission may determine and prescribe what are just and reasonable individual or joint tolls.⁵¹ The regulations further provide that the Commission may disallow any tariff or any part thereof that it considers to be unjust, unreasonable, or contrary to any provisions of the regulations or any orders or directions issued by the Commission and require the air carrier to substitute a tariff or part thereof satisfactory to the Commission, or it may prescribe other tariffs or parts thereof in lieu of those so disallowed.⁵² Rates for air services are thus subject to the just and reasonable test. No statutory guidelines are offered.

Part III of the National Transportation Act provides that the Commission may disallow a highway carrier's rate that is not compensatory *and* not in the public interest.⁵³ It follows that a rate may be permissible if it is in the public interest whether it is compensatory or not. There is no guidance to the Commission with respect to the criteria to be applied.

The provisions of the Railway Act as amended by the National Transportation Act in 1967 are relatively elaborate.⁵⁴ The basic provision is that rail freight rates must be compensatory, that is, they must exceed the variable cost of the traffic concerned. The Commission is given the responsibility of prescribing costs for this and other purposes⁵⁵ and did so in the cost order of August 5, 1969.⁵⁶ Agreed charges are authorized by the Transport Act⁵⁷ and are not subject to the requirement of the Railway Act that charges be compensatory.⁵⁸ Express tariffs are subject to the provisions of the Act relating to freight rates.⁵⁹

The Transport Act provides that where an agreed charge has been in effect for at least three months, carriers and other persons adversely affected by the charge may complain to the Minister and the Minister may, if he is satisfied that the facts justify an investigation, refer the complaint to the Commission for that purpose.⁶⁰ The Governor-in-council

51. Sections 45, 46.

52. *Ibid.*, s. 47.

53. Section; not yet operative.

54. See Prabhu, "Freight Rate Regulation in Canada", 17 McGill Law Journal 292 (1971).

55. Sections 329, 330.

56. Railway Transport Committee, Order No. R-6313 and Reasons for Order. A subsequent appeal was dismissed by the Supreme Court of Canada, the Court stating only that it was "of the opinion that all the questions in issue in this appeal should be answered in the negative." Unreported judgment, October 8, 1970.

57. Part IV

58. *Ibid.*, s. 32, but cf. s. 33 (3)

59. Section 305.

60. Transport Act, s. 33 (1)

has a similar power of reference.⁶¹ The Commission is directed to have regard to the following considerations:

In dealing with a reference under this section, the Commission shall have regard to all considerations that appear to it to be relevant, including the effect that the making of the agreed charges has had or is likely to have on the net revenue of the carriers who are parties to it, and in particular shall determine whether the agreed charge is undesirable in the public interest on the ground that it is unjustly discriminatory against any person complaining against it or places his business at an unfair disadvantage or on any other ground, and, if so directed by the Governor in Council in a reference under subsection (2), whether the agreed charge is undesirable in the public interest on the ground that it places any other form of transportation services at an unfair disadvantage.

and the Commission is given the power to vary or cancel the agreed charge.⁶²

The provisions of the Railway Act dealing with railway passenger fares stipulate that such fares must be just and reasonable for non-competitive and commuter services.⁶³ On complaint, the Commission may fix a rate in the public interest.

The provincial laws applicable to rates for truck service vary widely from the extreme of no regulation whatsoever (for example, Ontario and Alberta) to specific approval (for example, Saskatchewan and British Columbia). Only Quebec attempts to regulate rates for extra-provincial service.

The provisions of the Transport Act respecting regulated water carriers provide for specific approval by the Commission.⁶⁴ The Commission may disallow any tariff or any portion thereof that it considers to be unjust or unreasonable or contrary to any provisions of Part II (Transport by Water) and may require the licensee, within a prescribed time, to substitute a tariff satisfactory to the Commission or the commission may prescribe other tolls in lieu of the tolls so disallowed.⁶⁵

Part II of the National Transportation Act contains a provision re-

61. *Ibid.*, s. 33 (2)

62. *Ibid.*, s. 33(3), cf. s. 32 (10) respecting the rights of a shipper who complains of unjust discrimination.

63. Section 280.

64. Sections 14, 16, 17, 18, 19, 20 and 23.

65. *Ibid.*, s. 23.

specting tolls and tariffs for commodity pipelines identical to the provision of Part III respecting highway carriers. The National Energy Board Act, by contrast, provides that all tolls shall be just and reasonable. The Board may disallow any tariff or portion thereof that it considers to be contrary to any of the provisions of the Act (including the just and reasonable provision) and may require the company to substitute a satisfactory tariff or itself prescribe a tariff in lieu of the tariff or portion disallowed.⁶⁶

In summary, therefore, it appears that the old just and reasonable test was left intact by the National Transportation Act for the air and water modes and for some railway passenger service, rail freight got special treatment because of the background to the statute, particularly the MacPherson Royal Commission Report of 1961, and the provisions of the N.T.A. respecting highway carriers and commodity pipelines should probably be regarded as a rather hastily put together addition to the statutes to parallel the provisions governing rail freight rates. It should also be noted that an important number of rates are guaranteed by statute or subsidized (the Crows' Nest Pass rates,⁶⁷ the "at and east rates"⁶⁸ and the Maritime freight rates.⁶⁹

All rates are subject to the overriding power of the Commission under section 23 of the National Transportation Act to respond to a complaint that a rate fixed by a carrier is not in the public interest. Having complied with the requirements of that section and, in particular, having held a public hearing and determined that the rate in respect to which the appeal is made is prejudicial to the public interest, the Commission may, notwithstanding the fixing of any rate pursuant to Section 278 of the Railway Act (the captive shipper section) "but having regard to Section 276 and 277 of that Act, make an order requiring the carrier to remove the prejudicial feature in the relevant tolls or conditions specified for the carriage of traffic, or such other order as in the circumstances it may consider proper, or it may report thereon to the Governor-in-Council for any action that is considered appropriate".⁷⁰

There has as yet⁷¹ been no final decision under Section 23, although

66. National Energy Board Act R.S.C. 1970, Chapter N-6, Sections 52 and 53. The constitutional validity of those sections was upheld by Mr. Justice Gibson in the Federal Court of Canada in his decision of June 11, 1971 with regard to the price of gas delivered by Trans-Canada Pipe Lines Limited to certain purchasers in Ontario. *Northern and Central Gas Corporation et al v. National Energy Board and Trans-Canada Pipe Lines Limited*, [1971] F.C. 149.

67. Railway Act, s. 271.

68. *Ibid.*, s. 272.

69. Maritime Freight Rates Act, R.S.C. 1970, c. M-3 and Atlantic Region Freight Assistance Act, R.S.C. 1970, c.A-18.

70. Section 23 (4).

71. At the time of writing, March 1973.

there have been important decisions regarding jurisdiction and the establishment of a prima facie case.⁷² There are three cases before the Commission and the first hearings on the substance of the issues began on April 24, 1972. That case involves a complaint by certain rapeseed processors about the rates applicable to rapeseed, rapeseed meal and rapeseed oil shipped into, through or from their processing plants in Manitoba, Saskatchewan and Alberta.⁷³ The other cases are: (1) The *Prince Albert* case⁷⁴ in which the complaint is against the rates applicable to wood pulp from Prince Albert to certain Minnesota, Wisconsin and Michigan points; and (2) the *Anglo-Canadian* case,⁷⁵ involving an application by a number of companies respecting the transport of newsprint from their mills in the province of Quebec and New Brunswick to the United States.⁷⁶

Section 23 of the National Transportation Act provides that the public interest for the purpose of that section "without limiting the generality thereof" includes the public interest as described in Section 3 (the statement of national transportation policy). In conducting an investigation under the section, the Commission is required to "have regard to all considerations that appear to it to be relevant, including without limiting the generality of the foregoing,

- (a) whether the tolls or conditions specified for the carriage of traffic under the rate so established are such as to create
 - (i) an unfair disadvantage beyond any disadvantage that may be deemed to be inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or
 - (ii) an undue obstacle to the interchange of commodities between points in Canada or an unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports; or

72. There was a preliminary decision November 2, 1971 in the rapeseed case with regard to the status of the intervenors and the establishment of a prima facie case by the applicants. Other decisions involve points of evidence (November 16, 1971, in the *Prince Albert* case) and jurisdiction over joint rates with foreign carriers (June 21, 1971 in both the *Prince Albert* and the *Anglo-Canadian* cases.). The decision of May 26, 1972 in the *Anglo-Canadian* case determined that the applicants had established a prima facie case.

73. The application was filed on October 14, 1970.

74. The application was made April 24, 1970.

75. May 17, 1970.

76. An application by the Kootenay Columbia Timber Council for leave to appeal certain acts, omissions and/or rates of Canadian Pacific has been abandoned.

(b) whether control by, or the interests of a carrier in, another form of transportation service, or control of a carrier by, or the interest in the carrier of, a company or person engaged in another form of transportation service may be involved.⁷⁷

Those provisions are very close to parts of Section 3 and one may question why it was thought necessary to repeat the principles in Section 23, they having already been imported into that section by the definition of public interest. The Commission is given no direction as to whether it should confine its considerations to economic efficiency or whether it should go beyond those considerations to whatever social and national policy issues may be involved in elimination of regional disparity, the social effects or relocation of industry, and so on. Also, it remains to be seen to what extent the experiences and jurisprudence built up under the old "unjust or unreasonable" rate provision of the Railway Act⁷⁸ are relied upon and made relevant to the consideration of the public interest in the Section 23 cases.⁷⁹

77. National Transportation Act, s. 23(4).

78. R.S.C. 1952, Chapter 23, section 328.

79. See generally Prabhu's article, *op. cit.*, footnote 54, at page 312.

